IN THE SUPREME COURT OF FLORIDA

NO. 74478

RALEIGH PORTER,

Petitioner,

v.

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

Respondent.

PETITION FOR EXTRAORDINARY RELIEF
AND FOR A WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

This is Mr. Porter'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. Porter is entitled to habeas corpus relief, and that the prior disposition of Mr. Porter's claims by this Court 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. Porter seeks to have this Court determine his claim that Booth error appears of record. Mr. Porter also calls to the Court's attention the decision in Scull v. State, 533 So. 2d 1137 (Fla. 1988), holding that sentencing judges could not rely on a victim's personal characteristics in sentencing a capital defendant to death.

On July 27, 1989, this Court rendered its decision in Cochran v. State, ___ So. 2d ___, No. 67,972 (Fla., July 27, 1989). There Chief Justice Ehrlich in dissent noted that under "a mechanistic application of the Tedder [standard]," Mr. Porter's sentence of death cannot stand as it results from an improper override. Thus, the death sentence in Mr. Porter's case is clearly arbitrary, capricious and not in accord with the law. Its imposition would be "freakish" and a violation of Furman v. Georgia, 408 U.S. 238 (1972).

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. On July 27, 1989, this Court issued its decision in Hamilton v. State, ___ So. 2d ___, No. 72,502 (Fla., July 27, 1989), where this Court noted that aggravating circumstances must rest on proof beyond a reasonable doubt, and not upon speculation. Here, the jury did not find heinous, atrocious, or cruel present and no consideration has ever been given to that fact, nor to the fact that the judge had to speculate to find the circumstance present in this case. Fundamental error occurred in Mr. Porter's direct appeal because appellate counsel inadequately argued and this Court failed to find that the sentencing judge failed to apply the proper limiting construction of that aggravator and improperly concluded that the 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.

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 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. Porter's burden-shifting claim should now be reveiwed.

Additionally, 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 cannot be procedurally barred. Applying Penrv to Mr. Porter's case, it is clear that the sentencing judge did not believe sympathy or mercy towards a capital defendant were proper considerations. This violated Penrv.

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. Porter's capital conviction and sentence of death. On November 30, 1978, Mr. Porter was sentenced to death. The jury recommended life but this recommendation was overridden. Direct appeal was taken to this Court. Mr. Porter's conviction was affirmed but his sentence was vacated and a resentencing ordered because of error under Gardner v. Florida, 430 U.S. 349 (1977). Porter v. State, 400 So. 2d 5 (Fla. 1981). At the resentencing before the trial judge, a death sentence was reimposed. On direct appeal, the death sentence was affirmed. Porter v. State, 429 So. 2d 293 (Fla. 1983). A subsequent motion for post-conviction relief was denied and the denial affirmed on appeal. Porter v. State, 478 So. 2d 33 (Fla. 1985).

Jurisdiction in this action lies in this Court, **see**, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein involved the appellate review process. **See** Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985); Baggett v. Wainwriaht, 229 So. 2d 239, 243 (Fla. 1969); see also Porter v. Wainwright, 498 So. 2d 938 (Fla. 1987); cf. Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981). A

petition for a writ of habeas corpus is the proper means for Mr. Porter 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. Wilson; Porter: Downs; Riley. This petition presents substantial constitutional questions which go to the heart of the fundamental fairness and reliability of Mr. Porter's capital conviction and sentence of death, and of this Court's appellate review. Mr. Porter'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; Porter, supra. The petition pleads claims involving fundamental constitutional error. See Dallas v. Wainwright, 175 So. 2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So. 2d 362 (Fla. 1984). The petition includes claims predicated on significant, fundamental, and retroactive changes in constitutional law. See, e.g., Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987); Tafero v. 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). 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. Porter's claims.

This Court therefore has jurisdiction to entertain Mr. Porter's claims, Knight v. State, 394 So. 2d at 999, and, as will be shown, to grant habeas corpus relief. Wilson, supra; Porter, supra. This and other Florida courts have consistently recognized that the Writ must issue where fundamental error occurs on crucial and dispositive points, or where a defendant received ineffective assistance of appellate counsel. See, e.g., Wilson v. Wainwright, supra, 474 So. 2d 1163; McCrae v. Wainwright, 439 So. 2d 768 (Fla. 1983); State v. Wooden, 246 So. 2d 755, 756 (Fla. 1971); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); Ross v. State, 287 So. 2d 372, 374-75 (Fla. 2d DCA 1973); Davis v. State, 276 So. 2d 846, 849 (Fla. 2d DCA 1973), affirmed, 290 So. 2d 30 (Fla. 1974). The proper means of securing a hearing on such issues in this Court is a petition for writ of habeas corpus. Baggett, supra, 287 So. 2d at 374-75; Powell v. State, 216 So. 2d 446, 448 (Fla. 1968).

Mr. Porter's claims are presented below. They demonstrate that habeas corpus relief is proper in this case. This is Mr. Porter's first and only petition for a writ of habeas corpus. The claims he presents are no less substantial than those involved in the cases cited above. He therefore respectfully urges that the Court grant habeas corpus relief.

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 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. Porter's case, substantial

and fundamental errors occurred in his capital trial. These errors were uncorrected by the appellate review process. As shown below, relief is appropriate.

CLAIM I

THE CONSIDERATION OF AND RELIANCE UPON THE VICTIMS' PERSONAL CHARACTERISTICS BY THE SENTENCING JUDGE IN OVERRIDING THE JURY'S LIFE RECOMMENDATION VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS, BOOTH V. MARYLAND, AND SOUTH CAROLINA V. GATHERS.

This Court recently found that Booth v. Maryland, 107 S. Ct. 2529 (1987), was an unanticipated retroactive change in law under Witt v. State, **387** So. 2d 922 (Fla. 1980):

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

At Raleigh Porter's capital trial, the sentencing judge overrode the jury's life recommendation because as he explained:

> The Court is aware that a death by electrocution is not a pretty sight, but then neither were the pictures of the bodies of the old married couple that had been brutally beaten and strangled to death because Raleigh Porter wanted their automobile. It so happens that Raleigh Porter was tried by a Judge that has a lot more sympathy for the feelings of the victims than he does worry

about the sensibilities of the murderer.

(R. 791)(emphasis added).

