IN THE SUPREME COURT OF FLORIDA

NO. 74270

JEFFRY ALLEN MUEHLEMAN,

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

LARRY HELM SPALDING
Capital Collateral Representative

BILLY H. NOLAS
JUDITH J. DOUGHERTY
BRET B. STRAND

OFFICE OF THE CAPITAL
COLLATERAL REPRESENTATIVE
1533 South Monroe Street
Tallahassee, FL 32301
(904) 487-4376

COUNSEL FOR PETITIONER

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. Muehleman's appellate proceedings. At issue here is the legality of Mr. Muehleman's capital conviction and sentence of death. Jurisdiction in this action lies in this Court, see, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein involve 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 (Fla. 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. Muehleman to raise the claims presented herein. See, e.g., Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987).

This Court has consistently maintained an especially vigilant control over capital cases, exercising a special scope of review, see Elledge v. State, 346 So. 2d 998, 1002 (Fla. 1977); Wilson v. Wainwright, supra, 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. Muehleman's capital conviction and sentence of death and of this Court's appellate review process. Mr. Muehleman'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. Wainwright, 459 So. 2d 1034, 1035 (Fla. 1984); Edwards v. State, 393 So. 2d 597, 600 n.4 (Fla. 3d DCA), petition denied, 402 So. 2d 613 (Fla. 1981); cf. Witt v. State, 387 So. 2d 922 (Fla. 1980). The petition also involves claims of ineffective assistance of counsel on appeal, challenging omissions of counsel that occurred before this Court. See Wilson v. Wainwright, supra, 474 So. 2d at 1165; Johnson v. Wainwright, supra, 498 So. 2d at 939 (habeas relief appropriate where counsel fails to present clear claim of reversible error); Fitzpatrick v. Wainwright, supra, 490 So. 2d at 939-40 (same). 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 herein presented, is warranted in this action. As this petition shows, habeas corpus relief would be more than proper on the basis of Mr. Muehleman's claims.

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

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

B. REQUEST FOR STAY OF EXECUTION

Mr. Muehleman's petition includes a request that the Court stay his execution (presently scheduled for July 12, 1989). As will be shown, the issues presented are substantial and warrant a stay. This Court has not hesitated to stay executions when warranted to ensure judicious consideration of the issues presented by petitioners litigating during the pendency of a death warrant. See Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Kennedy v. Wainwright, 483 So. 2d 426 (Fla. 1986); cf. State v. Sireci, 502 So. 2d 1221 (Fla. 1987).

This is Mr. Muehleman'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.

II. GROUNDS FOR HABEAS CORPUS RELIEF

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

CLAIM I

MR. MUEHLEMAN WAS DENIED HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS BY PENALTY PHASE JURY INSTRUCTIONS AND PROSECUTOR ARGUMENT WHICH INCORRECTLY DESCRIBED THE LAW AS TO WHICH AGGRAVATING CIRCUMSTANCES COULD BE CONSIDERED, AND THUS MISLED THE JURY.

Although this Court has consistently reversed the defendant's sentence of death in cases in which aggravating circumstances were "doubled" and at least one mitigating circumstance was found by the trial court, this Court allowed Mr. Muehleman's capital sentence to stand while reviewing this case on direct appeal. See Muehleman v. State, 503 So. 2d 310 (Fla. 1987). Counsel failed his client by ignoring this issue, cf. Wilson v. Wainwright, supra, although trial counsel had preserved the issue for appeal.

This case involved the classic type of unconstitutional doubling of aggravating circumstances ("robbery/pecuniary gain"). This issue involved per se reversible error, as this Court's precedents make irrefutably clear. See Provence v. State, 337 So. 2d 783, 786 (Fla. 1976); Clark v. State, 379 So. 2d 97, 104 (Fla. 1980); Welty v. State, 402 So. 2d 1139 (Fla. 1981). Since mitigation was before the sentencing jury and court, and since the sentencing court in fact found mitigating circumstances, this

error would have mandated reversal. See Elledge v. State, 346 So. 2d 998 (Fla. 1977). However, Mr. Muehleman never received the reversal to which he was clearly entitled. Counsel provided prejudicially ineffective assistance and thus failed his client. This Court should now take corrective action.

At the penalty phase charge conference, defense counsel requested that the jury be instructed:

> Where the same aspect of the offense at issue gives rise to two (2) or more aggravating circumstances that aspect can only be considered as one aggravating circumstance. Thus, if you find that the offense occurred during the commission of a robbery and that the offense was committed for pecuniary gain, you must consider these circumstances as only one aggravating circumstance.

(R. 291). The State objected and the court denied the instruction (R. 2444-46)). Thus, in closing argument at the penalty phase, the State was permitted to argue that both the robbery and pecuniary gain aggravating circumstances applied (R. 2477, 2480), and the court instructed on both aggravating circumstances (R. 2543-44).

The instructions and prosecutor argument thus involved the classically condemned unconstitutional "doubling up" and overbroad application of aggravating factors. Mr. Muehleman's sentence of death was and is fundamentally unreliable and unfair, and violates the eighth and fourteenth amendments. See Provence v. State, 337 So. 2d 783, 786 (Fla. 1976), relying on State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973). See also Maynard v. Cartwright, 108 S. Ct. 1853 (1988) (condemning overbroad application of aggravating factors); Godfrey v. Georgia, 446 U.S. 420 (1980). Such procedures flatly abrogate the constitutional mandate that a sentence of death not be arbitrarily imposed, and that the application of aggravating factors "genuinely narrow the class of persons eligible for the death penalty." Zant v. Stephens, 462 U.S. 862, 876 (1983). It is, after all, "the risk

that the death penalty will be imposed in spite of factors which may call for a less severe penalty," Lockett v. Ohio, 438 U.S. 586, 605 (1978), that "require[s] us to remove any legitimate basis for finding ambiguity concerning the factors actually considered." Eddings v. Oklahoma, 455 U.S. 104, 119 (1982) (O'Connor, J., concurring). See also Godfrey v. Georgia, 446 U.S. 420 (1980).

Under Florida's capital sentencing scheme, the trial judge must defer to a jury's recommendation of a life sentence unless the facts suggesting death are "so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). It is axiomatic that a death recommendation, to be valid, must be soundly based on correct and applicable law. See, e.g., Riley v. Wainwright, supra (the role of an appropriately instructed capital sentencing jury in Florida is "fundamental".) This surely cannot occur when the trial judge can effectively determine the outcome. In this case the judge did so by providing the jury with duplicitous aggravating factors to consider. The prosecutor then capitalized on the judge's generous listing by telling the jury that they had more aggravating circumstances to weigh against mitigating circumstances. The aggravationg factors, however, were unlawfully presented and argued. The result here is unreliable. The jury's verdict was skewed by having duplicitous aggravating factors to choose among. The jurors may have believed that the duplicitous aggravating factors were all present and were of more weight than if they had not been instructed on the duplicitous circumstances. Had they been properly instructed, the result here could well have been different -- there was mitigation in this case. See Hall v. State, 14 F.L.W. 101 (Fla. 1988). Of course, as Hall makes clear, sentencing errors which occur before the jury cannot be cured by later judicial findings. See also Riley v. Wainwright, supra.

In the capital sentencing context, the United States Supreme Court has recently explained that the question is "what a reasonable juror could have understood the charge as meaning." Mills v. Maryland, 108 U.S. 1860 (1988), quoting Francis V. Franklin, 471 U.S. 307, 316 (1985). In Mills the court found reversible sentencing error where the sentencing jury could have read the instructions in an erroneous and improper fashion. Here the jury was erroneously instructed, and improper arguments were presented which were not cured by adequate instructions. Since the jury's recommendation had to be followed unless unreasonable, the question is whether the State can show beyond a reasonable doubt that the jury did not base its recommendation on improper doubling of the aggravating circumstances. Mills, supra. This the State cannot do in this case -- no facts support such an argument.

