IN THE SUPREME COURT OF FLORIDA

NO. 74468

RAYMOND ROBERT CLARK,

Petitioner,

v.

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

Respondent.

PETITION FOR EXTRAORDINARY RELIEF
AND FOR A WRIT OF HABEAS CORPUS

LARRY HELM SPALDING
Capital Collateral Representative

BILLY H. NOLAS
JULIE D. NAYLOR
MARTIN J. MCCLAIN

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

COUNSEL FOR PETITIONER

E I STATEMENT

This is Mr. Clark's first and only habeas corpus petition in this Court. It is being filed now because recent decisions by this court have established that Mr. Clark is entitled to habeas corpus relief, and that the prior dispositions of this action were in error.

On July 6, 1989, this Court ruled that Booth v. Maryland, 107 S. Ct. 2529 (1987), was a retroactive change in law under Witt v. State, 387 So. 2d 922 (1980). Jackson v. State, so. 2d , 14 F.L.W. 355 (Fla., July 6, 1989). Under this Court's analysis in Jackson, counsel for capital defendants could not have anticipated Booth and thus had no good faith basis for presenting Booth error to this Court for review prior to the decision itself. As a result this Court concluded Booth claims were not barred in post-conviction proceedings. Under the analysis in Jackson, Mr. Clark seeks to have this Court determine his claim that Booth error appears of record.[1] Mr. Clark also calls to the Court's attention the affidavit of Mr. Clark's trial counsel, the Honorable Susan Schaeffer, explaining -- in accord with what this Court held in Jackson -- that in 1977 she had no basis for objecting to Booth error (See App. 1).

This Court has also recently rendered its decisions in Hall v. State, 541 So. 2d 1125 (Fla. 1989), and Meeks v. Dusqer, ___ So. 2d 14 F.L.W. 313 (Fla., June 22, 1989). In those cases, this Court recognized that the statutory construction imposed on capital defense attorneys before Lockett and Sonser v. State not only limited the jury's and judge's sentencing discretion but

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[1] This claim, like the Lockett v. Ohio claims of many litigants who have been granted relief by this Court after the issuance of Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), was previously rejected on the basis of procedural default. Clark v. State, 533 So. 2d 1144 (Fla. 1988) Jackson demonstrates that there is no longer such a bar and that this claim should now be appropriately determined on its merits.

also the defense attorney's efforts to investigate, develop and introduce nonstatutory mitigation. See Meeks, supra; see also Knight v. Dugger, 863 F.2d 705 (11th Cir. 1989). In analyzing the harmfulness of Meeks error in Mr. Clark's case the Court completely overlooked this critical aspect of Mr. Clark's claim. Since this Court ruled before Meeks and Hall, it did not have the benefit of those significant opinions in determining Mr. Clark's claim. Meeks and Hall are retroactive changes in law under Witt v. State, 387 So. 2d 922 (1980). Consideration must be given to the nonstatutory mitigation which was not of record in 1977 by virtue of the constraints imposed on counsel. In the 1988 appeal from the denial of Mr. Clark's Rule 3.850 motion, this Court failed to apply the analysis it applied in Hall and Meeks. In addition this Court failed to factor in the cumulative effect of the other errors occurring in Mr. Clark's case. Habeas review is now proper.

On July 6, 1989, this Court issued its decision in Rhodes v. State, So. 2d ___, 14 F.L.W. 343, 345 (Fla., July 6, 1989). There, the Court explained that the "heinous, atrocious and cruel" aggravating circumstance can only be premised upon acts occurring before the murder which reflect torture towards the victim. Fundamental error occurred in Mr. Clark's direct appeal because appellate counsel failed to argue and this Court failed to find that the trial court and sentencing jury expressly relied only on acts occurring after the murder and the suffering of the victim's family in concluding that this aggravating circumstance was present. Thus under Maynard v. Cartwright, 108 S. Ct. 1853 (1988), the sentencer's discretion was not narrowly tailored, and the eighth amendment was violated.

Additionally, in Hamblen v. Dugger, ___ So. 2d ___, 14 F.L.W. 347 (Fla., July 6, 1989), this Court recognized that the question of whether a presumption of death was employed needed to be addressed case-by-case. This is consistent with the recent

United States Supreme Court decision in Penry v. Lynaugh, 109 S. Ct. ___, 45 Cr. L. 3188 (June 26, 1989), where the United States Supreme Court recognized that a death sentence should not be carried out if there was the possibility that it resulted from the sentencer's inability to give full effect to the mitigation which existed in the case. As in Hamblen, the merits of Mr. Clark's burden-shifting claim should now be reveiwed, and the Court erred in failing to do so in the 1988 appeal.

The United States Supreme Court's recent retroactive decision in Penry v. Lynaugh, 109 S. Ct. ___, 45 Cr. L. 3188 (1989), prohibits any impediments to the sentencer's ability to make a "reasoned moral response" to the question of whether a death sentence should be imposed. In Penry, the Supreme Court made crystal clear that its decision applied to cases in collateral review and can not be procedurally barred. Applying Penry to Mr. Clark's case, it is clear that submission of two improper aggravating circumstances ran the risk of "an unguided emotional response." This is particularly true where the defense was precluded from presenting nonstatutory mitigation. In Mr. Clark's case, the deck was stacked. The resulting death sentence was and is unreliable. Unreliable death sentences are "unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." 45 Cr. L. at 3195. Relief must be afforded now.

Finally, on July 6, 1989, this Court also handed down its decision in Rhodes v. State, So. 2d ___, 14 F.L.W. 343, 345 (Fla., July 6, 1989). There, this Court "reiterate[d] [] that the sentencing order reflect that the determination as to which aggravating and mitigating circumstances apply under the facts of a particular case is the result of 'a reasoned judgment' by the trial court." Fundamental error occurred in Mr. Clark's direct appeal because appellate counsel failed to argue and this Court failed to find that the sentencing order was inadequate in this

regard. Thus under Rhodes and Penry v. Lynaugh, 109 S. Ct. ___, 45 Cr. L. 3188 (1989), it does not appear that a reasoned judgment to impose death occurred, and the eighth amendment was violated.

I. JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla. R. App. P. 9.100(a). This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents constitutional issues which directly concern the judgment of this Court during the appellate process, and the legality of Mr. Clark's capital conviction and sentence of death. On September 26, 1977, Mr. Clark was sentenced to death. Direct appeal was taken to this Court. The trial court's judgment and sentence were affirmed. Clark v. State, 379 So. 2d 97 (Fla. 1979). Thereafter, in Clark v. State, 533 So. 2d 1144 (Fla. 1988), the Court affirmed the denial of Mr. Clark's Rule 3.850 motion which, based on this Court's subsequent precedents, forms the predicate for this habeas action. Jurisdiction for this action lies in this Court, see, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), because the fundamental constitutional errors challenged herein involve the appellate review process. See Wilson v. Wainwrisht, 474 So. 2d 1163 (Fla. 1985); Baggett v. Wainwrisht, 229 So. 2d 239, 243 (Fla. 1969); see also Johnson v. Wainwrisht, 498 So. 2d 938 (Fla. 1987); cf. Brown v. Wainwrisht, 392 So. 2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Clark to raise the claims presented herein. See, e.g., Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); Wilson, supra.

This Court has consistently maintained an especially vigilant control over capital cases, exercising a special scope of review, see Elledge v. State, 346 So. 2d 998, 1002 (Fla.

1977); Wilson v. Wainwright, 474 So. 2d at 1165, and has not hesitated in exercising its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital trial and sentencing proceedings. Meeks; Wilson; Johnson; Downs; Riley, supra. This petition presents substantial constitutional questions which go to the heart of the fundamental fairness and reliability of Mr. Clark's sentence of death, and of this Court's appellate review. Mr. Clark's claims are therefore of the type classically considered by this Court pursuant to its habeas corpus jurisdiction. This Court has the inherent power to do justice. As shown below, the ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. See, e.g., Riley; Downs; Wilson; Johnson, supra. The petition pleads claims involving fundamental constitutional error. See Dallas v. Wainwrisht, 175 So. 2d 785 (Fla. 1965); Palmes v. Wainwrisht, 460 So. 2d 362 (Fla. 1984). The petition includes claims predicated on significant, fundamental, and retroactive changes in constitutional law. See, e.g., Thompson v. Dusser, 515 So. 2d 173 (Fla. 1987); Tafero v. Wainwrisht, 459 So. 2d 1034, 1035 (Fla. 1984); Edwards v. State, 393 So. 2d 597, 600 n. 4 (Fla. 3d DCA), petition denied, 402 So. 2d 613 (Fla. 1981); cf. Witt v. State, 387 So. 2d 922 (Fla. 1980). The petition also involves claims of ineffective assistance of counsel on appeal. See Knight v. State, 394 So. 2d 997, 999 (Fla. 1981); Wilson v. Wainwrisht, supra; Johnson v. Wainwrisht, supra. These and other reasons demonstrate that the Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action. As the petition shows, habeas corpus relief would be more than proper on the basis of Mr. Clark's claims.

With regard to ineffective assistance, the challenged acts and omissions of Mr. Clark's appellate counsel occurred before

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

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

11. GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Petitioner asserts that his sentence of death was obtained and then affirmed during the Court's appellate review process in violation of his rights as guaranteed by the fourth, fifth, sixth, eighth and fourteenth amendments to the United States Constitution, and the corresponding provisions of the Florida Constitution, for each of the reasons set forth herein. In Mr. Clark's case, substantial and fundamental errors occurred in the penalty phase of trial.

These errors were uncorrected by the appellate review process. As shown below, relief is appropriate.

CLAIM I

MR. CLARK'S RIGHT TO A RELIABLE CAPITAL SENTENCING PROCEEDING WAS VIOLATED WHEN THE STATE URGED THAT HE BE SENTENCED TO DEATH ON THE BASIS OF VICTIM IMPACT AND OTHER IMPERMISSIBLE FACTORS, IN VIOLATION OF BOOTH V. MARYLAND, SOUTH CAROLINA V. GATHERS, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Clark's trial counsel, the Honorable Susan F. Schaeffer, Circuit Judge in Florida's Sixth Judicial Circuit, has stated:

> I, SUSAN F. SCHAEFFER, having been duly sworn, hereby depose and say:
>
> 1. My name is Susan F. Schaeffer and I am a Circuit Judge in Florida's Sixth Judicial Circuit. In **1977**, I was an Assistant Public Defender and served as a trial attorney for Raymond Robert Clark when he faced charges of first-degree murder, kidnapping and extortion.
>
> 2. At the time I represented Mr. Clark, I was aware that the State was going to actively seek the death penalty. I knew that if Mr. Clark was convicted that there would be a penalty phase at which the jury would consider aggravating and mitigating circumstances. The law at the time limited the relevant mitigating circumstances to those specifically listed in Fla. Stat. sec. **921.141** (before it was amended to allow consideration of any other mitigating circumstance). I was aware of that limitation and prepared Mr. Clark's case accordingly.
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> * * *
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> *8.* I note that at the time of Mr. Clark's trial, neither Caldwell v. Mississippi nor Booth v. Maryland had been decided. I therefore had no eighth amendment basis upon which to assert such issues.

(App. 1).[2]

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[2] Judge Schaeffer's affidavit is part of the record before this Court as it was appended to Mr. Clark's **1988** Rule 3.850 motion.

This Court recently acknowledged that Judge Schaeffer was correct: Booth v. Maryland is an unanticipated, retroactive change in law:

> At the time of Jackson's direct appeal, the United States Supreme Court had not yet decided Booth v. Maryland, in which the Court held that presentation of victim impact evidence to a jury in a capital case violates the eighth amendment of the United States Constitution. The Court reasoned that evidence of victim impact was irrelevant to a capital sentencing decision because this type of information creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner. Jackson now argues that the penalty phase testimony of Sheriff Dale Carson constitutes victim impact evidence, and thus she is entitled to a new sentencing proceeding under Booth. We agree.
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> Under this Court's decision in Witt v. State, 387 So.2d 922 (Fla.), cert. denied, 449 U.S. 1067 (1980), Booth represents a fundamental change in the constitutional law of capital sentencing that, in the interests of fairness, requires the decision to be given retroactive application.

Jackson v. Dugger, ___ So. 2d ___, 14 F.L.W. 355, (Fla., July 6, 1989).

At Mr. Clark's trial, the victim's son testified about his father's personal characteristics (E.g., R. 1790-91). Then in argument at the sentencing phase, the prosecutor urged that the jury impose death because of the "cruelty" to the victim's family, and argued that because of the suffering of the family the offense "is atrocious, that is heinous, and that is cruel" (R. 3177-78).

He also argued that it was "[t]ime for the family of David Drake to have justice," (R. 3174) and that:

> The only other people that were hurt -- and not with risk of death and not the only other people -- citizens of this community and particularly Mr. Drake's family, the family that no longer has him around to provide for their comfort, provide their companionship.

(Id.) This was the theme of his summation (See also R. 3176, 3182). He then urged the same considerations on the judge, who insisted upon conducting sentencing in front of the jury:

> Judge, I think the court is well aware that Mr. Drake had a fine family that's sitting here in front row of the courtroom, and suffered a tremendous loss by his murder.

(R. 3214). He also urged that Mr. Clark should be sentenced to death because of **"suffering"** inflicted on the family of Marshall Taylor, a previous victim in California, as a result of that offense (R. 3184).