The judge sentenced Mr. Porter to death on the basis of victim impact in violation of Booth, South Carolina v. Gathers, 109 S. Ct. ___, 45 Cr. L. 3076 (June 12, 1989), and Jackson, supra. In addition the judge's action violated Scull v. State, 533 So. 2d 1137 (Fla. 1988). There this Court addressed the sentencing judge's ability to rely on victim impact information:

> Scull raises one final issue on appeal. He alleges that the trial judge considered in his sentencing a victim impact statement (VIS) contained in the presentence investigation report (PSI). In doing so, Scull argues, the court violated the principles subsequently enunciated by the United States Supreme Court in Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987). The VIS involved here contained pleas from Mejides' mother and Villegas' sister, detailing the torment each family has suffered since the murders and requesting that Scull receive the death penalty. They were somewhat less detailed and articulate than the VIS in Booth, but essentially they operate in the same way. They both injected irrelevant material into the sentencing proceedings.
>
> We believe that it was error for the trial judge to consider these statements. However, the record is unclear as to whether the judge considered the VIS in his sentencing or whether he merely examined it without actually considering it for purposes of ordering a sentence of death. We further note that counsel made no objections to consideration of the statements. Because such statements are usually contained in a PSI, it is unreasonable to expect judges to excise those portions of the report that are not proper for consideration. Under Booth, it is error to admit the VIS into evidence before the sentencing or advisory jury. Similarly, it is error for a sentencing judge to consider those statements as evidence of aggravating circumstances. However, when a judge merely sees a victim impact statement contained in a presentence investigation report, but does not consider the statements for purposes of sentencing, no error has been committed.

533 So. 2d at 1142-43 (emphasis added). Thus, this Court held that a sentencing judge may not rely on victim impact information during the sentencing process. Certainly in Mr. Porter's case it

was violative of the eighth amendment for the judge to override the life recommendation because the victims' were "an elderly married couple" with whom he sympathized (R. 789).

The errors in petitioner's case violate the eighth amendment principles in Booth v. Maryland, 107 S. Ct. 2529 (1987), and South Carolina v. Gathers, supra. In petitioner's case, victim impact was relied upon by the sentencing judge and "create[d] a constitutionally unacceptable risk that the [sentencer] *may* [have] impose[d] the death penalty in an arbitrary and capricious manner." Id. at 2533 (emphasis added). The evidence here was identical to the type of victim impact information condemned in Booth. See id., 107 S. Ct. at 2533.

Booth, supra, sets the constitutional standard: matters such as those considered by the judge in Mr. Porter's case are flatly improper considerations in a capital sentencing proceeding. Booth prohibits consideration in the capital sentencing process of "the emotional impact of the crimes on the [victim's] family," or of the victim's personal characteristics, "an elderly married couple."

The Booth and Gathers courts found the consideration of evidence and argument involving matters such as those relied on by the sentencing judge to be constitutionally impermissible, as such matters violated the well established principle that the discretion to impose the death penalty must be "suitably directed and limited so as to minimize the risks of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. 153, 189 (1976)(joint opinion of Stewart, Powell, and Stevens, JJ.); see also California v. Ramos, 463 U.S. 992, 999 (1983). The Booth Court ruled that the sentencer was required to provide, and the defendant had the right to receive, an "individualized determination" based upon the "character of the individual and the circumstances of the crime." Booth v. Maryland, supra; see also Zant v. Stephens, 462 U.S. 862, 879 (1983); Eddings v.

Oklahoma, 455 U.S. 104, 112 (1982). Here, however, the judge justified the death sentence through an individualized consideration of the victim's personal characteristics. The Booth Court noted that victim impact evidence had no place in the capital sentencing determination, for such matters have no "bearing on the defendant's 'personal responsibility and moral guilt.'" 107 S. Ct. at 2533, citing Enmund v. Florida, 458 U.S. 282, 801 (1982). A contrary approach would run the risk that the death penalty will be imposed because of considerations that are "constitutionally impermissible or totally irrelevant to the sentencing process." See Zant v. Stephens, supra, 462 U.S. at 885.

The presentation of matters concerning "the personal characteristics of the victim" before a capital sentencer violate the eighth amendment because such factors create "a constitutionally unacceptable risk" that the death penalty may be imposed "in an arbitrary and capricious manner." Booth, supra, 107 S. Ct. at 2533. It is constitutionally impermissible to rest a sentence of death on a comparison of the "worth" of the defendant to that of the victim. Cf. Booth, supra; Vela v. Estelle, 708 F.2d 954 (5th Cir. 1983). "Worth of victim" and "comparable worth" have nothing to do with 1) the character of the offender, and/or 2) the circumstances of the offense. See Zant v. Stephens, 462 U.S. 862, 879 (1983). They deny the defendant an individualized capital sentencing determination, and render any resulting sentence arbitrary, capricious, and unreliable. See generally, Booth, supra, 107 S. Ct. at 2532-35. In short, the eighth amendment forbids the imposition of a sentence of death because of the impact of the victim's loss on the victim's relatives, or because of who the victim was. But this is precisely the analysis the judge employed when he concluded he had more sympathy for the victims than the defendant.

Sentencing procedures in capital cases must ensure "heightened reliability in the determination that death is the appropriate punishment." Woodson v. North Carolina, 428 U.S. 280, 305 (1976). See also Gardner v. Florida, 430 U.S. 349 (1977). The central purpose of these requirements is to prevent the "unacceptable risk that 'the death penalty [may be] meted out arbitrarily or capriciously' . . . or through 'whim or mistake.'" Caldwell v. Mississippi, 472 U.S. 320, 344 (1985)(O'Connor, J., concurring), quoting California v. Ramos, 463 U.S. 992, 999 (1983), and Eddings v. Oklahoma, 455 U.S. 104, 118 (1982). The decision to impose the death sentence must "be, and appear to be, based on reason rather than caprice or emotion." Gardner, 430 U.S. at 358.

To ensure this heightened reliability, the eighth amendment requires a capital sentencer to make "an individualized determination on the basis of the character of the individual and the circumstances of the crime." Zant v. Stephens, 462 U.S. 862, 879 (1983). See also Eddings v. Oklahoma, 455 U.S. 104, 112 (1982); Woodson, supra, 428 U.S. at 304. The decision to impose the death penalty "must be tailored to [the defendant's] personal responsibility and moral guilt." Enmund v. Florida, 458 U.S. 782, 801 (1982). Any other approach would run the risk that the death penalty will be imposed because of considerations that are "constitutionally impermissible or totally irrelevant to the sentencing process." Zant v. Stephens, supra, 462 U.S. at 885.

