IN THE SUPREME COURT OF FLORIDA

NO. **74,468**

RAYMOND ROBERT CLARK

Petitioner,

v.

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

Respondent.

REPLY TO STATE'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

LARRY HELM SPALDING
Capital Collateral Representative

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PRELIMINARY STATEMENT

Counsel for Mr. Clark herein provides a reply to the Respondent's contentions regarding Mr. Clark's claims for habeas corpus relief. As a reasoned review of the State's submission would show, the State has said little to rebut Mr. Clark's entitlement to relief. This Reply will therefore briefly discuss the State's assertions, and demonstrate the errors in the Respondent's analysis.

Respondent's "Preliminary Statement" asserts that Mr. Clark has filed a state habeas corpus petition as "an attempt to prolong the litigation.'' However, the petition was filed following the issuance of Jackson v. Dugger, ___ So. 2d ___, 14 F.L.W. 355 (Fla. July 6, 1989), where this Court granted relief to a state habeas petitioner, holding that, where the Court has erroneously interpreted the eighth amendment, and the United States Supreme Court's subsequent decisions expose the error in the interpretation, no procedural bar applies to presentation of a claim premised on the subsequent United States Supreme Court decision. Moreover, in Jackson, this Court specifically approved filing claims in a state habeas petition where "all the pertinent facts are contained in the original record." Mr. Clark has in good faith relied upon this Court's own precedents in filing his state habeas corpus petition, an action which certainly cannot be characterized as "an attempt to prolong the litigation." In fact, he filed the petition while litigation was ongoing in federal court. This petition is in no way "prolong[ing] the litigation."

CLAIM I

THE CONSIDERATION OF EVIDENCE REGARDING THE VICTIM'S PERSONAL CHARACTERISTICS AT MR. CLARK'S CAPITAL PROCEEDINGS VIOLATED THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, BOOTH V. MARYLAND, AND SOUTH CAROLINA V. GATHERS.

The State's Response asserts: 1) Jackson v. Duqqer is not a sufficient justification for representing Mr. Clark's Booth

claim, 2) the claim is not timely, and 3) federal precedent regarding federal procedure should pre-empt state law. The State is simply wrong.

First, it should be observed that the State has failed to comprehend that its first two points say the same thing. As this Court has explained in prior precedents, the question of procedural bar turns upon whether there is new precedent which establishes that this Court had failed in the past to properly analyze issues such as the one presented by Mr. Clark. For example, when Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), was decided, this Court determined that Hitchcock found this Court's precedents interpreting Lockett v. Ohio, 438 U.S. 586 (1976), to be erroneous. As a result, this Court determined that no procedural bars would be applied to claims pursuant to Lockett which this Court had previously failed to analyze properly or which appellate counsel had failed to raise because of this Court's earlier erroneous precedents. See Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987); Hall v. State, 541 So. 2d 1125, 1126 (Fla. 1989)("[A]s we have stated on several occasions, Hitchcock is a significant change in law, permitting defendants to raise a claim under that case in post-conviction proceedings."). Hitchcock for federal purposes was not a change in law because, according to the United States Supreme Court, Hitchcock is what Lockett meant. However, because Hitchcock overruled this Court's interpretation of Lockett, this Court recognized Hitchcock as a change in law which defeated the usual procedural bar. See Hall, supra. Thus the question of whether a case is new law for state purposes is entirely distinct and separate from the question of whether a case is new law for federal purposes.

The State has also overlooked the fact that this Mr. Clark's first and only petition for state habeas corpus relief. The questions presented are properly before this Court if they are cognizable in a habeas corpus proceeding. This Court has held

Booth claims are cognizable in habeas corpus proceedings where the original record establishes the error. That is the situation here. As a result, Mr. Clark's Booth claim is cognizable under Jackson v. Dugger, So. 2d ___, 14 F.L.W. 355 (Fla. July 6, 1989).