A sentence of death cannot stand when it results from prosecutorial comments or judicial instructions which may mislead the jury into imposing such a sentence. Caldwell v. Mississippi, 472 U.S. 320, 105 *S.* Ct. 2633 (1985). The prosecutor here nevertheless argued to the jury and the judge that the heinous, atrocious, or cruel aggravating circumstance was present not because of cruelty to the victim but because of cruelty to the victim's family. This novel interpretation of that aggravating circumstance was left uncorrected by the court. Errors such as this are precisely what was forbidden by Booth v. Maryland, 107 S. Ct. 2529 (1987). See also South Carolina v. Gathers, 109 S. Ct. ___, 45 Cr. L. 3076 (June 12, 1989). Nevertheless the prosecutor urged the jury to sentence Mr. Clark to death because the victim left behind a grieving family that was in fact sitting before them in the courtroom.

The trial judge later in his formal written order found the presence of the heinous, atrocious, or cruel aggravating circumstance. In an effort to explicate this finding at the oral pronouncement of sentence the trial judge stated:

> The jury has spoken recommending the death sentence in this case. The crime was a cold one, a calloused one, without mercy, without pity, without compassion. You took a citizen of our community, made a widow of his wife. deprived a son of his father; disrupted the lives of otherwise happy people in the comfort that they had a man who would support them, take care of them, love them.

(R. 3217-3218)(emphasis added). Here, the sentencing judge also considered and relied upon what the prosecutor had urged to the

jury and what is forbidden under Booth and Gathers.

In Booth the United States Supreme Court held that "the introduction of [victim impact information] at the sentencing phase of a capital murder trial violates the Eighth Amendment." Id. at 2536. The court further invalidated the Maryland statute requiring consideration of such a statement at a capital sentencing hearing and vacated Mr. Booth's death sentence because the statements had been considered. Similarly, in Gathers the death sentence was not allowed to stand because it may have resulted from the prosecutor's impermissible victim impact argument. Reversal is required where contamination may have occurred. Booth; Gathers. Contamination occurred in Mr. Clark's case, before the jury and the judge.

The State previously argued in Mr. Clark's case that Booth does not apply to arguments by the prosecutor on the evidence. However, that limiting reading of Booth has specifically been held to be erroneous in South Carolina v. Gathers, 109 S. Ct. ___, 45 Cr. L. 3076 (June 12, 1989). There the Supreme Court held that the argument of the prosecutor alone violated Booth where the prosecutor "characterized the victim's personal qualities." Gathers, 45 Cr. L. at 3077. The Supreme Court held that Booth was violated notwithstanding the fact that the prosecutor's argument was premised upon admissible evidence. In Mr. Clark's case, as in Gathers, the prosecutor argued that the decedent's personal qualities, his surviving family members' grief and loss, and the suffering of the decedent's family made the crime "heinous, atrocious or cruel," and hence justified the death penalty.[3]

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[3]There are striking similarities between the prosecutor's argument here and the Oklahoma courts' justification of the death penalty in Mavnard v. Cartwright, 108 S. Ct. 1853 (1988). There the "heinous, atrocious, and cruel" aggravating factor upon which the death sentence was premised was founded upon the suffering of

(footnote continued on following page)

The very matters paraded before the sentencing court and jury in Mr. Clark's case -- the victim's family's "sense of loss," Booth, 107 S. Ct. at 2534; the victim's personal characteristics as, inter alia, a "sterling member of the community," id. at 2534 -- were the matters which the Supreme Court in Booth and Gathers determined to be impermissible considerations at the penalty phase of a capital trial. The eighth amendment was violated here, as it was in Booth and Gathers.

This record is replete with Booth error. Mr. Clark was sentenced to death on the basis of the very constitutionally impermissible "victim impact" and "worth of victim" evidence and argument which the Supreme Court condemned in Booth and Gathers. 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 on (and urged to a far more extensive degree) and relied upon by the jury and judge in Mr. Clark'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)(opinion of Stevens, J.), such efforts to fan the flames are "inconsistent with the reasoned decision making" required in a capital case. Booth, supra at 2536. See also Penry v.

(footnote continued from previous page)

the survivors and not on the victim's suffering. Of course, there the sentence of death was vacated because of the unconstitutional misapplication of the heinous, atrocious or cruel agggravating circumstance. Here, Cartwright (see Claim 111, infra, Booth, and Gathers were all violated.

Lynaugh, 109 S. Ct. , 45 Cr. L. 3188, 3195 (1989)(death sentence can not be premised on "an unguided emotional response"); Rhodes v. State, So. 2d , 14 F.L.W. 343, 345 (Fla., July 6, 1989)(suffering after the homicide is not relevant to heinous, atrocious, or cruel aggravating circumstance).

In Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633 (1985), the Supreme Court discussed when eighth amendment error required reversal: "Because we cannot say that this effort had no effect on the sentence decision, that decision does not meet the standard of reliability that the Eighth Amendment requires." Id., 105 S. Ct. at 2646. Thus the question is whether the Booth errors in this case may have effected the sentencing decision. As in Booth and Gathers, the State here cannot show that the improper argument had "no effect" on the jury's or judge's sentencing decision. Indeed, the judge specifically referred to and relied upon the constitutionally impermissible information in sentencing Mr. Clark to death, while the jury heard extensive and vehement argument in that regard. Since the prosecutor's argument "could [have] resulted" in the imposition of death because of impermissible considerations, Booth, 107 S. Ct. at 505, relief is appropriate in Mr. Clark's case.

The claim, founded on what this Court has now recognized to be a retroactive change in law, Jackson, supra, is properly before the Court in this habeas petition. Relief is appropriate.

CLAIM II

MR. CLARK WAS DENIED AN INDIVIDUALIZED AND RELIABLE CAPITAL SENTENCING DETERMINATION BECAUSE THE OPERATION OF STATE LAW RESTRICTED HIS TRIAL COUNSEL'S EFFORTS TO DEVELOP AND PRESENT NONSTATUTORY MITIGATING EVIDENCE, IN VIOLATION OF HALL V. DUGGER, MEEKS V. DUGGER, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Clark's capital trial and sentencing proceedings took place in 1977, before the issuance of Lockett v. Ohio, 438 U.S. 586 (1978). Cooper v. State, 336 So. 2d 1133 (Fla. 1976), was

then the law. **See**, e.g., Knight V. Dugger, 863 F.2d 705 (11th Cir. 1988); Jones v. Dugger, 867 F.2d 1277 (11th Cir. 1989); Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); Hargrave v. Dugger, 832 F.2d 1528 (11th Cir. 1987)(in banc); see also Cooper v. Dugger, 526 So. 2d 900 (Fla. 1988). Under Cooper's official, preclusive interpretation, reasonable and professional defense attorneys were restricted in their efforts to investigate, develop, and present nonstatutory mitigating evidence. This Court did not recognize this when it rejected Mr. Clark's claim on appeal of the denial of his Rule 3.850 motion in 1988. The Court did not then have the benefit of its decisions in Hall v. State, 541 So. 2d 1125 (Fla. 1989), and Meeks v. Dugger, __ so. 2d , 14 F.L.W. 313 (Fla., June 22, 1989), opinions which recognized that the error at issue herein is more than sufficient to require resentencing, and which should be held to be retroactive changes in law.

Susan F. Schaeffer, then an Assistant Public Defender and now a Circuit Court Judge, represented Mr. Clark in 1977. Her affidavit provides us with her understanding of the preclusive sentencing scheme then in effect and its effects on her and on Mr. Clark's case:

> My name is Susan F. Schaeffer and I am a Circuit Judge in Florida's Sixth Judicial Circuit. In 1977, I was an Assistant Public Defender and served as a trial attorney for Raymond Robert Clark when he faced charges of first-degree murder, kidnapping and extortion.
>
> At the time I represented Mr. Clark, I was aware that the State was going to actively seek the death penalty. I knew that if Mr. Clark was convicted that there would be a penalty phase at which the jury would consider aggravating and mitigating circumstances. The law at the time limited the relevant mitigating circumstances to those specifically listed in Fla. Stat. sec. 921.141 (before it was amended to allow consideration of any other mitigating circumstance). I was aware of that limitation and prepared Mr. Clark's case accordingly.
>
> Mr. Clark's capital trial and sentencing

proceedings took place at a time when Florida criminal defense attorneys, prosecutors, and judges generally understood that the mitigating evidence which could be introduced at a capital sentencing proceeding was restricted to the statutory list referred to above. Cooper v. State, 336 So. 2d 1133 (Fla. 1976), was controlling precedent at the relevant time. In Cooper, the Florida Supreme Court instructed that Florida capital sentencers, whether judge or jury, were limited strictly to the consideration of mitigating factors enumerated especially in Fla. Stat. sec. 921.141.

As a public defender, I understood expending time and energy on an attempt to develop and prove inadmissible evidence to be a waste of resources. My focus was on uncovering evidence of those statutorily enumerated mitigating circumstances which were at the time the only ones relevant to the capital process. I did not pursue or develop nonstatutory mitigation because to do so would have been fruitless (such nonstatutory mitigating circumstances were inadmissible under the statute) and therefore a waste of time, particularly when there was so much other work to do in preparing for Mr. Clark's trial. My strategy as to the development of mitigating circumstances was quite simply what the law then mandated: I looked for evidence of the statutory circumstances because the law at the time precluded the use and introduction of any nonstatutory mitigating circumstances.

The trial court also limited my access to the assistance of a court-appointed psychiatrist. The court ruled that I was not entitled to a confidential expert, i.e., that I would have to share any information provided by the expert with the State and the sentencing court. Subsequent to Mr. Clark's trial the law changed not only as to the relevancy of nonstatutory mitigating circumstances but also as to the availability of a confidential court-appointed expert. If the trial were today, or if the law then had allowed for consideration of nonstatutory mitigating evidence such as was recently addressed in Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), I may have made the required showing of need of such confidential assistance and obtained the expert's help in developing the mitigating circumstances present in Mr. Clark's case, including those nonstatutory mitigating circumstances which I could not pursue in 1977. A mental health professional would have provided assistance in developing nonstatutory mitigating circumstances regarding Mr. Clark.

If the proceedings were today, I certainly would have presented as a nonstatutory mitigating circumstance the

> disparate treatment afforded Mr. Clark's co-defendant, Ty Johnston, to wit: he would not receive the death penalty, he was to receive no mandatory minimum, nor would he receive consecutive terms, and in all likelihood, his sentence would be less than the maximum (which in fact ultimately proved to be the case). The jury deliberated twelve hours before convicting Mr. Clark; certainly the length of the deliberations reflected on Mr. Johnston's credibility. Ultimately the jury may have convicted Mr. Clark without believing Mr. Johnston's incredible claim that he was passively observing. Certainly the jury's doubts about Mr. Johnston and the respective roles the co-defendants played in the crime could have been used to compellingly argue that this death penalty was inappropriate for Mr. Clark when Mr. Johnston under his plea agreement would be receiving so much less.
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> Another area that I certainly would have explored in an effort to uncover nonstatutory mitigation would have been the relationship between Mr. Clark and Mr. Johnston. At trial, Mr. Johnston conceded that Mr. Clark had cared for him and looked after him. Acts of kindness could have been further developed and argued as nonstatutory mitigation justifying the imposition of a sentence of less than death. However, because I was aware that the law in effect at the time did not permit the introduction and use of such mitigation, I did not pursue such evidence and instead focused my attention on the development of statutory mitigating circumstances.

(App. 1). In Knight v. Dusser, 863 F.2d 705 (11th Cir. 1989), the Eleventh Court held that in reviewing a federal habeas petitioner's Hitchcock claim the federal courts should look to, inter alia, "the status of Florida's law on the date of sentencing, the record of the trial and sentencing, . . . post-trial affidavits or testimony of trial counsel and other witnesses and proffers of nonstatutory mitigating evidence claimed to have been available at the time of sentencing." Id., 863 F.2d at 708, citing, Hitchcock v. Wainwright, 770 F.2d 1514, 1517 (11th Cir. 1985)(in banc), Hitchcock v. Dusser, 107 S. Ct. 1821 (1987), and Harsrave v. Dusser, 832 F.2d 1528 (11th Cir. 1987)(in banc). Mr. Clark presented such evidence and proffers in his Rule 3.850 motion. The circuit and this Court, however, declined to grant relief on the basis of the then-existing case

law. However, the most important aspect of Mr. Clark's or any litigant's Hitchcock/Lockett claim, the preclusion on counsel, was not addressed.[4] This Court's decisions in Meeks v. Dugger, 14 F.L.W. 313 (Fla., June 22, 1989), and Hall v. State, 541 So. 2d 1125 (Fla. 1989), show that resentencing is required when counsel's hands are tied. Counsel's hands were tied here. This Court should apply Meeks and Hall, precedents which did not exist when it reviewed Mr. Clark's case in 1988, and should now correct what is a patently unreliable sentence of death.

