IN THE SUPREME COURT OF FLORIDA

NO. 74,478

RALEIGH PORTER,

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

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PRELIMINARY STATEMENT

Counsel for Mr. Porter herein provides a reply to the Respondent's contentions regarding Mr. Porter'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. Porter'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. Porter has filed a state habeas corpus petition as a "ploy." 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. Porter 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 a "ploy."

CLAIM I

THE CONSIDERATION OF EVIDENCE REGARDING THE VICTIM'S PERSONAL CHARACTERISTICS AT MR. PORTER'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) Booth is not a change in law which should be applied retrospectively, 2) the claim is not

timely, and 3) the allegation of Booth error is baseless. 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. Porter. 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.

As to Claim I of Mr. Porter's habeas petition, 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, ___ So. 2d ___, 14 F.L.W. 355 (Fla. July 6, 1989), 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 appellate counsel relied on this Court's precedents that such claims were meritless), Jackson declared no procedural bar could be erected. Claims such as Mr. Porter's are thus now appropriately considered and decided on their merits in post-conviction proceedings. Therefore, Mr. Porter's claim of Booth and Gathers error is not barred.

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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 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.
>
> 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

(footnote continued on following page)

Respondent argues that consideration must be given to federal precedent on the question of whether Booth was novel or whether it followed from prior precedent. However, that is an entirely different issue. In Booth, the Supreme Court held that a sentence of death cannot turn on who the victim was 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.,

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(footnote continued from previous page)

> 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.

> 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 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 addition to Enmund, the eighth amendment principles firmly established by 1982 (at the time Mr. Porter's conviction

became final) are reflected in Eddings v. Oklahoma, 455 U.S. 104 (1982). There, 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," Gregg 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). However, even though the United States Supreme Court said Booth followed from Enmund, just as Hitchcock followed from Lockett, this Court failed to recognize the requirements of Enmund and Lockett before Booth and Hitchcock, respectively.

Booth claims should be treated like claims under Hitchcock v. Dusser, 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. Dusser 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.

The State also argues that Mr. Porter did not preserve his Booth claim. Response at 4. 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 overriding the jury's life recommendation set forth its reasons on the record: "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). Thus, the error is apparent on the face of the record.

Further, Mr. Porter has consistently pointed out this error to this Court. In Mr. Porter's first direct appeal, he argued that the trial judge improperly overrode the jury's life recommendation on the basis of his feelings for the victims:

> That the trial judge was guided more by passion than by reason in sentencing Appellant to death was demonstrated by his statement,
>
> > 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 brutually 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 (R191).

Initial Brief (Case No. 55,841) at 35-36.

This Court reversed Mr. Porter's sentence of death on other grounds and remanded for a resentencing before the judge. At the resentencing, the judge imposed death and once again supported

the decision to override the life recommendation on the basis of his sympathy for the victims. On direct appeal, Mr. Porter again attacked the judge's reasoning:

> While it cannot properly be ascertained whether the jurors were influenced by the impassioned argument of counsel, it can be determined from the trial judge's own findings that he was guided more by passion than by reason in sentencing Appellant to death. The trial judge expressly stated:
>
> > 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 brutually 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. (RR23)
>
> The application of the Tedder standard was explained by former Justice England in his concurring opinion in Chambers v. State, 339 So.2d 204, 208-09 (Fla. 1976), as follows:
>
> > Where a jury and a trial judge reach contrary conclusions because the facts derive from conflicting evidence, or where they have struck a different balance between aggravating and mitigating circumstances which both have been given an opportunity to evaluate, the jury recommendation should be followed because that body has been assigned by history and statute the responsibility to discern truth and mete out justice .... [B]oth our Anglo-American jurisprudence and Florida's death penalty statute favor the judgment of jurors over that of jurists.
>
> The judgment of the jury must be favored over that of the trial judge in this case because it was the judge, not the jury, who failed to adhere to the law and who imposed sentences resulting from passion rather than reason.

Initial Brief (Case No. 61,063) at 32 (emphasis added). The issue had been preserved and presented on direct appeal contrary to the Respondent's bald allegation that it had not. Mr. Porter's case is thus virtually identical to the situation in Jackson. Just as in Jackson, the claim is timely presented.