As to Mr. Clark's Booth claim, the question is whether prior to Booth v. Maryland, 107 S. Ct. 2529 (1987), this Court had considered that the eighth amendment's guarantee of an individualized and reliable sentence was violated by the consideration of victim impact, the victim's worth, and/or the comparable worth of the victim as opposed to the worth of the capital defendant. In other words, the question is whether prior to Booth, this Court had properly analyzed such eighth amendment claims and recognized that an individualized sentencing precluded comparisons of the value of the victim's life to the value of the defendant's life. In Jackson v. Dugger, supra, this Court quite clearly and correctly determined that it had failed to conduct the proper analysis of such eighth amendment claims prior to Booth. Thus, in those cases in which the claim was presented (or even in those cases in which the issue was preserved but not presented because counsel relied on this Court's precedents that such claims were meritless), Jackson declared no procedural bar could be erected. Claims such as Mr. Clark's are thus now appropriately considered and decided on their merits in post-conviction proceedings.[1] Therefore, Mr. Clark's claim of Booth and Gathers error is not barred.

Respondent argues that consideration must be given to federal precedent on the question of whether Booth was novel or

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[1] In Jackson v. Dugger, this Court noted that on direct appeal Andrea Jackson had argued that victim impact evidence and argument was improperly introduced and considered

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whether it followed from prior precedent. However, that is an entirely different issue. In Booth, the Supreme Court held that

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at her capital trial. However, on direct appeal, this Court failed to analyze the issue in light of the eighth amendment's requirement of an individualized sentencing:

> Appellant also takes issue with comments made by the prosecutor in both the conviction and guilt phases of the trial. Appellant argues that the egregious prosecutorial misconduct so infected the proceedings as to deny her due process of law and to deprive her of the constitutional rights to a fair trial and to an impartial jury.
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> On several occasions this Court has admonished attorneys concerning the propriety of arguments in capital cases. See, e.g., Bertolotti v. State, 476 So.2d 130, 133-34 (Fla.1985); Jennings v. State, 453 So.2d 1109 (Fla.1984), vacated on other grounds, 470 U.S. 1002, 105 S. Ct. 1351, 84 L.Ed.2d 374 (1985); Teffeteller v. State, 439 So.2d 840 (Fla.1983), cert. denied, 465 U.S. 1074, 104 S. Ct. 1430, 79 L.Ed.2d 754 (1984). We have gone so far as to warn counsel that such misconduct may form the basis for disciplinary proceedings by The Florida Bar. Bertolotti. We note that the state attorney who prosecuted this case is a man of extensive experience who should be sensitive to the ethical restrictions governing the conduct of state prosecutors. The kind of argument complained of here is not such as this Court can approve. The comments shown in the record are not an appropriate model for young lawyers. However, after a complete review of the record we cannot say that the comments are so offensive as to warrant a new trial. As we stated in Davis v. State, 461 So.2d 67, 70 (Fla.1984), "[t]he control of comments in closing arguments is within a trial court's discretion, and a court's ruling will not be overturned unless a clear abuse is shown." The trial judge is in the best position to monitor the conduct of lawyers in the courtroom and the record shows that Judge Moran made continuing efforts to ensure that appellant was given a fair trial. Further, as in Valle v. State, 474 So.2d 796, 805 (Fla. 1985), vacated on other grounds, Valle v. Florida, U.S. ___, 106 S. Ct. 1943, 90 L.Ed.2d 353 (1986), there is nothing to indicate that the trial judge relied on any of the prosecutor's comments in making his sentencing decision.

Jackson v. State, 498 So. 2d 406, 410-11 (Fla. 1986). In Jackson v. Dugger, this Court agreed that it had failed to consider the prosecutor's comments in light of the eighth amendment, and thus ordered a new sentencing proceeding untainted by Booth error.

a sentence of death cannot turn on who the victim was or how the victim's family has suffered but instead must be based only upon individualized consideration of the defendant and his crime. This was recently repeated in South Carolina v. Gathers, 109 S. Ct. 2207 (1989):

> Our capital cases have consistently recognized that "[f]or purposes of imposing the death penalty ... [the defendant's] punishment must be tailored to his personal responsibility and moral guilt." Enmund v. Florida, 458 U.S. 782, 801, 102 S.Ct. 3368, 3378, 73 L.Ed.2d 1140 (1982). See also id., at 825, 102 S.Ct., at 3391 (O'CONNOR, J., dissenting)("[P]roportionality requires a nexus between the punishment imposed and the defendant's blameworthiness"); Tison v. Arizona, 481 U.S. 137, 149, 107 S.Ct. 1676, 1683, 95 L.Ed.2d 127 (1987)("The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender").