Judge Schaeffer's construction of the statute was "reasonable": judges and lawyers in Florida, at the time, could not but have labored under that preclusive view of the statute. See Sonaer v. Wainwriaht, 769 F.2d 1488, 1494 (11th Cir. 1985) (Clark, Kravitch, Johnson, and Anderson, concurring in part and dissenting in part)("Of course, neither the state trial judge's nor Songer's counsel's construction of the statute was unfounded. Quite the contrary, theirs was the most reasonable interpretation of Florida law at the time.") See also Meeks v. Duaaer, 14 F.L.W. 313 (Fla., June 22, 1989)(noting proffered affidavit of counsel in which counsel explained that he was "constrained by the language of the statute and [therefore] did not investigate [nonstatutory] mitigating circumstances," and granting relief pursuant to Hitchcock because the sentencing "jury did not hear and consider substantial nonstatutory mitigating evidence" proffered during post-conviction proceedings); Hall v. State, 541 So. 2d 1125 (Fla. 1989)(same); Knight V. Dugger, supra, 863 F.2d at 759 (Clark, J., specially concurring)("Because of the state of

[4]This Court erroneously treated Mr. Clark's claim as merely a claim premised upon instructional error which was the situation in Hitchcock. However, Mr. Clark's claim was not simply a Hitchcock claim; it was a claim based upon counsel's constraint. In Hall and Meeks, this Court recognized this important distinction and held for the first time that such constraints upon counsel violated the eighth amendment.

the law in Florida at the time of Knight's trial, defense attorneys could not anticipate the conflict between the not yet decided Lockett decision and Florida's law limiting a jury's consideration of non-statutory mitigating evidence . . . Because the facts of this case reflect the existence of non-statutory mitigating evidence at the time of Knight's trial which had not been developed by defense counsel, a new sentencing hearing is required. This is not inconsistent with a finding by the district court that defense counsel was not ineffective. Defense counsel in 1975 prepared his case in light of Florida law at the time.") Judge Schaeffer also prepared Mr. Clark's case in 1977 in "light of Florida law at the time," Knight, 863 F.2d at 759. The facts of Mr. Clark's case also "reflect the existence of non-statutory mitigating evidence at the time of [Mr. Clark's] trial which had not been developed," Knight, supra, 863 F.2d at 759; Meeks, supra; Hall, supra, because of the preclusion on counsel. See Affidavit of Judge Schaeffer (App. 1); see also infra (discussing nonstatutory mitigating evidence not developed, investigated, or considered by Judge Schaeffer -- as she has explained in her affidavits -- because of the preclusion then in effect). Thus, in Mr. Clark's case "a new sentencing hearing is required" as well. Knight, supra, 863 F.2d at 759.

It was because of the preclusion on counsel that no non-statutory mitigating evidence made its way into the record. Cf. Clark v. Dugger, supra, 834 F.2d at 1569. Such evidence existed in Mr. Clark's case, in abundance (see infra, discussing available nonstatutory mitigation). It is because of the preclusion on counsel that relief, post-Hitchcock, is appropriate in Mr. Clark's case. Knight; Hall; Meeks.

Although the trial court, on the record, did not specifically order counsel not to present such evidence, cf. Clark, 834 F.2d 1561, 1569 n.16 (11th Cir. 1987), Judge Schaeffer's affidavit makes clear that it was the official

constraints imposed on her by Florida's 1977 capital sentencing scheme that tied her hands, and limited her efforts with regard to the kind and quality of mitigating evidence which she sought to develop and present. What she tried to develop was only what fit into the statue. Judge Schaeffer was strapped by the statute and by the operation of state law. The only opportunity Mr. Clark had for a meaningful capital sentencing determination was therefore skewed ab initio.

Meeks and Hall are in fact strikingly similar to Mr. Clark's case. In Hall, 541 So. 2d 1125, this Court had initially declined to grant relief on the basis of the constrained judicial review and restrictive judicial instruction aspects of that petitioner's Hitchcock claim, finding those errors harmless. See Hall v. Dugger, 531 So. 2d 76 (Fla. 1988). This Court, however, in Mr. Hall's case (as in Mr. Clark's) failed to consider the effects on trial counsel's efforts resulting from Florida's pre-Lockett capital sentencing scheme. That issue was presented for the Court's consideration in a subsequent motion for post-conviction relief. The Court then granted relief, Hall v. State, supra, 541 So. 2d 1125, because of the preclusion on counsel. This Court reached a similar result in Meeks v. Dugger, supra. The same result is warranted in Mr. Clark's case. This Court, however, did not even speak to this aspect of Mr. Clark's claim in its pre-Hall, pre-Meeks 1988 opinion.

It was the **"reasonable"** construction of the statute which, as Judge Schaeffer explains, rendered the assistance she provided at the sentencing phase of Mr. Clark's proceedings constitutionally inadequate and which deprived Mr. Clark of what the eighth amendment mandates -- an individualized and reliable capital sentencing determination. Judge Schaeffer's efforts were restricted by the application of state law; the State's case for death was therefore never subjected to "meaningful adversarial testing." See United States v. Cronic, 466 U.S. 648, 659 (1984).

Consequently, a wealth of mitigating evidence never got to the jury and judge. Counsel's "reasonable" but preclusive understanding resulted in her failure to develop and present substantial non-statutory mitigating evidence which could have been convincingly used to demonstrate to the sentencing jury and court that a life sentence was appropriate. The State cannot demonstrate that this error was harmless beyond a reasonable doubt in this case, just as it was unable to make such a showing in Hall, 541 So. 2d at 1128 ("All of this expert and lay evidence proves or tends to prove a host of nonstatutory mitigating circumstances. We cannot say beyond a reasonable doubt that the three aggravating circumstances found at Hall's original sentencing proceeding would have outweighed all of this . . ."), or in Meeks, 14 F.L.W. 313 ("The jury did not hear and consider substantial nonstatutory mitigating evidence . . . We cannot say beyond a reasonable doubt that the jury would not have returned a life sentence recommendation . . ." had the evidence been presented). Cf. Knight v. Dusser, 863 F.2d at 710 ("The State argues that the Lockett error was harmless in this case because so many aggravating factors were found . . . that no amount of non-statutory mitigating evidence could change the result . . . . The State's theory, in practice, would do away with the requirement of an individualized sentencing determination in cases where there are many aggravating circumstances.")

Like Judge Schaeffer, judges and lawyers in Florida at the time could not but have labored under a preclusive statutory construction. See Sonser v. Wainwright, 769 F.2d 1488, 1494 (11th Cir. 1985)(in banc)(Clark, Kravitch, Johnson, and Anderson, concurring); see also Harvard v. State, 486 So. 2d 540 (Fla. 1986). Mr. Clark was tried before Lockett v. Ohio, 438 U.S. 586 (1978), and before Sonser v. State, 365 So. 2d 696 (Fla. 1978), at the time when the statute's preclusive interpretation had its most far reaching effects. Cf. Hitchcock v. Dusser, supra, 107 S. Ct.

at 1823 (noting that Florida judges conducting sentencing proceedings during the relevant time period "believed that Florida law precluded consideration of nonstatutory mitigating circumstances"). The constraints imposed by that interpretation were discussed by the Florida Supreme Court in Harvard, supra, and by the Eleventh Circuit in Sonser V. Wainwright, 769 F.2d at 1489.

As the Florida Supreme Court noted in Harvard v. State, 486 So. 2d 540 (Fla. 1986), "at the time appellant was sentenced, our death penalty statute could have been reasonably understood to preclude the introduction of nonstatutory mitigating evidence." Id. at 540.

Here, as in Sonser v. Wainwrisht, Judge Schaeffer's failures to develop and present available nonstatutory mitigating evidence were "not the product of a tactical choice" but were a direct result of the official constraints. 769 F.2d at 1491 (footnote omitted); Affidavit of Judge Schaeffer (App. 1). In United States V. Cronic, 466 U.S. 648 (1984), the Supreme Court held that

> [t]he right to the effective assistance of counsel is . . . the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing . . . . But if the process loses its character as a confrontation between adversaries, the constitutional suarantee is violated.

Id. at 656-7 (emphasis added)(footnote omitted). Mr. Clark's is such a case.

Mr. Clark's penalty trial lost its character as a confrontation between adversaries because his attorney operated in a system which constrained her presentation of nonstatutory mitigation.[5] As Judge Clark explained in Sonser, in conformity

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[5]The irony of the situation, in fact, is that the more knowledgeable and professional a defense attorney was prior to Lockett, the more such an attorney would believe herself precluded. When counsel knew nonstatutory mitigation could not be presented, and would not be considered, counsel of course would have and did put her limited resources to other use (See Affidavit of Susan Schaeffer [App. 1]).

with the Florida Supreme Court's recent pronouncements, see Meeks, supra; Hall, supra, the majority opinion (granting only resentencing before a judge) did not go far enough because it,

> ignore[d] the reality of the state of mind of the prosecutor, the defense counsel, the trial judge and the jury with respect to the meaning of the Florida death penalty statute at the time of Songer's capital sentencing proceeding in **1974**. The effect of their combined perception resulted not only, as the majority acknowledges, in the trial judge's failure to consider nonstatutory mitigating evidence, but also in counsel's failure to develop or present nonstatutory mitigating evidence . . .

769 F.2d at **1490** (Clark, Kravitch, Johnson and Anderson, JJ., concurring)(emphasis added).[6] Mr. Clark is no less entitled to relief, as Hitchcock and this Court's recent rulings make undeniably clear. See Hall, supra; Meeks, supra.

A. THE OFFICIAL CONSTRAINTS

Cooper v. State, **336** So. 2d **1133** (Fla. **1976)** was the law at the time Mr. Clark was sentenced to death. There, this Court had held:

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[6]The right to counsel is violated when the State "interferes . . . with the ability of counsel to make independent decisions about how to conduct the defense." Strickland v. Washinston, **466** U.S. **668, 687 (1984);** see also United States v. Cronic, supra. Thus, for example, a defendant is deprived of the right to counsel by a state statute disallowing summation at a bench trial, Herring v. New York, **422** U.S. **853 (1975);** by a state statute requiring a criminal defendant who wishes to testify on his own behalf to do so prior to the presentation of other defense testimony, Brooks v. Tennessee, **406** U.S. **605 (1972);** or by a state statute restricting a criminal defendant's right to testify on his own behalf. Ferguson v. Georgia, **365** U.S. **570 (1961).**

A fortiori, a criminal defendant's right to counsel, Cronic, supra, is violated where, as here, a state statute, Brooks, supra; Ferguson, supra, and the official judicial interpretation given that statute by the state's highest court, see Cooper v. State, supra, tie counsel's hands and "interfere" with counsel's "decisions about how to conduct the defense." Strickland v. Washinston, **466** U.S. at **687.** Mr. Clark's counsel's hands were tied. The statute then in effect and its official interpretation, Cooper, supra, was the "objective factor external to the defense [which] impeded counsel's efforts . . ." Amadeo v. Zant, 108 S. Ct. **1771, 1776 (1988),** citing Murray v. Carrier, **477** U.S. **478, 488 (1986).** Mr. Clark's resulting sentence of death was neither individualized nor reliable and was thus obtained in violation of Hitchcock and the eighth and fourteenth amendments.

> The sole issue in a sentencing hearing under Section 921.141, Florida Statutes (1975), is to examine in each case the itemized aggravating and mitisatins circumstances. Evidence concerning other matters have no place in that proceeding any more than purely speculative matters calculated to influence a sentence throush emotional appeal. Such evidence threatens the proceeding with the undisciplined discretion condemned in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).
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> [T]he Legislature chose to list the mitisatins circumstances which it judged to be reliable for determining the appropriateness of a death penalty for "the most aggravated and unmitigated of serious crimes," and we are not free to expand the list.
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> The legislative intent to avoid condemned arbitrariness pervades the statute. Section 921.141(2) requires the jury to render its advisory sentence "upon the following matters: (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6); (b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist. ..." (emphasis added). This limitation is repeated in Section 921.141(3), governing the trial court's decision on the penalty. Both sections 921.141(6) and 921.141(7) begin with words of mandatory limitation. This may appear to be narrowly harsh, but under Furman undisciplined discretion is abhorrent whether operating for or against the death penalty.

336 So. 2d at 1139 and n.7 (emphasis in original).

Now, this Court has recognized that Cooper was interpreted as limiting consideration of mitigating factors.[7] See Harvard v. State, supra; Perry v. State, 395 So. 2d 170, 174 (Fla. 1981)(trial judge, citing Cooper, "followed the law as he believed it was being interpreted at the time of trial" and precluded evidence of nonstatutory factors); Jacobs v. State, 396 so. 2d 713, 718 (Fla. 1981)(judge "held the mistaken belief that

[7] In fact, in Cooper v. Dugger, 526 So. 2d 900 (Fla. 1988), this Court recognized, post-Hitchcock, the very constitutional error created by its initial Cooper opinion.

he could not consider nonstatutory mitigating circumstances" where sentence was imposed after Cooper and before Mr. Clark's 1977 sentencing proceeding). Cf. Lucas v. State, 490 So. 2d 943 (1986); McCrae v. State, 510 So. 2d 874 (Fla. 1987); Morsan v. State, 515 So. 2d 975 (Fla. 1987); Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987).[8]

In Meeks and Hall, this Court expressly acknowledged that those constraints precluded counsels' efforts, and therefore that Hitchcock and Lockett were violated. Of course, that restrictive interpretation, albeit "reasonable", resulted in constitutional error which in this case "precluded the development of true facts," Smith v. Murray, 106 S. Ct. 2661, 2668 (1986). The fact remains that the status and operation of Florida law at the time Mr. Clark was sentenced to death strapped his attorney's hands, cf. United States v. Cronic, 466 U.S. 648 (1984), and by operation of state law deprived Mr. Clark of the reliable and individualized capital sentencing determination which the eighth amendment requires.