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

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

instructions worked just the opposite result. Mr. Muehleman is entitled to relief under the eighth and fourteenth amendments.

This error undermined the reliability of the jury's sentencing determination and prevented the jury from properly assessing the mitigation presented by Mr. Muehleman. This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Muehleman'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.

CLAIM II

THE DEFINITION OF THE AGGRAVATING CIRCUMSTANCE OF COMMISSION OF THE CRIME IN A COLD/CALCULATED MANNER AS SIMPLE PREMEDITATION FAILED TO ADEQUATELY GUIDE AND CHANNEL THE SENTENCERS' DISCRETION, IN VIOLATION OF MR. MUEHLEMAN'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

This issue was rejected by this Court during Mr. Muehleman's direct appeal proceedings. Since then, it has become clear that the jury instructions regarding this aggravating factor and the application of this factor to Mr. Muehleman's case do not comport with what the eighth amendment requires. The eighth amendment standards set forth in Maynard v. Cartwright, 108 S. Ct. 1853 (1988), issued since Mr. Muehleman's direct appeal, demonstrates the unconstitutionally overbroad application of this aggravating circumstance in this case. As the record reflects, the jury was never given the limiting construction of the "cold, calculated, and premeditated aggravating circumstance, as required by Cartwright.

The trial court instructed the jury on the aggravating circumstance found in section 921.141(5)(i) as follows (R. 2544-2545):

> The fourth aggravating circumstance, the crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.
>
> Killing with premeditation is killing after consciously deciding to do so. The decision must be present in the mind at the time of the killing. The law does not fix the exact amount of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing.
>
> The question of premeditation is a question of fact to be determined by you from the evidence. It will be sufficient proof of premeditation if the circumstances of the killing and the conduct of the accused convince you beyond a reasonable doubt of the existence of premeditation at the time of the killing.

This definition of "killing with premeditation" is found at page 63 of the Florida Standard Jury Instructions in Criminal Cases, and is to be read at the guilt phase in a trial for first degree murder. It does not apply at the capital sentencing proceeding: a higher standard is required there. Defense counsel objected to the giving of this instruction at the penalty phase (R. 2436, 2450-2451).

No further explanation of the aggravating circumstance was given. In Maynard v. Cartwright, 108 S. Ct. 1853 (1988), the Supreme Court held that the use of the aggravating circumstance in a capital case that the killing was "especially heinous, atrocious, or cruel" violated the eighth amendment in the absence of a limiting construction of that phrase which sufficiently channels the sentencer's discretion so as to minimize the risk of "arbitrary and capricious action." Although this Court affirmed this aggravating factor on Mr. Muehleman's direct appeal, an affirmance of the death sentence on appeal is insufficient "to cure the jury's unchanneled discretion where the court fails" to apply its previously recognized limiting construction of the aggravating circumstance. Id. at 1859. In any event, this Court did not then have the benefit of Cartwright.

The manner in which the jury was allowed to consider "cold, calculated and premeditated" 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 premeditated murder to be cold and calculated under the instructions. See Mills v. Maryland, 108 U.S. 1860 (1988). These terms require definition in order for the statutory aggravating factor genuinely to narrow, and its undefined application here violated the eighth and fourteenth amendments. Godfrey v. Georgia, 466 U.S. 420 (1980). Jurors must be given adequate guidance as to what constitutes a cold and calculated killing without pretense of legal or moral justification, and a sentencing judge must apply the required limiting construction. See Cartwright, supra. In fact, rather than narrow, the definition provided to Mr. Muehleman's jury broadened the category of persons to which the aggravating circumstance applied to every person convicted of first degree murder. This is precisely what Cartwright forbids. Accordingly, Mr. Muehleman's death sentence was obtained in violation of the eighth and fourteenth amendments, and must be vacated.

In Mr. Muehleman's case, the Court's definition of "cold, calculated and premeditated" was undoubtedly interpreted by the jury as telling them that in fact the murder fit this factor since Mr. Muehleman had already pled guilty to first degree murder. This alone violated Mills, supra.

This Court has repeatedly made it clear that premeditation alone is insufficient to support a finding of the cold and calculated aggravating circumstance. See, e.g., Herzog v. State, 439 So. 2d 1372 (Fla. 1983); Maxwell v. State, 443 So. 2d 967 (Fla. 1983). The "cold, calculated, and premeditated" aggravating circumstance was not intended by the legislature to apply to all premeditated murder cases. Harris v. State, 438 So. 2d 787 (Fla. 1983). Rather, the evidence must show a degree of

heightened premeditation beyond that necessary to support a finding of premeditated first-degree murder. Jent v. State, 408 So. 2d 1024 (Fla. 1981); Hardwick v. State, 461 So. 2d 79 (Fla. 1984); Stano v. State, 460 So. 2d 890 (Fla. 1984); Jennings v. State, 453 So. 2d 1109 (Fla. 1984); Maxwell, supra. The instruction the court gave failed to apprise the jury that anything more than simple premeditation was needed for this aggravating circumstance to apply.

The prosecutor's closing argument exacerbated the effect of the improper instruction:

> The Judge will instruct you that premeditation that is only one part of this aggravating circumstance but premeditation means killing after consciously deciding to do so, no time set forth. It can be a second, half a second, can be a day or can be a year. Time is not important. What is important is it's a mental decision this person should die.
>
> The defendant in his confession, even although he says he didn't decide to do it until after the robbery, indicates at that point he decided to kill. That is premeditation and can there be any doubt in your minds this was a cold and calculated offense?

(R. 2485). Given these remarks and the trial court's misleading instruction, it is impossible to imagine that the jury did not find this aggravating circumstance to apply, especially as they had been informed that Mr. Muehleman pled guilty to premeditated murder (R. 2232, 2234-2235).

When Mr. Muehleman challenged this aggravating circumstance on direct appeal, the Court did not have the benefit of Maynard v. Cartwright, decided by the United States Supreme Court in June, 1988. Cartwright did not exist at the time of Mr. Muehleman's trial, sentencing, or direct appeal, and it substantially alters the standard pursuant to which Mr. Muehleman's claim must be determined. As did Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), Cartwright also represents a substantial change in the law that requires Mr. Muehleman's claim

to be determined on the merits. In any event, the ends of justice counsel that this Court now correct this fundamental error: an unreliable death sentence should not be allowed to stand; a death sentence based on the flatly improper application of an aggravating factor is a classic example of an unreliable death sentence.

The new precedent, Cartwright, supra, involves the most fundamental of constitutional errors -- proceedings which violate the standards enunciated in Cartwright render any ensuing sentence arbitrary and capricious. Id. Mr. Muehleman was denied the most essential eighth amendment requirement -- his death sentence was constitutionally unreliable. The total lack of any limitations renders the application of the aggravating circumstance in this case subject to the same attack found meritorious in Cartwright. The Supreme Court's eighth amendment analysis fully applies to Mr. Muehleman's case. Habeas corpus relief is proper.

CLAIM III

THE STANDARDLESS AND UNGUIDED APPLICATION OF THE AGGRAVATING FACTOR OF INTENT TO AVOID ARREST VIOLATED MR. MUEHLEMAN'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

This issue was raised on direct appeal and is presented for reconsideration in light of the United States Supreme Court's recent decision in Maynard v. Cartwright, 108 S. Ct. 1853 (1988). On direct appeal, this Court rejected Mr. Muehleman's claim, a determination which Cartwright now demonstrates was erroneous.

At the penalty phase charge conference, defense counsel requested that the jury be given the following instruction regarding the "avoiding arrest" aggravating circumstance:

> In order that you might better understand and be guided concerning the meaning of aggravating circumstance (e), the Court hereby instructs you:
>
> That an intent to avoid arrest is not present, at least when the

> victim is not known to be a law enforcement officer, unless it is clearly shown that the dominant or only motive for the murder was the elimination of a witness.