109 S. Ct. 2210. Thus, as the United States Supreme Court has now made plain, the rule of Booth was dictated by the principles enunciated in Enmund v. Florida, and Gregg v. Georgia and was not "novel" or created out of whole cloth. Booth resulted from prior precedent for federal purposes, just as Hitchcock did before it. The Fifth Circuit Court of Appeals in granting habeas relief on the basis of Booth error stated:

> Our decision that Rushing's sentence was conducted in a constitutionally impermissible fashion is bolstered by the heightened level of scrutiny which appellate courts apply in capital cases. In this regard, it has been said that death is a "punishment different from all other sanctions," Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 2990-91, 49 L.Ed.2d 944 (1976)(citations omitted), and therefore a capital jury is bound to make an "individualized determination" of whether a defendant should be assessed the death penalty based on the "character of the individual and the circumstances of the crime." Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 2744, 77 L.Ed.2d (1983)(emphasis in the original)(citations omitted). Moreover, extraneous factors which are injected into the capital jury's decisionmaking process at the sentencing phase must be carefully scrutinized to ensure that they bear upon the defendant's "personal responsibility and moral guilt." Booth v. Maryland, 107 S.Ct. at 2533 (quoting Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 3378, 73 L.Ed.2d 1140 (1982).

Rushing v. Butler, 868 F.2d 800, 804 (5th Cir. 1989). Implicit in Rushing, a case on collateral review, was a finding that Booth was directed by prior United States Supreme Court precedent, specifically Enmund.

In Eddings v. Oklahoma, 455 U.S. 104 (1982) the Supreme Court stated:

> Thus, the rule in Lockett followed from the earlier decisions of the Court and from the Court's insistence that capital punishment be imposed fairly, and with reasonable consistency, or not at all. By requiring that the sentencer be permitted to focus "on the characteristics of the person who committed the crime," Gress v. Georgia, supra, at 197, 96 S.Ct., at 2936, the rule in Lockett recognizes that "justice ... requires ... that there be taken into account the circumstances of the offense together with the character and propensities of the offender." Pennsylvania v. Ashe, 302 U.S. 51, 55, 58 S.Ct. 59, 60, 82 L.Ed. 43 (1937).

455 U.S. at 12 (emphasis added). The concept of an "individualized sentencing" focusing upon the character of the defendant and the circumstances of the crime, in fact dates back to Gresq in 1976. However, even though the United States Supreme Court said Booth followed from its prior precedent in Gresq just as Hitchcock followed from Lockett, this Court failed to recognize the requirements of Gresq and Lockett before Booth and Hitchcock, respectively.

Booth claims should be treated like claims under Hitchcock v. Dusuer, 107 S. Ct. 1821 (1987). For state law purposes, there was no procedural bar to the presentation of Hitchcock claims. This was because Hitchcock was a substantial change from the way the Florida Supreme Court had read Lockett v. Ohio, 438 U.S. 586 (1978). Hitchcock was new law under the state law analysis of Witt because the Florida Supreme Court had misread Lockett. It was not new law for federal purposes.

This Court has recognized in Jackson v. Dugger that it had previously erred and failed to recognize that eighth amendment jurisprudence had placed limitations upon the consideration of victim impact evidence or argument. The decision to remove

procedural bars from the presentation of Booth claims in post conviction proceedings was premised upon the error in this Court's prior opinions.

Further, the State's proposal that this Court should not bother to review Mr. Clark's claim because the federal courts are in the process of doing it, is odd indeed. The State is, apparently, advocating that this Court need not carry out its mandated duty under the Florida Constitution to review death cases because the federal courts always do that anyway. It would seem the Attorney General's Office, as the State's representative, should be arguing to uphold the Florida Constitution and the independence of this Court.