B. THE NONSTATUTORY MITIGATION THAT WAS NEVER DEVELOPED DUE TO THE PRECLUSION ON COUNSEL

Judge Schaeffer's affidavit relates some of what would have been pursued. What would have been "produce[d]", Clark 834 F.2d

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[8]This Court has likewise recognized that Cooper affected attorneys' presentation of evidence at the sentencing phase of capital trials, and that an attorney's failure, during the post-Cooper/pre-Songer period to develop and present available mitigating evidence, was "reasonable" in light of the then prevailing understanding of capital sentencing law. Thus, in Harvard v. State, 486 So. 2d 540 (Fla. 1986), the Court, in denying a claim of ineffective assistance of counsel at sentencing, "conclude[d], as did the trial judge, that the conduct of Harvard's counsel, given the state of the law on the date the case was tried, reflects reasonable professional judgment." Id. at 540. This was so because "at the time appellant was sentenced, our death penalty statute could have been reasonably understood to preclude the introduction of nonstatutory mitigating evidence." Id. at 539; see also Muhammad v. State, 426 So. 2d 533, 538 (Fla. 1982)(counsel not ineffective because of restrictive view of statute and counsel would not be "expected to predict the decision in Lockett v. Ohio."); Meeks, supra; Hall, supra.

at **1570,** had counsel not been precluded would have made a real difference. Under no construction can it be said that the preclusion on Judge Schaeffer's efforts to develop and present nonstatutory mitigating evidence would have had "no effect upon the [sentencers'] deliberations." See Skipper v. South Carolina, **106 S.** Ct. **1669, 1673 (1986).** See also Hall, Meeks; Knight, supra.

In this regard, it should be noted that the error herein was compounded by the improper doubling of aggravating circumstances. In Mr. Clark's initial appeal to this Court, the State conceded and the Court agreed that the trial court had erred in finding two of the aggravating circumstances listed in the sentencing order:

> The State concurs with Clark's contention that the trial court erroneously doubled up certain aggravating circumstances which this Court held was prohibited in Provence v. State, **337** So.2d **783** (Fla. **1976).** We find that the trial court erred in finding as two separate aggravating circumstances that the murder was committed during a robbery for pecuniary gain and, in finding as two separate aggravating circumstances, that the victim was killed in order to eliminate him as a witness to the robbery and that the murder was committed to hinder law enforcement.

Clark v. State, **379** So. 2d at 104.

This Court in affirming, however, failed to consider the fact that the jury had improperly been instructed on these extra aggravators, and reasonably could have believed that doubling up was proper. No consideration was given to the question of whether the jury's recommendation could have rested upon an erroneous interpretation of the instructions. Cf. Mills v. Maryland, **108** S. Ct. **1860 (1988).** Certainly in reviewing Mr. Clark's Hitchcock claim consideration must be given to the impact under Mills of loading the jury up with impermissible aggravating circumstances while improperly limiting the available mitigating circumstances.

Obviously, the development and presentation of evidence and argument regarding the disparate treatment afforded to the cooperating co-defendant would have been significant (see App. 1 [Affidavit of Judge Schaeffer]). In Brookings v. State, 495 So. 2d 135 (Fla. 1986), this Court reversed a judge's override of a jury's "life recommendation'' because that recommendation could well have rested on the independent nonstatutory mitigating effect of the life sentence given to a cooperating accomplice in exchange for testimony. Id. at 142-43.[9] The Court held that the disparate treatment given to a cooperating accomplice, as opposed to the treatment given the capital defendant, were "reasonable" mitigating factors to be considered by the jury and the court at the penalty phase. Brookings, 495 So. 2d at 142-43. Similarly, in granting post-conviction relief on the basis of the Hitchcock violations in Downs v. Dugger, 514 So. 2d 1069, 1072 (Fla. 1987), this Court noted that the disparate treatment afforded a cooperating accomplice was valid nonstatutory mitigation demonstrating that the Hitchcock error was not harmless.

Raymond Clark was prosecuted to the utmost. "Ty Stick" Johnston, in exchange for his testimony, was given special treatment: no death penalty and early parole. (Johnston today is not incarcerated.) His status as a cooperating accomplice and, in turn, the disparate treatment given to him and Mr. Clark, should have been developed and forcefully presented as [nonstatutory] mitigating factors, Downs; Brookings; Hitchcock, but counsel's efforts were restricted by the statute. Moreover, here as in Pentecost v. State, So. 2d ___, 14 F.L.W. 319 (Fla., June 29, 1989), "the testimony would have raised in the jurors' minds the question of who actually [shot] the victim."

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[9] Accord McCampbell v. State, 421 So. 2d 1072 (Fla. 1982); Cailler v. State, 523 So. 2d 158 (Fla. 1988); Harmon v. State, 527 So. 2d 182 (Fla. 1988); Spivey v. State, 529 So. 2d 1088 (Fla. 1988); DuBoise v. State, 520 So. 2d 260 (Fla. 1988); Malloy v. State, 382 So. 2d 1190 (Fla. 1979).

Id., slip op. at 4. This is valid mitigation. Id. Counsel's efforts to present such mitigating issues for the jury's consideration, however, were constrained (See App. 1, Affidavit of Susan Schaeffer).

Similarly, the jury should have been asked to consider, in mitigation, that the only direct evidence implicating Mr. Clark was that provided by cooperating accomplice "Ty Stick" Johnston. Counsel, however, was precluded from developing such evidence and argument because of the then-existing constraints imposed by the statute and its official interpretation. Such matters, however, also mitisated the offense. The jury should have been allowed to consider the mitigating effect of the fact that the only direct evidence implicating Mr. Clark in the capital offense came from an accomplice who had every reason to lie in order to save himself. Nothing in any instruction allowed the jury to consider as mitigation, at sentencing, the fact that questions remained to be answered, because the prosecution was essentially based on bargained-for accomplice testimony, and the law precluded counsel from properly developing and presenting the issue for the penalty phase jury's consideration. The jury, at the penalty phase, was not allowed to deliberate and reflect with regard to what numerous courts have considered even in non-capital cases: the fact that accomplice testimony is inherently unreliable.[10]

But there is a great deal more. Judge Schaeffer relates that she would have sought to develop mental health mitigation

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[10] See Phelps v. United States, 252 F.2d 49 (5th Cir. 1958); United States v. Curry, 471 F.2d 419 (5th Cir. 1973); Turner v. State, 452 A.2d 416 (Md. 1982); Thompson v. State, 374 So. 2d 338 (Ala. 1979); Bendle v. State, 583 P.2d 840 (Alaska 1978); State v. Howard, 400 P.2d 332 (Ariz. 1965); Redman v. State, 668 S.W.2d 541 (Ark. 1984); Castell v. State, 301 S.E.2d 234 (Ga. 1983); State v. Evans, 631 P.2d 1220 (Idaho 1981); State v. Hutchison, 341 N.W.2d 33 (Iowa 1983); State v. Harmons, 664 P.2d 922 (Mont. 1983); State v. Morse, 318 N.W.2d 889 (Neb. 1982); Sheriff, Clark County, Nevada v. Hamilton, 646 P.2d 122 (Nev. 1982); People v. Lipsky, 443 N.E.2d 925 (N.Y. 1982); State v. Lind, 322 N.W.2d 826 (N.D. 1982); Oregon v. Hall, 595 P.2d 1240 (Or. 1979); Mathis v. State, 590 S.W. 449 (Tenn. 1979); Paulus v. State, 633 S.W.2d 827 (Tex. App. 1981).

had the statute and its official interpretation not precluded her (see App. 1). Such evidence would have been compelling, as the account of a qualified mental health expert who was asked to evaluate Mr. Clark in this regard demonstrates:

> Mr. Clark is an individual who essentially has never grown up. It was indicated that despite his two violent episodes, he is generally an extremely passive person who avoids conflicts whenever possible. His passive and escapist approach to problem solving is characterized by his numerous suicide attempts, several of them being almost lethal. Many of Mr. Clark's behavior patterns can be explained by his need to compensate for his feelings of inadequacy and perceived rejection. He is easily manipulated and influenced by others, particularly by those with whom he is in a dependent relationship. Although it could be assumed that due to the codefendant's age, he was dependent on Mr. Clark, from a review of the relevant data, including the codefendant's records and a transcript of taped telephone calls between the two parties, it is clear that Mr. Clark was certainly the weaker of the two emotionally. Throughout these conversations, Mr. Clark literally begs Ty to respond in kind when he tells him "I love you," but fails to get such a response. As is typical with adult children of alcoholics, Mr. Clark was apparently still searching for the affection lacking in his childhood. Although one could easily accept the codefendant's testimony regarding Mr. Clark at face value, a review of the records clearly reveals numerous contradictions in Ty's testimony, suggesting the self-serving nature of his statements.
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> The additional materials reviewed by this examiner strongly support the contention that Mr. Clark derives from an extremely unstable family background, which is characterized by neglect, emotional deprivation and a lack of significant positive role models. This man has demonstrated significant emotional problems from an early age. Mr. Clark was ignored by his natural father who left the family when Mr. Clark was 4 years old. He was subsequently raised by his mother and step-father. The parents report that their marriage was unhappy and that both of them abused alcohol. They were inadequate and ineffective parents who admit that Mr. Clark "never really had a fair chance when he was growing up." Mr. Clark was punished to excess during his childhood and lacked love and attention. He was never adopted by his step-father, but took his name, perhaps in an effort to feel as if he belonged. When his step-father left, Mr. Clark was abandoned by

his mother and taken in by a neighbor who attempted to provide him with a home.

Given his home situation, it is not surprising that Mr. Clark did poorly in school. It is reported that at times he would go to the neighbor's home for breakfast as the provision of meals in the Clark household was inconsistent. In **1959,** when Mr. Clark enlisted in the Navy, he was noted to be malnourished and underweight, which is no doubt a consequence of his upbringing.

Mr. Clark's first suicide attempt occurred in 1962 while he was in the Navy. As with his later suicide attempts, it was nearly lethal. He remained comatose for two days and was described as having a "long term pattern of emotional instability." A later suicide attempt in **1964** rendered Mr. Clark unconscious as a result of the inhalation of noxious gas and slashing of his wrists. Mr. Clark's most recent suicide attempt was in **1982** and caused respiratory arrest. CPR was administered during Mr. Clark's transport by helicopter to a hospital. These suicide attempts are congruent with his history of depression and emotional disturbance. In prison, he was medicated with both Triavil and Sinequan for his depression.

Mr. Clark has developed a deeply ingrained sexual identity conflict which has contributed to the development of pathological relationships with persons who tend to dominate and easily influence him due to his highly vulnerable emotional state. He has a history of depression, poor self-image, and failure at his various endeavors despite what is reported to be an average IQ.

In addition to Mr. Clark's emotionally unstable background, a recent affidavit of Ruth Rogers (Mr. Clark's mother) reveals that he was diagnosed as suffering from encephalitis when he was about **12** years old. This information was not known to this examiner at the time of my previous examination, or I would have strongly recommended that Mr. Clark be evaluated for possible neurological deficits. Encephalitis, with its accompanying high fever, is known to produce irreversible brain damage, which certainly could have contributed to Mr. Clark's deviant behavior patterns, as could his abuse of narcotics. Additionally, Mr. Clark was a participant in a drug experimentation program in the California prison system during which time a variety of chemical substances were administered to Mr. Clark. The long term effects of these drugs are not clear. This strongly supports the need for neurological testing and evaluation.

> A review of Mr. Clark's Department of Corrections records reveals that Mr. Clark has continued to be free of management problems at Florida State Prison as he has not had a disciplinary report in eight years. In view of his positive adjustment and personality profile, it is likely that he would not pose a management problem should he be permitted to reside within an open prison population.
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> In conclusion, the current evaluation supports my original impressions that Mr. Clark is a seriously disturbed individual, who under the stress of a pathological relationship, has a tendency to have a tenuous grasp on reality. This is consistent with the 1965 evaluation by Dr. Owen E. Henniger, a psychiatrist who concluded that Mr. Clark was insane at the time of his prior offense in California. Based on the additional materials reviewed, it is this examiner's contention that Mr. Clark was under the substantial psychological domination of the codefendant, despite the disparate age difference of the two parties. He suffers from Mixed Personality Disorder which is chronic in nature and was certainly in existence at the time of both of the offenses. Strong components of Borderline and Dependent Personality Disorder are also present, in that Mr. Clark engages in physically self-damaging acts, has an identity disturbance relating to self-image and gender identity, has a pattern of unstable and intense interpersonal relations, is impulsive in areas that are self-damaging and has affective instability as documented by his periods of depression. Given Mr. Clark's history, I would strongly recommend that a neurological examination be conducted on Mr. Clark to more definitively rule out any Organic Brain Syndrome which may have been caused by his history of encephalitis, drug use, and participation in drug experimentation.

(App. 2 [Report of Dr. Krop]).

The judge and jury charged with the responsibility of determining Raymond Robert Clark's ultimate fate had no opportunity to consider evidence regarding his background, character or early life. The law restricted his attorney's efforts. The humanity of a person about to be sentenced for a capital offense is the critical question at the penalty phase of a capital trial. Evidence bearing on who Raymond Clark was and where he came from would have shown that his personality and motivations could be explained, at least in part, by his history

and thus would have shown that there was a Ray Clark worth saving. As the Supreme Court recently explained:

> [F]ull consideration of evidence that mitigates against the death penalty is essential if the jury is to give a "reasoned moral response to the defendant's background, character, and crime" . . . In order to ensure "reliability in the determination that death is the appropriate punishment in a specific case," . . . the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background, character, or the circumstances of the crime . . . Our reasoning in Lockett and Eddings thus compels a remand for resentencing so that we do not "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty" . . . When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.