(R. 290). The court denied the instruction (R. 2444).

The requested jury instruction was fully congruent with decisions of this Court construing the aggravating circumstance set forth in section 921.141(5)(e) of the Florida Statutes. See, e.g., Bates v. State, 465 So. 2d 490 (Fla. 1985); Menendez v. State, 368 So. 2d 1278 (Fla. 1979); Riley v. State, 366 So. 2d 19 (Fla. 1978). It was necessary that it be given in order properly to define this aggravating factor and channel the jury's discretion. Cartwright, supra; see Godfrey v. Georgia, 446 U.S. 420 (1980).

Under Cartwright, Mr. Muehleman's sentence of death violates the eighth and fourteenth amendments. Habeas corpus relief is proper.

CLAIM IV

> MR. MUEHLEMAN'S SENTENCE OF DEATH VIOLATES THE EIGHTH AMENDMENT BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS SHIFTED THE BURDEN TO MR. MUEHLEMAN TO PROVE THAT DEATH WAS INAPPROPRIATE, CONTRARY TO 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).

At the penalty phase, prosecutorial argument and judicial instructions informed Mr. Muehleman's jury that death was the appropriate sentence unless "mitigating circumstances exist that outweigh the aggravating circumstances." Such comments and instructions, which shift to the defendant the burden of proving that life is the appropriate sentence, violate the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), and the eighth and fourteenth amendments.

Counsel for Mr. Muehleman proposed instructions that would have informed the jury that the death penalty was only for the most aggravated cases, that the law does not require the death

penalty in all cases, that the jury's job was to make a reasoned judgment in light of the totality of the circumstances, and that, under Mullaney, the State must show that aggravating circumstances outweigh mitigating circumstances (R. 283-86). These requests were denied (R. 2441-42).

Defense counsel argued that the jury's task was to look at Jeffry Muehleman as an individual when determining the aggravating and mitigating factors (R. 2531-2538). However, the State had already made it clear that if the jury should find any aggravation, the death penalty was presumed appropriate, and then the defense had the burden to prove that life was appropriate:

> You first look at the aggravating circumstances and determine how many exists and the Judge will instruct on five and I think you'll see from the nature of that aggravating circumstances this is no ordinary homicide for five factors to apply in a single killing. You're to consider if those factors have been proven beyond a reasonable doubt and I can indicate to you the evidence is overwhelming and unconstricted, they are indeed.
>
> The Defense didn't ask the persons in the panel as to the existence of the factors because they knew, as you will when you hear them, they exist in this case and you should decide if those factors are sufficient to justify the death penalty. And there is no question in a homicide this brutal, the aggravating factors surrounding it justify the death penalty.

(R. 2456).

The court's instructions then solidified the burden - shifting notion:

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

(R. 2542).

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

> circumstances exist that outweigh the aggravating circumstances.

(R. 2545).

Such instructions, which shift to the defendant the burden of proving that life is the appropriate sentence, violate the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), as the Court of Appeals for the Ninth Circuit recently held in Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(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 capital sentencing determination:

> We also hold A.R.S. sec. 13-703 unconstitutional on its face, to the extent that it imposes a presumption of death on the defendant. Under the statute, once any single statutory aggravating circumstance has been established, the defendant must not only establish the existence of a mitigating circumstance, but must also bear the risk of nonpersuasion that any mitigating circumstance will not outweigh the aggravating circumstance(s). See Gretzler 135 Ariz. at 54, 659 P.2d at 13 (A.R.S. sec. 13-703(E) requires that court find mitigating circumstances outweigh aggravating circumstances in order to impose life sentence). The relevant clause in the statute--"sufficiently substantial to call for leniency"--thus imposes a presumption of death once the court has found the existence of any single statutory aggravating circumstance.
>
> Recently, the Eleventh Circuit held in Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988), that a presumption of death violates the Eighth Amendment. The trial judge, applying Florida's death penalty statute, had instructed the jury to presume that death was to be recommended as the appropriate penalty if the mitigating circumstances did not outweigh the aggravating circumstances. Examining the jury instructions, the Eleventh Circuit held that a presumption that death is the appropriate sentence impermissibly "tilts the scales by which the [sentencer] is to balance aggravating and mitigating circumstances in favor of the state." Id. at 1474. The court further held that a presumption of death "if employed at the level of the sentencer, vitiates the individualized sentencing determination

required by the Eighth Amendment." Id. at 1473.

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

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

Arizona Revised Statute sec. 13-703(E) reads, in relevant part: "the court . . . shall impose a sentence of death if the court finds one or more of the aggravating circumstances . . . and that there are no mitigating circumstances sufficiently substantial to call for leniency." Thus, the Arizona statute presumes that death is the appropriate penalty unless the defendant can sufficiently overcome this presumption with mitigating evidence. In imposing this presumption, the statute precludes the individualized sentencing required by the Constitution. It also removes the sentencing judge's discretion by requiring the judge to sentence the defendant to death if the defendant fails to establish mitigating circumstances by the requisite evidentiary standard, which outweigh the aggravating circumstances. See Arizona v. Rumsey, 467 U.S. 203, 210 (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. Muehleman'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. Muehleman on the central sentencing issue of whether he should live or die. This unconstitutional burden-shifting violated Mr. Muehleman'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 this unconstitutional standard at the sentencing phase violated Mr. Muehleman'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.

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

The 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.'" Eddings v. Oklahoma, 455 U.S. 104, 110 (1982), quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion) (emphasis in original). See Skipper v. South Carolina, 476 U.S. 1, 4 (1986). The corollary that "the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence'" is equally "well established." Ibid. (emphasis added), quoting Eddings, 455 U.S., at 114.

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

In Mills, the court concluded that, in the capital sentencing context, the Constitution requires resentencing unless

a reviewing court can rule out the possibility that the jury's verdict rested on an improper ground:

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

Mills, supra, 108 S. Ct. at 1866-67 (footnotes omitted). Thus under Mills the question must be: could reasonable jurors have read the instructions as calling for a presumption of death which shifted the burden to the defendant and deprived him of an individualized sentencing under Lockett, Eddings, Skipper, and Hitchcock. That question in Mr. Muehleman's case must be answered in the affirmative.

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

circumstances outweighed the aggravating circumstances. Cf. Mills, supra; Hitchcock, supra.

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. In Blystone, the defendant presented no mitigation. Thus, after finding an aggravating circumstance the jury returned a sentence of death.

Clearly, 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 then 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, however, 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 is the Pennsylvania statute at issue in Blystone. The outcome in Blystone will affect correct

resolution of the issue presented and the viability of Mr. Muehleman's death sentence.

Moreover, the error raised here cannot be written off as harmless. Any consideration of harmlessness must also consider that had the jury voted for life, that vote could not have been disturbed -- the evidence before the jury established much more than a "reasonable basis" for a jury's life recommendation. See Hall v. State, 14 F.L.W. 101 (Fla. 1989); Mann v. Dugger, 844 F.2d 1446, 1450-51 (11th Cir. 1988)(in banc)(citing precedent); Wasko v. State, 505 So. 2d 1314 (Fla. 1987); Tedder v. State, 322 So. 2d 908 (Fla. 1975). In fact, the sentencing judge found that the defense had established mitigation; in addition, the defense had presented and argued numerous "reasonable" nonstatutory mitigating factors. Under Florida law, to be binding, a jury's decision to recommend life does not require that the jury reasonably conclude that the mitigating circumstances outweigh the aggravating. In fact, the Tedder standard for overriding a jury recommendation of life belies any contention of harmlessness that may be made by the State. Under Tedder and its progeny, a jury recommendation of life may not be overridden if there is a "reasonable basis" discernible from the record for that recommendation, regardless of the number of aggravating circumstances, and regardless of whether the mitigation "outweighs" the aggravation. See, e.g., Ferry v. State, 507 So. 2d 1373 (Fla. 1987)(override reversed irrespective of presence of five aggravating circumstances); Hawkins v. State, 436 So. 2d 44 (Fla. 1983)(same). Thus the instruction not only violated Mullaney and Adamson, but it was not an accurate statement of Florida law. The error cannot be found to be harmless beyond a reasonable doubt because if the jury here had been correctly told that it could recommend life so long as it had a reasonable basis for doing so and the jury had recommended life, a reasonable

basis for that recommendation existed in the record. Thus a life recommendation could not have been overridden.

