IN THE SUPREME COURT OF FLORIDA

Case No. 74888

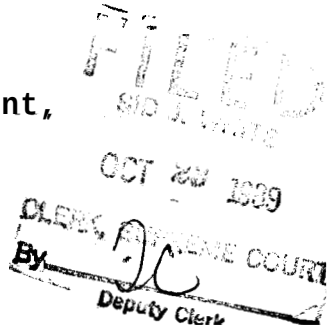
J.B. PARKER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.



ON APPEAL FROM DENIAL OF CONSOLIDATED MOTION TO VACATE JUDGMENT AND SENTENCES BY THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR MARTIN COUNTY.

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellant, J.B. Parker, respectfully submits this brief on appeal from the denial of his emergency application for stay of execution and his motion pursuant to Rule **3.850** of the Florida Rules of Criminal Procedure, dated September **28, 1989,** and his supplement to that motion, dated October 6, **1989.** On August **29, 1989,** Governor Martinez signed the first death warrant against Mr. Parker. Mr. Parker is currently scheduled to be executed on October **27, 1989** at **7:00** a.m.

In his Rule **3.850** motion and his supplement thereto, Mr. Parker raised numerous substantial claims of fundamental constitutional errors during his trial and post-conviction proceedings, which establish that he is entitled to relief. The court below erred in summarily denying Mr. Parker's application for a stay of execution and Rule **3.850** motion on primarily procedural grounds. Mr. Parker's claims deserve, at the very least, consideration on their merits by the state courts of Florida. Accordingly, this Court should immediately stay Mr. Parker's scheduled execution in order to afford Mr. Parker his constitutional right to the full and fair consideration of his claims by this Court.

STATEMENT OF THE CASE

For the procedural history of this case prior to August 29, 1989, and a statement of the facts underlying the claims raised in Mr. Parker's motion pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure, the denial of which is appealed here, Mr. Parker respectfully refers this Court to his Rule 3.850 motion dated September 28, 1989, and the supplement thereto dated October 6, 1989.

Governor Martinez signed the death warrant -- the first against Mr. Parker -- on August 29, 1989. (Q 34).[1] The death warrant directs the Superintendent of the Florida State Prison to schedule Mr. Parker's execution for "some day of the week beginning noon, Thursday, the 26th day of October, 1989, and ending noon, Thursday, the 2nd day of November, 1989." The Superintendent has scheduled Mr. Parker's execution for 7:00 A.M. on Friday, October 27, 1989, less than sixty days after the date on which the warrant was signed, and less than forty-eight hours after his appeal is scheduled to be heard.

On September 28, 1989, Mr. Parker filed a Rule 3.850 motion and emergency application for stay of execution

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1 References to the record on appeal of the denial of this Rule 3.850 motion are indicated by "Q __"; references to the record on the direct appeal of Mr. Parker's conviction and sentences are indicated by "R __."

in the Circuit Court of the Nineteenth Judicial Circuit, in and for Martin County. (Q 1-30). On October 6, 1989, Mr. Parker filed a factual supplement to the claims raised in his Rule 3.850 motion, including the claim that, during the penalty phase proceedings of his trial, he was deprived of his constitutional right to the effective assistance of the psychologist appointed to assist defense counsel. (Q 327-349).

On October 5, 1989, Chief Judge Dwight L. Geiger of the Nineteenth Judicial Circuit Court ordered the State to respond to Mr. Parker's Rule 3.850 motion by October 9, 1989, stating that he was "unable to say from examination of that motion that the motion, files, and records of the case conclusively show that the defendant is entitled to no relief . . . . " (Q 326).

On October 11, 1989, Judge Geiger signed an order in which he summarily denied the claims raised in Mr. Parker's Rule 3.850 motion. This order stated that defendant had 30 days to appeal the order. (Q 665-667). Mr. Parker's undersigned counsel did not receive this order until October 13, 1989, when it also first received the State's response to Mr. Parker's Rule 3.850 motion ("the Response"). (Q 606-663).

On October 13, 1989 the Circuit Court amended its order denying the Rule 3.850 motion, to provide that defendant had not 30, but 3 days to appeal the order. (Q 669A). The Circuit Court clerk mailed a copy of this order to defendant's counsel, who did not receive it until October 16, 1989.

On the afternoon of October 16, 1989, appellant filed a motion for rehearing in the Nineteenth Judicial Circuit Court. (Q 707-722). That court denied the motion for rehearing on the same day it was filed. (Q 669). A notice of appeal of the denial of Mr. Parker's Rule 3.850 motion was filed in the Nineteenth Judicial Circuit Court on October 16, 1989. (Q 670-671).

SUMMARY OF ARGUMENT

POINT I: Mr. Parker's execution, scheduled for Friday October 27 1989, should be immediately and indefinitely stayed in order to permit this Court to consider and decide this appeal of Mr. Parker's Rule 3.850 motion in a full, fair and rational manner. The trial court's inadequate review process has left insufficient time for this Court's reasoned consideration of this appeal. A stay of execution is also mandated because the motion satisfies the standards for an evidentiary hearing and the full consideration of the claims on their merits by the trial court, thus requiring a

remand to the trial court so that it can conduct the necessary hearing on Mr. Parker's claims.