The State also argues that Mr. Clark did not preserve his Booth claim. However, this overlooks this Court's well-established precedent. In State v. Whitfield, 487 So. 2d 1045 (Fla. 1986), this Court ruled that a "contemporaneous objection" is not required where the sentence on its face is illegal. Sentencing errors apparent on the face of the record are cognizable and preserved. State v. Rhoden, 448 So. 2d 1013 (Fla. 1984); Walker v. State, 462 So. 2d 452 (Fla. 1985); State v. Snow, 462 So. 2d 455 (Fla. 1985). No contemporaneous objection is necessary so long as the claim involves factual matters that are apparent or determinable from the record on appeal. Dailey v. State, 488 So. 2d 532 (Fla. 1986); Forehand v. State, 537 So. 2d 103 (Fla. 1989). Here, the trial court in imposing death based its sentence on victim impact, on the suffering of the victim's family. The trial court stated on the record:

> 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. 3217-18). Thus, the error is apparent on the face of the record. The trial court expressly relied on what the eighth amendment forbids, the suffering of the victim and his family.

Further, Mr. Clark has consistently pointed out this error to this Court. In Mr. Clark's direct appeal, he argued that the trial court improperly found "heinous, atrocious and cruel" when it relied on victim impact instead of the proper considerations set out in State v. Dixon, 283 So. 2d 1, 9 (Fla. 1983); and Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). The issue had been preserved and presented on direct appeal contrary to the Respondent's bald allegation that it had not.[2] Mr. Clark's case is thus virtually identical to the situation in Jackson. Just as in Jackson, the claim is timely presented.

Finally, the State has not contested that Mr. Clark has met his burden under Booth to show that the jury or the sentencer based any sentencing decision on victim impact information. Booth and Gathers require reversal if "contamination" occurs, i.e., if the improper evidence gets to the sentencer. Booth requires that the Court disallow the "risk" that impermissible information "may" influence the capital sentencing determination, and mandates that the State bear the heavy burden of proving that the errors had no effect on the petitioner's sentence. Here, the judge explicitly relied on victim impact and the suffering of the victim's family in imposing death. The error could not be clearer. Mr. Clark was denied "an individualized sentencing."

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[2]Mr. Clark acknowledged, in his petition for habeas corpus relief, that trial counsel did not object to the prosecutor's closing argument. However Mr. Clark nonetheless asserts that the prosecutor's closing argument violated Booth and Gathers, and that this error is also cognizable now. This Court should not hold counsel to read Gregg as establishing a basis for objecting to Booth error when this Court failed to correctly read Gregg. Fairness should prevent this Court from requiring counsel to object in good faith to error which this Court did not recognize as error. In the context of Hitchcock error it is instructive to note that this Court did not impose an obligation on counsel to anticipate Hitchcock and object to Hitchcock when this Court itself failed to anticipate Hitchcock. See Mikenas v. Dugger, 519 So. 2d 601 (Fla. 1988)(In the direct appeal 367 So. 2d 606, it is apparent no objection was raised to the failure of the jury instructions to advise the jury of nonstatutory mitigation.)

In Mr. Clark's case, the risk condemned in Booth actualized -- his capital sentence was imposed in "violat[ion of the] principle that a sentence of death must be related to the moral culpability of the defendant." South Carolina v. Gathers, 109 S. Ct. at 2210. The judge relied on victim impact to conclude death was appropriate. See also Enmund v. Florida, 458 U.S. 782, 801 (1982)("[f]or purposes of imposing the death penalty ... [the defendant's] punishment must be tailored to his personal responsibility and moral guilt.") Under both Booth and Gathers, Mr. Clark's sentence of death cannot stand. Habeas corpus relief must be granted.

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 AS IT RESTRICTED THE JURY'S AND JUDGE'S CONSIDERATION, IN VIOLATION OF HITCHCOCK V. DUGGER, LOCKETT V. OHIO, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

The State contends that this claim is an improper renewal of a previously decided issue. In Hall v. State, 541 So. 2d 1125 (Fla. 1989), the State made the same argument. Mr. Hall had presented a Hitchcock claim to this Court and lost. Specifically, Mr. Hall had argued that the jury was improperly instructed to consider only statutory mitigation. Hall v. Dugger, 531 So. 2d 76 (Fla. 1988). Thereafter, Mr. Hall presented a Rule 3.850 motion where he argued that this Court had failed to consider the impact on defense counsel of the prevailing law at the time of the trial which limited mitigating evidence to that which supported one of the statutory mitigating factors. In Hall v. State, 541 So. 2d 1125, this Court concluded Mr. Hall was right. Notwithstanding the State's erroneous contention that the decision in 531 So. 2d 76 precluded consideration of the claim, this Court ordered a new sentencing.