This error undermined the reliability of the jury's sentencing determination and prevented the jury from assessing the full panoply of mitigation presented by Mr. Muehleman. The jury did not know that it could recommend life if it had a reasonable basis for doing so. Counsel failed to zealously and competently represent Mr. Muehleman under the sixth amendment, by failing to raise this issue on direct appeal.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Muehleman's death sentence. The ends of justice also call on the Court to entertain the merits of the claim. The constitutional errors herein asserted "precluded the development of true facts, and "perverted the jury's deliberations concerning the ultimate question whether in fact [Jeffry Muehleman 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. Moreover, appellate counsel rendered prejudicially ineffective assistance in failing to urge this preserved claim on direct appeal.

For each of the reasons discussed above, the Court should vacate Mr. Muehleman's unconstitutional sentence of death. Alternatively, it is respectfully submitted that this Honorable Court should stay Mr. Muehleman's execution pending the Supreme Court's decision in Blystone. Cf. Riley v. Wainwright, supra, 517 So. 2d 656.

CLAIM V

THE INTRODUCTION OF NONSTATUTORY AGGRAVATING FACTORS SO PERVERTED THE SENTENCING PHASE OF MR. MUEHLEMAN'S TRIAL THAT IT RESULTED IN THE ARBITRARY, CAPRICIOUS, AND FUNDAMENTALLY FLAWED AND UNRELIABLE IMPOSITION OF THE DEATH PENALTY IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

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. Georgia, 408 U.S. 238, 274, 92 S. Ct. 2726, 2744 (1972)(Brennan, J., concurring)(footnote omitted).

The Supreme Court has also held that in order to satisfy the eighth amendment, a capital sentencing scheme must require sentencers to examine "specific factors" in determining whether to impose death:

> 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 weighed 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.

Proffitt v. Florida, 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 Elledge 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, supra 373 So. 2d at 885. See also Riley v. State, 366 So. 2d 19 (Fla. 1979); Robinson v. State, 520 So. 2d 1 (Fla. 1988).

Here, the State argued that Mr. Muehleman showed no remorse, a flatly impermissible nonstatutory aggravating factor. The first argument was made to the jury during the closing argument:

> You also know with incredible clarity this man's reaction after having committed a murder is to pour a glass of milk and turn on a TV and enjoy himself and keep himself occupied until the morning traffic came.

(R. 2469).

However, the State was not content with arguing that Mr. Muehleman's actions showed no remorse. The prosecutor also argued that the presence of mental illness was really an aggravating factor since Mr. Muehleman had "no conscience":

> One other point and I'll go on, again, I don't think that is really -- really a salient point because I think the experts miss the mark. They don't relate to the offense but his basic theories, as I understand it from the letter, is that the defendant because of factors happening before the age of three developed no conscience and I would concede as far as conclusions, the man sitting across the courtroom from you doesn't have much of a conscience.

(R. 2394).

The State carried this theme into the final sentencing address to the court:

> I have tried many cases and death with many capital and other first-degree murder cases, and this case is extreme cruelty, and meanness, the lack of remorse, all of the factors concerning this offense are gruesome and brutal and deserved of the death penalty compared to any that I have dealt with in my rather brief career.

(R. 1321)(emphasis added).

The State also argued that Mr. Muehleman was beyond rehabilitation, another nonstatutory aggravating circumstance. For example, the State argued:

> The State continues to believe, as we told you in voir dire, that this crime in which a helpless, defenseless 97-year old man was brutally and savagely killed for money and so that this man could avoid the consequences of his actions. And in particular, this defendant, whose record indicates not just a record we presented but the evidence that the Defense presented, has had in his lifetime innumerable opportunities to change. Psychologists, loved ones, chances, everything the system had to offer. Their evidence shows him to be what he is: A brutal murderer an incorrigible juvenile, a person beyond rehabilitation.

(R. 2457-58).

> And if one thing was evident through all of the testimony is that this man cannot be rehabilitated. Psychologists, aunts, uncles, grandparents, mother and father, they weren't perfect but they tried and the frustration about ate them alive because you can lead a horse to water but you can't make him drink.

(R. 2490).

> Now, it should be obvious to you that psychiatrist and psychologist are professionals that label people. If someone does not act normally, they have to label him something other than normal. The fact you have three words to describe this man is a criminal without a conscience who can commit a cold-blooded murder doesn't change what he did and doesn't change who he is or what he is. Simply words to direct your attention to some other direct.

(R. 2496).

> What you have and I think Dr. Mourer conceded is an anti-social personality and I suggest that is basically a psychologist's label for someone who has obviously chosen to be criminal and continue to be a criminal and who will, despite everyone's best efforts, continue to be a criminal yesterday, today, and tomorrow and 25 years from now. He will be unchanged.

(R. 2497).

> One witness testified about how incredulous they were when the father didn't support the defendant when he was charged with stealing a motorcycle and the defendant said it wasn't stolen. You read that report and see how many motorcycles he has stolen and this man in the period up to this point in his life not only in terms of what he criminally accomplished and criminally been involved in but also in terms of rehabilitation efforts what he's had. Some people maybe get the first real chance at 35, some people at 40. This man has had numerous chances not only through professionals or expert programs--you see he went to a wilderness program and went to the Carribean [sic], Santo Domingo and was given that opportunity. And those were opportunities every juvenile, every kid doesn't have a chance with but he's had many many chances to reform and change and he's rejected them all.
>
> His age does not justify or mitigate what he has done in light of his history and his record indicates what he is. He's a brutal and savage murderer who is beyond rehabilitation.

(R. 2498).

The State relied heavily upon nonstatutory aggravating circumstances to justify the imposition of a death sentence. Mr. Muehleman's jury returned a death recommendation. It is clear that consideration of these nonstatutory aggravating circumstances resulted in that recommendation. This violated Mr.

Muehleman's constitutional guarantees under the eighth and fourteenth amendments. At the time of sentencing by the trial court, the State specifically relied on the argument made to the jury, which included the above quoted non-statutory aggravating factors. As long as there is a "possibility" that the jury relied on the non-statutory aggravating circumstances in recommending death, this is error under Mills v. Maryland, 108 S. Ct. 1860 (1988).

This Court has specifically barred the use of lack of remorse as evidence of an aggravating circumstance. In its recent decision in Robinson v. State, 520 So. 2d 1 (Fla. 1988), the Court vacated Mr. Robinson's death sentence because the State, inter alia, impermissibly argued lack of remorse as a nonstatutory aggravating factor. Id. at 5.

This Court wrote in Robinson that:

> In Sireci v. State, 399 So.2d 964, 971-72 (Fla.1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982), this Court held that lack of remorse may be considered in finding that a murder was especially heinous, atrocious and cruel. However, as a result of the 1981 revision of the standard jury instructions in criminal cases as well as the consistent misapplication of the Sireci holding, this Court subsequently held that any consideration of a defendant's remorse was extraneous to the question of whether the murder was especially heinous, atrocious or cruel. Pope v. State, 441 So.2d 1073, 1077-78 (Fla.1983). Citing McCampbell v. State, 421 So.2d 1072 (Fla. 1982), the Court in Pope noted that lack of remorse is not an aggravating factor, in and of itself, and held:
>
> > [H]enceforth lack of remorse should have no place in the consideration of aggravating factors. Any convincing evidence of remorse may properly be considered in mitigation of the sentence, but absence of remorse should not be weighed either as an aggravating factor nor as an enhancement of an aggravating factor.
> >
> > 441 So.2d at 1078.