Because of the requirement of heightened reliability and the focus on individual culpability, a sentence of death cannot stand when it results because of the personal characteristics of the victim, and a defendant must not be convicted and sentenced to die by a judge who may have "failed to give [his] decision the independent and unprejudiced consideration the law requires." Wilson, 777 F.2d at 626, quoting Drake v. Kemp, 762 F.2d 1449, 1460 (11th Cir. 1985)(en banc); see also Potts v. Zant, 734 F.2d

526 (11th Cir. 1984). In short, a capital proceeding is flatly unreliable when the judge erroneously relies upon forbidden matters in making the determination to impose a sentence of death. Booth v. Maryland, 107 S. Ct. 2529 (1987); Wilson v. Kemp, supra.

Here the judge violated Booth, Gathers, Scull, and Jackson, and called into question the reliability of the penalty phase. Booth requires that the court disallow the "risk" of impermissible information which "may" influence the capital sentencing determination. In petitioner's case, that risk actualized -- Mr. Porter's 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, 45 Cr. L. 3076 (June 12, 1989). See also Enmund v. Florida, supra, 458 U.S. at 801; see also id. at 825 (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 (1987)('The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender'). Here, the trial judge overrode the jury's life recommendation and imposed death not on the basis of Mr. Porter's "moral culpability" but because the judge "ha[d] a lot more sympathy for the feelings of the victims." (R. 791).

For these reasons, Mr. Porter's sentence of death should be vacated, and a life sentence imposed. Habeas corpus relief is proper.

CLAIM II

THE JURY OVERRIDE IN MR. PORTER'S CASE RESULTED IN AN ARBITRARILY, CAPRICIOUSLY, AND UNRELIABLY IMPOSED SENTENCE OF DEATH, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The jury override procedure in Florida is constitutionally valid only to the extent that it is utilized within specific

reliable procedural parameters, and so long as it does not lead to freakish and arbitrary capital sentencing. Spaziano v. Florida, 468 U.S. 447, 465 (1984). The eighth amendment requires "significant safeguard[s]," id., to be built into the override process.[1]

The override in this case was constitutionally wrong. It was permeated with and resulted from Booth error as set out in Claim I, supra. The override in this case would not be allowed to stand today, thus demonstrating the unreliability and arbitrariness of Mr. Porter's sentence of death. See Cochran v. State, ___ So. 2d ___, No. 67,972 (Fla., July 27, 1989), slip op. at 13-14 (Ehrlich, C.J., dissenting). Of course, the unreliability and wrongfulness of this death sentence requires that the claim now be heard. See Smith v. Murray, 106 S. Ct. 2661, 2668 (1986); Murray v. Carrier, 106 S. Ct. 2639, 2650 (1986). The unreliable sentence of death in this case is a classic example of a fundamental miscarriage of justice.

If the jury override here, and the method by which it was sustained, is acceptable under the Florida statute, then "the application of the jury override procedure has resulted in arbitrary or discriminatory application of the death penalty . . . in general . . . [and] in this particular case." Spaziano, supra. To allow the override to stand in this case would indeed be to validate a procedure providing no meaningful basis upon which to distinguish between those persons who receive life (when a judge does not override, or when an override is reversed) and those who receive death. This violates the eighth and fourteenth amendments.

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[1] See, e.g., Maynard v. Cartwright, 108 S. Ct. 1853 (1988)(state courts free to establish definition of and parameters under which aggravating circumstances may be applied, but the propriety of the application of such factors under the state's established standards is a federal constitutional question).

A. THE STANDARDS ATTENDANT TO FLORIDA'S JURY OVERRIDE PROCEDURE

The nature of Florida's capital sentencing process ascribes a role to the sentencing jury that is central and "fundamental", Riley v. Wainwright, 517 So. 2d 656, 657-58 (Fla. 1988); Mann, supra, 844 F.2d at 1452-54, representing the judgment of the community. Id. A Florida sentencing jury's recommendation of life is entitled to "great weight," and can only be overturned by a sentencing judge if "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975)(emphasis supplied). See also Mann, 844 F.2d at 1450-51 (and cases cited therein); Cochran v. State, ___ So. 2d ___, No. 67,972 (Fla., July 27, 1989); Freeman v. State, ___ So. 2d ___, No. 71,756 (Fla., July 27, 1989).

The standard established under Florida law is thus that if a jury recommendation of life is supported by any reasonable basis in the record -- such as a valid mitigating factor, albeit nonstatutory -- that jury recommendation cannot be overridden. See Mann, supra, 844 F.2d at 1450-54 (and cases cited therein); see also Ferry v. State, 507 So. 2d 1373, 1376-77 (Fla. 1987); Wasko v. State, 505 So. 2d 1314, 1318 (Fla. 1987); Brookings v. State, 495 So. 2d 135, 142-43 (Fla. 1986); Tedder, supra, 322 So. 2d at 910. Cf. Hall v. State, 541 So. 2d 1125 (Fla. 1989). This is "the nature of the sentencing process," Mann, supra, 844 F.2d at 1455 n.10, under Florida law. This standard has in fact been recognized by the United States Supreme Court as a "significant safeguard" provided to a Florida capital defendant. Spaziano, supra, 468 U.S. at 465.

B. THE OVERRIDE IN MR. PORTER'S CASE RESULTED IN AN ARBITRARILY, CAPRICIOUSLY, AND UNRELIABLY IMPOSED DEATH SENTENCE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Porter's jury recommended that he be sentenced to life. However, although mitigation was present in the record, and although there was much more than a reasonable basis for the jury's recommendation, the trial judge ignored the law and imposed death because he, unlike the jury, was more sympathetic to the victims than to Mr. Porter. This Court then refused to apply its own settled standards and affirmed that sentence. See Porter, supra, 429 So. 2d 293, 296 (Fla. 1983). Here, the sentencing judge and this Court violated Mr. Porter's eighth amendment rights to a capital sentencing determination in accord with Florida's settled standards. See Mann, supra, 844 F.2d at 1455, n.lO.

The record here demonstrates many, many reasonable bases for life. For example, Mr. Porter's youth was argued to the jury, and it could have found that statutory mitigating circumstance established. The jury could have been convinced by defense counsel's argument that Mr. Porter had no significant history of criminal activity (R. 769), and thus found two statutory mitigating circumstances. The jury could have also considered the fact that Mr. Porter was married with children as nonstatutory mitigation, even though the judge did not.

