IN THE SUPREME COURT OF FLORIDA

NO. 34044

FILED
SID J. WHITE
MAY 1 1989
CLERK, SUPREME COURT
By
Deputy Clerk

ROBERT DAVID HEINEY,

Petitioner,

v.

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

Respondent.

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

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

A. JURISDICTION

This is an original action under Fla. R. App. P. 9.100(a). This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents constitutional issues which directly concern the judgment of this Court during Mr. Heiney's appeal, see ~~Heiney~~ v. State, 447 So. 2d 210 (Fla. 1984). At issue here is the legality of Mr. Heiney's capital conviction and his sentence of death. Jurisdiction in this action lies in this Court, see, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein involved the appellate review process. See Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985); Johnson v. Wainwright, 498 So. 2d 938 (Fla. 1987); Fitzpatrick v. Wainwright, 490 So. 2d 938 (1986); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); cf. Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Heiney to raise the claims presented herein. See, e.g., Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987). A warrant was signed in Mr. Heiney's case on March 30, 1989.

This Court has consistently maintained an especially vigilant control over capital cases, exercising a special scope of review, see Elledge v. State, 346 So. 2d 998, 1002 (Fla. 1977); Wilson v. Wainwright, supra, and has not hesitated in exercising its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital trial and sentencing proceedings. Wilson; Johnson; Downs; Riley, supra. This petition presents substantial constitutional questions which go to the fundamental fairness and reliability of Mr. Heiney's capital conviction and sentence of death and of this Court's appellate review process. Mr. Heiney'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 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. Wainwrisht, 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 that occurred before this Court. See Wilson v. Wainwrisht, supra, 474 So. 2d at 1165 ("no substitute for the careful partisan scrutiny of a zealous advocate [whose] . . . unique role . . . is to discover and highlight possible error . . . "); Johnson v. Wainwrisht, supra, 498 So. 2d at 939 (habeas relief appropriate where counsel fails to present clear claim of reversible error); Fitzpatrick v. Wainwrisht, supra, 490 So. 2d at 939-40 (habeas relief where counsel failed to appeal erroneous ruling that let state present evidence rebutting existence of statutory mitigating circumstance after petitioner had declined to present evidence of same circumstance). The appellate level right to counsel comprehends the sixth amendment right to effective assistance of counsel. Knight v. State, 394 So. 2d 997, 999 (Fla. 1981); Evitts v. Lucey, 469 U.S. 387 (1985). These and other reasons demonstrate that the Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those pled here, is warranted in this action. As this petition shows, habeas corpus relief would be more than proper on the basis of Mr. Heiney's claims.

With regard to ineffective assistance of appellate counsel, the challenged acts and omissions of Mr. Heiney's counsel occurred before this Court. Therefore this Court has jurisdiction to entertain Mr. Heiney'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, Wilson v. Wainwrisht, supra; McCrae v. Wainwrisht, 439 So. 2d 768 (Fla. 1983); Beggett v. Wainwrisht, 229 So. 2d 239, 242 (Fla. 1969); Ross v. State, 287 So. 2d 372, 374-75 (Fla. 2d DCA 1973); Davis v. State, 276 So. 2d 846, 849 (Fla. 2d DCA 1973), affirmed, 290 So. 2d 30 (Fla. 1974). See also Matire v. Wainwrisht, 811 F.2d 1430 (11th Cir. 1987). The proper means of securing a hearing on such issues in this Court is a petition for writ of habeas corpus. Powe v. State, 216 So. 2d 446, 447-48 (Fla. 1968). With respect to the ineffective assistance of counsel claims, Mr. Heiney will demonstrate that the inadequate performance of his appellate counsel was so significant, fundamental, and prejudicial as to require issuance of the writ.

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

B. REQUEST FOR STAY OF EXECUTION

Mr. Heiney's petition includes a request that the Court stay his execution (presently scheduled for June 6, 1989). As will be shown, the issues presented are substantial and warrant a stay. This Court has not hesitated to stay executions when warranted to ensure judicious consideration of the issues presented by petitioners litigating during the pendency of a death warrant. See Riley v. Wainwrisht, 517 So. 2d 656 (Fla. 1986); Groover v.

State, 489 So. 2d 15 (Fla. 1986); Copeland v. State (Nos. 69,429 and 69,482, Fla., Oct. 16, 1986); Jones v. State (No. 67,835, Fla., Nov. 4, 1985); Bush v. State (Nos. 68,617 and 68,619, Fla., April 21, 1986); Spaziano v. State (No. 67,929, Fla., May 22, 1986); Mason v. State (No. 67,101, Fla., June 12, 1986). See also, Downs v. Dusser, 514 So. 2d 1069 (Fla. 1987)(granting stay of execution and habeas corpus relief); Kennedy v. Wainwright, 483 So. 2d 426 (Fla.), cert. denied, 107 S. Ct. 291 (1986). Cf. State v. Sireci, 502 So. 2d 1221 (Fla. 1987); State v. Crews, 477 So. 2d 984 (Fla. 1985).

This is Mr. Heiney'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, Robert David Heiney 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.

As reflected in each claim, many of the claims arise because appellate counsel did not perform his constitutionally mandated duties and present to this Court claims on which Mr. Heiney was entitled to relief. These and other claims herein presented also involve fundamental errors in the proceedings against Mr. Heiney. Also since this Court's decisions in Mr. Heiney's appeal, new case law was developed which indicates that issues therein

presented were wrongly decided while significant matters were overlooked by the Court. This Court should now correct the errors which occurred. Mr. Heiney is entitled to habeas corpus relief.

CLAIM I

THE JURY OVERRIDE WAS IMPROPER, AND STANDS IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The override in this case was constitutionally wrong. It was permeated with and resulted from Hitchcock error. Hitchcock v. Dugger, 107 S. Ct. 1821 (1987). It would not be allowed to stand today, thus demonstrating the unreliability and arbitrariness in Mr. Heiney's sentence of death. Of course, the unreliability and wrongfulness of this death sentence requires that the claim now be heard.

The nature of Florida's capital sentencing process ascribes a role to the sentencing jury that is central and **"fundamental"**, Riley V. Wainwright, 517 So. 2d 656, 657-58 (Fla. 1988); Mann, supra, 844 F.2d at 1452-54, representing the judgment of the community. Id. A Florida sentencing jury's recommendation of life is entitled to "great weight," and can only be overturned by a sentencing judge if "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975)(emphasis supplied). See also Mann, 844 F.2d at 1450-51 (and cases cited therein).

The longstanding standard established under Florida law is thus that if a jury recommendation of life is supported by *any* reasonable basis in the record -- such as a valid mitigating factor, albeit nonstatutory -- that jury recommendation cannot be overridden. See Mann, supra, 844 F.2d at 1450-54 (and cases cited therein); see also, Ferry v. State, 507 So. 2d 1373, 1376-77 (Fla. 1987); Wasko v. State, 505 So. 2d 1314, 1318 (Fla.

1987); Brookings v. State, 495 So. 2d 135, 142-43 (Fla. 1986); Tedder, supra, 322 So. 2d at 910. This is "the nature of the sentencing process," Mann, supra, 844 F.2d at 1455 n.10, under Florida law. This standard has in fact been recognized by the United States Supreme Court as a "significant safeguard" provided to a Florida capital defendant. Spaziano v. Florida, 468 U.S. 447, 465 (1984).

Mr. Heiney's jury recommended that he be sentenced to life. However, although mitigation was present in the record and although there was much more than a reasonable basis for the jury's recommendation, the trial judge ignored the law and imposed death. The Florida Supreme Court then refused to apply its own settled standards and affirmed that sentence. Here, as in Mann, supra, the Florida Supreme Court violated Mr. Heiney's eighth amendment rights to a capital sentencing determination in accord with Florida's settled standards. Id., 844 F.2d at 1455, n.10.

There were many reasonable bases (again, albeit nonstatutory), for a life sentence in the record (as well as mitigation that could have been presented to the Jury. See Claim VI). There was testimony concerning Mr. Heiney's alcohol use. This, in itself, provided a reasonable basis. See Holsworth v. State, 522 So. 2d 348 (Fla. 1988)(history of drug and alcohol use properly considered by jury in mitigation along with other nonstatutory mitigating factors); Waterhouse v. State, 522 So. 2d 341 (Fla. 1988)(jury should have been allowed to consider evidence that defendant suffered from alcoholism and was under the influence of alcoholism on night of murder); Ross v. State, 474 So. 2d 1170, 1174 (Fla. 1985)(jury override improper due in part to defendant's "drinking problems" and history of alcoholism, notwithstanding defendant's testimony that he was "cold sober" on night of crime).

In Fead v. State, 512 So. 2d 176, 178 (Fla. 1987, this Court held the override in that case violated the standards set forth in Tedder, supra:

> As we reiterated in the recent case of Ferry v. State, 507 So.2d 1373 (Fla. 1987), only when there are no "valid mitigating factors discernible from the record upon which the jury could have based its recommendation" is an override warranted. Id. at 1376. See. e.g., Lusk v. State, 466 So.2d 1038 (Fla.) cert. denied, 469 U.S. 873 (1984). We find that the record before us contains several valid mitigating factors upon which the jury could have relied in reaching its recommendation. As a result, the judge's decision to override that recommendation is improper. Moreover, when viewed in light of our prior decisions in jury-override cases, we find that the death penalty clearly would not be proportional if imposed in this case.
>
> First, we find that sufficient evidence was presented during the sentencing phase to establish a reasonable belief in the minds of jurors that appellant was under the influence of alcohol. The jury in the present case could have weighed this evidence and reasonably concluded that the appellant acted under the effects of alcohol. This Court frequently has reversed jury overrides where the jury could have found alcohol or drug abuse as a mitigating circumstances. Huddleston v. State, 475 So.2d 204, 206 (Fla. 1985); Cannady v. State, 427 So.2d 723, 731 (Fla. 1983); Phippin v. State, 389 So.2d 991, 993 (Fla. 1980); Buckrern v. State, 355 So.2d 111, 113-14 (Fla. 1977). In Amazon v. State, 487 So.2d 8 (Fla.), cert. denied, 107 S.Ct. 314 (1986), for instance, we held improper an override where, among other mitigating factors, there was "some inconclusive evidence that [appellant] had taken drugs the night of the murders" along with **"stronger"** evidence of a drug abuse problem. Id. at 13.

Id. at 179.

Mr. Heiney's case is not unlike Fead. There are additional cases: Barbera v. State, 505 So. 2d 413, 414 (Fla. 1987) (intoxication and drug dependency may mitigate recommended sentence); Amazon v. State, 487 So. 2d 8, 13 (Fla. 1986)("history of drug abuse" one factor rendering jury override improper); Roman v. State, 475 So. 2d 1228, 1235 (Fla. 1985)(alcoholism and organic brain syndrome justified jury instruction on statutory mitigating factor of substantial mental impairment); Huddleston v. State, 475 So. 2d 204, 206 (Fla. 1985)(history of drug abuse

among factors rendering jury override improper and mental can be mitigating factor even though not severe enough to satisfy **921.141** (6)(b)).

The jury might also have based their recommendation on the evidence they had of Mr. Heiney's past history and intelligence. In addition, the jury may have been impressed with the knowledge that Mr. Heiney acted with courtesy when arrested and was cooperative with the police. Further, Mr. Heiney acted as co-counsel and the jury may have been impressed by Mr. Heiney's character and behavior as exhibited in the courtroom. In addition, Mr. Heiney did not fight extradition and offered no resistance when arrested (R. **1122, 1182).** His prior life history reflected a life of non-violence. Most important, however, the jury may have considered that Mr. Heiney, after the shooting incident in Texas which the State used as res gestae evidence, went to Terry (the person who was shot), hugged him and helped him to the automobile to be taken to the hospital (R. **758, 775).** The behavior of Mr. Heiney showed a person who, at one moment might act irrational, also had the capacity for remorse and affection. In addition the jury heard that the incident in Texas was one precipitated by passion, and not thought out rationally. The gun belonged to Mr. Benson, the roommmate (R. **776).** A few hours after the incident, Mr. Heiney returned the gun to Mr. Benson (R. **776).** This was not the act of a man bent on escape, robbery and murder. The jury could have considered Mr. Heiney emotionally unstable, but nevertheless compassionate. Although the basis for the jury's recommendation cannot be ascertained at this point in time, it is reasonable to assume that they adopted a "practical view" of the evidence and rejected heinous, atrocious or cruel as an aggravating circumstance. The autopsy showed that any of several blows would have rendered Mr. May unconscious immediately if he was not already in an alcoholic stupor **(R. 917-919, 926).** There was only one slight

"superficial", "minor" and "inconsequential" defensive wound (R. 910)). The victim's blood alcohol level was recorded at .28 (R. 913). As testified to by the coronor, Mr. May was "quite out of possession of his normal faculties" (R. 917). Further, the coroner stated that Mr. May's alcohol content could have been .35 (R. 937); that Mr. May was "completely uncoordinated," "couldn't drive" and "couldn't focus" (R. 918). What the coroner made clear is that any of the blows would have killed or rendered Mr. May unconscious immediately (R. 926). In the end they likely concluded that the case fell within the category of "normal capital crimes," and that death was inappropriate.

Based on all of the above, it is quite plain that "reasonable people could differ as to the propriety of the death penalty in this case, [and thus] the jury's recommendation of life must stand." Brookings v. State, 495 So. 2d 135, 143 (Fla. 1986). There were thus numerous valid and eminently reasonable nonstatutory mitigating factors in this case. Whatever balance the trial judge might have struck, the jury's balancing and resulting life recommendation, were undeniably reasonable under Florida law. See Mann v. Dugger, 844 F.2d 1446, 1450-55 (11th Cir. 1988)(in banc), cert. denied, 109 U.S.L.W. (March 6, 1989); Ferry, supra; Wasko, supra.

The Court's sentencing order recited that "notwithstanding the recommendation of a majority of the jury, the Court, after weighing the aggravating and mitigating circumstances shall enter a sentence of death." The Tedder standard was not mentioned, and, in fact, the jury was not again mentioned. The judge considered only statutory mitigation, weighed statutory aggravation and mitigation, and imposed death. The judge did not consider the nonstatutory mitigation in the record, nonstatutory mitigation which formed an eminently reasonable basis for the jury's recommendation of life.

Neither the eighth amendment, nor due process, nor equal protection can be squared with the fact that Florida law afforded Mr. Heiney the right to an affirmance of the jury's reasonable life recommendation, while the Florida courts' unfounded, unique, and illogical ruling arbitrarily withdrew that right. See Evitts v. Lucey, 469 U.S. 387, 400-01 (1985); Heiney v. Avery, 393 U.S. 483, 488 (1969); Smith v. Bennett, 305 U.S. 708, 713 (1961). See also Reece v. Georgia, 350 U.S. 85 (1955).

If a jury recommends life, death may not be imposed if there is any "reasonable basis in the record" for the recommendation. Ferry v. State, 507 So. 2d 1373, 1376-77 (Fla. 1987); see also Hansbrouqh v. State, 509 So. 2d 1081, 1086 (Fla. 1987)("a reasonable basis for the jury to recommend life" cannot be overridden); Fead v. State, 512 So. 2d 176 (Fla. 1987)("[O]nly when there are no 'valid mitigating factors discernible from the record' is an override warranted"); Wasko v. State, 505 So. 2d 1314, 1318 (Fla. 1987)(no override "unless no reasonable basis exists for the opinion"); Duboise v. State, 12 FLW 107, 109 (Fla. 1987)(If a "fact could reasonably have influenced the jury," no override is proper). If any valid mitigating circumstances exist in the record, an override cannot be sustained. That is the right afforded to capital defendants under Florida's capital sentencing statute. That is the right arbitrarily denied to Mr. Heiney.

The record before the jury contained mitigating circumstances which provided a reasonable basis for the life recommendation. The jury also could have reasonably differed with the judge's findings regarding aggravating circumstances (as this Court often does) and with the weight given the aggravating circumstances.

The override was predicated, however, upon what the judge felt, and not upon any analysis of why there was no reasonable basis for the jury. That is not the law:

> The state, however, suggests that the override was proper here because the trial court judge is the ultimate sentencer and his sentencing order represents a reasonable weighing of the relevant aggravating and mitigating circumstances. According to the state's theory, this Court should view a trial court's sentencing order with a presumption of correctness and, when the order is reasonable, this Court should uphold the trial court's sentence of death. We reject the state's suggestion. Under the state's theory there would be little or no need for a jury's advisory recommendation since this Court would need to focus only on whether the sentence imposed by the trial court was reasonable. This is not the law. Sub judice, the jury's recommendation of life was reasonably based on valid mitigating factors. The fact that reasonable people could differ on what penalty should be imposed in this case renders the override improper.

Ferry, 507 So. 2d at 1376-77 (emphasis added).

The override in this case is wrong and arbitrary. See Ferry, Hansbroush, Fead, Wasko, Duboise; cf. Skipper. The jury override procedure in Florida is constitutionally valid only to the extent that it is utilized within specific reliable procedural parameters, and so long as it does not lead to freakish and arbitrary capital sentencing. Spaziano v. Florida, 468 U.S. 447, 104 S. Ct. 3154, 3166 (1984). Where the state courts fail to, the federal courts must apply the "significant safeguard[]s," Spaziano, supra, built into the override procedure. Mann v. Dusser, 844 F.2d at 1455 n.10 ("[W]e independently decide how the federal Constitution applies to claims pertaining to that [state court capital sentencing] process as . . . defined [by state law]."). Indeed, Florida's federal district courts have done just that in cases presenting far less arbitrary affirmances of jury overrides than Mr. Heiney's. See Parker v. Dusser; Lusk v. Dusser.