POINT 11: During the voir dire of prospective jurors at Mr. Parker's trial, the State Attorneys used their peremptory challenges to exclude every black potential juror. Although Mr. Parker's trial counsel made timely and non-frivolous objections to these challenges, the trial court overruled the objections without requiring the State to explain its actions. This violated Mr. Parker's rights under the Florida Constitution, see State v. Slappy, 522 So. 2d 18 (Fla.) cert. denied, 108 S. Ct 2873 (1988), and the United States Constitution, see Batson v. Kentucky, 476 U.S. 79 (1986), Swain v. Alabama, 380 U.S. 202 (1965); Holland v. Illinois, cert. granted, 44 Crim. L. Rptr. 4192, 4193 (March 8, 1989).

POINT 111: Prior to testifying at the penalty phase of Mr. Parker's trial, Mr. Parker's court-appointed mental health expert completely failed to conduct a competent mental health evaluation of Mr. Parker, which directly resulted in inadequate support for the expert's conclusions and an utter inability to withstand the prosecutor's cross-examination. Mr. Parker was thus denied his right to the effective assistance of a mental health expert in violation of the Florida and United States Constitutions. See Ake v.

Oklahoma, 470 U.S. 68 (1985); State v. Sireci, 502 So. 2d 1221 (Fla. 1987).

POINT IV: The State Attorneys' comments throughout the guilt and penalty phase proceedings and the trial court's instructions during the penalty phase informed the jury that it had no choice but to impose the death penalty if the mitigating circumstances did not outweigh the aggravating circumstances. This deprived Mr. Parker of an individualized and reliable determination of whether death was the appropriate sanction in his case in violation of his rights under the Florida and United States Constitutions. This precise issue will be addressed during the current term of the United States Supreme Court. See Blystone v. Pennsylvania, cert. granted, 109 S. ct. 1567 (1989); Boyde v. California, cert. granted, 109 S. Ct. 2447 (1989).

POINT V: The State Attorneys' comments throughout the guilt and penalty phase proceedings and the trial court's instructions during the penalty phase resulted in placing the burden of proof on Mr. Parker to show that death was not the appropriate sentence in his case by requiring that he establish that any mitigating circumstances outweighed any aggravating circumstances. This deprived Mr. Parker of his right to due process as guaranteed by the Florida and United States Constitutions. See, e.g., Jackson v. Dugger, 837 F.2d 1469 (11th Cir.), cert. denied, 108 S. Ct. 2005 (1988);

Adamson v. Ricketts, 865 F.2d 1011 (9th Cir., 1988) (en banc), petition for certiorari pending, 57 U.S.L.W. 3655 Docket No. 88-1553, March 20, 1989).

POINT VI: Because the jury at the penalty phase of Mr. Parker's trial voted 8 to 4 to recommend imposing the death penalty on Mr. Parker, it cannot be determined whether the jury unanimously found at least one statutory aggravating circumstance. This violated Mr. Parker's rights under the Florida and United States Constitutions to a jury trial. See Adamson v. Ricketts, supra.

POINT VII: Throughout Mr. Parker's trial, the State Attorneys told the jury that sympathy was not a relevant consideration in determining the appropriateness of death as a sanction. This effectively precluded Mr. Parker's sentencers from considering record-based mitigating evidence in violation of his rights under the Florida and United States Constitution. See Parks v. Brown, 860 F.2d 1545 (10th Cir., 1988) (en banc), cert. aranted sub nom, Saffle v. Parks, 109 S. Ct. 1930 (1989).

POINT VIII: In response to Mr. Parker's request to the State Attorney for access to files and records pursuant to section 119.01 of the Florida Statutes, the State Attorney initially refused to disclose his files without placing unwarranted and unreasonable conditions on their disclosure, and only agreed to their full disclosure after a death

warrant was signed against Mr. Parker. The State Attorney's unwillingness to provide Mr. Parker immediate and unconditional access to his files and records was in violation of the Florida Statutes, see Bludworth v. Palm Beach Newpapers, Inc., 476 So. 2d 775 (4th Dist. 1985), rev. denied, 488 So. 2d 67 (Fla. 1986), and effectively precluded Mr. Parker from determining whether his conviction or sentence were obtained in violation of his due process rights as guaranteed by the Florida and United States Constitutions, see Brady V. Maryland, 373 U.S. 83 (1963).

ARGUMENT

POINT I

THIS COURT SHOULD IMMEDIATELY STAY MR. PARKER'S SCHEDULED EXECUTION

A. In the Absence of the Immediate Entry of an Indefinite Stay of Execution, Mr. Parker Will Be Deprived of A Full And Fair Opportunity To Have His Claims Heard In A Reasoned And Proper Manner By This Court

The trial court erred in failing to grant Mr. Parker's emergency application for a stay of execution. In light of the insufficient time remaining before execution for rational consideration of this appeal, an immediate and indefinite stay of execution should be entered.

This Court should not be forced to consider and decide Mr. Parker's substantial claims of constitutional violations under the extraordinary pressures of an imminent execution. The laws of Florida and the United States Constitution do not favor making decisions crucial to life or death in such an exigent atmosphere. See, e.g., Michel v. Louisiana, 350 U.S. 91, 93 (1955) (due process requires a "'reasonable opportunity to have the issue as to the claimed right heard and determined by the state court'" quoting Parker v. Illinois, 333 U.S. 571, 574 (1948)).