As to the aggravating circumstances, defense counsel argued that the murder was not heinous, atrocious or cruel because the victims "were knocked unconscious immediately upon entering the house," and whatever happened thereafter could not make the crime heinous, atrocious or cruel (R. 768). The victims "did not know what was going on, did not feel pain." Id. See Cochran, supra, slip op. at 5. As to whether the crime was committed to avoid arrest, defense counsel argued that "It's not sufficent to furnish evidence to you, merely suggesting that these aggravating

circumstances apply. If you're not convinced beyond a reasonable doubt that [the aggravating circumstances argued by the State] were proven beyond a reasonable doubt, then I ask you to disregard them." (R. 768). See Hamilton v. State, ___ So. 2d ___, No. 72,502 (Fla., July 27, 1989), slip op. at 5 (aggravating circumstances must be proven beyond a reasonable doubt and cannot be based on speculation). Clearly the jury did just that. Moreover, the jury had a reasonable basis for doing so.

Defense counsel reminded the jury, "You heard Raleigh Porter today. You heard him beg for mercy." The jury in recommending life obviously found reasonable doubt as to the existence of the aggravating circumstances and found a basis for the mitigation argued by counsel. "[T]he facts suggesting a sentence of death [are not] so clear and convincing that virtually no reasonable person could differ." Tedder, 327 So. 2d at 910. Thus, the jury's recommendation should have been followed.

The judge overrode the jury's life recommendation saying:

> The Court is aware that a death by electrocution is not a pretty sight, but then neither were the pictures of the bodies of the old married couple that had been brutally beaten and strangled to death because Raleigh Porter wanted their automobile. It so happens that Raleigh Porter was tried by a Judge that has a lot more sympathy for the feelings of the victims than he does worry about the sensibilities of the murderer.
>
> The Court finds that, beyond and to the exclusion of every reasonable doubt, the aggravating circumstances outweigh the mitigating circumstances. The totality of the circumstances dictate the death penalty be imposed. Therefore, it is the sentence of this Court that Raleigh Porter is to be executed in accordance with the laws of the State of Florida for the first degree murder of Harry Walrath and the first degree murder of Margaret Walrath.

(R. 791).

Based on all of the above, it is quite plain that "reasonable people could differ as to the propriety of the death penalty in this case, [and thus] the jury's recommendation of life must stand." Brookings V. State, 495 So. 2d 135, 143 (Fla.

1986). There were numerous valid and eminently reasonable statutory and nonstatutory mitigating factors in this case, a case involving only three aggravating factors, which the jury quite reasonably rejected. See Claim 111, infra (regarding the applicability of heinous, atrocious, or cruel). Whatever balance the trial judge and this Court may have struck, the jury's balancing and resulting life recommendation, were undeniably reasonable under Florida law. See Mann, supra, 844 F.2d at 1450-55; Ferry, supra; Wasko, supra. The trial judge and this Court, however, refused to provide Mr. Porter with the right which the law clearly afforded him: the right not to have a reasonable jury verdict overturned.

In fact, the trial judge failed to even explain why the jury had no rational basis for its recommendation, as Tedder requires. A jury life recommendation magnifies the sentencing judge's duty to actually consider statutory and nonstatutory mitigating factors, cf. Hitchcock, supra, because the usual presumption in Florida that death is the proper sentence upon proof of one or more aggravating factors does not apply (and indeed is reversed) when a jury recommendation for a life sentence has been made. Williams v. State, 386 So. 2d 538, 543 (Fla. 1980).[2]

The override was thus predicated upon what the judge felt (his sympathy for the victims), and not upon any analysis of why there was no reasonable basis for the jury. That is not the law:

> The state, however, suggests that the override was proper here because the trial court judge is the ultimate sentencer and his sentencing order represents a reasonable weighing of the relevant aggravating and mitigating circumstances. According to the

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[2]The judge considering an override must weigh aggravating circumstances "against the recommendation of the jury." Lewis v. State, 398 So. 2d 432, 439 (Fla. 1981). The overriding judge must make findings that explain why the jury was unreasonable, why no reasonable person could differ, and why death is proper. Tedder, supra. Neither this procedure, nor the substantive "no reasonable juror" determination, occurred in this case.

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

Ferry, 507 So. 2d at 1376-77 (emphasis added). Despite the presence of the significant mitigation cited above, this Court sustained the override. Porter v. State, 429 So. 2d 293. This was a fundamental error of law, an error which deprived Mr. Porter of his eighth amendment rights.

This Court thus arbitrarily ignored its own standards and arbitrarily denied Mr. Porter the protections, i.e., the "liberty interest," afforded under Florida's capital sentencing statute. See Vitek v. Jones, 445 U.S. 480, 488-89 (1980)(state-created liberty interest is one that fourteenth amendment preserves against arbitrary deprivation by the State); Hicks v. Oklahoma, 447 U.S. 343 (1980)(same). Neither the eighth amendment, nor due process, nor equal protection can be squared with the fact that Florida law afforded Mr. Porter the right to an affirmance of the jury's reasonable life recommendation, while the Florida courts' unfounded, unique, and illogical ruling arbitrarily withdrew that right. See Evitts v. Lucey, 469 U.S. 387, 400-01 (1985); Porter v. Avery, 393 U.S. 483, 488 (1969); Smith v. Bennett, 305 U.S. 708, 713 (1961). See also Reece v. Georgia, 350 U.S. 85 (1955). If a jury recommends life, death may not be imposed if there is any "reasonable basis in the record" for the recommendation. Ferry, supra, 507 So. 2d at 1376-77; see also Hansbroush v. State, 509 So. 2d 1081, 1086 (Fla. 1987)("a reasonable basis for the jury to recommend life" cannot be overridden); Fead, supra, 512 So. 2d at 178("[O]nly when there are no 'valid mitigating

factors discernible from the record' is an override warranted"); Wasko, supra, 505 So. 2d at 1318(no override "unless no reasonable basis exists for the opinion"); Duboise v. State, 520 So. 2d 260, 266(Fla. 1988)(If a "fact could reasonably have influenced the jury," no override is proper). If any valid mitigating circumstances exist in the record, an override cannot be sustained. That is the right afforded to capital defendants under Florida's capital sentencing statute. That is the right arbitrarily denied to Mr. Porter.

Recently this Court, in another case, has recognized that its application of the Tedder standard has been arbitrary, particularly as to Mr. Porter and several other individuals. See Johnson v. Dugger, 523 So. 2d 161 (Fla. 1988); Cochran, supra.[3] In fact, members of this Court have recognized the eighth amendment violation occurring when, during the early 1980s, several overrides were erroneously and arbitrarily affirmed.