This Court must determine whether one of those "significant safeguards" -- the reasonable basis for the jury's recommendation -- exists and whether the imposition of the death sentence conformed to constitutional requirements regarding the

consideration of **all** possible bases for that recommendation:

> [T]he application and interpretation of the Tedder standard cannot avoid the developing fabric of federal constitutional principles governing the imposition of the death penalty. See Mann v. Dusser, 844 F.2d 1446, 1454 n.10 (11th Cir. 1988) (en banc) (although state law defines nature of sentencing process, federal courts must independently decide application of the federal Constitution as it pertains to process thus defined).
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> Of particular significance to the Tedder standard is the growth in the role of nonstatutory mitigating evidence in the sentencing process. Beginning three years following Tedder, the Supreme Court defined the individualized-sentencing requirement in capital cases, holding that the sentencing authority must be permitted to consider "as a mitisatins factor, any aspect of a defendant's character or record and any circumstances of the offense." Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion). As the individualized-sentencing requirement developed further, it became apparent that "Lockett requires the sentencer to listen" to all forms of mitigating evidence. Eddings v. Oklahoma, 455 U.S. 104, 115 n.10 (1982). Just last year a unanimous Supreme Court applied Lockett to Florida's capital sentencing, setting aside a death sentence because "the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances." Hitchcock v. Dusser, 107 S. Ct. 1821, 1824 (1987).
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> The interaction of the individualized-sentencing requirement from Lockett-Eddings-Hitchcock with the Tedder standard imposes stringent federal constitutional requirements on the decision to override a jury's recommendation of life imprisonment. Discerning whether a jury's recommendation rests on a reasonable basis inherently turns on questions of federal constitutional law. It would be an exercise in futility to require that nonstatutory mitigating evidence may be presented, as Lockett establishes, to impose an obligation on the sentencing authority to listen to that evidence, as Eddings demands, and to extend that obligation to the advisory jury, as Hitchcock holds, unless nonstatutory mitigating circumstances can form a basis for a jury life recommendation. Cf. Franklyn v. Lynaugh, 108 S. Ct. 2320, 2333 (1988) (O'Connor, J., concurring in judgment) ("[T]he right to have the sentencer consider and weigh relevant mitigating evidence would be meaningless unless the sentencer was also permitted to give effect to its

consideration."). "If the guarantee for consideration of (rather than mere presentation of) nonstatutory mitigating circumstances is to be given any meaning, then the trial judge must accord those circumstances weight as a reasonable basis for a jury's recommendation of life imprisonment." Parker v. Dugger, Case No. 86-797-Civ-J-12, slip op. at 54-55 (M.D. Fla., Feb. 26, 1988), appeal pending, Dkt. No. 88-3189 (11th Cir.); see also Engle, 108 S. Ct. at 1097 (Marshall, J., dissenting from denial of cert.).

Lusk v. Dugger, No. 88-22-Civ-J-12 (U.S.D.C. M.D. Fla. Nov. 1, 1988), Order Denying Relief as to Conviction But Vacating Sentence of Death, slip op. at 26-28.

As this Court's recent opinions acknowledge, the standard for sustaining a jury override has changed since Mr. Heiney's direct appeal -- the override would not be sustained today. The Lusk court explained why this is so:

> Cases decided by the Florida Supreme Court in the wake of Hitchcock demonstrate recognition of the significance which nonstatutory mitigating circumstances may have on the Tedder standard. In Holsworth v. State, 522 So. 2d 348 (Fla. 1988), the trial judge overrode a jury's life recommendation, finding proof to establish three aggravating factors -- defendant previously convicted of a felony involving use or threat of violence, murder committed during an armed burglary, and murder of an especially heinous, atrocious, and cruel nature -- and no mitigating circumstances. Id. at 353-54. In fact, the trial judge expressly rejected testimony and opinion from an expert witness and gave little weight to testimony from other witnesses on a range of nonstatutory mitigating circumstances. Id. at 354. The Florida Supreme court held the override improper.
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> > The jury . . . may have given more credence to this testimony. Under Florida's capital sentencing statute, it is the jury's function, in the first instance, to determine the validity and weight of the evidence presented in aggravation and mitigation. . . . 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.
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> Id. (citations omitted). The state supreme court then surveyed the record to find evidence regarding impaired conduct,

> childhood trauma, and potential for rehabilitation. Id. "Despite the depravity of the crime, we find the mitigating evidence sufficient to support a life recommendation." Id. at 355. Likewise, in DuBoise v. State, 520 So. 2d 260, 266 (Fla. 1988), the trial court found three aggravating factors and no mitigating circumstances, but the Florida Supreme Court vacated the death sentence because the jury's recommendation of life could have been reasonably based on nonstatutory mitigating circumstances. In sum, the Florida Supreme Court now appears to recognize the importance of the nonstatutory mitigating circumstances aspect of the individualized-sentencing requirement in application of the Tedder standard.

Lusk, supra, slip op. at 28-30 (footnote omitted). The court provided a similar explanation in Parker, supra. This Court in Mr. Heiney's case, however, arbitrarily allowed an unreliable, Mann, supra, death sentence to stand. The arbitrariness has only now been made apparent -- because of what this Court said in 1988. See Sonaer, supra.

This Court's override standard has evolved to conform with constitutional requirements, but Mr. Heiney has arbitrarily been denied the benefit of that evolution. (This is precisely the type of case in which federal intervention is found, Parker, supra; Lusk, supra; Mann, supra, and in which no procedural obstacles can be properly asserted against the petitioner's entitlement to relief. Sonaer, supra.) The ends of justice require that the claim now be entertained, and that relief now be granted rather than passing the case on for consideration in another forum.

If the jury override here, and the method through which it was sustained, is acceptable under the Florida statute, then "the application of the jury override procedure has resulted in arbitrary or discriminatory application of the death penalty . . . in general . . . [and] in this particular case." Spaziano, supra. To allow the override to stand in this case would indeed be to validate a procedure providing no meaningful basis upon which to distinguish between those persons who receive life (when

a judge does not override, or when an override is reversed) and those who receive death. This violates the eighth and fourteenth amendments.

In **1973**, this Court, in Dixon, ruled on the constitutionality of Section **921.141**, Fla. Stat., and set forth its interpretation of the statute. It was understood, as part of Florida's history of the jury system, that the jury would retain authority to recommend mercy. The court noted, however, the statute provided for the trial judge to have ultimate sentencing authority as an additional safeguard for the Defendant.

> The fact that the Defendant has committed the crime no longer determines automatically that he must die in the absence of a mercy recommendation.
>
> . . .
>
> Thus, the inflamed emotions of the jurors can no longer sentence a man to die; . . . the sentence is viewed in the light of judicial experience.

Id. at *8*.

Two years later in Tedder, supra, this Court further defined the jury's role in the sentencing process and the degree of importance to be given its recommendation. The court stated:

> A jury recommendation under our trifurcated death penalty statute should be given great weight. In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.

Id. at 910.

Thus, it appeared in **1975** that a death sentence could be imposed in Florida based on a rational, objective system of justice which reserved to the jury the power to consider mercy, yet reserved to the trial court power to override a death recommendation made by an emotionally inflamed panel. By **1984**, however, it was evidence that the promises of Dixon and Tedder were being largely ignored by the courts of the state. The override provision of Section **921.141**, Fla. Stat., was employed

in the reverse of its original intention.

As of March 1, 1984, there were 85 jury override cases of which 61 were reversed by the Supreme Court. Of the remaining 19, 7 were later reversed by a federal court. Thus, roughly four-fifths (4/5) of the decisions to override the jury's recommended life sentence have been reversed on appeal. Florida H. R., Committee on Criminal Justice, HB-820 Bill Analysis at 2 (March 26, 1984). Whether the result of the Court's review process indicates the effectiveness of that process or whether it is indicative of the failure of Section 921.141, Fla. Stat., and the arbitrariness of the application of the statute is best answered by an analysis of some of the cases addressed by the court.

Sonya Jacobs was convicted of murdering two police officers. The trial court overrode the jury's life recommendation and, finding three aggravating circumstances, sentenced Ms. Jacobs to the electric chair. On appeal, the Supreme court reversed the death sentence. Notwithstanding a finding of no mitigating circumstances by the trial court, the Supreme Court pondered what the jury may have been thinking. The court stated:

> The jurors in this case may have considered the fact that Ms. Jacobs was the mother of two children for whom she cared. They could have found that her role was mostly passive and that she was under the influence of her lover, Tafero. They may have felt that her actions were what she perceived to be a necessary measure to protect her family. Additionally, Jacobs had no past history of violence. All in all, the evidence is not sufficient to override the jury's recommendation of a life sentence.

The Court took the position that since the jury may have considered these facts in reaching its verdict, the court should also have considered these circumstances. (Some of the mitigation listed is actually statutory, e.g., no prior history, undue influence.) The review process employed in Jacobs is, however, contrary to the usual practice of the Court and serves to point up the arbitrary application of the death penalty

statute. Typically, when the court reviewed a trial court's sentencing order, it found that although a judge did not list certain mitigation, that did not mean such mitigation was not considered. The court routinely assumed the trial judge considered and rejected such mitigation, and therefore, the jury must have considered and rejected it as well. (The issue usually arose in the context of a Cooper, Songer, ~~Lockett~~ problem; that is, whether nonstatutory mitigating circumstances were considered by the judge and jury or whether the trial judge limited mitigation to that listed in the statute.) An example of the concept that a judge **"must"** have "considered" but **"rejected"** as insignificant, mitigating circumstances that were otherwise applicable can be found in Porter v. State, 429 So. 2d 293 (Fla. 1983). Porter's contention on appeal was that the trial court erred in not finding as mitigating circumstances his age; his marriage and two small children; his lack of history of prior criminal activity; and his good employment history. The Court, not quite so disposed toward Mr. Porter as Ms. Jacobs, declined to interfere with the trial court's override of the jury's recommendation for a life sentence. "There is no requirement a court must find anything in mitigation" sounded the court:

> The only requirement is that the consideration of mitigating circumstances must not be limited to those listed in Section 921.141(6). What Porter really complains about here is the weight the trial court accorded the evidence presented in mitigation. However, mere disagreement with the force to be given (mitigating certain evidence) is an insufficient basis for challenging a sentence.

429 So. 2d 296.

The Porter court did not consider what the jury may have contemplated as it did in Jacobs. Rather, the court transformed the Tedder principle, a reasonable man test (which focuses on the state of mind of the jurors), into a weighing test (which plumbs the trial court's mind). Instead of addressing the notion that a

jury could have considered, as they may have done in Jacobs, Mr. Porter's youth, his family, his lack of criminal record, or any other other evidence in mitigation, the court erased all of this evidence by stating that the trial judge considered and rejected them; therefore, the jury considered and rejected them as well.

Once having decided what the jury rejected as mitigation vis a vis the trial judge, this Court addressed the Tedder issue joining the trial judge in guessing what the jury was thinking when it made its recommendation.

> The record in this case supports the court's findings regarding the aggravating and mitigating circumstances. As noted by the trial court, the jury might well have been swayed by defense counsel's reading of an 'extremely vivid and lurid' description of an electrocution to the jury. Defense counsel's description of an electrocution might well have been calculated to influence the recommendation of a life sentence through emotional appeal.

No case, however, better illustrates the arbitrariness of second guessing the jury than does Thomas v. State, 456 So. 2d 454 (Fla. 1984). Ed Thomas, like Sonya Jacobs, was convicted of two murders. The trial court, though, unlike the Jacobs and Porter courts, did consider and list in its findings two statutory mitigating factors, those of no prior criminal history and age. The court sentenced Thomas to death in the face of a 12 to 0 life recommendation. (The jurors specifically wrote on the verdict form "unanimous vote for life.") The court like the Porter court overrode the jury's recommendation by employing the weighing process traditionally reserved to those instances where a death recommendation was made by the jury rather than addressing the reasonable man test.

The Florida Supreme Court upheld the override in Thomas by again deciding what the jury must have been thinking when it unanimously recommended that Thomas live.

> The fact that the first victim may have been a homosexual and that he may have used the services of appellant as a prostitute, even if it were a valid basis for mitigating the

> first murder, which we do not hold, it is clearly not a valid basis for mitigating the seriousness of the second murder.

Id. at 461.

Thomas serves to highlight the arbitrariness of override review by the Supreme Court and illustrates the violence done to the principles set down in Tedder and Dixon. Twelve jurors and Justices McDonald and Overton, both of whom dissented in Thomas, were deemed to be unreasonable based on a perceived notion that the gay victim was the focal point of the jury's deliberations. Justice McDonald stated:

> The jury recommended life. Juries reflect the conscience of the community. Twelve people, all from different walks of life but representing a community's views, after being instructed on the matters that they should consider, have exercised their discretion to recommend life imprisonment on two counts of homicide. The trial judge has rejected their recommendations and imposed death. Why? The answer is not apparent.

And Justice Overton concluded:

> I concur with the dissent of Justice McDonald. I find that the unanimous jury recommendation of a life sentence was not unreasonable under the total circumstances of this case. I respect the jurors, who heard the evidence and saw the witnesses. The majority fails to properly apply Tedder and McCaskill and appears to have granted unlimited life and death power to the trial judge, at least in this cause.

Upon notice of the Supreme Court's decision and Mr. Thomas' affirmed death sentence, a juror in the Thomas case contacted trial defense counsel and stated her dismay at the opinion. The juror categorically denied the jury had based its decision on the homosexuality of the victim in the case. Quite the contrary, the jury never considered the sexual propensity of the victim. The jury was swayed by Mr. Thomas' age, lack of prior criminal activity, his desire to better himself through education by obtaining his high school degree while awaiting trial, his found faith and religion, and his excellent behavior while in prison. They considered his poor upbringing, abusive parents, and the

circumstances that led to his living on roofs and in the streets. The jury was also impressed by the number of witnesses who testified on the Defendant's behalf as to his loyalty, friendship, and selflessness. Thomas v. State, Petition for Extraordinary Relief, For a Writ of Habeas Corpus, Request for Stay of Execution, April 13, 1986.

In Thomas, there were written findings of two statutory mitigating circumstances, with no need to speculate as to what circumstances the jury might have relied upon to reach its verdict. These circumstances were recognized by the trial court as sufficient to affect part of his sentencing. The trial judge sentenced Thomas to life imprisonment on one charge because the statutory mitigating circumstances of no prior criminal record and his youth outweighed the single aggravating circumstance.

Since the trial court specifically found two mitigating circumstances, there is the inference that the jury considered these two circumstances as well. If, as in Porter, this Court can assume the jury had rejected all mitigation because the trial judge rejected all mitigation, then conversely, if the trial judge finds mitigation, this Court must assume the jury did as well. As the Dixon court observed, the legislature chose to provide the jury with the ability to consider the age and record of the Defendant. According to the Thomas court, however, it was "unreasonable" for a jury to have given much weight to these two statutory mitigating circumstances because as the court reasoned, the trial judge gave them little weight. The Thomas court stated:

> Here there were several aggravating circumstances and the trial judge determined that they were not outweighed by the mitigating circumstances found to exist. Other than the two statutory mitigating circumstances which the trial judge found were entitled to little weight, there does not appear to be any reasonable basis discernable from the record to support the jury's recommendation.

According to the reasoning in Thomas, jurors can be

considered unreasonable even when relying on the capital sentencing statute as interpreted by the Dixon court. Simply by stating that nothing appeared in the record in terms of mitigation, the court erased what was in fact record mitigation of a magnitude far exceeding the mitigation in the Jacobs case. By holding these two statutory mitigating circumstances not a reasonable basis for a jury's mercy, the court judicially excised them from the statute. By putting mitigating circumstances to a weighing test in Thomas, rather than subjecting them to an analysis against the Tedder principle, the court was able to eliminate them. By eliminating them first, the court was free to make the assumption that the jury must have been swayed by the homosexuality of the victim.

The jury override procedure in Florida is constitutional only to the extent that it is rationally applied.

By upholding Florida's jury override procedure, the United States Supreme Court applauded this Court's exemplary actions in policing jury overrides:

> This court already has recognized the significant safeguard the Tedder standard affords a capital defendant in Florida. We are satisfied that the Florida Supreme Court took that standard seriously and has not hesitated to reverse the trial court if it derogates the jury's role . . . We see nothing that suggests that the application of the jury-override procedure has resulted in arbitrary and discriminate application of the death penalty, either in general or in this particular case.

Spaziano v. Florida, **104** S. Ct. **3154, 3165-66, 3171-72 (1984).** ~~See also~~ Proffitt v. Florida, **428** U.S. **242, 252 (1976);** Dobbert v. Florida, **432** U.S. **282, 294-96 (1977);** Barclay v. Florida, **103** S. Ct. **3418, 3420 (1982).**

The critical determination of whether **"no** reasonable person could differ" should turn on the existence of *any* mitigating circumstances. Indeed, the existence of mitigation is at the heart of a series of cases beginning with Elledse v. State, **346**

So. 2d 998 (Fla. 1977). In Elledge, the court stated:

> It appears that the United States Supreme Court does not fault a death sentence predicated in part upon nonstatutory aggravating factors where there are no mitigating circumstances. The absence of mitigating circumstances becomes important because, so long as there are some statutory aggravating circumstances, there is no danger that nonstatutory circumstances have served to overcome the mitigating circumstances in the weighing process which is dictated by our statute.

Id. at 1003. See Riley v. State, 366 So. 2d 19 (Fla. 1978)(no prior history of criminal activity); Mikenas v. State, 367 So. 2d 606 (Fla. 1978)(age). See also Armstrons v. State, 399 So. 2d 953 (Fla. 1981); White v. State, 446 So. 2d 1031 (Fla. 1984)(no mitigating circumstances). In Eddings v. Oklahoma, 488 U.S. 104 (1982), the court relying on Lockett v. Ohio, 438 U.S. 586 (1978), stated that as a matter of law, the sentencer had to consider all relevant circumstances including an unhappy upbringing, emotional disturbance, and age. Thus, nonstatutory mitigating circumstances carry great weight. See Skipper v. South Carolina, 476 U.S. ___ (1986). On April 22, 1987, the United States Supreme Court decided Hitchcock v. Dugger, supra. The Court, in remanding with instructions to hold a resentencing proceeding that comported with the requirements of Lockett, reiterated the requirement that

> the sentencer may not refuse to consider or be precluded form considering any relevant evidence.