This Court has previously entered stays of execution in other cases in order to permit full and fair consideration of claims presented during the pendency of a death warrant. See, e.g, Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); Groover v. State, 489 So. 2d 15 (Fla. 1986); Copeland v. State, 457 So. 2d 1012 (Fla. 1984), cert. denied, 471 U.S. 1030 (1985); Spaziano v. State, 489 So. 2d 720 (Fla.), cert. denied, 479 U.S. 995 (1986). This Court should exercise its authority to stay Mr. Parker's execution pending its consideration of the substantial and meritorious claims raised on this appeal. As then Justice, now Chief Justice Ehrlich stated in his concurring opinion in Clark v. State, Case No. 72303 (Fla. April 26, 1988):

> I shall always vote for a stay of execution in order to give each member of this court adequate time to review the documents and arrive at a decision on the merits. I thoroughly eschew having to deal with these momentous decisions of life and death on an emergency basis. When confronted with the decision of whether to grant a stay of execution or see colleagues have to vote when they are really not prepared to do so, I shall always vote to stay.

B. Mr. Parker's Rule 3.850 Motion Satisfies The Standards For Granting A Stay of Execution And An Evidentiary Hearing

The standard for granting a stay of execution are well established. A stay of execution ought to be granted when the defendant presents facts in his Rule 3.850 motion indicating that he "might be" entitled to relief, State v. Schaeffer, 467 So. 2d 698, 699 (Fla. 1985), and demonstrates that the motion or "files and records in the case" do not "conclusively show that the defendant is entitled to no relief." State v. Crews, 477 So. 2d 984, 985 (Fla. 1985) (denying State's motion to vacate a stay of execution entered by the trial court); see O'Callaghan v. State, 461 So. 2d 1354, 1355 (Fla. 1985); Lemon v. State, 498 So. 2d 923 (Fla. 1986). A stay of execution is appropriate when the petitioner has presented colorable and non-frivolous issues, Brooker v. Wainwright, 675 F.2d 1150 (11th Cir. 1982), cert. denied, 464 U.S. 922 (1983), or claims which are "debatable among jurists of reason." Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983).

Mr. Parker's Rule 3.850 motion readily met those requirements. Given the substantial constitutional claims Mr. Parker raised, the court below could not rightfully conclude that the motion, files or records "conclusively show[ed]" that Mr. Parker was entitled to no relief. Under such circumstances, a stay of execution was and is mandated

to permit the Court below to give full and fair consideration to Mr. Parker's claims on the merits.

Furthermore, because an evidentiary hearing on Mr. Parker's claims was and is warranted, so is a stay of his scheduled execution. In enunciating the standard for determining whether the allegations in a Rule **3.850** motion in a capital case are sufficient to require a stay of execution and an evidentiary hearing, this Court held in O'Callaghan v. State, **462** So. 2d **1354** (Fla. **1985):**

> The question that must first be resolved is whether the allegations made by O'Callaghan were sufficient to require an evidentiary hearing. . . . The law is clear that under Rule **3.850** procedure, a movant is entitled to an evidentiary hearing unless the motion or files and records in the case conclusively show that the movant is entitled to no relief.

461 So. 2d at **1355-56** (emphasis added).

Because the "motion or files and records" in this case do not "conclusively show" that Mr. Parker is entitled to no relief, an evidentiary hearing is required. This Court should thus stay Mr. Parker's execution and remand for a hearing and full and fair consideration of Mr. Parker's claims on their merits.

C. A Stay of Execution is Warranted Pending the United States Supreme Court's Decisions in Blystone v. Pennsylvania, Bovde v. California and Saffle v. Parks

One of Mr. Parker's claims in his Rule 3.850 motion and on this appeal is that prosecutorial comments and jury instructions violated Mr. Parker's Eighth and Fourteenth Amendment rights to reliable and individualized sentencing by requiring the jury to recommend the death penalty for Mr. Parker if it found at least one statutory aggravating circumstance which was not outweighed by mitigating circumstances. See infra Pont IV. In Bovde v. California, 109 S. Ct. 2447 (1989), and Blystone v. Pennsylvania, 109 S. Ct. 1567 (1989), the United States Supreme Court recently granted petitions for certiorari in order to decide this precise constitutional issue. Accordingly, a stay of execution ought to be granted in this case until the Supreme Court renders its decisions in Blystone and Bovde.

In Saffle v. Parks, 109 S. Ct. 1930 (1989), the United States Supreme court will address the constitutional infirmities presented by actions at a capital trial that impel the jury to exclude sympathy for the defendant as a relevant consideration in the penalty phase. This issue is also presented in Mr. Parker's Rule 3.850 motion and on this appeal.

A human being should not be put to death when the very legal issues that will decide whether his execution comports with the Constitution will soon be conclusively resolved by the United States Supreme Court. This moral and legal principle has been followed by this Court. Thus, when Hitchcock v. Dusser, 481 U.S. 393 (1987), was pending before the Supreme Court on certiorari review, this Court granted stays of execution to defendants who raised Hitchcock claims pending the Supreme Court's ruling. See, e.g., Riley v. Wainright, 517 So. 2d 656 (Fla. 1987). Just as the United States Supreme Court in Hitchcock rendered a decision on the constitutional issue favorably for Riley, it may do so for Mr. Parker in Blystone, Saffle and Boyde. This consideration, as well as judicial economy, mandates a stay of Mr. Parker's scheduled execution.