Id. at 6 (emphasis added). See also Trawick v. State, 473 So. 2d 1235 (Fla. 1982); Jackson v. Wainwright, 421 So. 2d 1385, 1388

(Fla. 1982); Quince v. State, 414 So. 2d 185 (Fla. 1982). The situation here is virtually identical and calls for equal application of the law. The introduction of evidence of lack of remorse, argument based upon that evidence, and reliance by the sentencing jury on such evidence was clear eighth amendment error. Similarly, it is flatly impermissible to use a defendant's mental health problems as nonstatutory aggravation. It is equally improper under the eighth amendment to use the other factors noted above. Mr. Muehleman's resulting death sentence is unreliable and should not be allowed to stand.

The prosecutor's introduction and use of, and the sentencers' reliance on, these wholly improper and unconstitutional non-statutory aggravating factors starkly violated the eighth amendment. This is fundamental error. Moreover, appellate counsel provided prejudicially ineffective assistance in failing to litigate this fundamental eighth amendment violation. Mr. Muehleman's sentence of death violates the eighth and fourteenth amendments, see Elledge v. State, 346 So. 2d 998, 1002-03 (Fla. 1977), and should not be allowed to stand. This claim involves fundamental eighth amendment error and should be addressed at this juncture. Relief is proper.

CLAIM VI

MR. MUEHLEMAN'S SENTENCE OF DEATH WAS FOUNDED UPON IMPERMISSIBLE "VICTIM IMPACT" EVIDENCE, IN VIOLATION OF BOOTH V. MARYLAND, AND THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

The courts did not have the benefit of Booth v. Maryland, 107 S. Ct. 2529 (1987), at the time of Mr. Muehleman's trial and direct appeal. Nevertheless, at Mr. Muehleman's capital sentencing proceedings, defense counsel objected to the State's presentation of evidence and argument concerning the victim's personal characteristics. Appellate counsel also urged this Court to consider this error. Pre-Booth, this Court rejected the

claim. Under the standards elucidated in Booth, this Court should now correct its earlier, erroneous decision.

A jury's discretion in imposing the death sentence must be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. 153 (1976)(joint opinion of Stewart, Powell, and Stevens, JJ.); California v. Ramos, 463 U.S. 992 (1983).

> And while this court has never said that the defendant's record, characteristics, and the circumstances of the crime are the only permissible sentencing considerations, a state statute that requires consideration of other factors must be scrutinized to ensure that the evidence has some bearing on the defendant's 'personal responsibility and moral guilt.' Enmund v. Florida, 458 U.S. 782, 801, 102 S.Ct. 3368, 3378, 73 L.Ed 2d 1140 (1982). To do otherwise would create the risk that a death sentence will be based on considerations that are 'constitutionally impermissible or totally irrelevant to the sentencing process.' See Zant v. Stephens, supra, [462 U.S.] at 885, 103 S.Ct. at 2747.

Booth v. Maryland, 107 S.Ct. 2529, 2532-33 (1987).

As reflected by the clear record in Mr. Muehleman's case, the jury and judge here heard and considered, in aggravation of sentence, the very constitutionally impermissible "victim impact" and "worth of victim" evidence which was condemned in Booth. The victim here was an elderly man. That fact alone is enough to stir the passions and sympathies of the ultimate sentencers and great caution should have been taken by those officers of the court trying a case such as this to insure that those passions were not deliberately aroused. A record transcript is cold and flat and cannot convey the expressions of the speakers, yet here even the printed word paints the portrait. From the beginning of the penalty proceedings to the final sentencing, the prosecutor repeatedly reminded the judge and the jurors that the victim was "a ninety-seven year old man" (R. 2453, 2457, 2464).

In his penalty summation, the prosecutor argued:

> And when he didn't die, he began to choke him, face-to-face with a feeble, sickly, 97-year-old man.

(R. 2453).

> On that day, this man sentenced Earl Baughman to death without a proceeding, without the opportunity to present evidence to talk about his life, his family, his expectations, his joys and sorrows.

(R. 2454). The prosecutor continued this improper argument by referring to the victim as a "helpless, defenseless 97-year-old man" (R. 2457).

In argument urging the death penalty the prosecutor implied that a verdict of death must be rendered for the victim's family's sake:

> All we are asking is a reasonable judgment to reflect justice. The family, the community, the legal system are all looking to you to render justice.

(R. 2161).

The prosecutor improperly utlized the following argument to the jury and court in order to ensure the jury considered the victim's personal characteristics in their deliberations:

> Mr. Baughman, as you know from the evidence, was 97 years old. One of the few momentoes that exists from his long life is that silver dollar dated 1886. You know from the evidence he was almost blind, he could walk only short distances without assistance, he lost his license at the age of 90 and could not drive. You know, unfortunately, although it's unfortunate that -- and particularly an innocent victim has to be exposed to this thing -- you know he was incontinent.
>
> You also know that despite his disabilities and infirmities he possessed because of age, that he was independent, did not make the family question the people he hired, didn't like them intervening.

(R. 2464).

At sentencing, the prosecutor openly urged that the feelings of the victim's family required a sentence of death:

> I would ask the Court to consider that the State's only chance for justice and the victim's family's only chance for justice

> resides with the Court at this moment in time.

(R. 1317). The Prosecutor repeatedly and passionately told the trial court that the feelings of the victim's family require a sentence of death (R. 1332, 1336). The trial court clearly considered the victim's age and his personal characteristics in his oral sentencing of Mr. Muehleman, referring to the "aged and defenseless victim" and to the victim's "keepsake silver dollar, a silver dollar which had a date of Mr. Baughman's birth. . . ." (R. 1340).

This was precisely the type of improper victim evidence held impermissible under Booth and prohibited by the eighth amendment. Instead of guarding against a tendency by the ultimate sentencers to be sympathetic toward an elderly victim, the State reminded them again and again about the old age of the victim (R. 2293, 2453, 2457). The State used that as the reason to forfeit the life of Jeffry Muehleman. The message was clear: the victim's character and his advanced age were why Mr. Muehleman should be sentenced to die. The feelings of the victim's family were why Mr. Muehleman should be put to death. All this is flatly impermissible.

This record is replete with Booth eighth amendment error. The record, in fact, speaks for itself, and Mr. Muehleman urges the Court to consider it in its totality, for in its totality it reflects a plain and egregious violation of Booth v. Maryland.

At a capital sentencing proceeding, Booth v. Maryland, 107 S. Ct. 2529, 2535 (1987), requires the exclusion of evidence of "the presence or absence of emotional distress of the victim's family, or the victim's personal characteristics." The logic of Booth applies equally to situations where it is argued that the impact of the crime upon the family warrants the defendant's execution or where it is argued that the victim's personal characteristics make the homicide more repugnant.

The victim's family in Booth "noted how deeply the [victims] would be missed," id. at 2531, explained the "painful, and devastating memory to them," id., spoke generally of how the crime had created "emotional and personal problems [to] the family members," id., and "emphasized the victim's outstanding personal qualities." The Supreme Court found the introduction of this information to violate the eighth amendment's mandate that any capital sentence be reliable. It violated the well established principle that the discretion to impose the death penalty must be "suitably directed and limited so as to minimize the risks of wholly arbitrary and capricious action."