If mitigation exists in the record, then the trial court should be precluded from utilizing the override provision. Any relevant evidence of mitigation is considered important to the United States Supreme Court and its presentation to, and consideration by, the jury essential to a satisfaction of the eighth amendment. For the Court to engage in a convoluted analysis of what a jury considered by referring to a trial judge's findings is to evade the actual evidence presented to the jury. To state that a judge considered and rejected such

evidence thereby concluding that the jury could not have relied upon such evidence in its recommendation demeans the significance accorded mitigation by the United States Supreme Court.

In Florida, a jury is not required to set forth the basis for its recommendation; that is, the jury does not list the aggravating and mitigating circumstances considered in reaching its verdict. Though a better practice would be to require a special verdict form, a listing of factors taken into consideration, thus providing the Court with a more concise and informed advisory opinion, the current practice is to guess at the basis for the jury's verdict. Thus, in a Tedder situation, the trial court, and consequently this Court, is left to speculate on the jury's decision making process. Although there is a requirement that an aggravating circumstance be proven beyond a reasonable doubt, there is no way of knowing whether the aggravating circumstance relied upon by the jury was in fact one actually relied upon by the State, or whether evidence was even presented supporting a particular circumstance. There can be no doubt the trial court engages in a guessing game when it attempts to determine the basis for the jury's verdict. The problem is compounded when the court is not required to address the mitigation it rejected. This Court too often is forced to the conclusion that such evidence was considered by the trial court, and thus the jury, and rejected, whereas in fact such evidence was accepted by the jury but not considered by the trial judge. Such ambiguity flies in the face of Tedder and condemns the integrity of the sentencing process. As long as such ambiguity in sentencing exists, the sentencing process in Florida will remain arbitrary and capricious and a violation of constitutional law.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Heiney's death sentence and rendered it unreliable. This Court has not

hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings, see Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error.

CLAIM II

MR. HEINEY'S SENTENCE OF DEATH, RESTING ON THE "HEINOUS, ATROCIOUS, AND CRUEL" AGGRAVATING FACTOR, IS IN DIRECT AND IRRECONCILABLE CONFLICT WITH AND CONTRARY TO MAYNARD V. CARTWRIGHT, 108 S. CT. 1853 (1988), IS IN CONFLICT WITH THE NINTH CIRCUIT COURT OF APPEALS DECISION IN ADAMSON V. RICKETTS, 865 F.2D 1011 (9TH CIR. 1988)(IN BANC), AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

The issue raised by Mr. Heiney's claim is identical to that raised in Maynard v. Cartwrisht, 108 S. Ct. 1853 (1988).[1] Mr. Heiney presented his claim on direct appeal, prior to Cartwrisht. At that time, the claim was rejected. However, post-Cartwright Mr. Heiney's entitlement to relief cannot be seriously disputed. The issue is also identical to that raised in Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(in banc); Adamson also demonstrates Mr. Heiney's entitlement to relief.

A. MR. HEINEY'S DEATH SENTENCE IS CONTRARY TO MAYNARD V. CARTWRIGHT

In the present case, as in Cartwrisht, the jury instructions provided no guidance regarding the "heinous, atrocious or cruel" aggravating circumstance. The jury was simply told: "the crime for which the Defendant is to be sentenced was especially heinous, atrocious or cruel." (R. 1481). As in Cartwrisht, the only explanation offered was: "Heinous means extremely wicked or

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[1] Oklahoma's "heinous, atrocious, or cruel" aggravating circumstance was founded on Florida's counterpart, see Cartwrisht v. Maynard, 802 F.2d 1203, 1219 (10th Cir. 1988), and the Florida Supreme Court's construction of that circumstance in State v. Dixon, 283 So. 2d 1 (Fla. 1973), was the construction adopted by the Oklahoma courts.

shockingly evil. Atrocious means outrageously wicked or vile. Cruel means designed to inflict a high degree of pain, utter indifference to or enjoyment of the suffering of others; pitiless" (R. 1481-1482). This is almost verbatim the instruction given in Cartwright, an instruction which the United States Supreme Court found insufficient under the eighth amendment.

The Tenth Circuit's in banc opinion (unanimously overturning the death sentence) explained that the jury in Cartwriaht received the following instruction:

> the term **"heinous"** means extremely wicked or shockingly evil; **"atrocious"** means outrageously wicked and vile; **"cruel"** means pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the sufferings of others.

Cartwriaht v. Maynard, 822 F.2d 1477, 1488 (10th Cir. 1987)(en banc), affirmed 108 S. Ct. 1853 (1988). Thus, Mr. Heiney's jury received the same explanation regarding this aggravating circumstance that was found wanting in Cartwriaht. In Cartwright, the United States Supreme Court unanimously held that such an instruction did not "adequately inform juries what they must find to impose the death penalty." 108 S. Ct. at 1858.

The United States Supreme Court affirmed the Tenth Circuit's grant of relief in Cartwrisht, explaining that the death sentence did not comply with the fundamental eighth amendment principle requiring the limitation of capital sentencers' discretion. Obviously something akin to **"elements"** of the aggravating circumstances must be given to the jury. The Court's eighth amendment analysis in Cartwright fully applies to Mr. Heiney case. The result here should be the same as in Cartwriaht:

> Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-

ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238 (1972).

108 S. Ct. at 1858.

The Court also explained:

> Godfrey [] which is very relevant here, applied this central tenet of Eighth Amendment law. The aggravating circumstance at issue there permitted a person to be sentenced to death if the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Id., at 422. The jury had been instructed in the words of the statute, but its verdict recited only that the murder was "outrageously or wantonly vile, horrible or inhuman." The Supreme Court of Georgia, in affirming the death sentence, held only that the language used by the jury was "not objectionable" and that the evidence supported the finding of the presence of the aggravating circumstance, thus failing to rule whether, on the facts, the offense involved torture or an aggravated battery to the victim. Id., at 426-427. Although the Georgia Supreme Court in other cases had spoken in terms of the presence or absence of these factors, it did not do so in the decision under review, and this Court held that such an application of the aggravating circumstance was unconstitutional, saying:
>
> > "In the case before us, the Georgia Supreme Court has affirmed a sentence of death based upon no more than a finding that the offense was 'outrageously or wantonly vile, horrible and inhuman.' There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.' Such a view may, in fact, have been one to which the members of the jury in this case subscribed. If so, their preconceptions were not dispelled by the trial judge's sentencing instructions. These gave the jury no guidance concerning the meaning of any of [the aggravating circumstance's) terms. In fact, the jury's interpretation of [that circumstance] can only be the subject of sheer speculation." Id., at 428-429 (footnote omitted).
>
> The affirmance of the death sentence by the Georgia Supreme Court was held to be insufficient to cure the jury's unchanneled discretion because that court failed to apply its previously recognized limiting

> construction of the aggravating circumstance. Id., at 429, 432. This Court concluded that, as a result of the vague construction applied, there was "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." Id., at 433. Compare Proffitt v. Florida, 428 U.S. 242, 254-256 (1976). It plainly rejected the submission that a particular set of facts surrounding a murder, however, shocking they might be, were enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty.

108 S. Ct. at 1858-59.

Accordingly, the Court concluded that what was actually said to the jury in the court's instructions regarding the heinous, atrocious or cruel aggravating factor was inadequate: "To say that something is 'especially heinous' merely suggests that the individual jurors should determine that the murder is more than just 'heinous,' whatever that means, and an ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous.'" 108 S. Ct. at 1859.

In Mr. Heiney's case, as in Cartwright, the penalty phase instructions did not guide or channel sentencing discretion. Likewise, here, no adequate "limiting construction" was ever applied by the factfinders to the "heinous, atrocious or cruel" aggravating circumstance. Ultimately, the court found this aggravating circumstance to apply.

The manner in which the jury and judge were allowed to consider "heinous, atrocious or cruel" provided for no genuine narrowing of the class of people eligible for the death penalty, because the terms were not defined in any fashion, and a reasonable juror could believe *any* murder to be heinous, atrocious or cruel under the instructions. Cf. Mills v. Maryland, 108 S. Ct. 1860 (1988). These terms require definition in order for the statutory aggravating factor genuinely to narrow, and its undefined application here violated the eighth and fourteenth amendments. Godfrey V. Georgia, 446 U.S. 420

(1980). Jurors must be given adequate guidance as to what constitutes "especially heinous, atrocious, or cruel." Maynard v. Cartwright, 108 U.S. 1853 (1988). In essence the jury must be told of the elements constituting this circumstance.

In Mr. Heiney's case, the Court offered no explanation or definition of "heinous, atrocious, or cruel" but simply instructed the jury that an aggravating circumstance the jury could consider was whether the crime "was especially wicked, evil, atrocious or cruel" (R. 1481), and provided the identical "explanation" as that provided by the state court in Cartwrisht. The judge's oral instructions may have been interpreted by the jury as telling them that in fact the murder was wicked, evil, atrocious or cruel. This alone violated Mills v. Marvland, 108 S. Ct. 1860 (1988).

The judge's recitation of facts in finding this aggravating factor did not cure the error. Indeed, the judge's finding did not contain any "narrowing principle to apply to those facts." Cartwrisht, 108 S. Ct. at 1859. Absent application of a narrowing or limiting principle, a reviewing court can not simply apply a sufficiency of the evidence test. Where an instruction fails to instruct on an essential element of the crime, a resulting conviction can not stand. Robles v. State, 188 So. 2d 789 (Fla. 1966). Since here the jury did receive instruction on all the "elements" of this aggravating circumstance, this circumstance must be stricken. See Mills, supra.

Even though the Florida Supreme Court had held that in order to show "heinous, atrocious, and cruel" something more than the norm must be shown, see Cooper v. State, 336 So. 2d 1133 (Fla. 1976); Odom v. State, 403 So. 2d 936 (Fla. 1981); Parker v. State, 458 So. 2d 750 (Fla. 1984), the Court found that "heinous, atrocious and cruel" applied to Mr. Heiney's case. In fact, in Proffitt v. Florida, 428 U.S. 242 (1976), the circumstance was found to have sufficient guidance because the Florida Supreme

Court had construed it as containing the requirement that the crime was "conscienceless or pitiless" because it was "unnecessarily torturous to the victim." 428 U.S. at 255-56.

When Mr. Heiney challenged this aggravating circumstance on direct appeal, the Court, of course, did not have the benefit of Maynard v. Cartwright, decided by the United States Supreme Court in June, 1988.

Maynard v. Cartwrisht, supra, like Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), constitutes a development of fundamental significance in eighth amendment law. The decision in Maynard v. Cartwrisht is very much akin to the decision in Hitchcock v. Dugger. Cartwright, like Hitchcock, changed the standard of review previously applied. See Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987).

Indeed, the Florida Supreme Court had previously passed off Godfrev as only effecting its own appellate review of death sentences. Brown v. Wainwright, 392 So. 2d 1327, 1332 (Fla. 1981)("Illustrative of the Court's exercise of the review function is Godfrev v. Georgia"). Thus it is clear that the Florida Supreme Court like the Oklahoma courts in Cartwright, had refused to properly apply Godfrev and declined to address the impact of Godfrev upon the adequacy of jury instructions regarding this aggravating circumstance.[2] Cartwrisht, like Hitchcock, changed the standard of review. See Downs v. Dugger, supra, 514 So. 2d 1059 (Hitchcock is substantial change in law because it changed the standard of review).

In its decision in Maynard v. Cartwright, the United States Supreme Court held that state courts had failed to comply with Godfrev when they did not require adequate jury instructions

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[2]In fact, through 1988, Shepards' United States Citations shows that the Florida Supreme Court cited Godfrev three times, once in Brown, once in Witt v. State, 387 So. 2d 922 (Fla. 1980), and once in the dissent in Hitchcock v. State, 413 So. 2d 741, 748 (Fla. 1982).

which guided and channelled the jury's sentencing discretion. More is required than simply asking the jury if the homicide was "wicked, evil, atrocious or cruel." Maynard v. Cartwright also applies to the judge's sentencing where there has been a failure to apply the controlling limiting construction of "heinous, atrocious, or cruel." Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(en banc). The Florida Supreme Court's limited reading of Godfrey (as only effecting appellate review of a death sentence) was thus in error. That error is now demonstrated by Maynard v. Cartwrisht. The heinous, atrocious, or cruel aggravating circumstance was improperly applied here.

B. MR. HEINEY'S DEATH SENTENCE IS IN DIRECT CONFLICT WITH ADAMSON V. RICKETTS, 865 F.2D 1011 (9TH CIR. 1988)(IN BANC)

Just as this claim is identical to that found meritorious in Cartwright, so is it identical to the claim upon which the Ninth Circuit Court of Appeals granted relief in Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(in banc). There, the sentencing judge's verdict stated, "the aggravating circumstance[] . . . exists [since Adamson] committed the offense in an especially cruel, heinous and depraved manner," and described the murder. Adamson, supra, 865 F.2d at 1030. In Mr. Heiney's case, the jury was instructed with and the trial judge applied the identical erroneous standard. The in banc Ninth Circuit found that the standard at issue lacked "any discussion or application of the 'actual suffering' cruelty standard" enunciated by the Arizona Supreme Court as a limiting construction of the circumstance, and that thus the circumstance did not provide for the "suitably directed discretion" of the sentencer required by Maynard v. Cartwrisht, 108 S. Ct. 1853 (1988), and Godfrey v. Georgia, 446 U.S. 420 (1980). Adamson, supra, 865 F.2d at 1030.

Adamson further found that appellate review of the propriety of the heinous, atrocious, or cruel aggravating circumstance did

not cure the trial judge's overbroad application of the circumstance:

> That the Arizona Supreme Court affirmed Adamson's death sentence based on cruelty grounds in no way cures the sentencing judge's failure to apply this allegedly constitutional cruelty construction in Adamson's sentencing proceeding. . . . [A]s the Supreme Court has repeatedly emphasized, it is the suitably directed discretion of the sentencing body which protects against arbitrary and capricious capital sentencing. Mavnard, 108 S. Ct. at 1858; Godfrey, 446 U.S. at 428-29; Gresq, 428 U.S. at 189; Furman, 408 U.S. at 313 (White, J., concurring). Post hoc appellate rationalizations for death sentences cannot save improperly channeled determinations by a sentencing court. Not only are appellate courts institutionally ill-equipped to perform the sort of factual balancing called for at the aggravation-mitigation stage of the sentencing proceedings, but more importantly, a reviewing court has no way to determine how a particular sentencing body would have exercised its discretion had it considered and applied appropriately limited statutory terms.

Adamson, supra, 865 F.2d at 1036 (emphasis in original) (footnote omitted).

As in Adamson, the discretion of the sentencing jury in Mr. Heiney's case was not properly channeled or guided, and the state high court's summary affirmance of the application of the heinous, atrocious, or cruel aggravating circumstance on direct appeal did not cure the sentencers' unbridled discretion in applying that factor.

C. THE ERROR WAS NOT HARMLESS

The Florida Supreme Court in Hall v. State, 14 F.L.W. 101 (Fla. 1989), recently explained when penalty phase error requires a new sentencing before a new jury: "The proper standard is whether a jury recommending life imprisonment would have a reasonable basis for that recommendation." 14 F.L.W. at 103. In other words, would a life recommendation based upon the mitigating evidence in the record have withstood an override? Certainly the considerable statutory mitigation presented here

established a reasonable basis for a life recommendation. See Holsworth v. State, 522 So. 2d 348 (Fla. 1988); DuBoise v. State, 520 So. 2d 260 (Fla. 1988); Burch v. State, 522 So. 2d 810 (Fla. 1988); Brown v. State, 526 So. 2d 908 (Fla. 1988). Accordingly, the error cannot be found to be harmless and a new sentencing before a new jury must be ordered.

D. SECTION 921.141(5)(5) IS ARBITRARILY APPLIED IN FLORIDA

Section 921.141(5)(5) on its face and as applied, has failed in two respects to "genuinely narrow the class of persons eligible for the death penalty." First, the circumstance has been applied by the Florida Supreme Court to virtually every type of first degree murder. This aggravating circumstance has become a global or "catch-all" aggravating circumstance. Secondly, even where the Florida courts have developed principles for applying the (5)(h) circumstance, those principles have not been applied with coherence or consistency.

The United States Supreme Court upheld this circumstance, on its face, based on the premise that the Florida Supreme Court was following the limiting construction laid out in State v. Dixon, 283 So. 2d 1 (1973). Proffitt v. Florida, 428 U.S. 242, 255-256 (1976). The Florida Supreme Court has stated in Dixon, supra, that this circumstance was limited to the conscienceless or pitiless crime which is unnecessarily torturous to the victim." Dixon, supra, 283 So. 2d at 9.

The limiting construction of Dixon, requiring unnecessary torture to the victim has not been followed with any consistency. This has resulted in this circumstance failing to "genuinely narrow the class of persons eligible for the death penalty" and has resulted in the arbitrary and capricious application of this circumstance.

The inconsistencies in the application of the aggravating circumstance are legion. One example is Raulerson v. State, 358

So. 2d 826 (Fla. 1978), where the Florida Supreme Court upheld the finding of this aggravating circumstance on direct appeal. 358 So. 2d at 828, 834. The defendant subsequently received a resentencing and on his second appeal, the Florida Supreme Court held that this factor was improper. Raulerson v. State, 420 So. 2d 567, 571-72 (Fla. 1982).

The arbitrariness is evident in virtually every aspect of this circumstance. The Florida Supreme court has generally held that instantaneous death by gunshot does not qualify for this circumstance. E.g., Cooper v. State, 336 So. 2d 1133, 1140-41 (Fla. 1976). Yet, in Harvard v. State, 375 So. 2d 833 (Fla. 1975), this circumstance was upheld despite the fact that death was caused instantaneously by one gunshot wound. Id. at 834, 835.