POINT II

THE STATE'S USE OF PEREMPTORY CHALLENGES TO STRIKE EVERY BLACK POTENTIAL JUROR, AND THE TRIAL COURT'S FAILURE TO CONDUCT AN ADEQUATE INQUIRY INTO THE REASONS FOR THOSE CHALLENGES, VIOLATED MR. PARKER'S RIGHTS UNDER ARTICLE I, SECTION 16(a) OF THE FLORIDA CONSTITUTION, AND UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. The Trial Court's Failure To Require The State To Demonstrate Non-Discriminatory Reasons For Its Peremptory Challenges Violated The Florida And Federal Constitutions

During the voir dire at the guilt phase of the trial, the State exercised nine peremptory challenges. Four of these challenges served to exclude each of the black potential jurors called to the box. As a result, there were no black members of the jury. Following each of the last three peremptory challenges by the State to a black prospective juror, defense counsel offered timely and relevant objections. R **335, 443-44, 454.**

After the State's second peremptory challenge of a black prospective juror, defense counsel (Robert Makemson) objected in a timely manner:

> MR. MAKEMSON: I want something I want to put on the record. Mrs. Fielding was the second black witness.
>
> THE COURT: Not witness, juror.
>
> MR. MAKEMSON: That has been peremptory challenged by the State. I would object that

the State is systematically excluding the blacks from this jury panel by use of peremptory challenges, systematically excluding them. That's my Motion.

THE COURT: I see no systematic exclusion besides I don't know if there is a law that says that he couldn't systematically excuse them, if he wanted to.

MR. STONE: I don't need to state the reason.

R 335.

This exchange constituted the only discussion, at any stage of the proceedings, regarding the peremptory excusal of the first two black prospective jurors. No explanation as to the State's reasons for either challenge was ever required by the trial court or offered by the State.

Subsequently, the State peremptorily challenged a third black juror, Miss Johnson, and defense counsel again made a timely objection:

MR. MAKEMSON: For the record, I believe that Mr. Stone has now excused the third black juror. I would say or suggest that this is a systematic exclusion of blacks from the jury. And I would ask for a mistrial based upon the fact that he has systematically excluded the blacks and I ask for a whole new jury panel to be brought in.

MR. STONE: I haven't excluded anybody. I have used my peremptory challenges. We don't have to give a reason for it. Just like I could say, he systematically excluded all of the men on there.

MR. MAKEMSON: I want the record to reflect that every black juror that has been called has been excused by the State, peremptory challenged by the State.

MR. STONE: I think the record shows that.

MR. MAKEMSON: But it doesn't show on the panel right now.

THE COURT: There is in the jury box. It looks like a half dozen others sitting in the audience.

MR. MAKEMSON: I just want to make my position clear. This is a systematic exclusion of blacks.

THE COURT: All right. The Court, of course, since the last such Motion has observed interrogation of Miss Johnson at this time and the Court noticed a hesitancy, ... in answering questions about capital punishment.

MR. MAKEMSON: She may have hesitated but she qualified and said that she could follow the law. Mr. Stone didn't ask a whole lot of questions about that.

THE COURT: A long time ago when I tried cases, I never cared that they answered, I was questioning how they answered. That's what scares off people.

MR. MAKEMSON: Hesitancy means she is thinking, trying to give an honest answer, is an interpretation.

WHEREUPON, CONFERENCE ENDED AT THE BENCH.

THE COURT: Miss Johnson, you may step down.

R 443-44.

Again, as with the first two peremptory challenges of black jurors, the court never required the State to give, nor did the State offer, any explanation for its peremptory challenge of Miss Johnson. The trial court, in response to defense counsel's objection, merely offered its own speculative analysis of why the juror was challenged and, after defense counsel responded, the court evaluated the credibility of its own explanation.[2]

Indeed the court's speculation concerning the possible basis for the State's peremptory challenge of Miss Johnson is not supported by the record. Miss Johnson had clearly stated her commitment to follow the law and her willingness to apply the death penalty if the circumstances so warranted. R 433. In fact, the record shows that at least one white juror who evidenced a similar hesitancy with respect to the death penalty was not challenged by the State

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2 Under this Court's recent decision in Roundtree v. State, 546 So. 2d 1042 (Fla. 1989), the suggested justification is, in any event, pretextual. In Roundtree, the Florida Supreme Court rejected the State's challenge of two black prospective jurors where the State attempted to justify the challenges on the basis of the views of the prospective jurors regarding the death penalty. Because both prospective jurors had indicated that they could follow the law and recommend a sentence of death, the Florida Supreme Court held that the proffered reasons were a pretext for racial discrimination. 546 So. 2d at 1045. Under Roundtree, a claim of "hesitancy" in the face of Miss Johnson's clear commitment to follow the law and her willingness to apply the death penalty, if the circumstances so warranted, was an insufficient and pretextual basis upon which to base a peremptory challenge.

(R 430-433; Q 9-10), thus demonstrating that any reliance on Miss Johnson's alleged hesitancy would be pretextual. See State v. Slappy, **522** So. 2d **18, 22** (Fla.), cert. denied, **108** S. Ct. **2873 (1988)** (fact that a challenge is based on reasons equally applicable to jurors who were not challenged is one factor that tends to show an impermissible pretext).

After Miss Johnson's excusal, the State peremptorily challenged Mrs. Williams -- the fourth, and last, black potential juror to be called on voir dire. Defense counsel objected for the third time and asked that the whole jury panel be stricken and a new panel brought in. R **454**. This time, the State volunteered two reasons for its challenge: **1)** the prospective juror's alleged "hesitancy" in stating that she could vote to advise the death penalty; and 2) hardship to the prospective juror that might result because she was responsible for caring for an invalid. R **454-55**. This was in marked contrast to the State's earlier assertions, that had been accepted by the court, that it was not obligated to provide an explanation for its challenges. R **443**. The trial court did not critically assess the legitimacy of the stated reasons but responded that "it doesn't matter what they excuse them for." R **456**.

After defense counsel's objections were rejected, and without the trial court requiring a hearing on the reasons for any of the State's peremptory challenges, an all-

white jury was empaneled. Mr. Parker was convicted on all counts. The jury rendered an advisory sentence of death.