Finally, the State contends that Mr. Porter has failed to meet his burden under Booth to show that the jury or the sentencer based any sentencing decision on victim impact information. However, 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 rejected the jury's life recommendation because of his feelings for the victims. The error could not be clearer. Mr. Porter was denied "an individualized sentencing." In Mr. Porter's case, the risk condemned in Booth actualized -- his capital sentence was imposed in "violate[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. 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. Porter's sentence of death cannot stand.

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.

Respondent's position as to this claim is basically that regardless of the merits of Mr. Porter's claim, he has had his day in court so let us get on with it. Fortunately for Mr. Porter, that is not the law, as the United States Supreme Court has eloquently explained:

> 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." Lockett, 438 U.S., at 605, 98 S.Ct., at 2695; Eddinss, 455 U.S., at 119, 102 S.Ct., at 879 (concurring opinion). "When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." Lockett, 438 U.S., at 605, 98 S.Ct., at 2965.

Penry v. Lynaugh, 109 S. Ct. 2934, 2952 (1989).

In fact, in Penry the question presented concerned the constitutionality of the Texas death penalty statute as applied to Mr. Penry, who was sentenced to death in 1980. The Supreme Court noted that it had previously found the Texas death penalty statute constitutional on its face. Jurek v. Texas, 428 U.S. 262 (1976). Nevertheless, it was proper to entertain Mr. Penry's claim in collateral proceedings that as applied to him, the death penalty statute violated the eighth amendment on the basis of decisions subsequent to Jurek, i.e., Lockett v. Ohio, 438 U.S. 586 (1978), and Eddings v. Oklahoma, 455 U.S. 104 (1982).

In Spaziano v. Florida, 468 U.S. 447 (1984), the United States Supreme Court held that on its face the Florida law, authorizing a judge to override a jury's life recommendation under the Tedder v. State, 322 So. 2d 908 (1975), standard, was constitutional. However, the Court specifically said that "no evidence that the Florida Supreme Court has failed in its responsibility to perform meaningful appellate review" had been presented.

In the years since Spaziano v. Florida, several justices of this Court have opined that the Tedder standard has not been consistently applied. The State in its Response concedes the point:

> There is no necessity, in this pleading, for the state to continue asserting that Cochran is an aberration, is wrong, and lacking in persuasiveness when it holds a jury override to be improper when the trial judge is aware of an additional homicide unknown to the jury. This Court affirmed under similar circumstances in Torres-Aboledo v. State, 524 So. 2d 408 (Fla. 1988). Justice Ehrlich's dissent in Cochran is

> correct and we urge its adoption by the entire Court at the earliest opportunity.

Response at 11 n.2. Chief Justice Ehrlich said in his dissent in Cochran: "Thus, a mechanistic application of the Tedder dictum would have resulted in reversals of the death sentences in these cases." Cochran, slip op. at 14. The cases referred to by the Chief Justice were Spaziano v. State, 433 So. 2d 508 (Fla. 1983); Porter v. State, supra; and White v. State, 403 So. 2d 331 (Fla. 1981).

The question that must arise is whether there is now evidence that Tedder is being applied in an arbitrary fashion. 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.

Chief Justice Ehrlich's opinion in Cochran, though disagreeing with the "mechanistic application of the Tedder standard," recognized that the Tedder standard was not mechanistically applied in Mr. Porter's case as it was in Mr. Cochran's case. Thus, there is no principled means for distinguishing Mr. Cochran's case where the death sentence was not reversed, from Mr. Porter's case, where the death sentence was affirmed.

Though Chief Ehrlich argued that the ~~Tedder~~ standard as construed today and as applied by the majority in ~~Cochran~~ is wrong as that Court should return to the standard employed in the earlier cases which he cited, he correctly noted that the shift in the standard has resulted in an eighth amendment violation under Furman v. Georgia, 408 U.S. 238 (1972). ~~Cochran~~, ~~supra~~, slip op. at 14. In response to Chief Justice Ehrlich's dissent, the majority wrote:

> Finally, we agreed with the dissent that "legal precedent consists more in what courts do than in what they say." However, in expounding upon this point to prove that Tedder has not been applied with the force suggested by its language, the dissent draws entirely from cases occurring in 1984 or earlier. This is not indicative of what the present court does, as Justice Shaw noted in his special concurrence to Grossman v. State, 525 So.2d 833, 851 (Fla. 1988)(Shaw, J., specially concurring):
>
> > During 1984-85, we affirmed on direct appeal trial judge overrides in eleven of fifteen cases, seventy-three percent. By constrast, 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 . . . .
>
> Clearly, since 1985 the Court has determined that Tedder means precisely what is says, that the judge must concur with the jury's life recommendation unless "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." Tedder, 322 So. 2d at 910.