In Mason v. State, 438 So. 2d 374 (Fla. 1983), the Court upheld this circumstance because "the victim probably lived from one to ten minutes" after the attack. However, in Teffeteller v. State, 439 So. 2d 840 (Fla. 1983), the Court struck this circumstance and stated:

> "The fact that the victim lived for a couple of hours in undoubted pain and knew he was facing imminent death . . . does not set this senseless murder apart from the norm of capital felonies." Id. at 308.

In Middleton v. State, 446 So. 2d 548 (Fla. 1982), the Court struck this aggravating circumstance because the victim "has just awakened from a nap . . . and had no awareness that she was going to be shot." Id. at 552. However, in Breedlove v. State, 413 So. 2d 1 (Fla. 1982), the Court upheld this circumstance because "the attack occurred while the victim was asleep in his bed." Id. at 9. Thus, the identical fact was used to justify this circumstance in one case and to negate it in another.

The Florida Supreme Court has also reached opposite results in cases that were "execution style" murders. This fact was held to be insufficient to uphold this circumstance. Cooper v. State,

336 So. 2d 1133, 1140-41 (Fla. 1976); Riley v. State, 336 So. 2d 19, 21 (Fla. 1979); Antone v. State, 382 So. 2d 1205, 1206, 1216 (Fla. 1980). However, the Florida Supreme court has explicitly relied on this theory in upholding this circumstance. Harsrave v. State, 336 So. 2d 1, 5 (Fla. 1979); Fersuson v. State, 417 So. 2d 639, 643-44, 646 (Fla. 1982); Steinhorst v. State, 412 So. 2d 332, 339-40 (Fla. 1982); Jones v. State, 411 So. 2d 165, 166-69 (Fla. 1982).

Death by a single stab wound has been relied on to uphold this circumstance. Proffitt v. State, 315 So. 2d 461, 466 (Fla. 1975). However, it has also been relied on to strike this circumstance. Wilson v. State, 436 So. 2d 908 (Fla. 1983).

The beating to death of the victim with a breaker bar was held to be insufficient to justify this circumstance in Halliwell v. State, 323 So. 2d 557, 561 (Fla. 1975). Yet, the beating of the victim with a steel bar was held sufficient to justify this circumstance in King v. State, 436 So. 2d 50 (Fla. 1983).

The original limiting construction of Dixon, supra, which was relied on by the United States Supreme Court in Proffitt v. Florida, supra. has been applied in such an arbitrary and inconsistent manner as to allow this circumstance to be applied to virtually every homicide. Thus, this aggravating circumstance fails to "genuinely narrow the class of persons eligible for the death penalty." Zant v. Stephens, supra at 2742-2743; Godfrey; Maynard; Adamson.

E. CONCLUSION

In its decision in Maynard v. Cartwrisht, the United States Supreme Court held that state courts had failed to comply with Godfrey when they did not require adequate jury instructions which guided and channelled the jury's sentencing discretion. More is required than simply asking the jury if the homicide was "wicked, evil, atrocious or cruel." Maynard v. Cartwrisht also

applies to the judge's sentencing where there has been a failure to apply a limiting construction to "heinous, atrocious, or cruel." Adamson V. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(in banc). The Florida Supreme Court's prior constructions of Godfrev (as only effecting appellate review of a death sentence) were thus in error. That standard has been altered by Cartwrisht.

One of the reasons given by the Court for the imposition of death, thereby overriding the jury recommendation, was that the offense was heinous, atrocious and cruel. The "heinous, atrocious, or cruel" aggravating factor, as applied in this case, was improper and violated the eighth and fourteenth amendments.

This error undermined the reliability of the sentencing determination and prevented the sentencer from assessing the full panoply of mitigation presented by Mr. Heiney. For each of the reasons discussed above the Court should vacate Mr. Heiney's unconstitutional sentence of death.

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

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

would have done the rest, based on long-settled Florida and federal constitutional standards.

No tactical decision can be ascribed to counsel's failure to urge the claim. No procedural bar precluded review of this issue. See Johnson v. Wainwrisht, 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. Heiney of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra. Accordingly, habeas relief must be accorded now.

CLAIM III

THE PRECLUSION OF CROSS-EXAMINATION OF THE STATE'S WITNESS, DAVID BENSON, VIOLATED MR. HEINEY'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

The defendant's right to confront and cross-examine the witnesses against him is a fundamental safeguard "essential to a fair trial in a criminal prosecution." Pointer v. Texas, 380 U.S. 403, 404 (1965). Mr. Heiney was denied his right to confront and cross-examine the witnesses against him when trial counsel was precluded from conducting any cross-examination of David Benson.

David Benson was called as witness for the State (R. 773). He was called upon to recount his knowledge of the facts in the days proceeding the homicide. After the State concluded their direct examination, the court refused to allow Mr. Heiney or Mr. Pascoe to proceed with cross-examination:

Q. Your witness.

THE COURT: Okay, Mr. Pascoe, let's move along. Mr. Pascoe, do you want to cross examine this witness?

MR. PASCOE: May I have just a few seconds?

THE COURT: No sir. You can cross examine him, or I'm going to excuse him.

MR. PASCOE: Yes sir.

THE COURT: You've had your time. Okay, you can step down.

MR. HEINEY: We want this witness to stay, subject to recall, Your Honor.

THE COURT: Don't leave.

(R. 782)(emphasis added).

Later the court justified the preclusion by stating that he had precluded the cross-examination because Mr. Heiney and Mr. Pascoe conferred for one to two minutes before beginning cross-examination:

> THE COURT: Before we recess for lunch, Mr. Pascoe had an objection for the record. Mr. Pascoe, after the witness, Benson, was excused, you registered an objection about the Court dismissing the witness after Mr. Pascoe did not cross examine the witness in accordance with the Court's instruction. **Mr.** Pascoe stated that he took less than a minute in conferring with the Defendant before I excused the witness. It's the Court opinion, without thiming, that the time was somewhere in between one and two minutes that I allowed him to confer with the Defendant, and only after instructing him to proceed with cross examination and he again turned to confer with the Defendant did I excuse the witness.
> . . .

(R. 791-2)(emphasis added). The court then proceeded to explain this incredible ruling:

> Mr. Pascoe, I'm going to advise you now that you're going to have to comply with the orders of this Court. Now, if you don't do it, I'm going to have to take action against you. I didn't miss your remark this morninq resardins the prejudice of the Court, that you made in open Court, which I considered to be very disrespectful, even another attorney commented to me in the hallway about it. and I don't like that kind of conduct on behalf attorneys, and do not expect to tolerate it. If it continues, I will have to take action.
>
> MR. PASCOE: Your Honor, what was I accused of saying?
>
> THE COURT: Regarding mv assisting the State in the preparation of their law and refusing to help YOU. You were very critical of the Court in that regard, which was totally without substance. All the areas that I have asked you for law on are areas that are brand new to me. For example, when you asked for the Court to require an eye examination of two witnesses and I asked you if you had any case law. And when you asked

> for a polygraph examination of somebody, the Defendant maybe, I asked you if you had any case authority to support that. Those are the types of instances where I asked you for case authority. Isn't that generally true?

(R. 792)(emphasis added). Certainly it must be highly unusual for a court to preclude cross-examination of an important state witness in a first degree murder trial and then explain that the action was prompted by the court's anger an unrelated comment allegedly made by defense counsel. As regards the provocation for the alleged remark, the record speaks for itself.

David Benson was the State's most critical witness. It was upon his testimony that Mr. Heiney was fleeing from the Houston authorities, had no money and was hitchhiking that the State constructed their argument for motive and premeditation. Obviously, it was critical to the defense to fully explore this witness' credibility and to effectively impeach his testimony before the jury. However, cross-examination was never permitted.

There can be no doubt that this decision violated the sixth amendment right of confrontation, which requires that a defendant be allowed to impeach the credibility of prosecution witnesses by showing the witness' possible bias or showing that the there may be other reasons to doubt the State's reliance upon the witnesses testimony. For example, where a witness who had claimed to have heard something could have misunderstood. Sometimes a witness will herself have a benign explanation for what appears to be very incriminating evidence. For that reason it has been recognized that:

> . . . denial of cross-examination [in such circumstances] would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.

Smith v. Illinois, 390 U.S. 129, 131, 88 S. Ct. 748, 749, 19 L.Ed.2d 956, 959 (1968).

The prejudice to the petitioner resulting from this denial of cross-examination and confrontation rights is manifest when the testimony of this witness is analyzed in the context of the

testimony that may have been elicited during cross-examination. David Benson gave tantalizing preliminary information during direct examination regarding Mr. Heiney's behavior at the time of the shooting of Terry Phillips a few days before the instant offense:

> A. I didn't pay a whole heap of attention at the time. But I heard a gunshot, and I kind of just rolled over and went to sleep. Then Terry came up, and he said - at first I was kind of about half awake, half asleep - and he said, "Dave, I've been shot," and proceeded to bleed all over me. And Bob was with him; and Bob had the gun; and said, "I shot Terry." And at that time I got up and got my clothes on, and everything, and we sot Terry down to the car and I took him to the hospital. And Bob didn't go to the hospital with us, but Bob did help me set him in the car.

(R. 7920 (emphasis added). There are many questions raised by this unusual testimony. If Bob Heiney shot Terry, why was he then assisting him to get treatment only minutes later? The strong suggestion was that the shooting was unintentional. Was Bob intoxicated? Was Terry intoxicated? Many critical questions for the defense remained unanswered due to the preclusion of the cross-examination.

In Alford v. United States, 282 U.S. 687, 51 S. Ct. 218, 75 L.Ed. 624 (1931), the Supreme Court in recognizing that cross-examination of a witness is a matter of right, stated:

> [p]rejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. (Citations omitted)

Id., 282 U.S. at 692, 51 S. Ct. at 219, 75 L.Ed. at 628.

This constitutional error contributed to Mr. Heiney's conviction. The error can by no means be deemed harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967); Satterwhite V. Texas, 108 S. Ct. 1792 (1988). The court's refusal to permit one to two minutes for counsel to confer prior to cross-examination violated an absolute constitutional right to

the confrontation of a critical witness.

This violation of the confrontation clause allowed the jury to assess David Benson's testimony without the knowledge that cross-examination would have revealed. The jury should have been granted the opportunity to properly weigh Mr. Benson's testimony. The preclusion of cross-examination prevented the jury from reaching a reliable verdict.

A criminal defendant's right to cross-examine witnesses is one of the basic guarantees to a fair trial protected by the confrontation clause:

> Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness.

Davis v. Alaska, 415 U.S. 315, 317 (1972).

The scope of cross-examination may not be limited to prohibit inquiry into areas that tend to discredit the witness:

> A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is "always relevant as discrediting the witness and affecting the weight of his testimony." 3A J. Wigmore, Evidence Section 940, p. 775 (Chadbourn rev. 1970). We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. Greene v. McElroy, 360 U.S. 474, 496, 79 S. Ct. 1400, 1413, 3 L.Ed.2d 1377 (1959).

Davis, supra at 316-17 (footnote omitted).

A limitation on the right to reveal a witness' bias or motivation for testifying impermissibly prevents the jury from properly assessing the witness' testimony and prevents the

defendant from developing the facts which would allow the jury to properly weigh the testimony. In Davis v. Alaska, the Supreme Court found that a confrontation clause violation had occurred when the defendant was prevented from asking the witness questions that would reveal possible bias. In holding that the State's interest in protecting juvenile offenders did not override the defendant's right to inquire into bias or interest the court stated:

> In the instant case, defense counsel sought to show the existence of possible bias and prejudice of Green, causing him to make a faulty initial identification of petitioner, which in turn could have affected his later in-court identification of petitioner.
>
> We cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it. But we do conclude that the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Green's testimony which provided "a crucial link in the proof . . . of petitioner's act." Douglas v. Alabama, 380 U.S. at 419, 85 S. Ct. at 1077. The accuracy and truthfulness of Green's testimony were key elements in the State's case against petitioner. The claim of bias which the defense sought to develop was admissible to afford a basis for an inference of undue pressure because of Green's vulnerable status as a probationer, cf. Alford v. United States, 282 U.S. 687, 51 S. Ct. 218, 75 L.Ed. 624 (1931), as well as of Green's possible concern that he might be a suspect in the investigation.
>
> We cannot accept the Alaska Supreme Court's conclusion that the cross-examination that was permitted defense counsel was adequate to develop the issue of bias properly to the jury. While counsel was permitted to ask Green whether he was biased, counsel was unable to make a record from which to argue why Green might have been biased or otherwise lacked that degree of impartiality expected off a witness at trial. On the basis of the limited cross-examination that was permitted, the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness or, as the prosecutor's objection put it, a "rehash" of prior cross-examination. On these facts it seems clear to us that to make any such inquiry effective, defense counsel

> should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. Petitioner was thus denied the right of effective cross-examination which "'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.' Brookhart v. Janis, 384 U.S. 1, 3, 86 S. Ct. 1245, 1246, 16 L.Ed.2d 314." Smith v. Illinois, 390 U.S. 129, 131, 88 S. Ct. 748, 750, 19 L.Ed.2d 956 (1968).

Id. at 318-19 (footnote omitted)(emphasis added).

The State of Florida has recognized the overriding importance of the right to confront a witness time and time again. In State v. Stubbs, 239 So. 2d 241, 242 (Fla. 1970), the court pointed out that the effect of the preclusion of cross-examination of even written evidence taints the evidence which is offered:

> It is clear that the rationale of Bruton is simply that when oral evidence, even if reduced to writing, is introduced which may be considered by the jury as evidence against a defendant, the opportunity for cross-examination should be given else the evidence is tainted.

A mere formal proffer of an opportunity to cross-examine is not a sufficient observance of the right.

> The risht of a defendant to cross-examine witnesses and his risht to present evidence in opposition to or in explanation of adverse evidence are essential to a fair hearing and due process of law. See Horton v. State, Fla.App.1964, 170 So.2d 470 at 474.
>
> After a careful examination of the record on appeal, we conclude that there was no indication of probable tampering with the packets of heroin and thus, these packets should have been introduced into evidence. See Bernard v. State, Fla.App.1973, 275 So.2d 34 and cases cited therein. The packets in the case sub judice having been marked for identification, but not introduced into evidence, defendant was denied thereby of a real opportunity to cross-examine the witnesses of the prosecution. For a mere formal proffer of an opportunity to cross-examine, where the circumstances as in the case at bar are such that the accused cannot effectively avail himself of it, is not a sufficient observance of the risht. 21 Am.Jur.2d Criminal Law sec. 333 (1965).

(emphasis added). Alexander v. State, 288 So. 2d 538, 539 (Fla. 3d DCA 1974). Furthermore, the right of confrontation cannot be taken from a defendant without a knowing and voluntary waiver of the constitutional gurantees of due process, right to counsel, and right to confront adverse witnesses, Whitney v. Cochran, 152 So. 2d 727 (Fla. 1963), cert. denied 375 U.S. 888 rehearing denied, 375 U.S. 949. It is only after the defendant has had the opportunity to exercise the right to full cross-examination that the discretion of the court to limit the scope of the examination becomes operative. U.S. v. Greenberg, 423 F.2d 1106 (1970).

Here, Mr. Heiney's cross-examination of David Benson was not merely limited as in Davis, but actually precluded. The preclusion of cross-examination here is far more serious but with a much less substantial basis than the limitation which occurred in Davis.

The preclusion of cross-examination at Mr. Heiney's trial presented a wholly irrelevant factor for the jury's consideration. David Benson was seated before the jury on the witness stand. After calling him to the witness stand and allowing him to testify on direct, the prosecutor stated, "Your witness." The jury watched as counsel attempted to confer and then heard the judge dismiss the witness over defense counsel's objection. Not only was Mr. Heiney denied his right to confront the witness but he and his counsel were deliberately demeaned in the presence of the jury. The court later explained that this was a deliberate strategy to discredit defense counsel and to seek revenge at Mr. Heiney's expense for an earlier remark allegedly made by Mr. Pascoe.

Without the opportunity of subjecting the testimony of David Benson to cross-examination, Mr. Heiney was deprived of his fundamental rights. What is more basic to the right to defend than the right to cross-examine? The State attempted to elicit Mr. Heiney's intent to leave Houston from Mr. Benson's testimony

in order to provide the jury with Mr. Heiney's motive for robbery and murder. The State relied on the evidence provided by David Benson to make its case and its argument in both the guilt and penalty phases. Yet, the State deliberately precluded the defense's right to cross-examine.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Heiney's death sentence and rendered it unreliable. 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 prejudicially ineffective assistance of counsel on direct appeal. This issue involved a classic violation of longstanding principles of Florida law. See Davis v. Alaska, supra. It virtually "leaped out upon even a casual reading of transcript." Matire V. Wainwrisht, 811 F.2d 1430, 1438 (11th Cir. 1987). This clear claim of per se error required no elaborate presentation -- counsel only had to direct this Court to the issue. The court would have done the rest, based on long-settled Florida and federal constitutional standards.

No tactical decision can be ascribed to counsel's failure to urge the claim. No procedural bar precluded review of this issue. See Johnson v. Wainwrisht, 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. Heiney of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwrisht, supra, 474 So. 2d at 1164-65; Matire, supra. Accordingly, habeas relief must be accorded now.

CLAIM IV

THE PREDICATE FOR THE INTRODUCTION OF THE OTHER CRIMES "WILLIAMS RULE EVIDENCE WAS UNSUBSTANTIATED, THE STATE IMPROPERLY ARGUED TO THE CONTRARY, AND DEFENSE COUNSEL INEFFECTIVELY OPPOSED THE INTRODUCTION OF THIS INFLAMMATORY AND PREJUDICIAL EVIDENCE, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The State was allowed to introduce into evidence information which, according to now Chief Justice McDonald, had "no relevance . . . at all, and it was clearly prejudicial." Heiney v. State, 447 So. 2d 210, 219 (Fla. 1984)(dissent). The evidence was that

> On June 4, 1978, Heiney was residing in Houston, Texas, with Lawanna Wickline, Terry Phillips, and David Benson. On that date, after fighting with his girl friend, Lawanna Wickline, Heiney shot Terry Phillips in the abdomen. Wickline called the police. Upon learning that Phillips was in critical condition and that the police had been notified of the shooting, Heiney requested Benson to give him a ride out of town. Benson drove him to near the Texas state line. Heiney told Benson he was broke and that he planned to hitchhike to Florida. Benson gave Heiney $4.