This case had substantial racial overtones. The victim was a young white female, and Parker and his three co-defendants are black males.

In State v. Slappy, 522 So. 2d 18, 21 (Fla.), cert. denied, 108 S. Ct. 2873 (1988), this Court held:

> Recognizing, as did Batson, that peremptory challenges permit "those to discriminate who are of a mind to discriminate," . . . we hold that any doubt as to whether the complaining party has met its initial burden should be resolved in that party's favor. If we are to err at all, it must be in the way least likely to allow discrimination.
>
> Once a trial judge is satisfied that the complaining party's objection was proper and not frivolous, the burden of proof shifts.

Id. at 22. Slappy requires the State to bear the burden of proof if defense counsel's objections are not frivolous.

This Court's decision in Tillman v. State, 522 So. 2d 14 (Fla. 1988) makes clear that, under the Slappy test, the facts of the jury selection process at Mr. Parker's trial mandated a full inquiry into the State's reasons for its challenges. In Tillman, the defendant alleged that the trial judge improperly failed to conduct a full inquiry into the

reasons for the State's challenges of black prospective jurors. The Tillman Court summarized the critical facts:

> During the jury selection phase of the proceedings, the state struck two jurors who, like Tillman, are black. Defense counsel made no objections at this point. Upon the state's exercise of the third peremptory challenge to excuse the next black juror, counsel asked the court to note for the record that it appeared that the state was systematically striking blacks. Without inquiring of the prosecutor as to why the strikes were being exercised, the judge expressed his own reasons why the jurors could be excluded, notwithstanding race.
>
> Upon the exercise of a peremptory challenge to excuse a fourth black juror, defense counsel again moved for a response from the prosecutor stating valid reasons for exclusion. The prosecutor then gave facially valid reasons for excusing the fourth juror. While excusing that juror, the trial judge did not rule as to the motions regarding the excusal of the previous three black jurors.

522 So. 2d at 16. These are the precise facts presented here. In Tillman, as at Mr. Parker's trial, the State challenged four black potential jurors and provided an explanation only as to the last challenge. No explanation was supplied for the first two challenges and only the trial court's speculation was offered for the third.

Applying Slappy, the Court in Tillman found:

> [i]n this case, the record indicates little doubt as to whether Tillman met his initial burden regarding the likelihood that the state exercised its

> peremptory challenges solely on the basis of race. Such doubt must be resolved in favor of Tillman. At this point, the record shows that the trial judge stated his own reasons for allowing the peremptory strikes, rather than requiring the prosecutor to proffer racially neutral reasons.

522 So. 2d at 17. This Court held that "the procedure followed by the court below fell far short of the standards set down by this Court in Neil, and more recently in Slappy and Blackshear." Id. The Court vacated Tillman's sentence and remanded for a new sentencing proceeding before a different judge and jury.

On Mr. Parker's direct appeal, taken prior to Slappy, this Court found the voir dire at Mr. Parker's trial to reflect "nothing more than a normal jury selection process" under the test enunciated in State v. Neil, 457 So. 2d 481 (Fla. 1984). Parker v. State, 476 So. 2d 136, 139 (Fla. 1985). However, on identical facts in Tillman, the Court found the procedures used by the trial court fell "far short" of satisfying the state and federal constitutional requirements of Slappy.

Both Tillman and Parker involved one challenge for which the judge offered an explanation instead of the State, one challenge for which the State offered facially valid reasons, and two challenges for which no explanation was ever given. In Tillman, the defense offered two timely objections

to the State's use of its peremptories; in this case there were three. In Tillman, the State accepted one black juror; in this case the State successfully challenged every black potential juror, resulting in an all-white jury.

Slappy commands that "[p]art of the trial judge's role is to evaluate both the credibility of the person offering the explanation as well as the credibility of the asserted reasons." State v. Slappy, 522 So. 2d at 22. At Mr. Parker's trial, the trial judge specifically stated on two occasions that he believed there was nothing constitutionally improper with the systematic exclusion of blacks, R 335, and that it did not matter what the prosecutors' reasons were for excusing black jurors. R 456. It is apparent that, in overruling defense counsel's objections, the trial court believed the State could exercise peremptory challenges for any reason, including race. The trial court thus hardly can be said to have assessed the credibility of the State's explanation.

In this Court's subsequent decisions in Kibler v. State, 14 FLW 291 (Fla. June 15, 1989) and Roundtree, supra n.2, this Court found that defense counsel had demonstrated a non-frivolous objection after peremptory challenges of only three black potential jurors. Here, there were four such challenges.

Under Slappy, the failure of the trial court to conduct a full inquiry into the State's use of its peremptory challenges, in response to defense counsel's repeated objections, violated Mr. Parker's rights under the Florida Constitution, Article 1, §§ 2 and 16(a), thereby requiring a new trial.

B. Slappy and Tillman Should Be Applied To This Case

This claim is not barred by this Court's determination on direct appeal, under prior case law, that Mr. Parker had not demonstrated a "'strong likelihood"' that the black jurors were challenged solely on the basis of their race. Parker v. State, 476 So. 2d at 138-39 (relying on State v. Neil, 457 So. 2d 481 (Fla. 1984)). Even if the issue has been "taken and resolved" on the direct appeal, this Court may again address the issue:

> [I]n the case of error that prejudicially denies fundamental consitutional rights . . . this Court will revisit a matter previously settled by the affirmance of a conviction or sentence.