Cochran, supra slip op. at 9-10.

Justice Kogan, joined by Justice Barkett, expressed similar concerns in Spaziano v. State, 545 So. 2d 843 (Fla. 1989). Justice Kogan disagreed with Chief Justice Ehrlich on the question of whether the Tedder standard should be mechanistically applied. However, he agreed that this Court had not been consistent in how Tedder was applied. "The standard to which the majority cites has not remained static in the last fourteen

years." Id. at 846. Justice Kogan expressed his fears that the Court's affirmance of Mr. Spaziano's death sentence would violate eighth amendment principles. "If we are to administer a death penalty that is not arbitrary, then we must do so in a consistent fashion." Id. Justice Kogan is correct; Furman v. Georgia, 408 U.S. 238 (1972), and Cartwrisht, supra, require consistency.

Respondent argues that Spinkellink v. Wainwright, 478 F.2d 582 (5th Cir. 1978), stands for the proposition that a capital defendant cannot return to this Court when new case law develops which establishes either a factual or legal basis for a constitutional claim. Respondent conveniently ignores this Court's own precedent to the contrary. Jackson v. Dugger, ___ So. 2d ___, 14 F.L.W. 355 (Fla. 1989); Meeks v. Dusser, ___ so. 2d ___, 14 F.L.W. 313 (Fla. 1989); Hall v. State, 541 So. 2d 1125 (Fla. 1989); State v. Sireci, 536 So. 2d 231 (Fla. 1988); Cooper v. Dusser, 526 So. 2d 900 (Fla. 1988); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); Thompson v. Dusser, 515 So. 2d 173 (Fla. 1987). See also Lishtbourne v. Dugger, ___ So. 2d ___, 14 F.L.W. 376 (Fla. 1989).

The new opinions in Cochran and Spaziano establish as a matter of fact that this Court has over the years applied different Tedder standards. See Cochran, slip op. at 10 ("since 1985, the Court has determined that Tedder means precisely what it says") (emphasis added). There is no "principled way to distinguish" those cases like Mr. Porter's, where the jury override was affirmed, from Mr. Chochran's, where the jury override was reversed. As a result, the Florida death penalty Tedder standard has been arbitrarily administered. Under Furman, supra, Mr. Porter's eighth amendment rights have been violated. Since the factual basis for this claim did not exist until members of this Court published their opinions in Cochran and Spaziano, Mr. Porter's claim is now cognizable. The evidence that the United States Supreme Court found lacking in Spaziano v.

Florida now exists. The Tedder standard as applied is arbitrary. This new evidence is no different than the new evidence in Lishtbourne, supra, which was held to be cognizable in a second collateral proceeding. Mr. Porter can now establish that the basic premise of Furman was violated in his case. As explained in Penry:

> 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.**

Mr. Porter is in a "capriciously selected group" of individuals. This Court, as Chief Justice Ehrlich notes, selected Mr. Porter, Mr. Spaziano, and Mr. White for different treatment. Their cases were reviewed under a less stringent Tedder standard.

The State's only response on the merits of Mr. Porter's claim is:

> Reducing a well-deserved death sentence to life imprisonment when the jury has not explained its recommendation is as arbitrary as the reverse situation present at the time of Furman.

Response at 11. However, Penry specifically and categorically rejected the State's argument:

> But as we made clear in Gregg, so long as the class of murderers subject to capital punishment is narrowed, there is no constitutional infirmity in a procedure that allows a jury to recommend mercy based on the mitigating evidence introduced by a defendant.

109 S. Ct. at **2951.**

Mr. Porter's eighth amendment rights were violated. This Court must now correct its error and apply the Tedder standard consistently and across the board; it must apply the standard to

Mr. Porter just as it applied it to Mr. Cochran. Under the "mechanistic application" of the Tedder standard which Mr. Cochran received, Mr. Porter's sentence of death must be reduced to life.

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.

In the Response, the State "reiterate[d] that [Mr.] Porter's failure to urge the claim on direct appeal from his resentencing constitutes a procedural default precluding collateral review." Response at 11. For this the State, rather than looking at Mr. Porter's briefs on appeal, relied upon the Eleventh Circuit holding in Porter v. Wainwright, 805 F.2d 930 (11th Cir. 1986).