Penry v. Lynaugh, 109 S. Ct. ___, 45 Cr. L. 3188, 3195 (June 26, 1989)(citations omitted)(emphasis in original). Mr. Clark's sentence of death, resulting from the constraints imposed on his counsel, is also unacceptable and incompatible with what the eighth and fourteenth amendments command.

Unless the sentencer can consider "compassionate and mitigating factors stemming from the diverse frailties of humankind," capital defendants will be treated not as unique human beings, but as a "faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." Woodson v. North Carolina, 428 U.S. 280, 304 (1976). Such relevant mitigating evidence was never considered by Mr. Clark's sentencers. Strapped by the operation of state law, Judge Schaeffer never asked them to. Relevant and compelling mitigating evidence, however, was available and should have been considered:

Raymond Robert Clark was born in Meriden, Connecticut on July 12, 1941 to Ruth and Frank Partridge. Ray was "a wartime baby - conceived so that Mr. Partridge could avoid the service." (App. 5 [Aff. of Harry Clark]). His mother, now known as Ruth

Rogers, recalls that Ray's father was a "womanizer and a gambler . . . [he] never cared much about Ray, he just ran around on me all the time. In fact, one of Frank's girlfriends had his baby before [we] were even divorced." (App. 4 [Aff. of Ruth Rogers]).

Ray's mother remarried when he was four years old. Her second husband, Harry Clark, moved the family to Independence, Missouri, where Ray grew up unwanted, ignored and unloved. "Because we were never the kind of parents we should have been," Harry Clark recalls, "Ray never really had a fair chance when he was growing up." Ray's mother, Ruth, paints a similar picture:

> Harry and I did not have a good relationship - especially after our daughter, Ruth Ann, was born. Harry paid a lot of attention to Ruth Ann when she was a baby and just ignored Ray. It hurt me a lot to see how Harry rejected Ray. Because I was so unhappy, I started to drink a lot and that made things a lot worse.

(Id.).

Ruth and Harry Clark's marital misery left Ray tragically scarred. Their alcoholism prevented them from interacting in any meaningful way with Ray, leaving him ignored and neglected. Ray's resulting emotional problems went largely unnoticed by his parents who were too unhappy with their own lives to care:

> Ruth and I both drank a lot when Ray was growing up and after awhile we never really paid attention to what was going on with him. I do remember that Ray was having problems in school, but I never paid much attention to what they were . . . Even though Ray was having a hard time growing up normally, Ruth and I didn't pay much attention to it at the time. We were busy with our own problems and weren't smart enough to realize Ray needed help.

(App. 5 [Aff. of Harry Clark]).

Ray's step-father explains that his "life was at a standstill then." Ruth recalls that

> Harry was always very moody. Sometimes he would just sit there silently for days. The only time he ever really paid attention to Ray was when he misbehaved. I remember one time, when Harry was beating Ray in the basement with his belt, I got so upset that I ran down and grabbed the belt and cracked

> Harry with it and told him that if he ever laid a hand on Ray again, it would be the last time.

(App. 4 [Aff. of Ruth Rogers]). Harry's own confusion and unhappiness is revealed in his comments regarding Ruth's reaction to his physical abuse of her son:

> Ruth never came to Ray's defense when I would get onto him like a normal mother would. When I would punish or yell at Ray, Ruth just didn't care what was happening. Sometimes I would have to spank Ray when he was bad and I am sure that there were times when I hit him too hard. Ray never had the kind of supervision that he deserved, and our drinking problem just made everything worse.

(App. 5 [Aff. of Harry Clark]).

The depression and despair of a second failed marriage rendered Ruth Clark incapable of providing her son with the nurturing love necessary to overcome the damage of his step-father's cruel rejection and abuse:

> About all that Ruth ever did for Ray was feed him. There was never the closeness or caring that most mothers have for their children. When I would get up in the morning to go to work, Ruth would stay in bed and when I said "Good Morning" to her she would say to me, "What the hell is so good about it?"

(Id.).

Joyce Clark, the wife of Ray's step-brother, Bob, reports that Ray's mother "was a selfish individual who rejected him and as long as he was living with his mother and step-father she discriminated against him and favored his younger half-sister." (App. 11 [California Probation officer's report, 4/23/65]).

Ray's childhood was consistently marked by his constant attempts to win the approval and affection of those around him. Despite a desperate need for the guidance and support of strong parental role models, Ray was denied caring and love during his critical childhood years. A neighbor, Frances Schmidt, recalls that

> [Ray] never could do anything to please his parents and he tried so hard . . . No one in his family showed him any respect or love. His mother didn't speak a civil word to that

> child from the time he got up in the morning til he went to bed at night. Poor thing, he heard yelling and shouting all the time. It breaks my heart when I remember that poor kid . . . Ray wanted to be loved more than anything . . .

(App. 6 [Aff. of W. J. Schmidt]).

Denied even the simplest display of caring in his own home, Ray sought refuge by spending as much time as he could with the Schmidt family:

> Little Ray used to call me "mom", not his mother. He used to come to my house in the morning, to go to school with my children. Many days he had no breakfast at home and would eat breakfast at my house . . . He was so neglected at home that the little bit of love we could give him meant a lot to him.

(Id.).

School records show that Ray was unable to achieve on a level commensurate with his peers. His academic performance ratings were consistently poor or failing. Ray's mother explains that

> As Ray got older, he started acting like he might have some problems and so we sent him to a military academy called the De La Salle School. The school was run by Catholic Franciscan Brothers who knew how to straighten out boys that were difficult. The school was not too far from where we lived so Ray still lived at home even though he was going to a special school.

(App. 4 [Aff. of Ruth Rogers]). This attempt to intervene on Ray's behalf proved futile, however, because he only attended this "special school" for a short time before the Clark family came apart at the seams:

> Things just got worse and worse at home and then I found out Harry was sleeping with my best friend, Florence, and so I told him to leave. When Harry left me . . . I was so confused and miserable that I just didn't care what happened, so Harry took Ruth Ann with him but he left Ray behind . . . Since I didn't have any money I had to move from Independence into a hotel apartment in Kansas City.

(Id.). The loss of her husband and daughter devastated Ray's mother. Harry Clark explains how the divorce affected Ray:

> I just couldn't take it anymore, and so I left Ruth. When I left, I took our 10 year old daughter Ruth Ann with me because things were too bad with Ruth to leave her there. Ruth didn't try to stop me from taking Ruth Ann because she knew that if she contested it, I would win . . . After I left, Ruth moved to a bad part of town and just abandoned Ray, even though he was still a young boy.

(App. 5 [Aff. of Harry Clark]). Frances Schmidt, a neighbor to the Clark family, recalls what happened when Ray was abandoned by his mother and step-father:

> . . . there came a time when the poor child had to live with us for one and a half years. His mom and step-dad had divorced and she just kicked him out on the streets. My son asked me if Ray could live with us as he had no place to go -- he was all of thirteen. Ray simply had no place to go and no one to turn to but us . . . After his parents were divorced, Ruth moved to a bad part of town. All she wanted to do was entertain all the men, and she didn't care what happened to her son. I remember he came to stay with us in November, when it was just getting cold.

(App. 6 [Aff. of W. J. Schmidt]).

Barely a teenager, Ray Clark had already been emotionally, psychologically and intellectually crippled by the family into which he was born. The Schmidt family tried to give Ray the caring he had never had before, but the damage was done. After a few more years of high school, Ray dropped out, fled to California, and joined the Navy. Navy medical records indicate that at the time Ray enlisted, he was suffering from malnutrition (App. 8 [Navy Records of Ray Clark]).

The emotional deprivation, neglect and abuse suffered during childhood and adolescence took its toll on Ray Clark during young adulthood and led to a gradual downward spiral into the escape of dangerous and self-destructive drugs. During his Navy service, Ray was accused of possessing and/or distributing barbituates. He responded by attempting suicide -- Ray ingested 70 Dexamyl tablets, which left him comatose for two days. Dr. Blair, a Navy psychiatrist, notes:

> [H]e was 'depressed' and ingested to avoid going to the brig . . . Past history shows a long time pattern of emotionality instability marked by an itinerant way of life and his own view of himself as moody, beligerent [sic] and a person who finds it difficult to take orders. Has much disciplinary action since in the Navy, mostly for unauthorized absence.

(Id.).

Because of Ray's immaturity and instability, he eventually received a dishonorable discharge from the Navy. Ray then moved into a garage apartment in Long Beach, California, rented to him by the Taylor family, who were friends and neighbors of Ray's step-brother, Bob Clark. Mrs. Taylor remarked that

> [s]he had heard that [Ray] had been kicked around by his parents . . . she found that he hated his mother and had not much use for his father either. However, he seemed to like kids and there was always a gang of boys and girls around him. It appeared as if he wanted to be a big shot in their eyes . . . Sometimes [Ray] told her he felt people didn't like him . . . She felt sorry for [Ray] and since they were a big family she took him in and always treated him well and did everything they could to help him.

(App. 11 [California Probation Officer's report, 4/23/65]).

In 1964, Ray attempted suicide for the second time. Dr. Owen E. Heninger, a psychiatrist, relates the events surrounding this incident:

> Mr. Clark recently came to medical attention when he was discovered with both arms and wrists slashed and apparently trying to kill himself by breathing household gas fumes.
>
> According to Mr. Clark, this took place because of a mutual suicide pact he had with a **"boy"** whom he was in love with. He and the "boy" had had a long and close relationship together and when he told the "boy" that he was leaving town, the **"boy"** threatened to kill himself. "He put his arms around me and cried." They decided that rather than separate, they would mutually commit suicide, wrote a suicide note, turned on the gas without lighting it and went to bed together. (. . . Mr. Clark said he had had six beers). He awoke in the middle of the night, left the room, and when he returned the **"boy"** was dead and at this point he tried to kill himself by slashing his arms with a razor and breathing gas fumes.

(App. 10 [Psychiatric Examination Report of Dr. Heninger]). Ray was convicted of first degree murder and was incarcerated for approximately nine years in a California prison despite Dr. Heninger's conclusion that Ray was insane at the time of the offense:

> Under the influence of alcohol, noxious gas fumes and the psychological conflict of separating from his love object, he lost control over his primitive impulses of destructive rage and acted them out directly on his love object . . . In my opinion, [Mr. Clark] was insane at the time of the act; he was, by reason of a disease of the mind, unable to choose the right and refrain from the wrong.

(Id.).

While incarcerated in California, Ray was used as a guinea pig in a drug experimentation program. A variety of chemicals were administered to Ray, including Dichlorvos, an organophosphorus insecticide generally used in the form of impregnated strips or blocks which slowly release vapor. The U.S. Department of Health recommends that insecticide strips with Dichorvos not be used in rooms where ill patients or the aged are confined or in areas where food is prepared or served. Ray was also given Indocin as part of these drug experiments. Potential side effects of Indocin include depression, anxiety, depersonalization, mental confusion and psychic disturbances including psychotic episodes. Other chemicals were administered to Ray as well (See App. 9 [drug experimentation records from California Prison Records]). However, "[t]he long term effects of these drugs is not clear [but] strongly supports the need for neurological testing and evaluation" (App. 2 [Report of Harry Krop, 4/24/88]).

In 1974, Ray was paroled and put on work release washing windows at a juvenile facility in California where he met his codefendant in this case, Ty Johnston. Johnston's relationship with Mr. Clark, and his motives at trial also should have been explored. Counsel, however, was restricted.

C. MR. CLARK'S ENTITLEMENT TO HABEAS CORPUS RELIEF

The penalty phase proceedings in this case, like those in Hitchcock, Meeks, and Hall, violated the eighth amendment. The same preclusive consideration was provided because the statute restricted counsel. See Meeks; Hall, supra.

> The key aspect of the penalty trial is that the sentence be individualized, focusing on the characteristics of the individual. Gresq v. Georsia, 428 U.S. 153 (1976). Here the jurors were [not permitted to] mak[e] such an individualized determination.

Thomas v. Kemp, 796 F.2d 1322, 1325 (11th Cir. 1986). No one took note of anything concerning the character of the offender and circumstances of the offense, Gregg v. Georgia, 428 U.S. 153 (1976), which mitigated against death but which was not in the statute. The evidence never even reached the jury. Judge Schaeffer's hands were tied. However, ample [nonstatutory] mitigation was available and should have been developed, presented, and considered.

Mr. Clark respectfully submits that the ends of justice counsel reconsideration because the claim was never properly assessed during the litigation of his prior action. Meeks and Hall demonstrate that Mr. Clark is entitled to relief. The ends of justice also counsel consideration of this significant claim for this error "precluded the development of true facts," Smith v. Murray, 106 S. Ct. at 2668, and rendered Mr. Clark's sentence of death fundamentally unreliable, unfair, and wrongful. This Court should grant habeas relief as it did in Meeks and Hall.