Kennedv v. Wainwright, 483 So. 2d 424, 426 (Fla. 1986). The Untied States Supreme Court has explicitly held that the right to trial by a jury of one's peers "is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants." Duncan v. Louisiana, 391 U.S. 145, 158 (1968).

See also Batson v. Kentucky, 476 U.S. 79, 86 n.8 (1986) ("In Duncan . . . the Court concluded that the right to trial by jury in criminal cases was such a fundamental feature of the American system of justice that it was protected against state action by the Due Process Clause of the Fourteenth Amendment"). Therefore, the issue presented on this claim may properly be revisited by this Court.

It would be fundamentally unfair to deny Mr. Parker the benefit of Slappy and Tillman because the race-based exclusion of potential jurors was a basic flaw in the integrity of his trial. As in Tillman, the jury selection process that was followed

> failed to insure that [Mr. Parker's] rights to a jury trial composed of a fair cross section of the community were protected. Instead, [Mr. Parker] was subjected to a proceeding that was open to racial discrimination by the State, thus violating article I, section 2 of the Florida Constitution, as well as the Equal Protection Clause of the fourteenth amendment to the United States Constitution.

Tillman v. State, 522 So. 2d at 17.

Moreover, under Jackson V. Dugger, 14 FLW 355 (Fla. July 6, 1989), this Court may revisit this issue under its habeas corpus jurisdiction to correct the fundamental error. An direct appeal, appellate counsel failed to argue effectively the critical deficiencies in the trial court's handling of defense counsel's objections to the State's

discriminatory exercise of its peremptory challenges. In his brief, he merely quoted from Nil v. State, 457 So. 2d 481 (Fla. 1984) without attempting to demonstrate that defense counsel had clearly met the standard to require the State to justify its objections.

POINT III

NEUROLOGICAUY, INTELLECTUALLY AND DEVELOPMENTALLY IMPAIRED J.B. PARKER WAS DENIED A COMPETENT MENTAL HEALTH EXAMINATION IN VIOLATION OF HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMEN RIGHTS

Mr. Parker was constitutionally entitled to the competent assistance of a mental health expert during all phases of his capital trial and sentencing. Ake v. Oklahoma, 470 U.S. 68, 76-77 (1985). The psychologist who testified on Mr. Parker's behalf at the sentencing phase, Dr. Paul Eddy, conducted an incompetent mental health evaluation of Mr. Parker and thereby rendered ineffective assistance to Mr. Parker's defense. Another psychologist has recently conducted a thorough evaluation of Mr. Parker's mental health which evaluation confirms the incompetence and ineffectiveness of Dr. Eddy's participation. This subsequent evaluation establishes the presence of numerous statutory and non-statutory mitigating factors which would have altered the outcome of his sentencing proceeding.

The court below denied this claim on the grounds that it "should and could have been heard on direct appeal and is filed more than two years after the judgment and sentence became final and without legal justification for said late filing." (Q 666, ¶ 7). That decision was error.

A. Mr. Parker's Claim Is Not Barred For Failure To Present It On Direct Appeal

This claim, like a claim of ineffective assistance of counsel, is not cognizable on the direct appeal of a conviction and sentence, but is properly raised for the first time in a Rule 3.850 motion. See, e.g., Kelley v. State, 486 So. 2d 578, 585 (Fla.), cert. denied, 479 U.S. 871 (1986) (refusing to address ineffective assistance of counsel claim asserted on direct appeal): State v. Barber, 301 So. 2d 7, 9 (Fla. 1974) (same): Hammer v. State, 543 So. 2d 437 (2d DCA 1989) (same).

Claims of ineffective assistance of counsel are not reviewable on a direct appeal because appellate courts confine themselves to "a review of only those questions which were before the trial court and upon which a ruling adverse to the appealing party was made." Barber, supra, 301 So. 2d at 9: see also Gibson v. State, 351 So. 2d 948, 950 (Fla. 1977), cert. denied, 435 U.S. 1004 (1978). Parker's claim of ineffective assistance by Dr. Eddy could not have been raised on direct appeal because that issue was not presented to, or decided by, the trial court.

Moreover, there was no record on the direct appeal on which the Florida Supreme Court could assess Dr. Eddy's effectiveness. The record on the direct appeal of Mr. Parker's conviction and sentence, which did not contain the

findings of a competent psychologist or the other evidence of Dr. Eddy's ineffectiveness set forth in Mr. Parker's Rule 3.850 motion, did not permit the Florida Supreme Court to address this claim. See Kelley, supra, 486 So. 2d at 585 (concluding that record on appeal was insufficient to allow consideration of ineffective assistance of counsel claim).

Finally, although not raised or considered at trial or on direct appeal, the claim of ineffective assistance of a psychologist can unquestionably be presented in either an initial or successive Rule 3.850 motion. See State v. Sireci, 502 So. 2d 1221 (Fla. 1987). The court below has either ignored or overlooked each of these adequate justifications for the failure to present this claim on direct appeal.

B. Mr. Parker's Claim Is Not Barred For Failure To Present It Within Two Years Of The Date Judgment and Sentences Became Final

The facts upon which Mr. Parker's claim of ineffective assistance of a mental health expert is based were unknown to counsel until more than two years after Mr. Parker's conviction and sentence became final. Counsel was unable, despite the exercise of due diligence, to discover those facts within the period specified by Rule 3.850.