Id., p. 211. See also Heiney, 447 So. 2d at 216 (Boyd, J., dissenting).

Unknown to the jurors, and apparently to counsel for Mr. Heiney, this "crime" in Texas was unsupported by an official law enforcement activity whatsoever. No indictment, no warrant, no arrest, no fugitive from justice warrant. The State made much ado about the serious nature of this crime which purportedly caused Mr. Heiney to flee and kill, yet the truth of the matter is Texas authorities never made so much as a real inquiry into the matter.

The State's overreaching runs throughout the transcript:

> It's the whole basis for the State's case, it's the motive the defendant had in killing May . . . And that night, or early the next morning, he killed the victim, took his credit cards, his wallet, his car, a diamond ring that he had, and took off and went all over the country to avoid capture and prosecution for the shootins, which he thousht was killing, in Houston, Texas, and

the killing of May one or two days later.

> [T]here's no question that under our rules of evidence and our law that you have a right to present evidence on the motive, and this is the motive for the killing. We have to show he was running to avoid capture and prosecution for the Phillips' shooting.

(R. 709-10). In fact, no prosecution was contemplated, yet "this is the whole basis for the State's case, the reason for the robbery" (R. 711). During the State's opening argument, the prosecutor argued:

> Phillips was in the hospital for a long time, in critical condition for four or five days and they didn't think he'd live. . . . After he shot Terry Phillips, the defendant, to avoid prosecution, capture and prosecution, decided to run.

(R. 740-41). During the State's first closing argument at guilt-innocence, the prosecutor stated:

> There are two questions because there are two counts. The defendant is charged with murder in the first degree in the first count, and robbery with a deadly weapon, to wit: a hammer, in the second count. So, you're called on to answer questions, "Did the defendant, Robert Heiney, kill Francis Marion May **intentionally,"** that's with a premeditated design, and/or he could have had a premeditated design to do it. And I think when we get into the evidence, that you could reach the conclusion that it was both, since he was on the run from the law and needed time to get away.
>
> . . . .
>
> He made lots of mistakes, and lots of bad mistakes. We have to go, to start with the mistakes, we have to go back to Houston, where he shot Terry Phillips and he started out on his run. He's running from the law. You know he did that, you know he was running from the law because David Benson told you he was . . . So we know he was running from the law . . . He has no wheels. He's running. He's desperate. He didn't know. You know, they didn't know, they didn't even know for four or five days whether or not Terry Phillips was going to live or not. So, as far as Mr. Heiney was concerned, they'd be looking for him any minute for murder. You've got a desperate man on the run from the law, no transportation and no money.
>
> . . . .
>
> So we know, here you've got a man on the run

> from the law who needs money, finances, and transportation. You know that. That's the beginning.
>
> . . . .
>
> You know that Robert Heiney was looking for somebody to rob because he needed money and transportation.

(R. **1235, 1241-43**). During the State's closing at sentencing, the State argued:

> Was he trying to -- did he do this in order to prevent himself from being arrested? You know that he did. You know that he shot Terry Phillips in Houston a day or two before that, that he was on the run from Houston, hitchhiking, when May picked him up. You know that he murdered Francis Marion May in order to get his automobile and to get finances, to avoid arrest for the shooting in Houston. So that aggravating circumstance exists.
>
> . . . .
>
> Mr. Pascoe's hypothetical example to you is pitiful. It has no basis of fact, whatsoever, with the situation here. He tells you about a fisherman that goes fishing with somebody and comes back and finds the body dead. Now, what we're talking about in our situation is a man who shoots another one in Houston, Texas; the man is in critical condition. Right after the body is taken to the hospital, he takes off running from the law. He is in need, he had no money, no transportation.

(R. **1322, 1327**).

The insertion of baseless accusations that serious crimes had been committed surely distracted the jury from objectively determining Mr. Heiney's guilt or innocence of murder and robbery and as importantly, whether Mr. Heiney should live or die. Under well established Florida law, evidence of collateral crimes is not admissible to establish propensity or bad character. It is only admissible if relevant to a material issue. Drake v. State, **400 So. 2d 1217** (Fla. **1980**); Williams v. State, **110** So. 2d **654** (Fla. **1959**), cert. denied, **361** U.S. **847**.

Here, the prosecution succeeded in bootstrapping a murder conviction through bad character evidence.

As evidenced by the claims in this pleading and the record

as a whole, Mr. Heiney was denied his right to a fundamentally fair trial as demanded by due process. "Improper admission of evidence of a prior crime or conviction, even in the face of other evidence amploy supporting the verdict, constitutes plain error impinging upon the fundamental fairness of the trial itself." United States v. Parker, 604 F.2d 1327, 1329 (10th Cir. 1978). See also United States v. Gilliland, 586 F.2d 1384, 1391 (10th Cir. 1978); United States v. Biswell, 700 F.2d 1310, 1319 (10th Cir. 1983).

A prosecutor's concern in a criminal prosecution is not that it shall win a case, but that justice shall be done. Berger v. United States, 295 U.S. at 88-89. Clearly the inclusion of the collateral crimes evidence tainted this trial to an extent that justice was left by the wayside. Presenting the evidence of a prior shooting during Mr. Heiney's trial for his life violated his rights under the fifth, sixth, eighth and fourteenth amendments to the Constitution of the United States.

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

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

would have done the rest, based on long-settled Florida and federal constitutional standards.

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

CLAIM V

THE DEFENDANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO SELF-REPRESENTATION CONTRARY TO THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

On October 26, 1978, Mr. Pascoe filed a request that Mr. Heiney be permitted to act as co-counsel in the defense of the charges against him (R. 46-47).

Through a series of subsequent rulings, Mr. Heiney was denied his right to self-representation. On December 1, 1978, Mr. Pascoe filed a motion that Mr. Heiney be permitted to voir dire the jurors and alleged that "on the 27th of November, 1978, this Court announced in chambers and off the record that the Defendant would not be allowed to voir dire the jurors" (R. 63). A second Motion for Decision that Court's Previous Order Was in Error accompanied the motion alleging that the court had entered an order without notice to the defense or the opportunity to prepare argument (R. 64).

On December 11, 1978, Mr. Pascoe referred to a hearing on a "half dozen motions" in the judge's chambers and Mr. Heinery requested an explanation as to why he was not permitted to attend the hearing (R. 105).

Throughout the trial, the attorneys approached the bench for bench conferences which were outside Mr. Heiney's hearing and

most often were unrecorded as well (R. 528, 685, 688, 756, 824, 831, 1173). The conference between counsel and the judge regarding jury instructions is also unrecorded and conducted outside Mr. Heiney's presence (R. 1232).

In Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525 (1975), the United States Supreme Court recognized a defendant's sixth amendment right to conduct his own defense. The court erred in depriving Mr. Heiney of the right to represent himself. Faretta, supra; McKaskle v. Wiggins, 465 U.S. 168 (1984); Dorman v. Wainwright, 798 F.2d 1358 (11th Cir. 1986).

The denial of Mr. Heiney's right to act as counsel in his own behalf constituted a denial of his fundamental constitutional rights in violation of the fifth, sixth, eighth and fourteenth amendments.

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

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

No tactical decision can be ascribed to counsel's failure to

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

CLAIM VI

THE STATE'S INTENTIONAL USE OF PERJURED TESTIMONY BEFORE THE GRAND JURY IN ORDER TO OBTAIN AN INDICTMENT VIOLATED THE CONSTITUTIONAL RIGHTS OF ROBERT DAVID HEINEY UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Mr. Heiney was originally charged with second degree murder in the death of Mr. May. Subsequent to his arrest the State "found" a jailhouse informant who stated that Mr. Heiney had made incriminating statements to him. This jailhouse informant was the primary witness presented to the Grand Jury. On the basis of Mr. Tuszynski's testimony a grand jury indicted Mr. Heiney for first degre murder.

On February 1, 1979, Mr. Pascoe, representing Mr. Heiney filed a Motion to Quash Indictment (R. 100). This motion was based on the allegation that the State's primary witness, who allegedly heard a confession from Mr. Heiney, was ordered to lie by the Okaloosa Sheriff's Deputy investigating the case (R. 100). Pursuant to this motion a hearing took plce on February 9, 1979. On that date the following colloquy took place in Chambers of Judge Clyde B. Wells. Mr. Anderson represented the State:

> MR. PASCOE: The first motion I would like for the Court to consider is the motion to quash the indictment, Your Honor.
>
> THE COURT: OKAY.
>
> MR. PASCOE: First of all, I would like to call my first witness on that Particular motion, and that is Tom Tuszinski.

MR. ANDERSON: State objects to that, Your Honor.

THE COURT: What's the basis of the objection?

MR. ANDERSON: The allegation in the motion to quash is that the State's witnesses testified at the grand jury proceedings as to the alleged confession from Thomas Tuszinski. There's no way that Mr. Pascoe could know what Thomas Tuszinski testified before the grand jury, it's a secretive proceeding, and, therefore, that allegation is wrong, or he has been delving into something he has no right to delve into. And to call Thomas Tuszinski and ask him about what he testified before a secretive proceeding would be wrong, as prohibited under the law, Your Honor, and the State objects to it. And in any event, the allegation that this would subject the indictment to being quashed is totally incorrect. The testimony, even if the allegation of the motion was correct, it would go to the credibility of the witness and would be something that would be introduced to impeach the witness at the trial of the case, and for no other purpose. It would not, even if true, be justification for questioning.

THE COURT: Mr. Pascoe, you want to respond to that?

MR. PASCOE: Yes, sir, if I may. Agreed, the proceedings in front of the grand jury are secret. But there no, no reason, whatsoever, or, that is, no legal requirement that I cannot ask an individual, who was a witness in front of the grand jury, as to what he testified to. And if he's willing to tell the attorney, then there's nothing illegal about it. And this is exactly what I have done with Mr. Tuszinski, since he is a State's witness, a very important State's witness; in fact, their case hinges on him. I have asked him what he testified to at the grand jury, what he had to say, what questions were asked of him, and what his responses were. And I don't think there's anything illegal about it. As far as it being irrelevant as to whether Tom Tuszinski lied to the grand jury, as to whether or not Tom Tuszinski was ordered by Mike Hollinshead, the chief deputy on the case, to lie to the grand jury, that certainly is relevant, definitely. If this was done, then that means the indictment is based on fraud. It's a fradulent document. . . .

MR. HEINEY: Mr. Hollinhead presented the witness to the grand jury.

THE COURT: Is that true, Mr. Anderson?

MR. ANDERSON: You Honor, I'm prohibited

from commentins on what took place before the grand jury, and so are these other people, and Mr. Pascoe should be held in contempt of court for talking to a witness about something that took place before the srand jury. Because, certainly, Mr. Pascoe knows that that's a secretive proceeding and that he should not be questioning people about what took place before the grand jury.

MR. PASCOE: The only thing that's essentially secret in front of the grand jury is how they voted and what issues were considered, and that's all, not what the witnesses testified to. They testified under oath. That is not a secret. It certainly isn't a secret to the defense attorney. Now, Mr. Heiney brought up a good, valid point. The question was, was this indictment based on the alleged confession of Heiney to Tuszinski. Yes. In fact, the State didn't even attempt to go in front of the grand jury until Tuszinski reported this alleged confession. . . .

I went in front of the Court - in fact, it was Judge Wade at that time - with a motion to dismiss the information on murder, and I had a good valid case to dismiss then, except Judge Wade allowed the State to go ahead and put in the alleged confession of the defendant. And, in my opinion, that's the only reason Judge Wade didn't dismiss it in the first place.

(R. _____) (emphasis admitted).

The Court denied the motion to quash the grand jury indictment (R. **449-454**).

Defense counsel Pascoe attempted to proffer the witness for testimony:

MR. PASCOE: Request that I be allowed, or unless the State Attorney will agree with my motion, as typed there, request that I be allowed to at least proffer, for the record, the testimony of Tom Tuszinski; that Mike Hollinhead ordered him to lie and that he did lie in front of the grand jury.

THE COURT: Okay. Well, let's assume, for the sake of argument, that he would testify to that. Don't you think that would be something to attack his credibility at trial, rather than in a motion to quash?

MR. PASCOE: No sir, I think it should be used in both areas. In fact, if that's so

THE COURT: Okav, let's assume that's the way I'm going to consider it. What would be the purpose of the proffer, at that point?

MR. PASCOE: For appeal purposes, Your Honor. So it will be in the record.

THE COURT: What?

MR. PASCOE: So the testimony will be in the record. Unless the State agrees that that is the testimony that will be elicited.

THE COURT: Well, assuming, for the sake of arsument, that he would testify as you have stated --

MR. PASCOE: Yes sir --

THE COURT: Doesn't that suffice the purpose of appeal, and save the time of taking his testimony?

MR. PASCOE: I think I would need his testimonv into the record.

THE COURT: Why?

MR. PASCOE: For appeal purposes.

THE COURT: Why would you need it?

MR. PASCOE: For appeal purposes, Tom Tuszinski's testimony under oath, that he did say that, that he was ordered to lie and he did lie.

THE COURT: Well, I don't, I don't see it, in view of the fact that I make the finding that even if he testified to that, I wouldn't quash the indictment. So I'm not going to hear his testimony today.

(R. 454-55) (emphasis added).

Tom Tuszynski revealed that the State in this case was willing to go to any lengths to obtain a conviction.

Tom Tuszynski provided an affidavit in which he stated, under oath, that his entire story about Mr. Heiney "confessing" to him was a lie, prompted and orchestrated by Officers Donaldson, Hollinhead, Barbaree, Barrow and Silva. Mr. Heiney in fact never discussed the case with Tom Tuszynski, despite the State saying so. In Mr. Tuszynski's words:

During the Summer of 1978, I was a trustee in the Okaloosa County Jail. Robert D. Heiney (David) was being held in the jail awaiting trial at the time.

In late June or early July, I was approached by several officers with the Okaloosa County Sheriff's Department

(including Officers Donaldson, Hollinhead and Barbaree) and two members of the jail personnel (Officers Barrow and Silva). They showed me the arrest reports and other information about the offense for which David was in custody, and also talked to me about how they thought the murder happened. They wanted me to agree to testify to a lie--they wanted me to say that David Heiney had confessed to me about the murder.

Everything that I knew and said about the murder came from my conversations with these men and from reading the materials they provided me. My only contact with David was when I brought him his meals, and he never spoke to me about the murder.

In exchange for me testifying to this lie before the grand jury, I was promised $500, an early release, and enrollment in the police academy.

When I went in front of the grand jury in August of 1978, I gave the story that I had been told to give, and said that I had learned this information from David himself. I also said that I had not been promised anything in exchange for my testimony.

I have not been promised anything by David's lawyer in return for signing this affidavit, and I am signing in spite of the fact that I'm afraid that this statement could cause my family and me some trouble in this county. I am signing because I don't want to see a man be put to death when he may not have committed a murder.

(Affidavit of Tom Tuszinski).

The State of Florida had a tenuous circumstantial case against Mr. Heiney. He was originally charged with second degree murder. An indictment for first degree murder was obtained only through the testimony of Tom Tuszynski before the grand jury. We now know that all of that testimony was false, and that the grand jury indictment was obtained by fraud, in violation of due process.

The Ninth Circuit Court of Appeals in United States v. Basurto, 497 F.2d 781 (9th Cir. 1974) originally set the standard for review of a case wherein perjured testimony was used to obtain an indictment:

The Fifth Amendment provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a

> presentment or indictment of a Grand Jury." The purpose of that requirement is to limit a person's jeopardy to offenses charged by a group of his fellow citizens acting independently of either the prosecutor or the judge. Stirone v. United States, **361** U.S. **212, 80** S.Ct. **270, 4** L.Ed.2d **252 (1960).**
>
> We hold that the Due Process Clause of the Fifth Amendment is violated when a defendaat has to stand trial on an indictment which the government knows is based partially on perjured testimony, when the perjured testimony is material, and when jeopardy has not attached.

Id. at **785.**

The Court went on to reason:

> In Napue v. Illinois, supra, the Supreme Court reaffirmed the principle stated in many of its prior decisions that
>
> > **"a** conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment, [citations]. The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears. [Citations.]**"**
>
> The Court reiterated "[t]he principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty **. . . ."** Id. See Giles v. Maryland, supra, at **74.**
>
> The Court held in Napue that the prosecution's use of known false testimony at trial required a reversal of the petitioner's conviction. The same result must obtain when the government allows a defendant to stand trial on an indictment which it knows to be based in part upon perjured testimony. The consequences to the defendant of perjured testimony given before the grand jury are no less severe than those of perjured testimony given at trial, and in fact may be more severe. The defendant has no effective means of cross-examining or rebutting perjured testimony given before the grand jury, as he might in court.

Id.

Courts differ on whether an indictment based in part on perjured testimony must be dismissed; materiality being the focus. Recent decisions have more narrowly focused on the materiality requirement. See United States v. Flahertv, **668** F.2d

566, 584 (1st Cir. 1981)(validity of indictment not affected by perjured immaterial testimony); United States v. Levine, 700 F.2d 1176, 1180 (8th Cir. 1983)(validity of indictment not affected by perjured immaterial testimony). In Mr. Heiney's case, the primary witness to testify offered totally perjured testimony, testimony supplied entirely by the State; testimony known by the State to be entirely perjured. In United States v. Benny, 786 F.2d 1410, 1420 (9th Cir. 1986), the court quoted United States v. Kennedy, 564 F.2d 1329, 1338 (9th Cir. 1977):

> only in a flagrant case, and perhaps **only when knowing perjury, relating to a material matter**, has been presented to the grand jury should the trial judge dismiss an otherwise valid indictment . . .