Mr. Clark simply asks for the same consideration of his claim that Mr. Hall received, and for the relief to which he is clearly entitled. Mr. Clark's proceedings occurred precisely during the period of time when Florida capital defense attorneys' hands were strapped with regard to the development and presentation of nonstatutory mitigating evidence by the operation of state law. Hall, supra; see also Meeks v. Dugger, 14 F.L.W. (Fla. 1989). This Honorable Court failed to consider this issue when it rejected Mr. Clark's Hitchcock claim. Hall and Meeks established new law which requires this Court to revisit the issue here and grant relief.

The eighth amendment requires that there be a "principled way to distinguish" those cases "in which the death penalty was imposed, from the many cases in which it was not." Godfrey v. Georgia, 446 U.S. 420, 433 (1980). As the Supreme Court explained in Maynard v. Cartwright, 108 S. Ct. 1853, 1858 (1988):

> Furman held that Georgia's then standardless capital punishment statute was being applied in an arbitrary and capricious manner; there was no principled means provided to distinguish those that received the penalty from those that did not. E.g., id., at 310, 92 S. Ct., at 2762-2763 (Stewart, J., concurring); id., at 311, 92 S. Ct., at 2763 (WHITE, J., concurring). Since Furman, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action.

(Emphasis added). As explained in Penry v. Lynaugh, 109 S. Ct. 2934 (1989):

> To be sure, Furman held that "in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant." Gress v. Georgia, 428 U.S. 153, 199, 96 S. Ct. 2909, 2937, 49 L.Ed.2d 859 (1976)(joint opinion of STEWART, POWELL, and STEVENS, JJ.).

109 S. Ct. at 2951 (emphasis added).

Mr. Clark is in a "capriciously selected group" of individuals. This Court has capriciously selected him to not receive the benefit of Lockett. His jury, his judge and even his defense counsel did not know that nonstatutory mitigation was to be considered. This is no "principled way to distinguish" Mr. Clark's case from Mr. Hall's case or Mr. Meek's case. The claim should now be considered in light of the preclusion on counsel, and a resentencing should be granted. Habeas corpus relief is warranted.

CLAIM III

MR. CLARK'S SENTENCING JURY WAS IMPROPERLY INSTRUCTED REGARDING THE "ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL" AGGRAVATING CIRCUMSTANCE IN VIOLATION OF RHODES V. STATE, MAYNARD V. CARTWRIGHT, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

In the Response, the State argues that Mr. Clark's failure to urge this claim on direct appeal constitutes a procedural default precluding collateral review. Under Hitchcock V. Dugger, 107 S. Ct. 1821 (1987), and its progeny, a jury must be allowed to consider non-statutory mitigation because of the significance of its recommendation. Following Hitchcock, this Court held that prior to Hitchcock objections to jury instructions were not necessary to preserve the issue. In fact no objection was made to the instructions given in Hitchcock, or in most of the cases in which relief has been granted on the basis of Hitchcock. See Meeks v. Dusser, ___ So. 2d ___, 14 F.L.W. 313 (Fla. June 22, 1989); Hall v. State, 541 So. 2d 1125 (Fla. 1989); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); Morgan v. State, 515 So. 2d 975 (Fla. 1987); Thompson v. Dugger, 515 So. 2d 73 (Fla. 1987).

This Court has required no objection to the instructions even in cases where it has determined the error to be harmless. Jackson V. Dugger, 529 So. 2d 1081 (Fla. 1988); Demps V. Dugger, 514 So. 2d 1092 (Fla. 1987); Delap v. Dugger, 513 So. 2d 659 (Fla. 1987). In fact in Delap this Court stated:

> The fact that Delap's request for a proper instruction was late is not significant to our decision because in Hitchcock the impropriety of the instruction was not even raised at the trial.