Mr. Parker's undersigned counsel filed a Rule 3.850 motion on December 3, 1987, which was within two years of the

date the judgment and sentence became final. At that time, counsel filed the most complete and reasonably comprehensive motion that they could prepare under extraordinarily difficult circumstances. The undersigned counsel had only assumed its pro bono representation of Mr. Parker in August 1987. After repeated requests to his trial counsel for the release of his files were ignored, Mr. Parker filed a motion with this Court seeking an order compelling the release of those files. By order dated November 4, 1987, this Court granted the motion and compelled Mr. Parker's trial counsel to release his files. Present counsel thus had only approximately four weeks from the time of the release of trial counsel's files to investigate and prepare a motion for post-conviction relief.

In an effort to obtain sufficient time to investigate all possible grounds for relief and include them in the initial Rule 3.850 motion, present counsel also sought an extension of the time within which to file that motion. The motion for an extension was filed with this Court on October 20, 1987, and was denied by order dated October 30, 1987.

Mr. Parker's initial Rule 3.850 motion expressly sought leave to amend the motion to include claims discovered in the course of counsel's continuing investigation. On December 9, 1987, Mr. Parker sought leave to incorporate

information developed through counsel's ongoing investigations, including a review of any material supplied by the State Attorney in response to Mr. Parker's disclosure request made pursuant to Chapter 119 of the Florida Statutes. The State Attorney refused to supply the requested documents without legal justification and opposed Mr. Parker's motion to supplement his Rule 3.850 motion. **See** Point VIII below. This Court never ruled on Mr. Parker's request for leave to supplement his motion but, instead, scheduled an evidentiary hearing. Mr. Parker's counsel received only two days' notice of that hearing. The Circuit Court refused to grant an adjournment to provide Mr. Parker's counsel adequate time to prepare for that hearing.

The Circuit Court erred in summarily denying Mr. Parker's Rule 3.850 motion of September 28, 1989, and his October 6, 1989 supplement to that motion. A successive Rule 3.850 motion cannot be summarily denied where "the movant alleges that the asserted grounds were not known and could not have been known to the movant at the time the initial motion was filed." Christopher v. State, 489 So. 2d 22, 24 (Fla. 1986). See also State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987) (holding that a claim based on facts discovered after filing of first Rule 3.850 motion may be brought in a successive motion, where defendant sought to amend his first motion when facts became known). This motion sets forth those very allegations. The Response does not conclusively

rebut Mr. Parker's claims of inability to raise these issues by the time the initial Rule **3.850** motion was filed.

Mr. Parker's claim is founded upon the recently conducted evaluation of Mr. Parker that established the ineffectiveness of the mental health expert who testified on his behalf at the penalty phase of his trial. In light of the severe time constraints imposed in connection with the investigation and preparation of the initial Rule **3.850** motion, this claim could not have been developed and asserted prior to the due date for the filing of Mr. Parker's initial Rule **3.850** motion. Present counsel did everything within its power to obtain relief from the unreasonable and burdensome time pressures imposed by the brief period of their involvement in the case and by the failure of Mr. Parker's trial counsel to relinquish his files.

Simply put, insufficient time and resources were available before the filing of the initial Rule **3.850** motion to conduct the detailed investigation required to address the competency of the mental health expert who testified at trial. The file of trial counsel pertaining to that expert's testimony was received only four weeks before the motion was due. Present counsel was required, instead, within the limited time available, to focus on the effectiveness of Mr. Parker's trial counsel.

Under these circumstances, which are virtually identical to those presented in State v. Sireci, 502 So. 2d 1221 (Fla. 1987), Mr. Parker has presented legal justification for the assertion of this claim at this time. Sireci involved the State's appeal from a circuit court order directing an evidentiary hearing on defendant's claim, presented for the first time on a successive Rule 3.850 motion made more than two years after the conviction and sentence were final, that he had been denied the effective assistance of a mental health expert. Because the defendant in Sireci properly alleged, as did Mr. Parker, an inability to raise this claim on the initial Rule 3.850 motion and sought to amend his motion with the results of his ongoing investigation, as Mr. Parker has here, this Court upheld the lower court's determination that an evidentiary hearing was required to assess Sireci's claim on the merits. Mr. Parker is similarly entitled to an evidentiary hearing.

C. Mr. Parker's Claim Has Merit

On December 20, 1982, fourteen days before Mr. Parker's trial was to begin, trial counsel moved for the appointment of a psychological expert to aid and assist in Mr. Parker's defense at a possible penalty phase. (R. 1676). Trial counsel had been appointed months earlier, but had not previously addressed the need for a mental health expert at any sentencing proceedings. The Court granted the motion on

the same day, appointing Dr. Paul Eddy. (R 1678). Dr. Eddy performed a psychological examination on December 27th. Prior to the examination, he received no guidance from trial counsel concerning the mental health issues presented by this particular capital case.

It is clear that Dr. Eddy did not possess even a rudimentary understanding of what should have been the focus of his evaluation. His only contact with counsel, before his examination of Mr. Parker, was a brief phone call and a two-minute meeting which immediately preceded his pre-trial examination of Mr. Parker. (R 1273). He was told to look for "mitigating circumstances," but was not provided and did not request a copy of Florida's capital sentencing statute prior to his evaluation. (R 1273). Nor was he apprised of any potentially relevant aggravating circumstances. He asked Mr. Parker no questions which would aid in determining the presence of statutory or non-statutory mitigating factors attributable to Mr. Parker's mental and emotional condition on the night of the crime. (R 1373). As a direct result of his lack of preparation and investigation, on cross-examination at the penalty phase, Dr. Eddy's testimony was completely neutralized.