In Booth the Court stated: "Although this court normally will defer to a state legislature's determination of what factors are relevant to the sentencing decision, the Constitution places some limits on this discretion." Booth, supra, at 2532. The Court ruled that the sentencer was required to render an "individualized determination" of what the proper sentence should be in a capital case. This determination should turn on the "character of the individual and the circumstances of the crime." See also Zant v. Stephens, 462 U.S. 862, 879 (1983); Eddings v. Oklahoma, 455 U.S. 104, 112 (1982). The Court in Booth noted that a state statute such as the one there at issue "must be scrutinized to ensure that the evidence has some bearing on the defendant's 'personal responsibility and moral guilt.' Enmund v. Florida, 458 U.S. 782, 801 (1982)." Booth, supra, at 2533. A contrary approach would run the risk that the death penalty will be imposed because of considerations that are "constitutionally impermissible or totally irrelevant to the sentencing process." Booth, supra; cf. Zant v. Stephens, supra, 462 U.S. at 885.

As the Booth court explained: "Certainly the degree to which a family is willing and able to express its grief is irrelevant to the decision whether a defendant, who may merit the death penalty, should live or die." Id. Thus the Booth Court

concluded that "the presence or absence of emotional distress of the victim's family, or the victim's personal characteristics are not proper sentencing considerations in a capital case." Id. at 2535. These are the very same impermissible considerations urged (and urged to a far more extensive degree) and relied upon by the jury and judge in Mr. Muehleman's case. Here, as in Booth, the victim impact information "serve[d] no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant." Id. Since a decision to impose the death penalty must "be, and appear to be, based on reason rather than caprice or emotion," Gardner v. Florida, 430 U.S. 349, 358 (1977)(Stevens, J.), such efforts to fan the flames are "inconsistent with the reasoned decision making" required in a capital case. Booth, supra at 2536.

The Booth court concluded the decision to impose a death sentence could not "turn on the perception that the victim was a sterling member of the community rather than someone of questionable character." Id. at 2534. To permit such information to be injected into the sentencing process would violate the eighth and fourteenth amendments because there would be no "'principled way to distinguish [cases] in which the death penalty was imposed from the many cases in which it was not.' Godfrey v. Georgia, 446 U.S. 420, 433 (1980)(opinion of Stewart, J.)." Booth, supra, 107 S. Ct. at 2534. This principle was abrogated in Mr. Muehleman's case.[1]

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[1]A sentence of death cannot stand when it results from prosecutorial comments or judicial instructions which may mislead the jury into imposing a sentence of death, Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633 (1985), Wilson v. Kemp, 777 F.2d 621, 626 (11th Cir. 1985), reh. denied, 784 F.2d 404 (11th Cir. 1986), and a capital defendant must not be sentenced to die by a jury which may have "failed to give its decision the independent and unprejudiced consideration the law requires." Wilson, 777 F.2d at 21, quoting Drake v. Kemp, 762

(footnote continued on following page)

As stated, both the jury and judge relied on improper victim impact evidence in sentencing Mr. Muehleman to death. Mr. Muehleman's sentence violates Booth. The burden of establishing that the error had no effect on the sentencing decision rests upon the State. See Booth, supra; cf. Caldwell v. Mississippi, 105 S. Ct. 2633, 2646 (1985). That burden can be carried only on a showing of no effect beyond a reasonable doubt. Compare Chapman v. California, 386 U.S. 18 (1967), with Caldwell v. Mississippi, supra, and Booth v. Maryland, supra.

In a case involving such extensive and pervasive violations of the eighth amendment, the State cannot carry this burden with regard to the errors at issue in Mr. Muehleman's case. Accordingly, Mr. Muehleman is entitled to a new sentencing proceeding at which evidence of victim impact will be precluded from the sentencer's consideration. This case presents gross, fundamental eighth amendment error.

Trial counsel objected to the victim impact evidence and argument discussed herein, and appellate counsel attempted to present the issue to the Court. To the extent that appellate counsel failed to properly present the issue, this was prejudicially ineffective assistance of counsel. In any event, Booth involves new law and Booth error is fundamental error. Relief should now be granted.

(footnote continued from previous page)

F.2d 1449, 1460 (11th Cir. 1985)(in banc); see also Potts v. Zant, 734 F.2d 526 (11th Cir. 1984). In short, a sentencing proceeding is flatly unreliable when the jurors are misled as to their role in the sentencing proceeding or as to the matters which they must consider in making their determination of what is the proper sentence under the circumstances. Wilson; Caldwell.

The prosecutor in this case, however, provided textbook examples of improper argument. He urged the jury and judge to consider matters that are not appropriate for deciding whether a defendant lives or dies, and the consideration of which rendered the sentencing proceeding fundamentally unreliable. That overall improper presentation must not be isolated from the Booth violations herein at issue.

CLAIM VII

DURING THE COURSE OF MR. MUEHLEMAN'S CAPITAL PROCEEDINGS, THE PROSECUTION AND THE COURT IMPROPERLY ASSERTED THAT SYMPATHY TOWARDS MR. MUEHLEMAN WAS AN IMPROPER CONSIDERATION, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The State informed the jurors chosen to sit on Mr. Muehleman's trial that sympathy was an improper factor for their consideration. During voir dire, while the entire venire panel was in the courtroom, the prosecutor told a potential juror that it would be inappropriate for the jury to consider sympathy for Mr. Muehleman in its deliberations (R. 2328). During the State's closing argument the prosecutor told the jury that sympathy for Mr. Muehleman could not be considered (R. 2488). Defense counsel requested that the jury be instructed that it was permissible for the jury to exercise mercy for Mr. Muehleman (R. 298), but that request was denied (R. 2448).

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

> The clear impact of the [prosecutor's statements] is that a sense of mercy should not dissuade one from punishing criminals to the maximum extent possible. This position on mercy is diametrically opposed to the Georgia death penalty statute, which directs that "the jury shall retire to determine whether any mitigating or aggravating circumstances . . . exist and whether to recommend mercy for the defendant." O.C.G.A. Section 17-10-2(c)(Michie 1982). Thus, as we held in Drake, the content of the [prosecutor's closing] is "fundamentally opposed to current death penalty jurisprudence." 762 F.2d at 1460. Indeed, the validity of mercy as a sentencing consideration is an implicit underpinning of many United States Supreme Court decisions in capital cases. See, e.g., Woodson v. North Carolina, 428 U.S. 280, 303, 96 S.Ct. 2978, 2990, 49 L.Ed.2d 944 (1976)(striking down North Carolina's mandatory death penalty statute for the reason, inter alia, that it failed "to allow the particularized consideration of relevant aspects of the character and record of each convicted

> defendant before the imposition upon him of a sentence of death"); Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978)(striking down Ohio's death penalty statute, which allowed consideration only of certain mitigating circumstances, on the grounds that the sentencer may not "be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death") (emphasis in original). The Supreme Court, in requiring individual consideration by capital juries and in requiring full play for mitigating circumstances, has demonstrated that mercy has its proper place in capital sentencing. The [prosecutor's closing] in strongly suggesting otherwise, misrepresents this important legal principle.

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

Requesting the jury to dispel any sympathy they may have towards the defendant undermined the jury's ability to reliably weigh and evaluate mitigating evidence. Parks v. Brown, 860 F.2d 1545 (10th Cir. 1988)(in banc). See Coleman v. Saffle, ___ F.2d ___, No. 87-2011 (10th Cir., March 6, 1989); Davis v. Maynard, ___ F.2d ___, No. 87-1157 (10th Cir., March 14, 1989). The jury's role in the penalty phase is to evaluate the circumstances of the crime and the character of the offender before deciding whether death is an appropriate punishment. Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). An admonition to disregard the consideration of sympathy improperly suggests to "the jury that it must ignore the mitigating evidence about the [petitioner's] background and character." California v. Brown, 479 U.S. 538, 107 S. Ct. 837, 842 (1987)(O'Connor, J., concurring).