Mr. Heiney's case fits within the narrow standard enunciated by the Ninth Circuit: knowing perjury relating to a material matter was presented to Mr. Heiney's grand jury.

Government misconduct during the indictment process warrants dismissal when the government conduct significantly impairs the ability of the grand jury to exercise independent judgment. In United States v. Hogan, 712 F.2d 757 (2nd Cir. 1983) the Second Circuit opined:

> It is true of course that prosecutors, by virtue of their position, have gained such influence over grand juries that these bodies' historic independence has been eroded. 8 R. Cipes, J. Hall, M. Waxner, Moore's Federal Practice para. 6.02[1] at 6-19-6-23 (2d ed. 1982). After all, it is the prosecutor who draws up the indictment, calls and examines the grand jury witnesses, advises the grand jury as to the law, and is in constant attendance during its proceedings. Nonetheless, there remain certain limitations on the presentation that a prosecutor may make to the grand jury. **See**, e.g., United States v. Ciambrone, 601 F.2d 616, 623 (2d Cir. 1979)(prosecutor may not mislead grand jury or engage in fundamentally unfair tactics before it). In fact the gain in prosecutor's influence over grand juries is all the more reason to insist that these limitations be observed strictly. Due process considerations prohibit the government from obtaining an indictment based on known perjured testimony. **See** United States v. Basurto, 497 F.2d 781, 785 (9th

> Cir. 1974). Under the applicable guidelines prosecutors have an ethical obligation strictly to observe the status of the grand jury as an independent legal body. See American Bar Association, Standards For Criminal Justice Standard 3-3.5 at 3.48 (2d ed. 1980); United Stares Attorney's Manual 9-11.015 (August 17, 1978).
>
> In short, a prosecutor as an officer of the court is sworn to ensure that justice is done, not simply to obtain an indictment.

Id. at 759-60.

The Hogan court held:

> In summary, the incidents related are flagrant and unconscionable. (The government presented hearsay testimony and false testimony by a DEA agent.) Taking advantage of his special position of trust, the AUSA impaired the grand jury's integrity as an independent body . . . We believe that the indictment below must be dismissed.

Id. at 662. Mr. Heiney meets the test set forth in Hosan.

In United States v. Kilpatrick, 821 F.2d 1464 (10th Cir. 1987), the Tenth Circuit stated its position regarding prosecutorial misconduct before the grand jury:

> "An indictment may be dismissed for prosecutorial misconduct which is flagrant to the point that there is some siqnificant infringment on the srand jury's ability to exercise independent judgment." Pine, 708 F.2d at 530 (emphasis added); see also United States v. Pase, 808 F.2d 723, 726-27 (10th Cir. 1987).

Id. at 1465. The court continued:

> [W]e conclude that consideration of dismissal of an indictment because of prosecutorial misconduct before a grand jury calls for weighing several factors. First, a reviewing court must determine whether the claimed errors should be characterized as technical or procedural and affecting only the probable cause charging decision by the grand jury, or whether the alleged errors should be characterized as threatening the defendant's right to fundamental fairness in the criminal process. If the errors can be characterized as procedural violations affecting only the probable cause charging decision by the grand jury, then the defendant must have successfully challenged the indictment before the petit jury rendered a guilty verdict. Mechanik, 475 U.S. at ___, 106 S.Ct. at 941-43. If, however, the errors can be characterized as threatening the defendant's rights to fundamental

> fairness as "go[ing] beyond the question of whether the grand jury had sufficient evidence upon which to return an indictment, . . .," a determination of guilt by a petit jury will not moot the issue. Taylor, 798 F.2d at 1340.
>
> Second, it must be determined whether the prosecutor engaged in flagrant or egregious misconduct which significantly infringed on the grand jury's ability to exercise independent judgment. Pino, 708 F.2d at 530. Thus even assuming misconduct, a failure by the defendant to show a significant infringement on the ability of the grand jury to exercise its independment judgment in the charging decision will result in the denial of a motion to dismiss. "The relevant inquiry focuses on the impact of the prosecutor's misconduct on the grand jury's impartiality, not on the degree of the prosecutor's culpability." De Rosa, 783 F.2d at 1405 (citation omitted).

Id. at 1466. See also, United States v. Serubo, 604 F.2d 807 (3rd Cir. 1979); United States v. Giorgi, 840 F.2d 1022 (1st Cir. 1988).

The standard set by the First, Third and Tenth Circuits is also met in Mr. Heiney's case. Tom Tuszynski's testimony regarding Mr. Heiney's alleged confession was the only basis for the grand jury's handing up of the indictment. The "impact of the prosecutor's misconduct on the grand jury's impartiality'' is unquestioned in this case. But for the testimony of the "informant" there would have been no indictment. The prejudice requirement of all the circuits is met in Mr. Heiney's claim.

The various circuits all agree on one point: the knowing use of perjured testimony by the government, which testimony was material to the obtaining of the indictment, is a violation of the Constitution and as such requires a striking of the indictment. Basurto, supra; Kennedy, supra; Hogan, supra; Kilpatrick, supra; Serubo, supra; Giorgi, supra. Given the strictest standard, applying harmless error review, there is far more than an inference of bias on the part of the grand jury in the instant case. A jailhouse informant, bought and paid for by the State, knowingly and intentionally perjured himself before the grand

jury. The perjury was suborned by the State. Such testimony can hardly be deemed non-prejudicial. (The whole case for the defense revolved around impeachment of the informant (R. 690-91).) The State did not call Tom Tuszinski to testify at the trial of Mr. Heiney. This move was made to prevent the defense from establishing that Tom had lied and had been caught. The failure to call a witness who once claimed to have heard a confession from Mr. Heiney and so testified as the feature witness before the grand jury could not be called a tactical decision on the part of the State. Such an important witness, especially in a case based solely on weak circumstantial evidence, would not fail to be called unless the State knew the witness was going to give false testimony and would be exposed in the process.

This prosecution, from beginning to end, was so conducted as to violate the fifth, sixth, eighth and fourteenth amendments. Mr. Heiney was first charged with robbery and second degree murder. Without Tuszynski, no capital proceeding would have occurred -- his was the only evidence of capital murder presented to the grand jury. The State presented knowingly false evidence to the grand jury and perhaps the ultimate, paid a witness to lie. This is beyond the pale and violates the fifth, sixth, eighth, and fourteenth amendments. A stay of execution and relief is requested and warranted.

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

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

No tactical decision can be ascribed to counsel's failure to urge the claim. No procedural bar precluded review of this issue. See Johnson v. Wainwright, supra, 498 So. 2d 938. However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Heiney of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra; Cuvler v. Adams, supra, decided in 1981, specifically established Mr. Heiney's entitlement to relief.

Mr. Heiney's conviction and sentence of death were imposed in violation of the fifth, sixth, eighth and fourteenth amendments. That error must be corrected now, by means of habeas relief.

CLAIM VII

THE INTRODUCTION OF NONSTATUTORY AGGRAVATING FACTORS SO PERVERTED THE SENTENCING PHASE OF MR. HEINEY'S TRIAL THAT IT RESULTED IN THE TOTALLY ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

In considering whether the death penalty constitutes cruel and unusual punishment in violation of the eighth and fourteenth amendments, Justice Brennan wrote:

> In determining whether a punishment comports with human dignity, we are aided also by a second principle inherent in the Clause--that the State must not arbitrarily inflict a severe punishment. This principle derives from the notion that the State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others. Indeed, the very words "cruel and unusual punishments" imply condemnation of the arbitrary infliction of severe punishments. And, as we now know, the English history of the Clause reveals a particular concern with the establishment of a safeguard against arbitrary punishments. See Granucci, "Nor Cruel and Unusual Punishments Inflicted": The Original Meaning, 57 Calif.L.Rev. 839, 857-60 (1969).

Furman v. Georsia, 408 U.S. 238, 274, 92 S. Ct. 2726, 2744 (1972)(Justice Brennan concurring)(footnote omitted).

When then faced with a challenge to Florida's capital sentencing scheme, the Supreme Court found it passed constitutional muster:

> While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of Furman are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.
>
> The directions given to judges and jury by the Florida statute are sufficiently clear and precise to enable the various aggravating circumstances to be outweighed against the mitigating ones. As a result, the trial court's sentencing discretion is guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed.

Gregg V. Georsia, 428 U.S. 242, 96 S. Ct. 2960, 2969 (1976).

Thus, aggravating circumstances specified in the statute are exclusive, and no other circumstances or factors may be used to aggravate a crime for purposes of the imposition of the death penalty. Miller v. State, 373 So. 2d 882 (Fla. 1979).

> This court, in Elledse v. State, 346 So.2d 998, 1003 (Fla. 1977) stated:
>
> We must guard against any

> unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death.
>
> Strict application of the sentencing statute is necessary because the sentencing authority's discretion must be "guided and channeled" by requiring an examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.

Proffitt v. Florida, 428 U.S. 242, 258, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

Miller v. State, supra. See also Riley v. State, 366 So. 2d 19 (Fla. 1979), and Robinson v. State, 520 So. 2d 1 (Fla. 1988).

Here, the State argued to the judge and the jury the nonstatutory aggravating factors that Mr. Heiney was a pimp and a homosexual (R. 1242, 1271). Further, the consideration of the "heinous, atrocious or cruel" aggravating factor was improper and constituted consideration of a nonstatutory aggravating circumstance. See Claim II.

Another nonstatutory aggravating circumstance appears in the court's findings of fact in support of the death sentence, the court indicated that it did not consider the shooting of Terry Phillips as an aggravating factor under 921.141(5)(a), however, the court indicated that it considered the unrebutted testimony that the shooting did in fact occur. The court conceded that the incident was not a statutory aggravating circumstance but indicated that it was nonetheless considered in regard to the imposition of sentence.

Consideration of these nonstatutory aggravating circumstances resulted in a death sentence. This violated Mr. Heiney's constitutional guarantee under the eighth and fourteenth amendments. At the time of sentencing by the trial court, the State relied entirely on the argument made to the jury, which included the above quoted non-statutory aggravating factors.

The prosecutor's introduction and use of, and the

sentencers' reliance on, these wholly improper and unconstitutional non-statutorv aggravating factors starkly violated the eighth amendment. Mr. Heiney's sentence of death therefore stands in violation of the eighth and fourteenth amendments, **see** Elledse v. State, 346 So. 2d 998, 1002-03 (Fla. 1977); Barclay v. Florida, 463 U.S. 939, 955 (Fla. 1983), and should not be allowed to stand.

This error undermined the reliability of the sentencing determination and prevented the sentencer from assessing the full panoply of mitigation presented by Mr. Heiney. For each of the reasons discussed above the Court should vacate Mr. Heiney's unconstitutional sentence of death.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Heiney's death sentence and rendered it unreliable. 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 prejudicially ineffective assistance of counsel on direct appeal. This issue involved a classic violation of longstanding principles of Florida law. **See** Elledse, supra. It virtually "leaped out upon even a casual reading of **transcript."** Matire V. Wainwrisht, 811 F.2d 1430, 1438 (11th Cir. 1987). This clear claim of per se error required no elaborate presentation -- counsel only had to direct this Court to the issue. The court would have done the rest, based on long-settled Florida and federal constitutional standards.

No tactical decision can be ascribed to counsel's failure to urge the claim. **No** procedural bar precluded review of this issue. **See** Johnson v. Wainwrisht, 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. Heiney of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra. Accordingly, habeas relief must be accorded now.

CLAIM VIII

MR. HEINEY'S SENTENCE OF DEATH VIOLATES THE EIGHTH AMENDMENT BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS AND THE SENTENCING JUDGE SHIFTED THE BURDEN TO MR. HEINEY TO PROVE THAT DEATH WAS INAPPROPRIATE, CONTRARY TO MULLANEY V. WILBUR, 421 U.S. 684 (1975), LOCKETT V. OHIO, 438 U.S. 586 (1978), MILLS V. MARYLAND, 108 S. CT. 1860 (1988), AND THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

The court's penalty phase instructions contained the following burden-shifting standard:

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

(R. 1339). Later this was repeated:

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

(R. 1340). Still later the judge re-emphasized the requirement that the mitigation be shown to outweigh the aggravation:

> The sentence which you recommend to the Court must be based upon the facts as you find them from the evidence and the law as it's given to you by the Court. Your verdict must be based upon your finding of whether sufficient aggravating circumstances exhist [sic] and whether sufficient mitigating circumstances exist which outweigh any aggravating circumstances found to exist.

(R. 1342). Finally, the court restated the burden-shifting requirement in his findings of fact:

> The court has found that the aggravating circumstances, as enumerated in 921.141 Sub-5, Sub-A, Sub-E and Sub-H are present in this case, and that there are no mitigating circumstances to overcome the aggravating circumstances found present.

(R. 248).

The instructions and the sentencing court's understanding, shifting to the defendant the burden of proving that life was the appropriate sentence, violated the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), as the Court of Appeals for the Eleventh Circuit held in Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988), cert. denied, 108 S. Ct. 2005 (1988), and the Ninth Circuit recently held in Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(in banc). In Adamson, the Ninth Circuit 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 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 non-persuasion 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 (1984)("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, supra, 865 F.2d at 1041-44 (footnotes omitted)(emphasis in original).

What occurred in Adamson is precisely what occurred in Mr. Heiney's case. The instructions, and the standard upon which the court based its own determination, violated the eighth and fourteenth amendments, Mullaney v. Wilbur, 421 U.S. 684 (1975), Lockett v. Ohio, 438 U.S. 586 (1978), and Mills v. Maryland, 108 S. Ct. 1860 (1988). The burden of proof was shifted to Mr. Heiney on the central sentencing issue of whether he should live or die. This unconstitutional burden-shifting violated Mr. Heiney's due process and eighth amendment rights. See Mullaney, supra. See also, Sandstrom v. Montana, 442 U.S. 510 (1979); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988). Moreover, the application of that unconstitutional standard at the sentencing phase violated Mr. Heiney's rights to a fundamentally fair and reliable capital sentencing determination, i.e., one which is not infected by arbitrary, misleading and/or capricious factors. See Adamson, supra; Jackson, supra. The instruction as given was fundamental error under the eighth amendment.

It is clear that the trial judge applied his understanding, based on the instructions, that Mr. Heiney had the ultimate burden to prove that life was appropriate. The express application of 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), cert. denied, 108 S. Ct. 2005 (1988).

The rules derived from Lockett v. Ohio, 438 U.S. 586 (1978), "are now well established . . . ." Skipper v. South Carolina, 476 U.S. 1, 4 (1986). See also, Hitchcock v. Dugger, 107 S. Ct. 1821 (1987). These rules require that the sentencer:

a. "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 sentence less than death," Lockett v. Ohio, 438 U.S. at 604 (emphasis in original);

b. not be permitted to "exclud[e] such evidence from [his or her] consideration," Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)(emphasis supplied); and,

c. not be "prevented[ed] . . . from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation," Lockett v. Ohio, 438 U.S. at 605.

Proper analysis requires consideration of the United States

Supreme Court's recent decision in Mills v. Maryland, 108 S. Ct. 1860 (1988). There, the Court focused on the special danger that an improper understanding of jury instructions in a capital sentencing proceeding could result in a failure to consider factors calling for a life sentence:

> Although jury discretion must be guided appropriately by objective standards, see Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (plurality opinion), it would certainly be the height of arbitrariness to allow or require the imposition of the death penalty [when the jury's weighing process is distorted by an improper instruction]. It is beyond dispute that in a capital case "'the sentencer [may] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" Eddinss v. Oklahoma, 455 U.S. 104, 110 (1982), quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion) (emphasis in original). See Skipper v. South Carolina, 476 U.S. 1, 4 (1986). The corollary that "the sentencer may not refuse to consider or be Precluded from considering 'any relevant mitigating evidence'" is equally "well established." Ibid. (emphasis added), quoting Eddinss, 455 U.S., at 114.

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

The United States Supreme Court recently granted a writ of certiorari in Blystone v. Pennsylvania, 44 Cr. L. 4210 (March 27, 1989), to review a very similar claim. The question presented in Blystone has obvious ramifications here. Under Pennsylvania law, the jury is instructed that where it finds an aggravating circumstance present and no mitigation is presented, it "must" impose death. However, if mitigation is found then the jury must decide whether the aggravating circumstances outweigh the mitigating. Specifically, in Blystone, the defendant decided no mitigation was to be presented. Thus, the jury after finding an aggravating circumstance returned a sentence of death.

Under Pennsylvania law, the legislature chose to place upon a capital defendant a burden of production as to evidence of

mitigation and a burden of persuasion as to whether mitigation exists. However, once evidence of a mitigating circumstance is found, the State bears the burden of persuasion as to whether the aggravating circumstances outweigh the mitigating such that a death sentence should be returned.

Under Florida law and the instructions presented here, once one of the statutory aggravating circumstances is found, by definition, sufficient aggravation exists to impose death. The jury is then directed to consider whether mitigation has been presented which outweighs the aggravation. Thus under Florida law the finding of a statutorily-defined aggravating circumstance operates to impose upon the defendant the burden of production and the burden of persuasion of the existence of mitigation, and the burden of persuasion as to whether the mitigation outweighs the aggravation. Certainly, Florida law is more restrictive of the jury's ability to conduct an individualized sentencing than the Pennsylvania statute at issue in Blystone. The outcome in Blystone will directly affect correct resolution of the issue presented here and the viability of Mr. Heiney's death sentence.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Heiney's death sentence and rendered it unreliable. The ends of justice also call on the court to entertain the merits of the claim. See Potts v. Zant, 638 F.2d 727 (11th Cir. 1981), subseauent history, 734 F.2d 526 (11th Cir. 1984). The constitutional errors herein asserted "precluded the development of true facts, and "perverted the jury's deliberations concerning the ultimate question[s] whether in fact [Robert David Heiney was guilty of first-degree murder and should have been sentenced to die.]" Smith v. Murray, 106 S. Ct. 2661, 2668 (1986)(emphasis in original). Under such circumstances, the ends of justice require that the claim now be heard, notwithstanding its rejection in previous proceedings. A stay of execution would be proper in order for the Court to

properly assess this claim in light of the Supreme Court's forthcoming decision in Blystone, a decision which will drastically alter the standards previously used to assess this claim, should the Supreme Court rule in the petitioner's favor. See Autry v. Estelle, 464 U.S. 1301, 1302 (1983)(White, Circuit Justice).