CLAIM III

MR. CLARK'S SENTENCING JURY WAS IMPROPERLY INSTRUCTED ON THE "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" AGGRAVATING CIRCUMSTANCE, AND THE AGGRAVATOR WAS IMPROPERLY ARGUED AND IMPOSED, IN VIOLATION OF RHODES V. STATE, MAYNARD V. CARTWRIGHT AND THE EIGHTH AND FOURTEENTH AMENDMENTS, AND APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN FAILING TO URGE THESE ERRORS.

This Court recently explained:

> [T]he prosecutor argued that the fact that the victim's body was transported by dump truck from the hotel where she was killed to the dump where she was found supported the aggravating factor that the murder was heinous, atrocious, and cruel. We have stated that a defendant's actions after the death of the victim cannot be used to support this aggravating circumstance. Jackson v. State, 451 So.2d 458 (Fla. 1984); Herzos v. State, 439 So.2d 1372 (Fla. 1983). This statement was improper because it misled the jury.

Rhodes v. State, So. 2d ___, 14 F.L.W. 343, 345 (Fla., July 6, 1989)(emphasis added). In Cochran v. State, So. 2d ___, No. 67,972 (Fla., July 27, 1989), this Court stated:

> Our cases make clear that where, as here, death results from a single gunshot and there are no additional acts of torture or harm, this aggravating circumstance does not apply.

Slip op. at 6.

The jury was not advised of these limitations on the "heinous, atrocious or cruel" aggravating factor. Indeed, the unconstitutional constructions rejected by this Court are precisely what was argued to the jury and what the judge employed in his own sentencing determination. As a result the instructions failed to limit the jury's discretion and violated Maynard v. Cartwrisht, 108 S. Ct. 1853 (1988). In addition, the judge specifically referred to and relied upon the family's suffering when he pronounced the sentence in open court.

The jury instruction given in Cartwrisht was virtually identical to the instruction given to Mr. Clark's sentencing jury. The eighth amendment error in this case is absolutely

indistinguishable from the eighth amendment error upon which a unanimous United States Supreme Court granted relief in Maynard v. Cartwrisht, 108 S. Ct. 1853 (1988). The circuit court here instructed the jury:

> Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. Cruel means designed to inflict a high degree of pain, utter indifference to, or enjoyment of the suffering of others; pitiless.

(DR. 3200-01). The Tenth Circuit's in banc opinion (unanimously overturning the death sentence) explained that the jury in Cartwrisht received virtually the identical instruction:

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

Cartwrisht v. Maynard, 822 F.2d 1477, 1488 (10th Cir. 1987)(in banc), affirmed 108 S. Ct. 1853 (1988). In Cartwrisht, the Supreme Court unanimously held that such an instruction did not "adequately inform juries what they must find to impose the death penalty." 108 S. Ct. at 1858. The decision in Cartwrisht clearly conflicts with what was employed in sentencing Mr. Clark to death. See also Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(in banc)(finding that Cartwrisht and the eighth amendment were violated when heinous, atrocious, or cruel was not sufficiently limited).

The Florida Supreme Court has held that the "especially heinous, atrocious or cruel" statutory language is directed only at **"the** conscienceless or pitiless crime which is unnecessarily torturous to the victim." State v. Dixon, 282 So. 2d 1, 9 (Fla. 1973). The Dixon construction has not been consistently applied, and the jury in this case was never apprised of such a limiting construction. The homicide here involved two shots to the back of the head, clearly not "unnecessarily torturous to the victim." In fact, the prosecutor during the penalty phase did

not argue that the killing was unnecessarily torturous to the victim (who was shot). Instead, the prosecutor argued that the offense was heinous, atrocious and cruel because petitioner had inflicted pain on the victim's family and because of acts occurring after the victim's death. Certainly the prosecutor's argument was far removed from this Court's limiting construction; it had nothing to do with whether the homicide was torturous to the decedent. Dixon, supra.

In Maynard v. Cartwrisht, the victim had been killed by a shotgun blast. The victim's wife, also attacked, was "shot twice, her throat was cut and she was stabbed in the abdomen." Cartwrisht v. Maynard, 802 F.2d 1203 (10th Cir. 1987). In affirming the jury's finding of "heinous, atrocious or cruel" the Oklahoma Court of Criminal Appeals failed to apply the standard it had adopted from Dixon, supra,[11] that the offense to be "heinous, atrocious or cruel" had to be unnecessarily torturous to the victim. Just as in Mr. Clark's case, the state in Oklahoma focused on the suffering of the victim's wife. Because the surviving wife suffered, the Oklahoma courts tried to justify the heinous, atrocious or cruel aggravating circumstance even though the decedent died instantaneously without torture. Mr. Clark's case is indistinguishable from Cartwrisht.

Here, both the judge and the jury applied precisely the construction condemned in Rhodes and Cartwrisht. Of course, the role of a Florida sentencing jury is critical. The Eleventh Circuit Court in Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(in banc), cert. denied, 109 S. Ct. 1353 (1989), specifically discussed the fundamental significance of a Florida jury's sentencing role in a capital case:

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[11] Oklahoma's "heinous, atrocious, and cruel" aggravating circumstance was founded on Florida's counterpart, see Maynard v. Cartwrisht, 802 F.2d at 1219, and the Florida Supreme Court's construction in Dixon was adopted by the Oklahoma courts. There as here, however, the constitutionally required limiting construction was never applied.

In analyzing the role of the sentencing jury, the Supreme Court of Florida has apparently been influenced by a normative judgment that a jury recommendation of death carries great force in the mind of the trial judge. This judgment is most clearly reflected in cases where an error has occurred before the jury, but the trial judge indicates that his own sentencing decision is unaffected by the error. As a general matter, reviewing courts presume that trial judges exposed to error are capable of putting aside the error in reaching a given decision. The Supreme Court of Florida, however, has on occasion declined to apply this presumption in challenges to death sentences. For example, in Messer v. State, 330 So.2d 137 (1976), the trial court erroneously prevented the defendant from putting before the sentencing jury certain psychiatric reports as mitigating evidence. The jury recommended death and the trial judge imposed the death penalty. The supreme court vacated the sentence, even though the sentence judge had stated that he had himself considered the reports before entering sentence. The supreme court took a similar approach in Riley v. Wainwright, 517 So.2d 565 (Fla.1987). There, the defendant presented at his sentencing hearing certain nonstatutory mitigating evidence. The trial court instructed the jury that it could consider statutory mitigating evidence, but said nothing about the jury's obligation under Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), to consider nonstatutory mitigating evidence. The jury recommended death and the trial judge imposed the death penalty. In imposing the death sentence, the trial judge expressly stated that he had considered all evidence and testimony presented. On petition for writ of habeas corpus, the supreme court ordered the defendant resentenced. The court held that the jury had been precluded from considering nonstatutory mitigating evidence, and that the trial judge's consideration of that evidence had been "insufficient to cure the original infirm recommendation." Id. at 859 n. 1.

In light of this disposition of these cases, it would seem that the Supreme Court of Florida has recognized that a jury recommendation of death has a sui generis impact on the trial judge, an impact so powerful as to nullify the general presumption that a trial judge is capable of putting aside error. We do not find it surprising that the supreme court would make this kind of normative judgment. A jury recommendation of death is, after all, the final state in an elaborate process whereby the community expresses its judgment regarding the appropriateness of a death sentence.

844 F.2d at 1453-54 (footnote omitted).

> The [Florida] supreme court's understanding of the jury's sentencing role is illustrated by the way it treats sentencing error. In cases where the trial court follows a jury recommendation of death, the supreme court will vacate the senten e and order resentencing before a new jury' if it concludes that the proceedings before the original jury were tainted by error. Thus, the supreme court has vacated death sentences where the jury was presented with improper evidence, **see** Dougan v. State, 470 So.2d 697, 701 (Fla.1985), cert. denied, 475 U.S. 1098, 106 S.Ct. 1499, 89 L.Ed.2d 900 (1986), or was subject to improper argument by the prosecutor, **see** Teffeteller v. State, 439 So.2d 840, 845 (Fla.1983), cert. denied, 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 754 (1984). The supreme court has also vacated death sentences where the trial court gave the jury erroneous instructions on mitigating circumstances or improperly limited the defendant in his presentation of evidence of mitigating circumstances. See Thompson v. Dusser, 515 So.2d 173, 175 (Fla.1987); Downs v. Dusser, 514 So.2d 1069, 1072 (Fla.1987); Riley v. Wainwright, 517 So.2d 656, 659-60 (Fla.1987); Valle v. State, 502 So.2d 1225, 1226 (Fla.1987); Flovd v. State, 497 So.2d 1211, 1215-16 (Fla.1986); Lucas v. State, 490 So.2d 943, 946 (Fla.1986); Simmons v. State, 419 So.2d 316, 320 (Fla.1982); Miller v. State, 332 So.2d 65, 68 (Fla.1976). In these cases, the supreme court frequently focuses on how the error may have affected the jury's recommendation.

Id. at 1452.[12] Of course, as the in banc Eleventh Circuit noted in earlier portions of the Mann opinion:

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[12] Footnote 7 provided:

> The Supreme Court of Florida has permitted resentencing without a jury where the error in the original proceeding related to the trial court's findings and did not affect the jury's recommendation. **See**, e.g., Menendez v. State, 419 So.2d 312, 314 (Fla.1982); Mikenas v. State, 407 So.2d 892, 893 (Fla.1981), cert. denied, 456 U.S. 1011, 102 S.Ct. 2307, 73 L.Ed.2d 1308 (1982); Magill v. State, 386 So.2d 1188, 1191 (Fla. 1980), cert. denied, 450 U.S. 927, 101 S.Ct. 1384, 67 L.Ed.2d 359 (1981); Fleming v. State, 374 So.2d 954, 959 (Fla. 1979). . .

Id. at 1452, n.7.

A review of the case law shows that the Supreme Court of Florida has interpreted section 921.141 as evincing a legislative intent that the sentencing jury play a significant role in the Florida capital sentencing scheme. See Messer v. State, 330 So.2d 137, 142 (Fla. 1976)("[T]he legislative intent that can be gleaned from Section 921.141 [indicates that the legislature] sought to devise a scheme of checks and balances in which the input of the jury serves as an integral part."); see also Riley v. Wainwright, 517 So.2d 656, 657 (Fla.1987)("This Court has long held that a Florida capital sentencing jury's recommendation is an integral part of the death sentencing process."); Lamadline v. State, 303 So.2d 17, 20 (Fla.1974)(right to sentencing jury is "an essential right of the defendant under our death penalty lesiglation"). In the supreme court's view, the legislature created a role in the capital sentencing process for a jury because the jury is "the one institution in the system of Anglo-American jurisprudence most honored for fair determinations of questions decided by balancing opposing factors." Cooper v. State, 336 So.2d 1133, 1140 (Fla.1976), cert. denied, 431U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977); see also McCampbell v. State, 421 So.2d 1072, 1075 (Fla.1982)(the jury's recommendation "represent[s] the judgment of the community as to whether the death sentence is appropriate"); Chambers v. State, 339 So.2d 204, 209 (Fla.1976)(England, J., concurring)(the sentencing jury "has been assigned by history and statute the responsibility to discern truth and mete out justice").

To give effect to the legislature's intent that the sentencing jury play a significant role, the Supreme Court of Florida has severely limited the trial judge's authority to override a jury recommendation of life imprisonment. In Tedder v. State, 322 So.2d 908, 910 (Fla.1975), the court held that a trial judge can override a life recommendation only when "the facts [are] so clear and convincing that virtually no reasonable person could differ." That the court meant what it said in Tedder is amply demonstrated by the dozens of cases in which it has applied the Tedder standard to reverse a trial judge's attempt to override a jury recommendation of life. See, e.g., Wasko v. State, 505 So.2d 1314, 1318 (Fla.1987); Brookings v. State, 421 So.2d 1072, 1075-76 (Fla.1982); Goodwin v. State, 405 So.2d 170, 172 (Fla.1981); Odom v. State, 403 So.2d 936, 942-43 (Fla.1981), cert. denied, 456 U.S. 925, 102 S.ct. 1970, 72 L.Ed.2d 440 (1982); Neary v. State, 384 So.2d 881, 885-88 (Fla. 1980); Malloy v. State, 283 So.2d 1190, 1193 (Fla.1979); Shue v. State, 366 So.2d 387, 390-91 (Fla.1978); McCaskill

v. State, 344 So.2d 1276, 1280 (Fla.1977); Thompson v. State, 328 So.2d 1, 5 (Fla.1976).

Mann, 844 F.2d at 1450-51. In light of these standards there can be little doubt that a Florida jury is the sentencer for purposes of eighth amendment analysis of Mr. Clark's claim.[13]

In reversing death sentences because of Hitchcock error the Florida Supreme Court explained:

> It is of no significance that the trial judge stated that he would have imposed the death penalty in any event. The proper standard is whether a jury recommending life imprisonment would have a reasonable basis for that recommendation.

Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1989). In Lucas v. State, 490 So. 2d 943, 945 (Fla. 1986), this Court discussed approvingly its prior case law that required a resentencing before a new jury where there was instructional error. See also Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987)(improper instructions to sentencing jury render death sentence fundamentally unfair); Meeks v. Dusser, 14 F.L.W. 313 (Fla. June 22, 1989)(since it could not be said beyond a reasonable doubt that a properly instructed jury would not return a recommendation of life, resentencing was required). Thus it is clear that for purposes of reviewing the adequacy of jury instructions in Florida the jury is the sentencer. Instructional error is reversible where it may have affected the jury's sentencing verdict. Meeks, supra; Riley, supra. In Mr. Clark's case, a properly instructed jury could well have concluded that two

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[13] In Hitchcock v. Dusser, 107 S. Ct. 1821 (1987), the Supreme Court reversed a Florida sentence of death because the jury had been erroneously instructed not to consider nonstatutory mitigation. "In Hitchcock, the Supreme Court reversed this Court's in banc decision in Hitchcock v. Wainwright, 770 F.2d 1514 (1985) and held that, on the record of the case, it appeared clear that the jury had been restricted in its consideration of non-statutory mitigating circumstances. . . ." Knight v. Dugger, 863 F.2d 705, 708 (11th Cir. 1989). See also Harsrave v. Dugger, 832 F.2d 1528 (11th Cir. 1987)(in banc); Stone v. Dugger, 837 F.2d 1477 (11th Cir. 1988). The Supreme Court treated the jury as sentencer for purposes of eighth amendment instructional error review, as has this Court. See Mann, supra; Riley v. Wainwright, 517 So. 2d 565 (Fla. 1987).

bullets to the back of the head was not "unnecessarily torturous to the victim." Indeed in Mr. Clark's case the jury deliberated for twelve hours at the guilt-innocence phase, while its sentencing vote was unrecorded. The jury may well have rendered a seven-five death recommendation. Under such circumstances one juror properly instructed could quite conceivably have concluded that the absence of the heinous, atrocious or cruel aggravating circumstance made death inappropriate and that the two remaining aggravating factors were not sufficient to warrant a death sentence. See, e.g., Mills v. Marvland, 108 S. Ct. 1860 (1988). Such a change would have resulted in a binding life recommendation, and thus under Hall cannot be found to be harmless. The bottom line, however, is that this jury was unconstitutionally instructed, Mavnard v. Cartwrisht, supra, and that the State cannot prove harmlessness beyond a reasonable doubt. In addition, the judge in actually sentencing Mr. Clark to death considered and relied upon the suffering of the victim's family after the homicide.

Mr. Clark is entitled to relief under this Court's Rhodes opinion and the Supreme Court's standards in Mavnard v. Cartwrisht. The jury was not instructed as to the limiting construction applicable to "heinous, atrocious or cruel." The jury did not know that the murder had to be "unnecessarily torturous to the victim." The judge also misunderstood the law. As a result, the eighth amendment error here is plain.

As noted, the sentencing judge's unconstitutional construction is also plain. The judge in imposing death listed "heinous, atrocious or cruel" as an aggravating circumstance which was present:

> The murder was committed by the Defendant in a cool, callous and heartless manner without mercy or compassion for the victim, and therefore, was an especially heinous, atrocious and cruel crime.

(R. 1524). This is far removed from an application of the Dixon limiting construction. Cartwrisht, supra.

The prosecutor argued for this aggravating circumstance primarily because of the suffering of the victim's family. However, in Riley v. State, 366 So. 2d 19 (Fla. 1978), and Clark (Larry) v. State, 443 So. 2d 973 (Fla. 1983), this Court explained that "it is the effect upon the victim herself that must be considered in determining the existence of [the heinous, atrocious, or cruel] aggravating circumstance." There was absolutely no evidence in Mr. Clark's case that the victim was tortured in any fashion. He died instantaneously from two shots to the back of the head. Despite this dearth of evidence of torture this Court affirmed without addressing or applying its narrowing construction of "heinous, atrocious or cruel." In this case, this Court did not consistently apply its narrowing construction. At no time was the murder found by anyone to be unnecessarily torturous to the victim.

What cannot be disputed is that here, as in Cartwrisht, the jury instructions provided no guidance regarding the "heinous, atrocious or cruel" aggravating circumstance. The jury was simply told:

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

(R. 3200-01). At sentencing, the trial judge found:

> The murder was committed by the Defendant in a cool, callous and heartless manner without mercy or compassion for the victim, and therefore, was an especially heinous, atrocious and cruel crime.

The Tenth Circuit's in banc opinion (unanimously overturning the death sentence) explained that the jury in Cartwrisht received an almost identical instruction. Cartwrisht v. Maynard, 822 F.2d 1477, 1488 (10th Cir. 1987)(in banc), affirmed 108 S.

Ct. 1853 (1988). In Cartwrisht, the Supreme Court unanimously held that such an instruction did not "adequately inform juries what they must find to impose the death penalty." 108 S. Ct. at 1858. That which was found wanting in Cartwrisht is what Mr. Clark's jurors received, and what his judge employed.

The United States Supreme Court affirmed the Tenth Circuit's grant of relief in Cartwright, explaining that the death sentence did not comply with the fundamental eighth amendment principle requiring the limitation of capital sentencers' discretion. The Court's eighth amendment analysis fully applies to Mr. Clark's case; proceedings as egregious as those upon which relief was mandated in Cartwright are present here. The result here should be the same as in Cartwriaht. See id., 108 S. Ct. at 1858-59.

In Mr. Clark's case, as in Cartwrisht, what was relied upon by the jury, trial court, and this Court did not guide or channel sentencing discretion. Likewise, here, no adequate "limiting construction" was ever applied to the "heinous, atrocious or cruel" aggravating circumstance. This Court did not cure the unlimited discretion exercised by the jury and trial court by its general affirmance of this aggravating factor.

Under Cartwriaht the issue is thus whether the error can be found harmless beyond a reasonable doubt. In this case, two of the five aggravating circumstances have already been struck by this Court. The Cartwrisht court looked to state law to determine the appropriate remedy when an aggravating circumstance has been stricken. 108 S. Ct. at 1860. In Cartwrisht, state law required that a death sentence be set aside when one of several aggravating circumstances was found invalid on appeal. Id. Similarly, in Florida, this Court normally remands for resentencing when aggravating circumstances are invalidated. See, e.g., Schafer v. State, 537 So. 2d 988 (Fla. 1989)(remanded for resentencing where three of five aggravating circumstances stricken and no mitigating circumstances identified); Nibert v.

State, 508 So. 2d 1 (Fla. 1987)(remanded for resentencing where one of two aggravating circumstances stricken and no mitigating circumstances found); cf. Rembert v. State, 445 So. 2d 337 (Fla. 1984)(directing imposition of life sentence where one of two aggravating circumstances stricken and no mitigating circumstances found). In this case, this Court on direct appeal did not remand because "sufficient" aggravating circumstances remained. However, the striking of this additional aggravating factor would certainly require resentencing under Florida law. Schafer, supra. Here also there remain only three aggravating circumstances which the jury could have found.[14] Id. The "harm" before the jury is also plain -- a jury's capital sentencing decision, after all, is not a mechanical counting of aggravators and involves a great deal more than that. In addition there was nonstatutory mitigation which the jury was precluded from considering. That error in conjunction with the improper consideration of three aggravating circumstances not sustainable on the evidence denied Mr. Clark an individualized and reliable capital sentencing determination. Knight v. Dusser, 863 F.2d 705, 710 (11th Cir. 1989). The errors committed here can not be found to be harmless beyond a reasonable doubt.[15]

Appellate counsel rendered ineffective assistance in failing to urge this claim. A new sentencing must be ordered.

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[14]The remaining aggravating circumstances are of less significance here. For example, Mr. Clark was on parole at the time of the homicide but as this Court was on parole at the time of the homicide but as this Court recently explained "the gravity of [that] aggravating factor is somewhat diminished by the fact [the defendant] did not break out of prison." Sonser v. State, So. 2d ___, 14 F.L.W. 262, 263 (Fla. 1989).

[15]Recently a petition for a writ of certiorari was granted in Clemons v. Mississippi, U.S. ___, 45 Cr. L. 4067 (June 19, 1989), in order to resolve the question of when Cartwright error may be harmless.

CLAIM IV

THE DECISION BELOW ALLOWING THE EXECUTION OF MR. CLARK'S SENTENCE OF DEATH NOTWITHSTANDING THE FACT THAT THE PENALTY PHASE JURY INSTRUCTIONS SHIFTED THE BURDEN TO MR. CLARK TO PROVE THAT DEATH WAS INAPPROPRIATE IS IN CONFLICT WITH AND CONTRARY TO THE NINTH CIRCUIT'S DECISION IN ADAMSON V. RICKETTS, 865 F.2d 1011 (9TH CIR. 1988)(IN BANC), AND VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

A capital sentencing jury must be:

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

State v. Dixon, 283 So. 2d 1 (Fla. 1973)(emphasis added).

Shifting the burden to the defendant to establish that mitigating circumstances outweigh aggravating circumstances conflicts with the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), and Dixon, for such instructions unconstitutionally shift to the defendant the burden with regard to the ultimate question of whether he should live or die. In so instructing a capital sentencing jury, a court injects misleading and irrelevant factors into the sentencing determination, thus violating Caldwell v. Mississippi, 472 U.S. 320 (1985). Mr. Clark's jury was unconstitutionally instructed, as the record makes abundantly clear (See R. 3166; 3178; 3199; 3201). In Hamblen v. Dugger, ___ So. 2d , 14 F.L.W. 347 (Fla., July 6, 1989), this Court held that this issue had to be resolved on a case-by-case basis. Accordingly,,this claim is now properly presented to this Court.

At the penalty phase of trial, prosecutorial argument and judicial instructions informed Mr. Clark's jury that death was the appropriate sentence unless "mitigating circumstances exist that outweigh any aggravating circumstances" (R. 3199). Such instructions, which shift to the defendant the burden of proving

that life is the appropriate sentence, violate the eighth and fourteenth amendments, as the Court of Appeals for the Ninth Circuit recently held in Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(in banc). This claim involves a "perversion" of the jury's deliberations concerning the ultimate question of whether Mr. Clark should live or die. See Smith v. Murray, 106 S. Ct. 2661, 2668 (1986). No bars apply under such circumstances. Id.

The jury instructions here employed a presumption of death which shifted to Mr. Clark the burden of proving that life was the appropriate sentence. As a result, Mr. Clark's capital sentencing proceeding was rendered fundamentally unfair.

In Adamson, 865 F.2d at 1041-44, the Ninth Circuit held that because the Arizona death penalty statute "imposes a presumption of death on the defendant," the statute deprives a capital defendant of his eighth amendment rights to an individualized and reliable sentencing determination. What occurred in Adamson is precisely what occurred in Mr. Clark's case. See also Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988). The instructions, and the standard upon which the sentencing court based its own determination, violated the eighth and fourteenth amendments. The burden of proof was shifted to Mr. Clark on the central sentencing issue of whether he should live or die. Moreover, the application of this unconstitutional standard at the sentencing phase violated Mr. Clark'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 unconstitutional presumption inhibited the jury's ability to "fully" assess mitigation, in violation of Penry v. Lynaugh, 109 S. Ct. 45 Cr. L. 3188 (1989), a decision which on its face applies retroactively to cases on collateral review.

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). Here, the jury was in essence told that death was presumed appropriate once aggravating circumstances were established, unless Mr. Clark 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. Clark had the ultimate burden to prove that life was appropriate. This violates the eighth amendment.

This error cannot be deemed harmless. In Mills v. Maryland, 108 S. Ct. 1860 (1988), 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. Id. 108 S. Ct. at 1866-67. That constitutionally mandated standard demonstrates that relief is warranted in Mr. Clark's case.

The United States Supreme Court recently granted a writ of certiorari in Blystone v. Pennsylvania, 109 S. Ct. 1567 (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 Pennsylvania, 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 the instructions and standard employed here, once one of the statutory aggravating circumstances is found by definition sufficient aggravation exists to impose death. The jury was then directed to consider whether mitigation has been presented which outweighed the aggravation. Thus under the standard employed in Mr. Clark's case, the finding of an aggravating circumstance operated 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, the standard employed here was more restrictive of the jury's ability to conduct an individualized sentencing than the Pennsylvania statute at issue in Blystone.

The effects feared in Adamson and Mills are precisely the effects resulting from the burden-shifting instruction given in Mr. Clark's case. In being instructed that mitigating circumstances must outweigh aggravating circumstances before it 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. This jury was thus constrained in its consideration of mitigating evidence, Hitchcock, 107 S. Ct. 1821 (1987), and from evaluating the "totality of the circumstances," Dixon v. State, 283 So. 2d 1, 10 (Fla. 1973), in determining the appropriate penalty. The jury was not allowed to make a "reasoned moral response" to the issues at Mr. Clark's sentencing or to "fully" consider mitigation. Penry v. Lynaugh, supra. There is a "substantial possibility" that this understanding of the jury instructions resulted in a death recommendation despite factors calling for life. Mills, supra. The death sentence in this case is in direct conflict with Adamson, Mills, and Penry, supra. This error "perverted"

the jury's deliberations concerning the ultimate question of whether Mr. Clark should live or die. Smith v. Murray, 106 S. Ct. at 2668. No bars apply. Relief is appropriate.

CLAIM V

MR. CLARK WAS DENIED HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS BECAUSE THE SENTENCING JURY AND COURT USED THE IDENTICAL UNDERLYING PREDICATES TO FIND MULTIPLE AGGRAVATING CIRCUMSTANCES.