Sympathy is an aspect of a capital proceeding that must be considered by the jury during penalty deliberations. That, after all, is what mitigation is all about:

> The capital defendant's constitutional right to present and have the jury consider mitigating evidence during the capital phase of the trial is very broad. The Supreme Court has held that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from

considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978) (emphasis in original). See also Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

The sentencer must give "individualized" consideration to the mitigating circumstances surrounding the defendant and the crime, Brown, 479 U.S. at 541; Zant v. Stephens, 462 U.S. 862, 879 (1983); Eddings v. Oklahoma, 455 U.S. 104, 111-12 (1982); Lockett, 438 U.S. at 605, and may not be precluded from considering "any relevant mitigating evidence." Eddings, 455 U.S. at 114. See also Andrews v. Shulsen, 802 F.2d 1256, 1261 (10th Cir. 1986), cert. denied, ___ U.S. ___, 107 S. Ct. 1964, 95 L. Ed. 2d 536 (1987).

Mitigating evidence about a defendant's background or character is not limited to evidence of guilt or innocence, nor does it necessarily go to the circumstances of the offense. Rather, it can include an individualized appeal for compassion, understanding, and mercy as the personality of the defendant is fleshed out and the jury is given an opportunity to understand, and to relate to, the defendant in normal human terms. A long line of Supreme court cases shows that a capital defendant has a constitutional right to make, and have the jury consider, just such an appeal.

In Gregg v. Georgia, 428 U.S. 153 (1976), the Court upheld the Georgia sentencing scheme which allowed jurors to consider mercy in deciding whether to impose the penalty of death. Id. at 203. The Court stated that "[n]othing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution." Id. at 199.

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

allowed during the sentencing phase of capital trial in order to provide for the consideration of "compassionate or mitigating factors stemming from the diverse frailties of humankind." Id.

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

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

In Skipper v. South Carolina, 476 U.S. 1 (1986), the trial court had precluded the defendant from introducing evidence of his good behavior while in prison awaiting trial. The Court held that the petitioner had a constitutional right to introduce the evidence, even though the evidence did not relate to his culpability for the crime. Id. at 4-5. The Court found that excluding the evidence "impeded the sentencing jury's ability to carry out its task of considering all relevant facets of the character and record of the individual offender." Id. at 8.

"Mercy," "humane" treatment, "compassion," and consideration of the unique "humanity" of the defendant, which have all be affirmed as relevant considerations in the penalty phase of a capital case, all inevitably involve sympathy or are sufficiently intertwined with sympathy that they cannot be parsed without significant risk of confusion in the mind of a reasonable juror. Webster's Third International Dictionary (Unabridged ed. 1966) describes "mercy" as "a compassion or forbearance shown to an offender," and "a kindly refraining

from inflicting punishment or pain, often a refraining brought about by a genuinely felt compassion and sympathy." Id. at 1413 (emphasis added). The word "humane" similarly is defined as "marked by compassion, sympathy, or consideration for other human beings." Id. at 1100 (emphasis added). Webster's definition of "compassion" is a "deep feeling for and understanding of misery or suffering," and it specifically states that "sympathy" is a synonym of compassion. Id. at 462. Furthermore, it defines "compassionate" as "marked by . . . a ready inclination to pity, sympathy, or tenderness." Id (emphasis added).

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

Here, the petitioner did offer mitigating evidence about his background and character. Petitioner's father testified that petitioner was a "happy-go-lucky guy" who was "friendly with everybody." The father also testified that, unlike other people in the neighborhood, petitioner avoided violence and fighting; that he (the father) was in the penitentiary during the petitioner's early childhood; that petitioner was the product of a broken home; and that petitioner only lived with him from about age 14 to 19. Although the father admitted that petitioner once was involved in an altercation at school, he suggested that it was a result of the difficulties of attending a school with forced bussing. Record, vol. V, at 667-82.

Petitioner's counsel, in his closing argument, then relied on this testimony to argue that petitioner's youth, race, school experiences, and broken home were mitigating factors that the jury should consider in making its sentencing decision. In so doing, defense counsel appealed directly to the jury's sense of compassion, understanding, and sympathy, and asked the jury to show "kindness" to his client as a result of his background. Record, vol. V, at 708-723.
. . . [There is] an impermissible risk that the jury did not fully consider these mitigating factors in making its sentencing decision.

. . .

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

Parks v. Brown, 860 F.2d at 1554-57. On April 25, 1989, the United States Supreme Court granted a writ of certiorari in order to review the decision in Parks. See Saffle v. Parks, ___ Cr.L. ___ (cert. granted April 25, 1988).

The remarks by the prosecutor here may have served to constrain the jury in their evaluation of mitigating factors. Under Mills v. Maryland, 108 S. Ct. 1860 (1978), the question is whether reasonable jurors may have understood what they were told as precluding consideration of mercy or sympathy towards Mr. Muehleman. Certainly, here, reasonable jurors could have understood the argument as precluding them from allowing the natural tendencies of human sympathy from entering into their determination of whether any aspect of Mr. Muehleman's character required the imposition of a sentence other than death.

This error undermined the reliability of the jury's sentencing determination and prevented the jury from assessing the full panoply of mitigation presented by Mr. Muehleman. Appellate counsel's failure to litigate this claim was a failure to zealously represent Mr. Muehleman and was prejudicially ineffective assistance. This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Muehleman's death sentence. California v. Brown, Mills, and Parks v. Brown are new law. Soon the United States Supreme Court will address this very issue in its review of Parks. Certainly, at the least, Mr. Muehleman's execution should be stayed pending the decision in Parks.

CLAIM VIII

THE ERRONEOUS JURY INSTRUCTION THAT A VERDICT OF LIFE MUST BE MADE BY A MAJORITY OF THE JURY MATERIALLY MISLED THE JURY AS TO ITS ROLE AT SENTENCING AND CREATED THE RISK THAT DEATH WAS IMPOSED DESPITE FACTORS CALLING FOR LIFE, AND MR. MUEHLEMAN'S DEATH SENTENCE WAS THUS IMPOSED IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The jury in Mr. Muehleman's sentencing trial was erroneously instructed on the vote necessary to recommend a sentence of death or life. As decisions of this Court have made clear, the law of Florida is not that a majority vote is necessary for the recommendation of a life sentence; rather, a six-six vote, in addition to a seven-five or greater majority vote, is sufficient for the recommendation of life. Rose v. State, 425 So. 2d 521 (Fla. 1982); Harich v. State, 437 So. 2d 1082 (Fla. 1983). However, Mr. Muehleman's jury throughout the proceedings was erroneously informed that, even to recommend a life sentence, its verdict must be by a majority vote. These erroneous instructions are also the type of misleading information condemned by Caldwell v. Mississippi, 105 S. Ct. 2633 (1985), in that they "create a misleading picture of the jury's role." Caldwell at 2646 (O'Connor, J., concurring). As in Caldwell, the instructions here fundamentally undermined the reliability of the sentencing determination, for they created the risk that the death sentence was imposed in spite of factors calling for a less severe punishment, in violation of the most fundamental requirements of the eighth amendment.

There can be no question that the jury charged with deciding whether Mr. Muehleman should live or die was erroneously instructed. The trial court informed the jury that:

> In these proceedings, it is not necessary that the advisory sentence of the jury be unanimous. Your decision may be made by a majority of the jury.
>
> The fact that the determination of whether a majority of you recommended a sentence of death or sentence of life

> imprisonment is this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot, you should carefully weigh all of it, realizing that human life is at stake and bring to bear the best judgment in reaching your advisory sentence.
>
> If the majority of the jury determine that Jeffry A. Muehleman should be sentenced to death, the advisory sentence will be: A majority of the jury by a vote of, advise and recommend to the Court that it impose the death penalty upon Jeffry A. Muehleman.
>
> If, on the other hand, if by six or more votes, the jury determines that Jeffry A. Muehleman not be sentenced to death, your advisory sentence will be: The jury advises you and recommend to the Court by a vote of, that is impose a sentence of life imprisonment on Jeffry A. Muehleman without possibility of parole for 25 years.
>
> You will now retire to consider your recommendation. When seven or more are in agreement as to what sentence should be recommended to the Court, that form of recommendation should be signed by your foreman and returned to the Court.