For each of the reasons discussed above the Court should vacate Mr. Heiney's unconstitutional sentence of death. At the very least the Court should stay Mr. Heiney's execution pending the decision in Blystone, which will be a major development in this area of the law.

This error undermined the reliability of the sentencing determination and prevented the sentencer from assessing the full panoply of mitigation presented by Mr. Heiney. For each of the reasons discussed above the Court should vacate Mr. Heiney's unconstitutional sentence of death.

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

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

would have done the rest, based on long-settled Florida and federal constitutional standards.

CLAIM IX

INNUMERABLE CRITICAL PROCEEDINGS IN THIS CASE WERE CONDUCTED "OFF THE RECORD," MANY TIMES IN MR. HEINEY'S ABSENCE AND WITHOUT HIS CONSENT AND WAIVER, PREVENTING MEANINGFUL APPELLATE REVIEW, EVIDENCING INEFFECTIVE ASSISTANCE OF COUNSEL, AND DENYING MR. HEINEY'S RIGHT TO A PUBLIC TRIAL, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

Mr. Heiney had specifically requested that counsel ensure that he was present during all proceedings. He had the statutory and constitutional right to do so. Unfortunately, many critical proceedings occurred off the record, between judge and counsel, without the presence of Mr. Heiney.

The following examples are particularly startling:

a. Trial counsel spoke off the record to the Court, in the absence of Mr. Heiney, regarding whether counsel, who was resigning from the public defender's office, could withdraw as counsel:

> THE COURT: All right, we're here on several motions of the Defendant. Mr. Pascoe, in accordance with my conversation with you about this the other day; in view of the fact that you have filed these motions, it would be my thinking to go ahead and allow you to go through with this hearing for today and then consider the question of whether or not you will continue as counsel in the case.
>
> MR. PASCOE: Yes sir, I understand.

(R. **449**).

b. On February 26, **1979**, motions were heard in chambers, but not all the discussion was recorded, and Mr. Heiney was not present.

> THE COURT: Now Dave, we have dealt with your motion, your oral motion for payment of witness fees.

(R. **477**). No such motion occurred, and it does not appear of record when or where it was "dealt with."

c. During some unreported (in this record) proceeding, the trial court made comments indicating to Mr. Heiney and counsel that the court would be biased at sentencing. The following later transpired:

> THE COURT: Well, certainly there has not been the legal skirmishing in this case as there has been in the Bundy case. For the record, it's my recollection of the statement I made to the Defendant, which was made in response to some snide remark he made, probably off the record, it wasn't picked up by the court reporter, which was not the first time that he had made those kind of comments: as a matter of fact, he had done it repeatedly, and my indication to him was that I would deal with him by way of contempt if he was acquitted, not if he was convicted. Now, did you set a different impression of that, Mr. Pascoe?
>
> MR. PASCOE: The impression that I got was that you threatened the Defendant, in that you had recognized that he had been impolite to the court, you felt that he was impolite to the court, and that you said, in so many words, that you could not use contempt against him, since he was charged with murder one, your powers of keeping him in control were extremely limited, but one thing you could do is that you had the sentencing that was over his head.
>
> THE COURT: You're wrong. And the record will speak to that.
>
> MR. ANDERSON: I didn't get that impression, either, Your Honor.
>
> THE COURT: But, of course, any contempt that would be brought at that stage would have to be tried by another judge anyway, he wouldn't have to worry about any prejudice that I might have against him. Okay, go ahead. Do you have any other testimony to offer on your motion for recusal?

(R. **483-84**).

d. "THE COURT: Yes, in accordance with our [the attorneys'] conversation this morning before we went on the record, and that is, that we would start testimony tomorrow morning." (R. **485**).

e. "THE COURT: Well, David, came up with some case law that indicated that it was improper; and I would expect you to be able to convince me, if you want to introduce evidence." (R.

499). This refers to off the record contact between defense counsel and the court regarding some of the most critical evidence in the case -- handwriting exemplars.

f. Motions were conducted in chambers (R. **560),** regarding the defense's need for a continuance of trial. One of the bases was a missing out-of-state witness:

> MR. PASCOE: He's in Jackson, Mississippi.
>
> THE COURT: Well, I don't think we've got any way to compel him to be here.
>
> MR. PASCOE: You remember, Your Honor, that was the certificate under court seal.
>
> THE COURT: Right. But as I told you then, I told you that I didn't think that would get him hear, you had to go through a judge in that state. Isn't that right?
>
> MR. ANDERSON: Unless they changed the procedure, that's the way you do it.
>
> THE COURT: That's my understanding of the procedure.

(R. 562-63). The earlier discussion was not reported.

g. Defense counsel believed that he was entitled to two closing arguments at guilt/innocence, but counsel had introduced a document during the State's case, thereby giving the State two closing arguments. "The Court, before the court reporter arrived, considered in chambers with Mr. Pascoe and Mr. Anderson the order of closing arguments" (R. **750).** The defendant was not present; counsel got <u>one</u> argument.

h. The court returned to chambers to discuss the jury charges to be delivered at guilt/innocence. The discussion is not reported, and controversy about what happened in chambers later marred defense counsel's closing argument (R. **766).**

i. The reading of the jury instructions at guilt/innocence was not reported (R. **1289).**

j. Unreported bench conferences were rampant (R. **506, 528, 755, 756, 772, 795, 823, 826, 827, 828, 837, 866, 943, 1035, 1069, 1097, 1173, 1232, 1262).**

These and other occurrences violated Mr. Heiney's right to be present during critical stages, denied him his protection of public trial, and deprived him of a complete record of his capital sentencing proceeding so as to have adequate review, all in violation of his fifth, sixth, eighth, and fourteenth amendment rights.

A criminal defendant's sixth and fourteenth amendment right to be present at all critical stages of the proceeding is a settled question. See, e.g., Francis v. State, 413 So. 2d 1175 (Fla. 1982); Illinois v. Allen, 397 U.S. 337, 338 (1970); Hopt v. Utah, 110 U.S. 574, 579 (1884); Diaz v. United States, 223 U.S. 442 (1912); Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982). "One of the most basic rights guaranteed by the Confrontation Clause is the accused's right to be present ni 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).

The deprivation of fundamental rights which occurred here is even more egregious than that which occurred in Francis, as Mr. Heiney was acting as co-counsel. Thus, not only was Mr. Heiney deprived of his sixth and fourteenth amendment rights to be present at all critical stages of his trial, but also of his right to act as his own counsel, see Faretta v. California, 442 U.S. 806 (1975); McKaskle v. Wiggins, 465 U.S. 168 (1984); Dorman v. Wainwright, 798 F.2d 1358 (11th Cir. 1986), a status which the trial court had already conferred.

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

Moreover, the claim is now properly brought pursuant to the

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

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

CLAIM X

MR. HEINEY'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BECAUSE NO RELIABLE TRANSCRIPT OF HIS CAPITAL TRIAL EXISTS, RELIABLE APPELLATE REVIEW WAS AND IS NOT POSSIBLE, THERE IS NO WAY TO ENSURE THAT THAT WHICH OCCURRED IN THE TRIAL COURT WAS OR CAN BE REVIEWED ON APPEAL, AND THE JUDGMENT AND SENTENCE MUST BE VACATED.

Significant portions of Mr. Heiney's trial were unrecorded. See Claim IX. The unrecorded portions included motions for continuance, failure to subpoena witnesses and the jury instruction conference. Additionally, the State failed to record the proceedings of the grand jury at which the jailhouse informant, Thomas Tuszinski, presented his perjured testimony.

The constitutional due process right to receive transcripts for use at the appellate level was acknowledged by the Supreme Court in Griffin v. Illinois, 351 U.S. 212 (1956). The existence

of an accurate trial transcript is crucial for adequate appellate review. Id. at 119. The sixth amendment also mandates a complete transcript. In Hardy v. United States, 375 U.S. 277 (1964), Justice Goldberg, in his concurring opinion, wrote that since the function of appellate counsel is to be an effective advocate for the client, counsel must be equipped with "the most basic and fundamental tool of his profession . . . the complete trial transcript . . . anything short of a complete transcript is incompatible with effective appellate advocacy.'' Hardy at 288.

Complete and effective appellate review requires a proper and complete record on appeal. Adequate appellate review is impossible when the trial record is missing portions of the voir dire, the trial record is virtually incomprehensible because of numerous gross inaccuracies and errors, the trial record does not reflect bench conferences, and the record fails to accurately reflect what occurred. The United States Supreme Court in Entsminser v. Iowa, 386 U.S. 748 (1967), held that appellants are entitled to a complete and accurate record. Lower courts rely upon Entsminser. The concurring opinion in Commonwealth v. Bricker, 487 A.2d 346 (Pa. 1985), citing Entsminser, condemned the trial court's failure to record and transcribe the sidebar conferences so that appellate review could obtain an accurate picture of the trial proceedings. In Commonwealth v. Shields, 383 A.2d 844 (Pa. 1978), the Supreme Court of Pennsylvania reversed a second-degree murder and statutory rape conviction solely because a tape of the prosecutor's closing argument became lost in the mail. "[I]n order to assure that a defendant's right to appeal will not be an empty, illusory right . . . a full transcript must be furnished." The court went on to say that meaningful appellate review is otherwise impossible.

Entsminser was cited in Evitts v. Lucey, 105 S. Ct. 830 (1985), in which the court reiterated that effective appellate review begins with giving an appellant the advocate, and the

tools necessary to do an effective job.

Finally, in Gardner v. Florida, 430 U.S. 349 (1977), where the defendant was not allowed to view a confidential presentence report, the court held that even if it was proper to withhold the report at trial, it had to be part of the record for appeal, for the eighth amendment requires proper appellate review of capital proceedings -- a right which the Florida Supreme Court has time and again acknowledged, and a right which was denied to Mr. Heiney. The record must disclose considerations which motivated the imposition of the death sentence. "Without full disclosure of the basis for the death sentence, the Florida capital sentencing procedure would be subject to defects . . . under Furman v. Georsia, 408 U.S. at 361." Gardner, supra.

Appellate review is inadequate when based on a trial record about which profound reliability questions are raised. The issue is whether Mr. Muhammad should suffer the ultimate sentence of death when he did not have the benefit of a constitutionally guaranteed review of a bona fide record of the trial proceedings. Fla. Const. art. V, sec. 3(b)(1); Delap v. State, 350 So. 2d 462, 463 (Fla. 1977).

The Florida Supreme Court's death sentence review process involves at least two functions:

> First, we determine if the jury and judge acted with procedural rectitude in applying section 921.141 and our case law. This type of review is illustrated in Elledge v. State, 346 So. 2d 998 (Fla. 1977), where we remanded for resentencing because the procedure was flawed -- in that case a nonstatutory aggravating circumstance was considered.
>
> The second aspect of our review process is to ensure relative proportionality among death sentences which have been approved statewide. After we have concluded that the judge and the jury have acted with procedural regularity, we compare the case under review with all past cases to determine whether or not the punishment is too great. In those cases where we find death to be comparatively inappropriate, we have reduced the sentence to life imprisonment.

Brown v. Wainwright, 392 So. 2d 1327, 1331 (Fla. 1981). The court has emphasized that "[t]o satisfactorily perform our responsibility we must be able to discern from the record that the trial judge fulfilled that responsibility" of acting with procedural rectitude. Lucas v. State, 417 So. 2d 250 (Fla. 1982).

The record in this case is grossly incomplete in a way which absolutely prevented the Florida Supreme Court from conducting meaningful appellate review.

> Since the State must administer its capital sentencing procedures with an even hand, see Proffitt v. Florida, 428 U.S. at 250-58, 96 S.Ct. at 2966-67, it is important that the record on appeal disclose to the reviewing court the considerations which motivated the death sentence in every case in which it is imposed.
>
> . . . .
>
> In this particular case, the only explanation for the lack of disclosure is the failure of defense counsel to request access to the full report. That failure cannot justify the submission of a less complete record to the reviewing court than the record on which the trial judge based his decision to sentence petitioner to death.

Gardner v. Florida, 430 U.S. 349, 361 (1977)(emphasis added).

The Florida Supreme Court is required to review all death penalty cases. The review occurs "after certification by the sentencing court of the entire record. . . ." Fla. Stat. sec. 921.141(4). In furtherance of this statutory mandate, the Court has issued administrative orders requiring "the appropriate chief judge to monitor the preparation of the complete record for timely filing in this Court." Id.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Heiney's death sentence and rendered it unreliable. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings, see Wilson v. Wainwright, 474

So. 2d 1163 (Fla. 1985), and it should now correct this error.

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CLAIM XI

THE RIGHTS TO FUNDAMENTAL DUE PROCESS AND A FAIR TRIAL WERE VIOLATED BY AN IMPROPER JURY INSTRUCTION ON CIRCUMSTANTIAL EVIDENCE.

Counsel argued after the State, and the State was allowed to rebut. Defense counsel "explained" the law of circumstantial evidence thereby:

> It was all circumstantial evidence, every bit of it.

(R. 1249).

> No direct evidence that the Defendant, Robert David Heiney, ever committed the crime, only circumstantial evidence.

(R. 1263).

> Circumstantial evidence. Circumstantial

evidence. A little boy sees his mother's blueberry pie on the window sill in the kitchen; it's cooling. He reaches in and just sticks his forefinger and another finger and scoops up a little bit and eats it. About that time he hears his daddy coming across the wooden floor in the dining room coming into the kitchen. The boy doesn't want to get caught. He sees his pet cat down there and reaches down, grabs the cat, sticks the cat up on the window sill, stuffs his nose into the blueberry pie, and he scoots out the back door onto the back porch. His daddy comes in the kitchen. Cat, blueberry pie, right next to each other, and blueberry pie mess on the cat's mouth. Now, I know what conclusion I would draw, and I know what conclusion you would draw, the cat got into the blueberry pie. Circumstantial evidence. That's exactly what the boy's daddy did. He grabs up the cat, takes him off to the woods and shoots him. He's getting rid of the cotton pickin' cat. The cat tried; convicted; dead; gone; he didn't do it. A victim of circumstantial evidence, circumstantial evidence. There's all sorts of circumstantial evidence. Each bit of circumstantial evidence makes a fact. You have to take those facts, those little bits and pieces, and put them together into a logical, reasonable conclusion.

. . . .

You must decide this on the basis of beyond a reasonable doubt. The Court will go ahead and instruct you on reasonable doubt, the definition of reasonable doubt. When the Court instructs you -- Judge Wells is going to give you very lengthy jury instructions, what we call jury instructions. Pay very close attention, please. I realize it's been a very long trial, but pay close attention to the jury instructions. He's going to tell you how you are supposed to take these facts and put them together. So pay real close attention to that. Now, he's going to instruct you on one area, circumstantial evidence, on what you're supposed to do with that circumstantial evidence. And I want to just bring up two of those points in advance. One, the circumstances must be consistent with guilt and inconsistent with innocence. He'll tell you that. The circumstances must be consistent with guilt and inconsistent with innocence. And he'll also tell you this, and this is very, very important, if the circumstances are susceptible to two reasonable constructions, one indicating guilt and the other innocence, you must accept the construction indicating innocence. Now, again, one more time, and Judge Wells will instruct you on this in exactly these words. If the circumstances are susceptible to two reasonable constructions, one indicating guilt and the other innocence, you

must accept the construction indicating innocence. Now they're only talking about two reasonable constructions of facts.

. . . .

Be sure that you remember that if you come up with a reasonable conclusion that indicates innocence, then you must accept that and bring back a verdict of not guilty.

(R. 1265-69). Counsel was absolutely wrong about what the judge was going to tell the jury, as the jury was pointedly informed during the State's rebuttal:

Mr. Pascoe has not been under oath. Mr. Pascoe, if any part of it, any part of what he says came from any source except the speculation of his mind, it would be hearsay and inadmissible; and Mr. Pascoe is not subject to cross examination. Mr. Pascoe, when he kept talking to you about circumstantial evidence, he conveniently left out one word, one important word, "equally", he repeated just went right over the word "equally" in the instructions. If there are two equally reasonable conclusions, equally reasonable, based on the evidence in this case, two equally reasonable conclusions, then you would be justified in finding the Defendant innocent. But only if there are two equally reasonable conclusions. And there is no way, no whay that you could possibly reach a conclusion that this man, Francis Marion May, was --

MR. PASCOE: Objection, Your Honor. The State is again false: misleading. Here is the jury instructions, and you'll find that there is nothing in there, whatsoever, that says anything about "equal". It says, "two reasonable conclusions." I didn't cross over any such word. The word wasn't in there.

THE COURT: Okay. The word **"equally"** does not appear. You want to read it?

(Mr. Anderson read the jury instruuction)

MR. ANDERSON: This isn't the thing that you gave him. Where is your instructions? This is not what I read, to the best of my recollection.

THE COURT: Mr. Pascoe, it is in this one I intend to give. The word "equally" is in this one.

MR. ANDERSON: I have the Judge's instructions here. If you'll bear with me, it says, **"If** the circumstances are susceptible to two equally reasonable constructions, one indicating guilt and the other innocence, you must accept the

construction indicating innocence." That's two equally reasonable constructions, equally.

MR. PASCOE: May I approach the bench, Your Honor?

THE COURT: Yes.

(Conference at the bench as follows):

MR. PASCOE: That's not a true jury instruction. That's not the jury instruction. This is the jury instruction (indicating).

MR. ANDERSON: That's not up-to-date.

MR. PASCOE: Pardon?

MR. ANDERSON: That's not up-to-date.