The United States Supreme Court recently held in a case declared to be retroactive on its face that a sentencing jury must make a "reasoned moral response to the defendant's background, character, and crime." Penry v. Lynaugh, 109 S. Ct. ___, 45 Cr. L. 3188, 3195 (1989). It is improper to create "the risk of an unguided emotional response." 45 Cr. L. at 3195. A capital defendant should not be executed where the process runs the "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." 45 Cr. L. at 3195. There can be no question that Penry must be applied retroactively. The Court there concluded that, Jurek v. Texas, 428 U.S. 262 (1976), notwithstanding, the Texas death penalty scheme previously found constitutional created the "risk that the death [would] be imposed in spite of factors which [] call[ed] for a less severe penalty." 45 Cr. L. at 3195. Thus Mr. Penry's claim was cognizable in post-conviction proceedings. Similarly here the decision in Penry requires the examination of the procedure in Mr. Clark's case where excess and inappropriate aggravating circumstances were submitted to the jury in order to invoke "an unguided emotional response."

Although this Court has consistently reversed the defendant's sentence of death in cases in which aggravating circumstances were "doubled", this Court allowed Mr. Clark's capital sentence to stand while reviewing his case on direct appeal. See Clark v. State, 379 So. 2d 97 (Fla. 1979). Counsel

failed his client by ignoring this issue, and not arguing that a new sentencing proceeding was required.

This case, however, involved and involves the unconstitutionally classic types of doubling of aggravating circumstances ("robbery/pecuniary gain" and "preventing arrest/ hindering enforcement of law"). It involves fundamental error, and this Court should now correct the clear errors that it failed to correct on direct appeal. It also involves ineffective assistance of counsel: again, the Court should now take corrective action. Moreover, under Penry the presentation of these extra aggravating circumstances guaranteed an "unguided emotional response" by the sentencing jury that was also not allowed to consider nonstatutory mitigation, and thus violated the eighth amendment. There is in fact a likelihood in this that the death sentence was "imposed in spite of factors which [] call[ed] for a less severe penalty." 45 Cr. L. at 3195. Relief is now proper.

The sentencing order demonstrates that the sentencing judge and jury used identical underlying predicates to establish **two** separate aggravating factors. The sentencing court specifically found that the murder was part of a robbery, and also that it was committed for pecuniary gain.

The sentencing orders in this case thus involved the classically condemned unconstitutional "doubling up" and overbroad application of aggravating factors. Mr. Clark'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). Cf. Maynard v. Cartwriaht, 108 S. Ct. 1853 (1988)(condemning overbroad application of aggravating factors). 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).

In Mr. Clark's case, error under Hitchcock v. Dusser, 107 S. Ct. 1821 (1987), and Meeks v. Dusaer, ___ So. 2d 14 F.L.W. 313 (Fla. 1989), also occurred. As set forth in Claim 11, defense counsel did not present nonstatutory mitigation because she was constrained, even though such mitigation was available (See App. 1). Therefore, this error cannot be characterized as harmless. See Meeks v. Dusser, ___ So. 2d ___, 14 F.L.W. 313 (Fla. 1989); Elledse v. State, 346 So. 2d 998 (Fla. 1977). See also Menendez v. State, 368 So. 2d 1278 (Fla. 1979); Riley v. State, 366 So. 2d 19 (Fla. 1978); Mann v. State, 420 So. 2d 578, 581 (Fla. 1982). Mr. Clark is entitled, pursuant to the eighth and fourteenth amendments, to the relief he seeks.

Similarly, the sentencing order in Mr. Clark's case demonstrates that identical underlying predicates were used to establish the two separate aggravating circumstances that the offense was committed in order to eliminate a witness and also to hinder the enforcement of laws. This type of "doubling up" is also unconstitutional; it also renders a capital sentencing proceeding fundamentally unreliable and unfair, and violates the eighth and fourteenth amendments. See Welty v. State, 402 So. 2d 1139 (Fla. 1981); Clark v. State, 379 So. 2d 97, 104 (Fla. 1980). It also results in the unconstitutionally overbroad application of aggravating circumstances, see Cartwrisht, supra, 108 S. Ct. 1853, and fails to genuinely narrow the class of persons eligible for death. The result is a wholly arbitrary capital sentence. As discussed in this petition, mitigation was available in this case, and these errors cannot be deemed harmless. See also Zant v. Stephens, supra, 462 U.S. at 876.

Two aggravating circumstances were struck in Mr. Clark's case. However, no consideration was given to the impact on the jury or even the judge of having an excessive number of

aggravating circumstances presented in order to invoke "an unguided emotional response.'' Penry, 45 Cr. L. at 3195. The balance which would have been reached without the improper aggravating factors would have been quite different than the balance with which Mr. Clark's jury was left, because of the uncorrected errors. Resentencing would have been (and is) proper. See Meeks v. Dugger, supra; Elledse v. State, supra, 346 So. 2d 998; Menendez, supra, 368 So. 2d 1278; Riley, supra, 366 So. 2d 19.[16] In this regard, this Court's precedents are clear: because the improper application of aggravating factors unconstitutionally skews the balance by which the sentencer is to determine whether life or death is the appropriate sentence, the Court has consistently reversed and remanded for a new sentencing proceeding in cases where aggravating circumstances are improperly or overbroadly applied and mitigation is found. See Schafer, supra; Nibert, supra; Elledge, supra; Provence, supra, 337 So. 2d at 786; Mann v. State, 420 So. 2d 578, 581 (Fla. 1982)(vacating death sentence and remanding for new sentencing proceeding where aggravating circumstances improperly applied and court was "unable to discern" whether sentencing judge found mitigating circumstances); Menendez, supra, 368 So. 2d 1278; Riley, supra, 366 So. 2d 19; Welty, supra; Clark, supra. The balance was (and is) unconstitutionally skewed in Mr. Clark's case, particularly since nonstatutory mitigation never reached the jury. The sentencer and not an appellate court must decide the sentence. Mr. Clark was and is entitled to a new sentencing proceeding. The errors herein at issue cannot be deemed harmless.

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[16] In fact the United States Supreme Court has granted certiorari in Clemons v. Mississippi, 45 Cr. L. 4067 (June 19, 1989), in order to consider whether an appellate court can usurp the sentencer's discretion by declaring improper consideration of an aggravating circumstance harmless. In Mr. Clark's case, at least two improper aggravators were considered by the jury, and the error cannot be deemed harmless under Penry.

CLAIM VI

MR. CLARK'S DEATH SENTENCE MUST BE VACATED BECAUSE THE COURT FAILED TO PROVIDE A FACTUAL BASIS IN SUPPORT OF THE PENALTY, IN VIOLATION OF FLORIDA LAW AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

Florida law provides that for a death sentence to be constitutionally imposed there must be specific written findings of fact in support of the penalty. Fla. Stat. section 921.141(3). The legislature has mandated that the imposition of the death penalty cannot be based on a mere recitation of the aggravating or mitigating factors present, but must be supported by written findings regarding the specific facts giving rise to the aggravating and mitigating circumstances. The legislature has provided as part of the capital sentencing scheme:

> In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

Fla. Stat. section 921.141(3); see also Van Royal v. State, 497 So. 2d 625 (Fla. 1986).

The duty imposed by the legislature directing that a death sentence may only be imposed when there are specific written findings in support of the penalty serves to provide for meaningful review of the death sentence and fulfills the eighth amendment requirement that a death sentence not be imposed in an arbitrary and capricious manner. See Greas v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

Specific written findings allow the sentencing body to demonstrate that the sentence has been imposed based on an individualized determination that death is appropriate. Cf.

State v. Dixon, 283 So. 2d 1 (1973). As this Court has recently stated:

> We reiterate . . . that the sentencing order should reflect that the determination as to which aggravating and mitigating circumstances apply under the facts of a particular case is the result of "a reasoned judgment" by the trial court. State v. Dixon, 283 So.2d 1, 10 (Fla. 1973), cert. denied, 416 U.S. 943 (1974). Weighing the aggravating and mitigating circumstances is not a matter of merely listing conclusions. Nor do the written findings of fact merely serve to "memorialize" the trial court's decision. Van Royal, 497 So.2d at 628. Specific findings of fact provide this Court with the opportunity for a meaningful review of a defendant's sentence. Unless the written findings are supported by specific facts and are timely filed, this Court cannot be assured the trial court imposed the death sentence based on a "well-reasoned application" of the aggravating and mitisatins factors. Id.

Rhodes v. State, So. 2d ___, 14 F.L.W. 343, 346 (Fla., July 6, 1989)(emphasis added). This is consistent with the United States Supreme Court's recent holding that the sentencer must make a "reasoned moral response" to the evidence when deciding to impose death. Penry v. Lynaugh, 109 S. Ct. ___, 45 Cr. L. 3188, 3195 (1989). The court in Penry also declared that its decision in that case applies retroactively to cases on collateral review.

This Court has strictly enforced the written findings requirement mandated by the legislature, Rhodes, supra, and has held that a death sentence may not stand when "the judge did not recite the findings on which the death sentences were based into the record." Van Royal, 497 So. 2d at 628. The imposition of such a sentence is contrary to the "mandatory statutory requirement that death sentences be supported by specific findings of fact." Id. The written findings serve to "assure [] that the trial judge based the [] sentence on a well-reasoned application of the factors set out in section 921.141(5) and 6." The

> written finding of fact as to aggravating and mitigating circumstances constitutes an

integral part of the court's decision; they do not merely serve to memorialize it.

Id.

The findings in support of Mr. Clark's death sentence fail to in any way comport with the statutory mandate set out in section 921.141(3). The trial court based the death sentence merely on a written listing, without findings, of the aggravating and mitigating factors it deemed applicable under the statute. In this regard the findings provided:

> THIS CAUSE came on to be heard on the sentencing of Defendant, RAYMOND ROBERT CLARK, following the conviction of Murder in the First Degree and an advisory verdict recommending the death penalty by a jury of twelve of his peers, and the Court, having heard the case in chief and considered the mitigating and aggravating circumstances, makes the following Findings of Facts and Orders:
>
> AGGRAVATING CIRCUMSTANCES
>
> A. The Defendant, RAYMOND ROBERT CLARK, was previously convicted in California of Murder in the First Degree, which carried a possible maximum sentence of death. The Defendant was sentenced to life imprisonment for the commission of that crime but was paroled after serving ten (10) years in the California prison system. At the time of the commission of the present homocide, he was on parole from California, but was in violation of that parole by being in Florida.
>
> B. The murder in the present case was committed by the Defendant during the course of a robbery.
>
> C. The victim in the instant case was killed in order to eliminate him as a witness to the robbery.
>
> D. The murder was committed by the Defendant for pecuniary gain.
>
> E. The murder was committed for the purpose of hindering enforcement of the robbery laws of this State.
>
> F. The murder was committed by the Defendant in a cool, callous and heartless manner without mercy or compassion for the victim, and therefore, was an especially heinous, atrocious and cruel crime.
>
> MITIGATING CIRCUMSTANCES
>
> A. None.

THEREFORE, it is the order of this Court that the Defendant, RAYMOND ROBERT CLARK, be sentenced to death in the electric chair.

(R. 1523-24). The trial court failed to find or refer to *any* specific factual circumstances used to find the existence of the factors in aggravation and mitigation. Mr. Clark's death sentence is not based on a "well-reasoned application" of the statute. The findings of fact were questionable at best: the trial court imposed death within minutes after the jury returned. The findings appear to be an afterthought filed a month later.

It is clear that the court never conducted the type of proper weighing and consideration of aggravating and mitigating circumstances which this Court and the United States Supreme Court require. This is precisely what Rhodes and Penry prohibit. Penry has been determined to apply retroactively. This death sentence is unlawful, and must be vacated. See Fla. Stat. section 921.141(3). Here, as in Rhodes, the record is wholly **"inadequate",** to demonstrate that Mr. Clark's death sentence is appropriate. Indeed, the findings contain no facts. Thus there can be no determination that the sentencer's decision was a "reasoned moral response" as required by Penry.

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

Moreover, the claim is now properly brought pursuant to the Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. This issue involved a classic violation of the statutory language. It virtually "leaped out upon even a casual reading of **transcript."** Matire V. Wainwright, 811 F.2d 1430, 1438 (11th

Cir. 1987). This clear claim of per se error required no elaborate presentation -- counsel only had to direct this Court's attention to the issue. The court would have done the rest, based on the statute. Moreover, federal constitutional case law decided this year which is retroactive further establishes that this death sentence can not stand because it is not clear from the record that there was a "reasoned moral response" to the evidence when the death sentence was imposed.

No procedural bar precludes review of this issue. However, counsel's failure to present this claim on direct appeal deprived Mr. Clark of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra. Habeas corpus relief should now be accorded.

CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE, Raymond Robert Clark, through counsel, respectfully urges that the Court issue its Writ of habeas corpus and vacate his unconstitutional sentence of death. He also prays that the Court fully determine the significant claims herein presented. Since this action also presents questions of fact, Mr. Clark 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. Clark urges that the Court grant him habeas corpus relief, or, alternatively, a new appeal, for all of the reasons set forth herein, and that the Court grant all other and further relief which the Court may deem just and proper.

Respectfully submitted,

LARRY HELM SPALDING
Capital Collateral Representative

BILLY H. NOLAS
MARTIN J. McCLAIN
JULIE D. NAYLOR

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

By: Billy H. Nolas
COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by U.S. Mail, first class, postage prepaid, to Robert Krauss, Assistant Attorney General, Department of Legal Affairs, Park Trammel Building, 1313 Tampa Street, Tampa, Florida 33602, this 27 day of July, 1989.

Billy H. Nolas
Attorney