In Grossman v. State, 525 So. 2d 833, 850-51 (Fla. 1988), Justice Shaw explained the eighth amendment violation resulting from how the override law had been applied:

> I am not persuaded that our application of Tedder violates Caldwell. Combs v. State, 525 So.2d 853 (Fla.1988). However, I do suggest that the Tedder rule unnecessarily

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[3] Mr. Johnson's direct appeal occured in 1980, and the jury override was sustained by a 4-3 vote. Johnson v. State, 393 So. 2d 1069 (Fla. 1980). It is in fact only because the appeal occurred in 1980 rather than in 1988, that Mr. Johnson's sentence of death was allowed to stand. In a petition for writ of habeas corpus filed in the Florida Supreme Court last year, Mr. Johnson again challenged the arbitrary nature of the jury override in his case, and the resulting violation of his eighth and fourteenth amendment rights. Johnson v. Dugger, 523 So. 2d 161 (Fla. 1988). The opinion there revealed that four current members of the Florida Supreme Court would not sustain the jury override under current law. A person's life cannot depend upon when an appellate court reviews the case. This is arbitrary, capricious, wanton, and freakish, and this is cruel and unusual punishment. Clearly, with regard to capital defendants such as Mr. Porter, "appealing a 'life override' under Florida's capital sentencing scheme [has been] akin to Russian Roulette." Engle v. Florida, 108 S. Ct. 1094, 1098 (1988)(Marshall, and Brennan, JJ., dissenting from denial of certiorari).

> obscures and confuses the identity of the sentencer in Florida. Our statute unquestionably makes the judge the sentencer, but Tedder in its practical application has reversed the roles by mandating that the judge must defer to the jury recommendation unless "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." 322 So.2d at 910. The practical import of Tedder is to place the trial judge in the unenviable position of either following the statute and basing his sentence upon a weighing of the aggravating and mitigating factors or following Tedder. During 1984-85, we affirmed on direct appeal trial judge overrides in eleven of fifteen cases, seventy-three percent. By contrast, during 1986 and 1987, we have affirmed overrides in only two of eleven cases, less than twenty percent. This current reversal rate of over eighty percent is a strong indicator to judges that they should place less reliance on their independent weighing of aggravation and mitigation and more reliance on the indecipherable recommendation of the jury. If we continue to follow Tedder the independent sentencing judgment of trial courts becomes more and more debatable. This brings into question the constitutionality of our death penalty statute as applied. Caldwell.
>
> For the reasons set forth above, I feel that the only forthright position is to recede from Tedder and announce to one and all that the only useful purpose of the advisory recommendation of the jury under our death penalty statute is to apprise the trial judge and appellate court of the jury's reaction to the evidence of aggravation and mitigation as a matter of information. Short of a revision of section 921.141 to place the sentencing responsibility upon the jury and to require factual findings on which to base appellate review, the jury recommendation does not carry the great weight assigned to it by Tedder. It is as its designation indicates, advisory only, nothing more, nothing less.

(emphasis added)(footnote omitted).

In Cochran, supra, Chief Justice Ehrlich specifically noted that under the current application of the Tedder override standard, Mr. Porter's sentence of death was not sustainable:

> In Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), the Court advised that to impose a death sentence where the jury has recommended life imprisonment rather than death, "the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ."

This often quoted formulation expresses a preferred policy and provides a general principle to which sentencing judges and this Court may look in evaluating an override sentence. However, as all students of the common-law tradition know, legal precedent consists more of what courts do than what they say. So we must look to this Court's decisions applying the Tedder rule if we are to understand its proper meaning.

As refined by subsequent decisions, Tedder requires that the jury's life recommendation be followed if there is a reasonable basis for it in the evidence. See, e.g., Porter v. State, 429 So.2d 293, 296 (Fla.)(override proper where jury was probably influenced in favor of life by an improper factor), cert. denied, 464 U.S. 865 (1983). But the reasonableness of the jury's recommendation should be evaluated in light of all the evidence considered, see, e.g., Hoy v. State, 353 So.2d 826, 832 (Fla. 1977) (jury override sentence was proper "under the totality of the circumstances"), cert. denied, 439 U.S. 920 (1978), including that in the judge's possession which was not revealed to the jury. As the majority opinion acknowledges, it is permissible for the sentencing judge to receive evidence of aggravating factors not provided to the jury and such evidence can provide a basis for overriding the jury's life recommendation. Spaziano v. State, 433 So.2d 508 (Fla. 1983), aff'd, 468 U.S. 447 (1984); Porter v. State, 429 So.2d 293 (Fla.), cert. denied, 464 U.S. 865 (1983); White v. State, 403 So.2d 331 (Fla. 1981), cert. denied, 463 U.S. 1229 (1983). In all of these cases, there was information presented that could conceivably have influenced the jury to recommend life. Spaziano v. State, 433 So. 2d at 512 (defendant was not "normal" and his crime was "bizarre") (McDonald, J., dissenting); Porter v. State, 429 So.2d at 296 n.2 (the mitigating evidence was found by the judge to carry "little or no weight"); White v. State, 403 So.2d at 340 (defendant was non-triggerman who acquiesced in the murders). Thus, a mechanistic application of the Tedder dictum would have resulted in reversals of the death sentences in these cases. Our death penalty decisions recognize that to treat the jury recommendation as binding would violate the eighth amendment as interpreted in Furman v. Georgia, 408 U.S. 238 (1972). Spaziano v. State, 433 So.2d at 512; Douglas v. State, 373 So.2d 895 (Fla. 1979). It would also violate the legislative directive that the jury's determination should be "advisory," a recommendation and nothing more. Section 921.141(2),(3), Fla. Stat. (1987). This Court's experience with the variability and subjectiveness of juries' evaluations in sentencing validates and

> reinforces the legislative policy and the constitutional principle.

Slip op. at 13-14; see also Cochran, supra, slip op. at 9-10, suotins Grossman, supra (Shaw, J., concurring)(noting that "since 1985 the Court has determined that Tedder means precisely what it says")(emphasis added).

Though both Chief Justice Ehrlich and Justice Shaw argue that the Tedder standard as construed today is wrong and the Court should return to the standard applied in Mr. Porter's case which in essence **"rubberstamped"** overrides, they both correctly note that shifting the standard results in an eighth amendment violation under Furman v. Georgia, 408 U.S. 238 (1972). The imposition of the death penalty becomes arbitrary and freakish. There is no discernible difference between those who get death and those who do not, other than whether a sentencing judge for his own personal reasons chose to override a life recommendation and when this Court reviewed that decision. As applied to Mr. Porter, the Florida death penalty violates the eighth amendment and Furman.