MR. PASCOE: This is the up-to-date jury instruction.

THE COURT: Well, **"reasonable"** is changed to **"equally".** I think it's the same thing. I'm going to give this one.

(Bench conference concluded)

THE COURT: Objection will be overruled.

R. 1272-74. Defense counsel's closing argument on the only relevant issue in the case was thus completely ineffective, because counsel failed to understand upon what law the judge would instruct. The problem was discussed again later:

MR PASCOE: Okay with me, yes sir. We had the one other jury instruction on circumstantial evidence.

THE COURT: Okay.

MR. PASCOE: Whether or not the word **"equally"** should be there or should not be there.

MR. ANDERSON: We settled that in chambers, and I relied on the Court's instructions at that time. That word was in there.

THE COURT: Your argument is over whether or not it should be **"two** reasonable constructions" or "two equal constructions". I think **"reasonable",** in that sense, is equivalent to **"equal",** and I think that's the proper word. I'm going to leave it as it's written as **"equal".** I'll not your objection.

MR. PASCOE: As It's written which way?

THE COURT: In my instructions.

MR. PASCOE: As **"reasonable"?**

THE COURT: No, **"equally".**

MR. PASCOE: Your Honor, now, you showed me a copy of your instructions and it did not use the word **"equally".**

THE COURT: I showed you a copy of a page out of the standard jury instructions.

MR. PASCOE: Yes sir.

THE COURT: And these first degree murder instructions are some that I have used and other judges have used over a period of time, so I'm going to use them instead of the others.

MR. PASCOE: May I argue a little bit further about it?

THE COURT: Well, while I'm looking for this, you can.

MR. PASCOE: The word **"equal"** is not in the Standard Florida Jury Instructions, Your Honor. It's strictly "reasonable", not "reasonably equal", it's strictly **"reasonable",** two reasonable conclusions or explanations of the circumstantial facts, not **"equal".** In fact, the word **"equal"** will be illogical if you put it in there.

THE COURT: It's not **"equal",** it's **"equally".** That's the way the word is written, "equally". There's a difference between **"equal"** and **"equally".**

MR. PASCOE: Where do you put the, put the word **"equally"** in that paragraph?

THE COURT: **"If** the circumstances are susceptible of two equally reasonable constructions." Equally reasonable. In other words, one is just as reasonable as the other. That's what it means.

MR. PASCOE: But it also means, the way it's phrased right there, that they're both equal, equally reasonable. And that, in my opinion, is illogical. You never come across two equally reasonable conclusions. The Florida Standard Jury Instructions does not have either the word **"equal"** or **"equally",** just strictly **"reasonable".**

MR. ANDERSON: Your Honor, that instruction is in Judge Tolton's book, and he has a more up-to-date book than mine. The ones in the library at the State Attorney's Office in Fort Walton, I checked them to see if they were up-to-date with Judge Tolton's,

THE COURT: In my instructions.

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MR. ANDERSON: Your Honor, that instruction is in Judge Tolton's book, and he has a more up-to-date book than mine. The ones in the library at the State Attorney's Office in Fort Walton, I checked them to see if they were up-to-date with Judge Tolton's,

his is the latest thing. That was the same instruction that was given in the Finley, first degree murder and robbery trial, a few months back. Also, I got the instructions from you when you read it to Mr. Pascoe and I, in your chambers, and I wrote it down at that time. That's what I used in my closing argument. It would certainly be -- I would respectively submit that it is improper for the Court to change the instructions after I have wasted a good portion of my argument to the jury on what the Court told me would be in the instructions, in chambers.

MR. PASCOE: One, I don't remember the Court ever reading that, other than this is the basic jury instruction we're going to use. And I would like to point out that the only Standard Florida Jury Instruction that any three of us have seen, thus far, today, came out of Judge Wells book that he has on the podium right there, and it does not include the word **"equal"** or "equally".

THE COURT: It is my interpretation off the law, regarding justifiable homicide, that that is a self-defense type thing and a law enforcement situation, so I'm not going to give--I'm going to give excusable. Okay, are ya'll ready for the jury?

MR. ANDERSON: Yes, Your Honor.

MR. PASCOE: Defense is ready, Your Honor.

THE COURT: Bring the jury in, Mr. Bolton.

(R. **1286-88**). The prejudice to Mr. Heiney is obvious. Defense counsel told the jury <u>repeatedly</u> what the judge would say, and he based his argument on it. The jury heard without contradiction that counsel was wrong, which was devastating in and of itself. As important, the law actually read to the jury was incorrect. In the words of the prosecutor, a person arguing the wrong law "wasted a good portion of" argument (R. **1288**).

In fact the court did <u>not</u> properly instruct the jury. The Florida Standard Jury Instructions in Criminal Cases instruction as to circumstantial evidence at the time of trial did <u>not</u> include the word **"equally".** This constitutes a substantial change in the State's burden of proof as the State argued to the jury. Since Mr. Heiney's case was based entirely on circumstantial evidence, the improper instruction was a key

feature of the trial. The prejudice was devastating to the defense.

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

CLAIM XII

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

In Florida, the "usual form" of indictment for first-degree murder under sec. 783.04, Fla. Stat. (1987), is to "charg[e] murder . . . committed with a premeditated design to effect the death of the victim." Barton v. State, 193 So. 2d 618, 624 (Fla. 2d DCA 1968). The absence of felony murder language is of no moment: when a defendant is charged with a killing through premeditated design, he or she is also charged with felony-murder, and the jury is free to return a verdict of first-degree murder on either theory. Blake v. State, 156 So. 2d 511 (Fla. 1963); Hill v. State, 133 So. 2d 68 (Fla. 1961); Larry v. State, 104 So. 2d 352 (Fla. 1958).

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

In this case, it is likely that Mr. Heiney was convicted on the basis of felony murder. The State relied extensively on the felony charged, and argued that the victim was killed in the

course of a robbery. The jury received instructions on both theories and returned a general verdict.

If felony murder was the basis of Mr. Heiney's conviction, then the subsequent death sentence is unlawful. Cf. Stromberg v. California, 283 U.S. 359 (1931). This is because the death penalty in this case was predicated upon an unreliable automatic finding of a statutory aggravating circumstance -- the very felony murder finding that formed the basis for conviction. Automatic death penalties upon conviction of first-degree murder violate the eighth and fourteenth amendments, as was recently stated by the United States Supreme Court in Sumner v. Shuman, 107 S. Ct. 2716 (1987). In this case, felony murder was found as a statutory aggravating circumstance. ("The crime was committed during the course of an Armed Robbery" (R. 1065). The sentencer was entitled automatically to return a death sentence upon a finding of guilt of first degree (felony) murder. Every felony-murder would involve, by necessity, the finding of a statutory aggravating circumstance, a fact which, under the particulars of Florida's statute, violates the eighth amendment: an automatic aggravating circumstance is created which does not narrow ("[A]n aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty . . . ." Zant v. Stephens, 462 U.S. 862, 876 (1983)). In short, if Mr. Heiney was convicted for felony murder, he then faced statutory aggravation for felony murder. This is too circular a system to meaningfully differentiate between who should live and who should die, and it violates the eighth and fourteenth amendments.

The United States Supreme Court recently addressed a similar challenge in Lowenfield v. Phelps, 108 S. Ct. 546 (1988), and the discussion in Lowenfield illustrates the constitutional shortcoming in Mr. Teffeteller's capital sentencing proceeding. In Lowenfield, petitioner was convicted of first degree murder under Louisiana law which required a finding that he had "a

specific intent to kill to inflict great bodily harm upon more than one person," which was the exact aggravating circumstance used to sentence him to death. The United States Supreme Court found that the definition of first degree murder under Louisiana law that was found in Lowenfield provided the narrowing necessary for eighth amendment reliability:

> To pass constitutional muster, a capital-sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1983); cf. 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 narrowins function may not be performed bv 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 Gresq, 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 narrowins 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 statutorv assravatins 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."

Id. at 554-55 (emphasis added).

Thus, if narrowing occurs either in the conviction stage (as in Louisiana and Texas) or at the sentencing phase (as in Florida and Georgia), then the statute may satisfy the eighth amendment as written. However, as applied, the operation of Florida law in this case did not provide constitutionally adequate narrowing at either phase, because conviction and aggravation were predicated upon a non-legitimate narrower -- felony-murder.

The conviction-narrower state schemes require something more than felony-murder at guilt/innocence. Louisiana requires intent to kill. Texas requires intentional and knowing murders. This narrows. Here, however, Florida allows a first-degree murder conviction based upon a finding that does not legitimately narrow -- felony murder. Mr. Heiney's conviction and sentence required only a finding that he committed a felony during which a killing occurred, and no finding of intent was necessary.

Clearly, "the possibility of bloodshed is inherent in the commission of any violent felony, and . . . is foreseen," Tison v. Arizona, 107 S. Ct. 1676, 1684 (1987), but armed robbery, for example, is nevertheless an offense "for which the death penalty is plainly excessive." Id. at 1683. The same is true of burglary, as Proffitt, 428 U.S. 242 (1976)(burglary felony murder insufficient for death penalty) and other Florida cases have made clear. With felony-murder as the narrower in this case, neither the conviction nor the statutory aggravating circumstance meet constitutional requirements. There is no constitutionally valid criteria for distinguishing Mr. Heiney's sentence from those who have committed felony (or, more importantly, premeditated) murder and not received death.

This analysis cannot be sidestepped by any appellate finding of premeditation: first, it cannot be said that the jury found premeditation; second, neither the Florida Supreme Court, nor any other Court, can determine conclusively that there was premeditation finding, since that is a question for the jury, and

the jury was instructed on both premeditation and felony murder. See Mills v. Maryland, 108 S.Ct. 1860 (1988). If one or the other of the possible bases for the conviction results in an unconstitutional sentence, then a new sentencing hearing is necessary. See Strombera v. California, supra. Consequently, if a felony-murder conviction in this case has collateral constitutional consequences (i.e. automatic aggravating circumstance, failure to narrow), a Florida Supreme Court, or any other court's, finding of premeditation does not cure those collateral reversible consequences.

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

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

Presnell, 439 U.S. at 18.

Neither the Florida Supreme Court, nor any other court, can "affirm" based on premeditation when it cannot be said that the conviction was obtained based on premeditation. Here, felony-

murder could have been -- and most probably was -- the basis for the conviction.

This error undermined the reliability of the sentencing determination and prevented the sentencer from assessing the full panoply of mitigation presented by Mr. Heiney. For each of the reasons discussed above the Court should vacate Mr. Heiney's unconstitutional sentence of death.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Heiney's death sentence and rendered it unreliable. 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 prejudicially ineffective assistance of counsel on direct appeal. This issue involved a classic violation of longstanding principles of Florida law. See Woodson v. North Carolina, 428 U.S. 280 (1976), supra. It virtually "leaped out upon even a casual reading of transcript." Matire v. Wainwrisht, 811 F.2d 1430, 1438 (11th Cir. 1987). This clear claim of per se error required no elaborate presentation -- counsel only had to direct this Court to the issue. The court would have done the rest, based on long-settled Florida and federal constitutional standards.

No tactical decision can be ascribed to counsel's failure to urge the claim. No procedural bar precluded review of this issue. See Johnson v. Wainwrisht, 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. Heiney of the appellate reversal to which he was constitutionally entitled. See Wilson V. Wainwrisht, supra, 474 So. 2d at 1164-65; Matire,

supra. Under the sixth, eighth and fourteenth amendments, Mr. Heiney's sentence of death should not be allowed to stand. Accordingly, habeas corpus relief must be granted now.

CLAIM XIII

THE IMPOSITION OF A DEATH SENTENCE BY THE COURT, AFTER MR. HEINEY HAD BEEN OFFERED A LESSER PUNISHMENT, WITHOUT AN AFFIRMATIVE SHOWING ON THE RECORD TO JUSTIFY THE "QUALITATIVELY" ENHANCED PENALTY IMPOSED AFTER MR. HEINEY EXERCISED HIS FUNDAMENTAL RIGHT TO TRIAL BY JURY, VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND THE EIGHTH AMENDMENT.

The State offered Mr. Heiney a plea to second-degree murder before an indictment for first-degree murder was sought, and after telling defense counsel that a jailhouse informant had said that Mr. Heiney had confessed to him.

Counsel for Mr. Heiney wrote a letter to Mr. Heiney in which he told Mr. Heiney that he was going to discuss the case with the presiding judge off the record in order to "see what sort of deal he is willing to offer us." The complete contents of the letter are as follows:

August 2, 1978

Robert Heiney
c/o Okaloosa County Jail
Crestview, FL 32536

Dear Robert:

On the 28th of July I had a hearing on my Motion to Dismiss on your homicide case. It was brought out in evidence during the hearing by Mike Hollingshead that Charles Tuszynski, who is presently in the Okaloosa County Jail, related to Mike Hollingshead that you related to him that not only did you kill the victim, Mays, but you also explained to Tuszynski in great detail how it came down.

The State is now threatenins to go in front of the Grand Jury for murder 1 indictment. I in turn am going to contact Judge Wade and see what sort of deal he is willing to offer us. I will also call Tuszynski in for a sworn to deposition in the courthouse. Mike Hollingshead and Glenn Barbarree also said

after the hearing that they have another witness that you have confessed to.

Sincerely,

David A. Pascoe
Assistant Public Defender

(emphasis added).

The ultimate sentencer in this case knew that a plea had been offered, that Mr. Heiney had evidently not accepted it, and that the maximum penalty under the plea was life imprisonment. The Court would have had no choice but to allow Mr. Heiney to plead guilty if he so desired. Mr. Heiney exercised his right to go to trial.

The State decided to charge a higher offense, which the court allowed. After jury trial, the jury convicted Mr. Heiney, but recommended life imprisonment, the maximum sentence that would have been possible had Mr. Heiny foregone his constitutional right to trial and pled guilty earlier.

The trial judge overrode the jury recommendation and sentenced Mr. Heiney to death. To punish a defendant for exercise of a constitutional right is a basic violation of due process of law under the fourteenth amendment and, in a capital context, violates the eighth amendment requirement that capital sentencing be free from reliance upon impermissible factors, quintessentially free from reliance upon the fact that the defendant exercised his of constitutional rights.

Consequently, the law requires that the record affirmatively reveal that the enhanced punishment is **not** the result of the exercise of rights.

The right to trial by jury is a fundamental right, Duncan v. Louisiana, **391** U.S. **145, 158 (1968),** and criminal defendants may not be penalized for the exercise of constitutional rights. United States v. Jackson, **390** U.S. at **581;** Bordenkircher v. Hayes, **434** U.S. at **363** ("To punish a person because he has done

what the law plainly allows him to do is a due process violation of the most basic sort"). From these two principles follow the command that "the Constitution forbids the exaction of a penalty for a defendant's unsuccessful choice to stand trial." Smith v. Wainwright, 664 F.2d 1194, 1196 (11th Cir. 1981). Such actions would "chill" -- if not freeze altogether -- a defendant's right, preserved by the Constitution, to seek a trial. "The chilling effect of such a practice upon standing trial would be as real as the chilling effect upon taking an appeal that arises when a defendant appeals, is reconvicted on remand and receives a greater punishment." United States v. Stockwell, 472 F.2d 1186, 1187 (9th Cir., 1973). See also Hess v. United States, 496 F.2d 936 (8th Cir. 1974); United States v. Derrick, 519 F.2d 1 (6th Cir. 1975); Poteet v. Fauver, 517 F.2d 393 (2d Cir. 1975); Baker v. United States, 412 F.2d 1069 (5th Cir. 1969).

Thus, a court may not penalize a defendant for exercising his constitutional right to stand trial. North Carolina v. Pearce, 395 U.S. 711 (1969). The question then becomes whether the Pearce requirements apply to the situation in the present case where a harsher penalty is imposed after the defendant exercises his right to trial. The ninth circuit has held they do, and that therefore when the court has been involved in plea bargaining the record must affirmatively show that no weight was given to the refusal to plead guilty:

> [O]nce it appears in the record that the court has taken a hand in plea bargaining, that a tentative sentence has been discussed, and that a harsher sentence has followed a breakdown in negotiations, the record must show that no improper weight was given the failure to plead guilty. In such a case, the record must affirmatively show that the court sentenced the defendant solely upon the facts of his case and his personal history, and not as punishment for his refusal to plead guilty. See generally A.B.A. Project on Minimum Standards for Criminal Justice, Standards Relating to Pleas of Guilty Sec. 1.8, at 36-37 (1968).

United States v. Stockwell, 472 F.2d 1186, 1187-88 (9th Cir.

1973). See also Hess v. United States, 496 F.2d 936, 938 (8th Cir. 1974).

The record suggests that the death sentence was improperly motivated. First, the judge had to override the jury recommendation of life in order to reach the harsher punishment. Furthermore, there were some off-the-record disagreements between the court and Mr. Heiney, leading Mr. Heiney and counsel to believe that prejudice against him was real, and would be exercised at sentencing. The court threatened to get even with Mr. Heiney at the time of sentencing:

> I am going to tell you Mr. Heiney that your total disrespect is noted. There is very little I can do now because you are incarcerated in the Okaloosa County Jail but let me assure you that I will be the sentencing judge on your case.

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

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

CONCLUSION AND RELIEF SOUGHT

WHEREFORE, Robert David Heiney, through counsel, respectfully urges that this Court issue its writ of habeas corpus and grant him the relief he seeks and a stay of execution. Since this action presents certain question of fact, Mr. Heiney requests that the Court relinquish jurisdiction to the trial court for the resolution of evidentiary factual questions regarding appellate counsl's decision making process or lack thereof. Mr. Heiney alternatively urges that the Court grant him a new appeal for all of the reasons stated herein, and that the Court grant all other and further relief which the Court may deem just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail, postage prepaid, to Walter Anderson, Assistant State Attorney, Office of the State Attorney, Post Office Box **517**, Crestview, Florida **32536**, this 19th day of May, **1989**.

_____
Attorney