513 So. 2d at 662.

Even before Hitchcock this Court held that contemporaneous objections to the jury instructions which violated the eighth amendment were not necessary:

> In view of the inadequate and confusing jury instructions, we believe Floyd was denied his right to an advisory opinion. We cannot sanction a practice which gives no guidance to the jury for considering circumstances which might mitigate against death.

Floyd v. State, 497 So. 2d 1211, 1216 (Fla. 1986).

There is no principled way to distinguish these cases and hold that Mr. Clark is barred because he did not object to inadequacy of the jury instructions under the eighth amendment. These cases were contemporaneous with Mr. Clark's case. The case relied upon by the State, Smalley v. State, So. 2d ___, 14 F.L.W. 342 (Fla. July 6, 1989), is post-Hitchcock and post-Floyd, and after the recognition in those cases that the sentencing jury must receive adequate instructions.

Clearly this Florida Supreme Court has held that, under Hitchcock, the sentencing jury must be correctly and accurately instructed as to the mitigating circumstances to be weighed against aggravating circumstances. Under Maynard v. Cartwright, 108 S. Ct. 1883 (1988), the jury must also be correctly and accurately instructed regarding the aggravating circumstances to be weighed by it against the mitigation when it decides what sentence to recommend. In Mikenas v. Duqqer, 519 So. 2d 601 (Fla. 1988), a new jury sentencing was ordered because the jury was instructed without objection that mitigating circumstances were limited by statute. A subsequent resentencing by trial judge alone did not cure the instructional error, although at the resentencing, the trial judge considered nonstatutory mitigation. The jury's recommendation was not reliable because it did not

know what to balance in making its recommendation. In Mr. Clark's case, the jury did not receive instructions narrowing aggravating circumstances in accord with the limiting and narrowing constructions adopted by the Supreme Court. Thus the jury, here, also did not know the parameters of the factors it was weighing.

Florida has adopted a statutory scheme in which the "jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose the death penalty," Zant v. Stephens, 462 U.S. 862, 890 (1983), unlike the scheme at issue in Stephens, which did not require a weighing process. Maynard v. Cartwrisht, 108 S. Ct. 1853 (1988), first held that the principle of Godfrey v. Georgia, 446 U.S. 420 (1980), did apply to a state where the jury weighs the aggravating and mitigating circumstances found to exist and required the jury to receive instructions adequately channeling and narrowing its discretion. In Cartwright, the United States Supreme Court determined that error had occurred where the sentencing jury received no instructions regarding the limiting constructions of an aggravating circumstance.

Under Florida law, aggravating circumstances "must be proven beyond a reasonable doubt." Hamilton v. State, So. 2d 14 F.L.W. 403, 405 (Fla. July 27, 1989). In fact, Mr. Clark's jury was so instructed. Florida law also establishes that limiting constructions of the aggravating circumstances are "elements" of the particular aggravating circumstance. "[T]he State must prove [the] element[s] beyond a reasonable doubt." Banda v. State, 536 So. 2d 221, 224 (Fla. 1988). Unfortunately, Mr. Clark's jury received no instructions regarding the elements of the "heinous, atrocious and cruel" aggravating circumstances submitted for the jury's consideration. Its discretion was not channeled and limited in conformity with Cartwrisht.

Florida law requires the jury to weigh the aggravating circumstances against mitigating evidence. In fact, Mr. Clark's jury was so instructed. This Court has produced considerable case law regarding the import of instructional error to a jury

regarding the mitigation it may consider and balance against the aggravating circumstances. In Mikenas v. Dugger, the court ordered a new sentencing because the jury had not received an instruction explaining that mitigation was not limited to the statutory mitigating factors. The error was cognizable in post-conviction proceedings even though there had been no objection at trial, the issue had not been raised on direct appeal, and at a resentencing to the judge alone, the judge had known that mitigation was not limited to the statutory mitigating factors. It was cognizable because this Court determined that Hitchcock required the sentencing jury in Florida to receive accurate information which channeled and limited its sentencing discretion, but allowed the jury to give full consideration to the defendant's character and background. Because of the weight attached to the jury's sentencing recommendation in Florida, this Court found that instructional error was not harmless because it could not "conclude beyond a reasonable doubt that an override would have been authorized." Mikenas, 519 So. 2d at 601. In other words, there was sufficient mitigation in the record for the jury to have a reasonable basis for recommending life and thus preclude a jury override.