C. THIS CLAIM MUST BE HEARD

As this Court's recent opinions have acknowledged, the standard for sustaining a jury override has changed since Mr. Porter's direct appeal -- the override would not be sustained today. A federal district court in Lusk, supra, explained why this is so:

> Cases decided by the Florida Supreme Court in the wake of Hitchcock demonstrate recognition of the significance which nonstatutory mitigating circumstances may have on the Tedder standard. In Holsworth v. State, 522 So. 2d 348 (Fla. 1988), the trial judge overrode a jury's life recommendation, finding proof to establish three aggravating factors -- defendant previously convicted of a felony involving use or threat of violence, murder committed during an armed burglary, and murder of an especially heinous, atrocious, and cruel nature -- and no mitigating circumstances. Id. at 353-54. In fact, the trial judge

expressly rejected testimony and opinion from and expert witness and gave little weight to testimony from other witnesses on a range of nonstatutory mitigating circumstances. Id. at 354. The Florida Supreme Court held the override improper.

> The jury . . . may have given more credence to this testimony. Under Florida's capital sentencing statute, it is the jury's function, in the first instance, to determine the validity and weight of the evidence presented in aggravation and mitigation . . . When there is some reasonable basis for the jury's recommendation of life, clearly it takes more than a difference of opinion for the judge to override that recommendation.

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

Lusk, supra, slip op. at 28-30 (footnote omitted); cf. Engle, supra, 108 S. Ct. at 1097 ("The court's determination [affirming a jury override] denigrates the role of valid mitigating circumstances in Florida's sentencing scheme, contrary to the principles in Lockett and Eddings.").

This Court in Mr. Porter's case, however, has arbitrarily allowed an unreliable death sentence to stand. This Court's override standard has evolved to conform with constitutional requirements, but Mr. Porter has arbitrarily been denied the benefit of that evolution. The ends of justice require that the claim now be entertained, and that relief now be granted.

Recently, the United States Supreme Court in a decision held to be retroactive on its face, declaring the Texas death penalty

statute unconstitutional as applied despite its earlier stamp of approval in Jurek v. Texas, 428 U.S. 262 (1976), concluded:

> [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 added). Thus, the Supreme Court recognized that despite Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); and Jurek, the death schemes approved there may still be found to violate the eighth amendment as applied. Moreover, the Court recognized that continuing and close scrutiny must be given to death sentences to make sure that a death sentence is not imposed in error. Under Penry, this Court must reexamine the override in Mr. Porter's case.

Mr. Porter has presented a claim that the override of the jury's life recommendation and the affirmance of that override violated the federal Constitution. The impropriety of this override is now manifest. The "interests of justice" required that his claim be heard, for Mr. Porter's death sentence is plainly unconstitutional and unreliable.

This Court should not allow a death-sentenced inmate to be dispatched to his execution when he has made so plain a showing of the unreliability, arbitrariness, freakishness, and wrongfulness of his sentence of death. Mr. Porter is entitled to

habeas corpus relief.

CLAIM III

MR. PORTER'S SENTENCING JUDGE IMPROPERLY FOUND THE "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" AGGRAVATING CIRCUMSTANCE 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**); Herzog 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. In Hamilton v. State, ___ So. 2d ___, No. 72,502 (Fla., July **27, 1989**), this Court stated:

> Although the trial court provided a detailed description of what may have occurred on the night of the shootings, we believe that the record is less than conclusive in this regard. Neither the state nor the trial court has offered any explanation of the events of that night beyond speculation. Nonetheless, the court found that the crimes were heinous, atrocious, or cruel and that they were committed in a cold, calculated manner with a heightened sense of premeditation. There is no basis in the record for either of these findings. Aggravating factors must be proven beyond a reasonable doubt. The degree of speculation present in this case precludes any resolution of that doubt.

Slip op. at 5.

The judge did not consider these limitations on the

"heinous, atrocious or cruel" aggravating factor. Indeed, the unconstitutional constructions rejected by this Court are precisely what Mr. Porter's judge employed in his own sentencing determination. As a result, the judge failed to limit his discretion and violated Maynard v. Cartwrisht, 108 S. Ct. 1853 (1988). In addition, the judge specifically referred to and relied upon his sympathy for the victims when he pronounced the sentence in open court. 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 decision in Cartwright clearly conflicts with what was employed in sentencing Mr. Porter 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 by sentencing judges).

This 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 judge in this case did not apply such a limiting construction.

Mr. Porter's defense counsel in this case argued to the jury:

> The State would argue the crimes were heinous, atrocious, and cruel. The Judge will define these terms, please listen carefully to his instructions. I submit to you, that if these victims, the Walrath's, were in fact murdered as the State witnesses would have you believe, Mat Thomas has indicated they were both killed instantaneously, or both knocked unconscious instantaneously upon someone entering the house. I submit to you, that the law would apply in that particular situation, you can not consider any conduct after these individuals were knocked unconscious, they did not know what was going on, did not feel

> pain. You can not consider that as an aggravating circumstance. The fact is, if they were knocked unconscious immediately upon entering the house, then anything that happened thereafter would not be heinous, atrocious, or cruel. Those two individuals could not feel any of these emotions or any of these feelings, on instantaneous death, where a person is unconscious. I submit to you that the aggravating circumstances involving heinous, atrocious, or cruel, does not apply. The Judge will remind you that aggravating circumstances must be proved beyond a reasonable doubt. It's not sufficient to furnish evidence to you, merely suggesting that these aggravating circumstances apply.

(R. 767-68)(emphasis added).

The jury apparently agreed and found the heinous, atrocious or cruel aggravating circumstance not present. The sentencing judge in overriding the jury's recommendation never explained what was unreasonable about the jury's finding. The judge even had to resort to speculation about what may have happened and how possibly the victims may have suffered (R. 789). Here, the judge failed to limit the circumstance as required in Rhodes, Cochran, Hamilton and Cartwright, supra.

In reversing death sentences because of Hitchcock error this Court has 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)(emphasis added). 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. Dugger, 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). Here, the

jury correctly concluded that the aggravating circumstance was not present but no one accorded that finding of fact any deference.