In Mr. Porter's Initial Brief in Case No. 55,841, he set forth as Issue 111:

THE TRIAL COURT ERRED BY FINDING THE MURDERS ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL BECAUSE THE CIRCUMSTANCES UNDERLYING THE COURT'S FINDINGS WERE NOT PROVEN BEYOND A REASONABLE DOUBT.

There followed a four-page argument of why the sentencing court's determination was in error. Initial Brief (Case No. 55,841) at 24-27. In Case No. 61,063, Mr. Porter set forth as Issue I:

THE TRIAL COURT ERRED BY FINDING THREE AGGRAVATING FACTORS ON THE BASIS OF CIRCUMSTANCES WHICH THE STATE HAD NOT PROVED BEYOND A REASONABLE DOUBT.

A. Appellant's Alleged Plan
B. Pecuniary Gain
C. Avoiding Arrest
D. Heinous, Atrocious, or Cruel

In that brief, the argument that the sentencing court had misapplied heinous, atrocious or cruel was also four pages long. Initial Brief (Case No. 61,063) at 21-24.

Obviously, the Eleventh Circuit is fallible too. The record undeniably establishes that Mr. Porter argued that this circumstance had been arbitrarily and capricously applied to him.

In his petition for habeas corpus relief, Mr. Porter challenged the adequacy of appellate counsel's advocacy and argued that new caselaw supported this claim.

The State in its Response failed to address Mr. Porter's claim that the jury found this aggravating circumstance inapplicable and thus found insufficient aggravating circumstances to justify a death sentence. A jury's finding that an aggravating circumstance is inapplicable must be accorded due deference. Similarly a jury's finding, that insufficient aggravating circumstances have been proven beyond a reasonable doubt, is binding unless no reasonable basis for it exists in the record.

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. In Hall v. State, 541 So. 2d 1125 (Fla. 1989), this Court found Hitchcock error and ordered a new sentencing despite the sentencing judge's statement that the non-statutory mitigation would not have affected his sentencing determination.

> 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.

541 So. 2d at 1128. It is axiomatic that the jury's finding that there is not sufficient aggravation warrants the same deference. It serves as a reasonable basis for its recommendation, particular where the jury receives, as it did here, the standard instruction that to recommend death it must first find sufficient aggravating circumstances.

In finding heinous, atrocious and cruel present, the judge failed to apply the applicable standards, see Rhodes v. State, So. 2d ___, 14 F.L.W. 343 (Fla. 1989); Cochran v. State, So. 2d ___, 14 F.L.W. 406 (Fla. 1989); Hamilton v. State,

So. 2d ___, 14 F.L.W. 403 (Fla. 1989), and gave no deference to the jury's life recommendation. This Court should now correct the error. Otherwise Mr. Porter's death sentence violates the eighth amendment principle discussed in Maynard v. Cartwright, 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. 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.

Respondent failed to address Mr. Porter'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).

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.

As to this Claim, Respondent argues that claims of ineffective assistance of appellate counsel are not cognizible in a state habeas corpus petition. This Court's precedent

establishes that the State's position is simply wrong. See Wilson v. Wainwright, 474 So. 2d 1162 (Fla. 1985). The state also argues that this issue is precluded by virtue of this Court's opinion in Porter v. State, 478 So. 2d 33 (Fla. 1985), which affirmed the denial of Rule 3.850 relief. The question of the effectiveness of appellate counsel was not at issue in Mr. Porter's Rule 3.850 Motion; thus it was not before this Court in the appeal from the denial of the Rule 3.850 motion.

The State also failed to address Mr. Porter's claim that Penry v. Lynaugh, 109 S. Ct. 2934 (1989), is new case law. See also Saffle v. Parks, 109 S. Ct. 1930 (April 24, 1989) (granting certiorari review). Apparently the State does not contest Penry's retroactive application. As Mr. Porter's petition demonstrates, he is entitled to the relief he seeks.

CONCLUSION

The State has said nothing to rebut Mr. Porter's entitlement to relief. 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 Landry, Assistant Attorney General, Department of Legal Affairs, Park Trammell Building, 1313 Tampa Street, Suite 804, Tampa, Florida 33602, this 26th day of September, 1989.

Matt J Moel
Attorney