Similar conclusions have been reached in other cases where the jury was erroneously instructed. Meeks v. Dugger, ___ So. 2d ___, 14 F.L.W. 313, 314 (Fla. June 22, 1989)("Had the jury recommended a life sentence, the trial court may have been required to conform its sentencing decision to Tedder v. State, 322 So. 2d 908 (Fla. 1975), which requires that, if there is a reasonable basis for the recommendation, the trial court is bound by it."); Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1989)("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 the recommendation."); Floyd v. State, 497 So. 2d 1211, 1216 (Fla. 1986)("In view of the inadequate and

confusing jury instructions, we believe Floyd was denied his right to an advisory opinion. We cannot sanction a practice which gives no guidance to the jury for considering circumstances which might mitigate against death."). In Mr. Clark's case the jury received no guidance as to the "elements" of the aggravating circumstances against which the evidence in mitigation was balanced. In Florida, the jury's pivotal role in the capital process requires its sentencing discretion to be channeled and limited. The failure to provide Mr. Clark's sentencing jury the proper "channeling and limiting" instructions violated the eighth amendment principle discussed in Maynard v. Cartwrisht.

In Maynard v. Cartwrisht, it was held "the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." 108 S. Ct. at 1858. There must be a "principled way to distinguish [the] case, in which the death penalty was imposed, from the many cases in which it was not." Id. at 1859, quoting, Godfrey v. Georsia, 446 U.S. 420, 433 (1980). In Mr. Clark's case, the jury was not instructed as to the limiting constructions placed upon three of the aggravating circumstances. The failure to instruct on the "elements" of these aggravating circumstances in this case left the jury free to ignore those "elements," and left no principled way to distinguish Mr. Clark's case from a case in which the state-approved and required "elements" were applied and death, as a result, was not imposed. The jury was left with open-ended discretion found to be invalid in Furman v. Georgia, 408 U.S. 238 (1972), and Mavnard v. Cartwrisht.

In Pinkney v. State, 538 So. 2d 329, 357 (Miss. 1988), it was recognized that "Maynard v. Cartwrisht dictates that our capital sentencing juries in this State be more specifically instructed on the meaning of 'especially, heinous, atrocious, or cruel.'" The court then ruled, "hereafter capital sentencing juries of this State should and must be specifically instructed

about the elements which may satisfy the aggravating circumstance of 'especially heinous, atrocious or cruel."' Id.

The Tennessee Supreme Court concluded that under Maynard v. Cartwrisht, juries must receive complete instructions regarding aggravating circumstances. State v. Hines, 758 S.W.2d 515 (Tenn. 1988). The court did not read Cartwright as applying only to the heinous, atrocious, and cruel aggravating circumstance. The court there also found that ambiguity in the instructions regarding any limiting constructions of an aggravating circumstance violated Mills v. Maryland, 108 S. Ct. 1860 (1988). The court ruled that error under Maynard v. Cartwright and Mills could not be found to be harmless beyond a reasonable doubt.

The court in Brogie v. State, 760 P.2d 1316 (Okla. Crim. 1988), also found error under Maynard v. Cartwrisht. The court found eighth amendment error where jury instructions failed to include any qualifying or limiting constructions placed upon on aggravating circumstance. Under this construction of Maynard v. Cartwrisht, Mr. Clark's jury received inadequate instructions and his sentence of death violates the eighth amendment.

This Court should now correct Mr. Clark's death sentence which violates the eighth amendment principle discussed in Maynard v. Cartwrisht, 108 S. Ct. 1853, 1858 (1988):

> Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically asserted that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L.Ed.2d (1972).

Habeas corpus relief should be granted.

CLAIM IV

THE SENTENCING JUDGE SHIFTED THE BURDEN TO MR. CLARK TO PROVE THAT DEATH WAS INAPPROPRIATE. THIS 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.