Mr. Porter is entitled to relief under this Court's Hamilton opinion and the Supreme Court's standards in Maynard v. Cartwrisht. The judge did not apply the limiting construction applicable to "heinous, atrocious or **cruel."** The judge did not know that the murder had to be "unnecessarily torturous to the victim." The judge misunderstood the law. He gave no deference to the jury's findings. 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, but failed to properly apply the limiting construction or explain why the jury's contrary finding was in error.

The United States Supreme Court affirmed the Tenth Circuit's grant of relief in Cartwrisht, explaining that the death sentence did not comply with the fundamental eighth amendment principle requiring the limitation of capital sentencers' discretion. The Court's eighth amendment analysis fully applies to Mr. Porter's case; proceedings as egregious as those upon which relief was mandated in Cartwright and Adamson are present here. The result here should be the same as in Cartwright and Adamson.

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

Under Cartwright the issue is thus whether the error can be found harmless beyond a reasonable doubt. In this case, in light

of the life recommendation based upon statutory and nonstatutory mitigation, the error cannot be found harmless. Appellate counsel rendered ineffective assistance in failing to adequately urge this claim. A new sentencing must be ordered.

CLAIM IV

THE SENTENCING JUDGE SHIFTED THE BURDEN TO MR. PORTER 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.

This case involves a flatly unconstitutional presumption of death. In Hamblen v. Dugger, ___ So. 2d ___, 14 F.L.W. 347 (Fla., July 6, 1989), this Court indicated that the issues concerning the use of an unconstitutional presumption of death must be resolved on a case-by-case approach. Moreover, in Penry v. Lynaugh, 109 S. Ct. ___, 45 Cr. L. 3188 (1989) the United States Supreme Court condemned death penalty schemes which in any way impeded the sentencer from making a "reasoned moral response" when deciding to impose death.

> The Court finds that, beyond and to the exclusion of every reasonable doubt, the aggravating circumstances outweigh the mitigating circumstances. The totality of the circumstances dictate the death penalty be imposed. Therefore, it is the sentence of this Court that Raleigh Porter is to be executed in accordance with the laws of the State of Florida for the first degree murder of Harry Walrath and the first degree murder of Margaret Walrath.

(R. 791).

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. Mr. Porter's sentence of death was unconstitutionally premised upon this burden shifting, as the record makes abundantly clear. This claim is now properly presented to this Court under Penry and Hamblen.

The judge concluded that since he did not believe he could be sympathetic or merciful towards the defendant and thus no mitigation existed in his mind, the law **"dictated"** a death sentence. This violates 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 sentencing process concerning the ultimate question of whether Mr. Porter should live or die. See Smith v. Murray, 106 S. Ct. 2661, 2668 (1986). No bars apply under such circumstances. Id.

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. Porter's case. See also Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988). 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. Porter 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. Porter'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 judge'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 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 standard employed here by the sentencing judge, once one of the statutory aggravating circumstances was found by definition sufficient aggravation existed to impose death. The judge then found no mitigation and concluded the law "dictated" a death sentence. Thus under the standard employed in Mr. Porter'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 judge'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 in Mr. Porter's case. This judge was thus constrained in his 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), including sympathy and mercy for Mr. Porter, in determining the appropriate penalty. The judge did not make a "reasoned moral response" to the issues at Mr. Porter's sentencing and did not "fully" consider mitigation.

Penry v. Lynaugh, supra. There is a "substantial possibility" that the judge's understanding of the sentencing process resulted in a death sentence 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 sentencer's deliberations concerning the ultimate question of whether Mr. Porter should live or die. Smith v. Murray, 106 S. Ct. at 2668. No bars apply. Relief is appropriate.

CLAIM V

DURING THE COURSE OF MR. PORTER'S TRIAL, THE COURT IMPROPERLY ASSERTED THAT SYMPATHY TOWARDS MR. PORTER WAS AN IMPROPER CONSIDERATION IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. THE FAILURE TO LITIGATE THIS CLAIM DEPRIVED MR. PORTER OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

The United States Supreme Court recently held in a case declared to be retroactive on its face that a capital sentencer 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. Porter's case where the sentencing judge found he would not consider sympathy or mercy for the defendant.

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

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

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

Requesting the sentencer to dispel any sympathy it may have towards the defendant undermined the sentencer's ability to reliably weigh and evaluate mitigating evidence. Parks v. Brown, 860 F.2d 1545 (10th Cir. 1988)(en banc). See Coleman v. Saffle,

___ F.2d ___, No. 87-2011 (10th Cir., March 6, 1989); Davis v. Maynard, ___ F.2d ___, No. 87-1157 (10th Cir., March 14, 1989). The sentencer's role in the penalty phase is to evaluate the circumstances of the crime and the character of the offender before deciding whether death is an appropriate punishment. Eddinss v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). An admonition to disregard the consideration of sympathy improperly suggests to the sentencer "that it must ignore the mitigating evidence about the [petitioner's] background and character." California v. Brown, 479 U.S. 538, 107 S. Ct. 837, 842 (1987)(O'Connor, J., concurring).

Sympathy is an aspect of the defendant's character that must be considered by the sentencer:

> The capital defendant's constitutional right to present and have the jury consider mitigating evidence during the capital phase of the trial is very broad. The Supreme Court has held that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978) (emphasis in original). See also Woodson v. North Carolina, 428 U.S. 280, 304 (1976).
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> The sentencer must give "individualized" consideration to the mitigating circumstances surrounding the defendant and the crime, Brown, 479 U.S. at 541; Zant v. Stephens, 462 U.S. 862, 879 (1983); Eddinss v. Oklahoma, 455 U.S. 104, 111-12 (1982); Lockett, 438 U.S. at 605, and may not be precluded from considering "any relevant mitigating evidence." Eddinss, 455 U.S. at 114. See also Andrews v. Shulsen, 802 F.2d 1256, 1261 (10th Cir. 1986), cert. denied, ___ U.S. ___, 107 S. Ct. 1964, 95 L. Ed. 2d 530 (1987).
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> Mitigating evidence about a defendant's background or character is not limited to evidence of guilt or innocence, nor does it necessarily go to the circumstances of the offense. Rather, it can include an individualized appeal for compassion, understanding, and mercy as the personality of the defendant is fleshed out and the jury is given an opportunity to understand, and to relate to, the defendant in normal human terms. A long line of Supreme court cases

shows that a capital defendant has a constitutional right to make, and have the jury consider, just such an appeal.