(R. 2547-48).

The trial court's erroneous instructions regarding the jury vote "create[d] a misleading picture of the jury's role." Caldwell, supra, at 2646 (O'Connor, J., concurring). This "misleading picture" may very well have diminished the importance the individual jurors placed on their "recommended" sentence. Caldwell, supra. In any case, the jury's deliberations, its application of law to facts, its very weighing process, remain untrustworthy. The results of this sentencing proceeding are not reliable.

Mr. Muehleman's jury was erroneously instructed. Although the record now reflects that a majority of the jurors recommended death, it is entirely possible that a six-to-six vote -- i.e., a life recommendation -- was reached at some point during deliberations only to be abandoned on the basis of the trial court's erroneous instructions. In a case such as this involving the presentation of mitigating evidence, this instructional error

cannot be written off as harmless. Cf. Hall v. State, 14 F.L.W. 101 (Fla. 1989). It is clear that the final instruction regarding the jury's vote, particularly when combined with the reinforcement previously received from the judge, misled the jury, and gave them the erroneous impression that they could not return a valid sentencing verdict if they were tied six to six. Jurors so instructed could quite logically believe that a tied jury was a hung jury. Such a mistaken belief could lead a vacillating juror to change his or her vote from life to death in order to avoid this eventuality.

In any event, it is the erroneous instruction itself that violated Mr. Muehleman's fifth, sixth, eighth, and fourteenth amendment rights. Mr. Muehleman may well have been sentenced to die because his jury was misinformed and misled. Such a procedure creates the substantial risk that a death sentence was imposed in spite of factors calling for a less severe punishment. Lockett v. Ohio, 438 U.S. 586, 605 (1978). Wrongly telling the jury that it had to reach a majority verdict "interject[ed] irrelevant considerations into the fact finding process, diverting the jury's attention from the central issue" of whether life or death is the appropriate punishment. Beck v. Alabama, 447 U.S. 625, 642 (1980). The erroneous instruction may have encouraged Mr. Muehleman's jury to reach a death verdict for an impermissible reason -- its incorrect belief that a majority verdict was required. The erroneous instruction thus "introduce[d] a level of uncertainty and unreliability into the [sentencing] process that cannot be tolerated in a capital case." Id. at 643.

Appellate counsel, however, failed to raise this issue on direct appeal. Appellate counsel's failure to present the claim here was unreasonable performance. See Johnson (Paul) v. Wainwright, supra. Counsel's unreasonable performance deprived Mr. Muehleman of his sixth and fourteenth amendment rights to the

effective assistance of counsel. Cf. Wilson v. Wainwright, supra. Mr. Muehleman is therefore entitled to the habeas corpus relief he now seeks.

Moreover, the United States Supreme Court's recent decision in Mills v. Maryland, 108 S. Ct. 1860 (1988), provides a new standard of review for constitutional claims such as the instant. Under Mills, in determining whether a particular instruction misled the jury, a court must determine how a reasonable juror would have understood the instruction. Mills v. Maryland, 108 S. Ct. 1860, 1866-67 (1988), citing Francis v. Franklin, 471 U.S. 307 (1985), and Sandstrom v. Montana, 442 U.S. 510 (1979). In the capital sentencing context, the Constitution requires resentencing unless a reviewing court can rule out the possibility that the jury's verdict rested on an improper ground:

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

Mills, 108 S. Ct. at 1866-67 (footnotes omitted).

The special danger of an improper understanding of jury instructions in a capital sentencing proceeding is that such an

improper understanding could result in a failure to consider factors calling for a life sentence:

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

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

In Mr. Muehleman's case, a "substantial possibility" exists that the jury understood its instructions to require a majority verdict for life. The penalty phase instructions emphasized that the jury must reach a majority verdict. A reasonable juror could certainly have understood these instructions to require a majority verdict. The jury was thus misled and misinformed to a degree which the eighth amendment does not countenance. See Mills v. Maryland, supra; Caldwell v. Mississippi, 105 S. Ct. 2633 (1985).

The risk of "a possibility that a single juror" could understand the instructions given to require a majority vote for either life or death and "consequently require the jury to impose the death penalty", see Mills, 108 S. Ct. at 1870, actualized here. A "substantial possibility" thus exists that the jury relied on its incorrect instructions and was effectively precluded from considering the factors before it calling for a

life sentence. Id. Mills represents a significant change in the law which announced a substantially different standard of review for this type of eighth amendment claim. The new constitutional standard announced in Mills is as "new" and as "substantial" as Hitchcock v. Dugger, 107 S. Ct. 1821 (1987). See Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987). Because Mills represents a substantial change in eighth amendment law, this claim is independently cognizable in the instant proceedings, without regard to the ineffectiveness of appellate counsel. See Downs, supra; Thompson, supra. However, for each of these reasons, relief is now appropriate.

CLAIM IX

THE ADMISSION OF EVIDENCE REGARDING PRIOR CRIMES PURPORTEDLY COMMITTED BY MR. MUEHLEMAN VIOLATED THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

This issue was presented and rejected on direct appeal. It is urged again in light of the United States Supreme Court's decision in Mills v. Maryland, 108 S.Ct. 1860 (1988), issued since Mr. Muehleman's direct appeal proceedings were concluded.

At the penalty phase of Mr. Muehleman's capital proceedings, the State was permitted to introduce, over defense objection, evidence concerning prior crimes which Mr. Muehleman had purportedly committed (See R. 1235-43). Defense counsel objected (R. 1232) and moved for a mistrial (R. 1244), because the defense had waived the "no significant prior criminal history" mitigating circumstance (R. 1232) and because the State was attempting to demonstrate propensity for violence, a nonstatutory aggravating factor (R. 1244). The court overruled the defense objections (R. 1233, 1245). Thus, in closing argument, the State was able to argue that there was "nothing mitigating" in Mr. Muehleman's record: "It's extremely aggravated. His record . . . I didn't hear anything good. Everything I heard was bad." (R. 2499).

The State's presentation of this evidence and argument violated Maggard v. State, 399 So. 2d 973 (Fla. 1981), Mills, supra, and the eighth amendment. The State's argument may very well have precluded the jury from giving full consideration to the mitigating evidence presented by Mr. Muehleman, and thus may have resulted in the jury's failure to consider factors calling for a sentence less than death. Mills, supra; Lockett, supra. The State cannot demonstrate beyond a reasonable doubt that this error had "no effect" on the jury's deliberations. See Caldwell v. Mississippi, 472 U.S. 320 (1985); Mills, supra.

This Court should now revisit this issue and correct its earlier erroneous determination. Relief is proper.

CONCLUSION AND RELIEF REQUESTED

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

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

LARRY HELM SPALDING
Capital Collateral Representative

BILLY H. NOLAS
JUDITH J. DOUGHERTY
BRET B. STRAND

OFFICE OF THE CAPITAL
COLLATERAL REPRESENTATIVE
1533 South Monroe Street
Tallahassee, FL 32301
(904) 487-4376

By: _____
COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing motion has been forwarded by (U.S. MAIL) (HAND DELIVERY) to Robert Krauss, Assistant Attorney General, Department of Legal Affairs, Park Trammel Building, 1313 Tampa Street, Tampa, Florida 33602, this 5th day of June, 1989.

_____
Attorney