Respondent failed to address Mr. Clark's reliance on ~~Penry~~ v. Lynaugh, 109 S. Ct. 2934 (1989), as a new retroactive decision which justified presentation of Claim IV at this juncture. ~~Penry~~, as well as ~~Hamblen v. Dugger~~, ___ So. 2d ___ 14 F.L.W. 347 (Fla. 1989), post-date the case relied upon by the state, Atkins v. Dugger, **541** So. 2d **1165** (Fla. 1989). Under Claim IV as set out in Mr. Clark's petition, habeas corpus relief must be granted.

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.

In its Response, the State claims fundamental constitutional error is not cognizable in a capital defendant's first and only state habeas corpus petition and that "[c]ollateral counsel well knows this." Response at **14**. Of course the State can and did cite no authority for this proposition which "[c]ollateral counsel [supposedly] well knows." In fact this Court's authority is to the contrary and supports Mr. Clark's claim. Habeas corpus jurisdiction lies for claims premised upon fundamental constitutional error occurring in the appellate process, including, but not limited to, ineffective assistance of appellate counsel.

Moreover, in reviewing for ineffective assistance of appellate counsel, it must be remembered that errors obvious on the face of the record are preserved for appellate review. In State v. Whitfield, 487 So. 2d 1045 (Fla. 1986), this Court ruled

that a "contemporaneous objection" is not required where the sentence on its face is illegal. Sentencing errors apparent on the face of the record are cognizable and preserved. State v. Rhoden, 448 So. 2d 1013 (Fla. 1984); Walker v. State, 462 So. 2d 452 (Fla. 1985); State v. Snow, 462 So. 2d 455 (Fla. 1985). No contemporaneous objection is necessary so long as the claim involves factual matters that are apparent or determinable from the record on appeal. Dailey v. State, 488 So. 2d 532 (Fla. 1986); Forehand v. State, 537 So. 2d 103 (Fla. 1989).

Here the doubling of aggravating circumstances which the jury and the judge reviewed to determine whether sufficient aggravating circumstances were present and whether they outweighed mitigation, was obvious on the face of the record and thus preserved for appeal. Counsel's failure to argue the improper doubling violated the principles of Furman v. Georsia, 408 U.S. 238 (1972); Gregg v. Georsia, 428 U.S. 153 (1976); Godfrey v. Georsia, 446 U.S. 420 (1980); Flovd v. State, 497 So. 2d 1211 (Fla. 1986); Mavnard v. Cartwright, 108 S. Ct. 1853 (1988).

The State also fails to comprehend the difference between a petition for state habeas corpus and motion pursuant to Rule 3.850. The two actions are governed by different rules.

Under the eighth amendment, error occurred. Mr. Clark's sentence of death is unreliable and his death sentence must be vacated and habeas corpus relief granted.

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.

As to this claim, the State repeats itself and argues that appellate counsel could not have been ineffective because the issue was not preserved. However the inadequacy of the trial court's findings were obvious on the record, just as defects in a judgment and sentence are obvious on the record and need not be

objected to in order to be preserved for appellate review. See Rhoden, supra; Walker, supra; Snow, supra; Dailey, supra; Forehand, supra.

The issue was preserved for appeal. Appellate counsel was ineffective for not raising this claim on direct appeal. This issue is only cognizable in a state habeas corpus petition; it is not cognizable under Rule **3.850.**

Under the sixth and eighth amendments, error occurred. Mr. Clark's sentence of death must be vacated and habeas corpus relief granted.

CONCLUSION

The State has said nothing to rebut Mr. Clark's entitlement to relief. In fact no where has the State, in its Response, contested the merits of any of the claims presented in Mr. Clark's habeas corpus action. This is clearly because Mr. Clark's claims, as set in the original petition and reasserted here, are meritorious. The relief sought is appropriate, and should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail, postage prepaid, first class to Robert Krauss, Assistant Attorney General, Department of Legal Affairs, Park Trammel Building, 1313 Tampa Street, Suite 804, Tampa, Florida 33602, this 26th day of September, 1989.

Attorney