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

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

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

In Caldwell v. Mississimi, 472 U.S. 320 (1985), the Court held that an attempt to shift sentencing responsibility from the jury to an appellate court was unconstitutional, in part, because the appellate court is ill equipped to consider "the mercy plea [which] is made directly to the jury." Id. at 330-31. The Court explained that appellate courts are unable to "confront and examine

the individuality of the defendant" because "[w]hatever intangibles a jury might consider in its sentencing determination, few can be gleaned from an appellate record." Id.

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

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

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

Here, the petitioner did offer

> mitigating evidence about his background and character. Petitioner's father testified that petitioner was a **"happy-go-lucky** guy" who was "friendly with everybody." The father also testified that, unlike other people in the neighborhood, petitioner avoided violence and fighting; that he (the father) was in the penitentiary during the petitioner's early childhood; that petitioner was the product of a broken home; and that petitioner only lived with him from about age 14 to 19. Although the father admitted that petitioner once was involved in an altercation at school, he suggested that it was a result of the difficulties of attending a school with forced bussing. Record, vol. V, at 667-82.
>
> Petitioner's counsel, in his closing argument, then relied on this testimony to argue that petitioner's youth, race, school experiences, and broken home were mitigating factors that the jury should consider in making its sentencing decision. In so doing, defense counsel appealed directly to the jury's sense of compassion, understanding, and sympathy, and asked the jury to show **"kindness"** to his client as a result of his background. Record, vol. V, at 708-723. . . . [There is] an impermissible risk that the jury did not fully consider these mitigating factors in making its sentencing decision.
>
> . . .
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> As we discussed above, sympathy may be an important ingredient in understanding and appreciating mitigating evidence of a defendant's background and character.

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

The judge's refusal to consider sympathy for Mr. Porter was eighth amendment error under Penry. This error undermined the reliability of the judge's sentencing determination and prevented the judge from assessing the full panoply of mitigation presented by Mr. Porter.[4]

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[4] In fact there was a wealth of material calling for a sentence of less than death that neither the jury nor the judge every heard. Under Penry it is essential for the sentencer to be

(footnote continued on following page)

Counsel's failure to litigate this claim was a failure to zealously represent Mr. Porter. This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Porter's death sentence. Certainly, California v. Brown, Mills, and Parks v. Brown are new cases but they merely expound upon the old principles of Lockett and Eddings. Thus, these cases are unquestionably retroactive, as the Tenth Circuit Court of Appeals has noted the State of Oklahoma conceded. Coleman v. Saffle, supra, slip op. at **30**. Soon the United States Supreme Court will address this very issue in its review of Parks. Moreover, the United States Supreme Court in Penry found

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(footnote continued from previous page)

provided with this information. At a recent federal evidentiary hearing it was established that in preparing for Mr. Porter's trial in **1978,** neither Mr. Widmeyer nor Mr. Jacobs conducted any investigation into Mr. Porter's family background. No attempts were made to contact Mr. Porter's family (Fed. Hearing T. Vol. IV at **15-17,** T. Vol. V at **42).** Mr. Widmeyer and Mr. Jacobs had information available prior to trial indicating that Mr. Porter had had a difficult childhood. For example, Dr. Redcay's report, which appeared in their case file, specifically noted that Mr. Porter **"was** born out of wedlock, never knowing his father, his mother remarried when he was three years of age to a man described as harsh and punitive **. . .** the home life was less than ideal physically, financially, and **emotionally."** (T. Vol. IV at **15,** Petitions Ex. **9).** Moreover, Mr. Porter's counsel also had the means available for contacting Mr. Porter's family (T. Vol. IV at **15-17;** Vol I at **80-81).** Mr. Widmeyer recalled no tactical reason for not contacting the family (T. Vol. IV at **19).** Considerable mitigating evidence would have been available in **1978** had counsel investigated and developed it. The testimony of Mr. Porter's family could have established his illegitimacy, his family's poverty, the sexual and physical abuse he suffered at the hands of his stepfather, the resulting alienation from his stepfather, his efforts to protect his sister from the sexual abuse, his concern and love for his sister, his anguish over his grandfather's death, his rejection by the military, and the abusive conditions in the juvenile facilities in Ohio. (Fed. Hearing T. Vol. I at **36, 40-41, 42-43, 49, 52-54, 58-59, 62-63, 67, 68, 86, 89-91, 93-95).** There was considerable mitigation available had counsel investigated the conditions of Mr. Porter's juvenile incarcerations in Ohio (T. Vol. I at **132).** Similarly, counsel's failure to investigate precluded development of mental health mitigation regarding the long term effects of physical and sexual abuse (T. Vol. IV at **144-48).** None of this was ever presented to either the jury or the judge. All of it would have been information which could have served as a basis for finding a sentence of less than death was appropriate.

its decision in Penry to be retroactive and applied it to a case in collateral review.

The error here undermined the reliability of the judge's sentencing determination and prevented the judge from assessing the full panoply of mitigation presented by Mr. Porter. The prosecutor's argument impeded a "reasoned moral response" which by definition includes sympathy. Penry v. Lynaush, **109 S.** Ct. ___, **45** Cr. **L. 3188, 3195 (1989).** For each of the reasons discussed above the Court should vacate Mr. Porter's unconstitutional sentence of death. This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Porter's death sentence. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings, see Wilson v. Wainwright, **474** So. 2d **1163** (Fla. **1985),** and it should now correct this error.

Moreover, the claim is now properly brought pursuant to the Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. This issue involved a classic violation of longstanding principles of Florida law. See Lockett, Eddings, supra. It virtually "leaped out upon even a casual reading of transcript." Matire v. Wainwright, 811 F.2d **1430, 1438** (11th Cir. **1987).** This clear claim of per se error required no elaborate presentation -- counsel only had to direct this Court to the issue. No procedural bar precludes review of this issue. See Johnson v. Wainwright, supra, **498** So. 2d **938.** However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Porter of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, supra, **474** So. 2d at **1164-65;** Matire, supra. Moreover, Penry requires this issue to be addressed now. The eighth amendment cannot

tolerate the imposition of a sentence of death where there exists a "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. Accordingly, habeas relief must be accorded now.

CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE, Raleigh Porter, 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. Porter 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. Porter 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,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by U.S. Mail, first class, postage prepaid, to Roberty Landry, Assistant Attorney General, Department of Legal Affairs, Park Trammel Building, 1313 Tampa Street, Tampa, Florida 33602, this 28th day of July, *1989.*

Matt J. Neal
Attorney