The scope and purpose of his psychological evaluation were not only matters about which Dr. Eddy possessed no insight or understanding. He was similarly

uninformed about the nature of a capital trial, and the crucial importance of the penalty phase proceedings. He stated that his participation at the guilt/innocence phase would have been more significant, and testified that he would have prepared differently and performed more competently had he been involved in the first phase of Mr. Parker's trial. (R **1277**). For inexplicable and unjustifiable reasons, Dr. Eddy sought none of the data referred to above that he said he would have gotten if he was involved in the trial phase and none was provided him.

Dr. Eddy's evaluation consisted of a cursory self-report interview and pro forma discussion of opinions gleaned from gross testing. None of the relevant and crucial facts regarding Mr. Parker's mental, emotional, psychological or developmental background were gathered, reviewed or considered, except through self-report. The authoritative literature, as well as common sense, suggests that self-report is not enough. Reliance upon the self-report of an intellectually and neurologically impaired youth, whose dominant personality characteristic is that of disabling dependence, falls far short of the requisite professional level of assistance to which Mr. Parker was constitutionally entitled. **See** Bonnie and Slobogin, The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation. 66 Va. L. Rev. **427** (1980). Accord, Pollack, Psychiatric Consultation for the Court. 1 Bull. Am. Acad.

Psych. & L. 267, 274 (1974); H. Davidson, Forensic Psychiatry 38-39 (2d ed. 1965). Here, no independent history was requested or obtained, and none was otherwise provided by counsel, who himself must be deemed ineffective for failing to do so. Dr. Eddy's evaluation was fundamentally insufficient under the standards recognized by the profession by this Court. See Mason v. State, 489 So. 2d 734 (Fla. 1986); State v. Sireci, 536 So. 2d 231 (Fla. 1988); State v. Sireci, 502 So. 2d 1221 (Fla. 1987).

The complete absence of background material in Dr. Eddy's possession resulting directly to his inadequate evaluation and trial counsel's failure to ensure his expert witness had a proper foundation for his opinions, became the focal point of the state's cross examination. Dr. Eddy was insufficiently prepared to support his assessment that Mr. Parker was a passive and non-aggressive personality because his examination failed, inter alia, to take into account Mr. Parker's prior juvenile and criminal record. The fact that Dr. Eddy had not reviewed sufficient information on Mr. Parker's prior criminal record ultimately allowed the prosecution to effectively undermine whatever credibility the psychologist might have had in expressing opinions he held as a result of the examination and minimal records review he performed.

As the trial court itself surmised see R 1315, Dr. Eddy was not "as good an expert as he should have been." The prosecutor, James Midelis, established through cross-examination that Dr. Eddy failed to conduct a competent mental health evaluation. Mr. Midelis pointed out, and Dr. Eddy largely admitted that, mitigating factors had to be known and questions concerning them had to be asked (R 1272); that offense reports had to be read (R 1274); that statements made by co-defendants could be "helpful" to a mental health professional (R 1276); that juvenile records should be sought out and reviewed (R 1369); that family members should be interviewed (R 1381); that family members should be interviewed (R 1381); and that school records should be obtained (R 1385). When questioned by the prosecutor about the importance of considering background information as a component of a competent mental health examination, Dr. Eddy replied:

> Mr. Midelis, you and I are on a little bit different approach to this thing. It would be helpful if I had talked to everybody involved . . . It would be helpful if I had talked to his family, to his teachers, if I had talked to everybody that he had ever been involved with, you would get a much more accurate picture.

(R 1383). Yet, Dr. Eddy performed none of those essential tasks.

Mr. Midelis' "approach" to what comprised a competent mental health evaluation was far superior to Dr. Eddy's. In fact, the prosecutor knew so much about Dr. Eddy's shortcomings that he not only succeeded in obtaining a death sentence for J.B. Parker, but provided Dr. Eddy with a "learning experience" at Mr. Parker's expense. As Dr. Eddy put it in a letter to counsel after the penalty phase:

> In retrospect, I feel that there were several areas which I could have handled differently under cross examination which might have been more effective. For some reason, I have difficulty with Midelis and his technique. However, as you said at dinner, these cases are always good learning experiences.

(Letter from Dr. Paul Eddy to Robert Makemson, Q 353).

Dr. Eddy's incompetent evaluation and unreliable testimony robbed J.B. Parker's sentencers of the opportunity to consider the truth about his psychology, intellect, developmental history and personality. With the most cursory investigation, defense counsel and Dr. Eddy would have been able to obtain the materials needed in order to perform a competent mental health evaluation and to reach accurate diagnostic impressions. Family, friends, teachers and other professionals would have provided a history that strongly suggested intellectual, neurological and personality deficiencies; school records and juvenile records would have added crucial insight into and documentation of these problems. Dr. Eddy would then have been in a position

meaningfully to assist trial counsel in vital areas of representation.

The mental health expert recently retained was provided extensive background material on J.B. Parker, including school records (Q 426-480), juvenile records (Q 482-551) and numerous affidavits (Q 552-604). He performed a battery of intellectual, projective, neurological, empirical personality and other tests, and he conducted a clinical interview. He was asked to provide current counsel with diagnostic impressions and to address specific areas of crucial importance in capital representation. The basic diagnostic impressions he reports are organicity in the form of Pervasive Developmental Disorder, strong indications of neurological impairments due to constant prenatal and childhood exposure to neurotoxins, borderline intellectual functioning, and dependent personality disorder. (Q 403-424). He then analyzed how these findings would have implicated many areas of legal representation. When contrasted with the assistance provided Dr. Eddy, those findings (Q 339-346) make clear that Mr. Parker was denied his constitutional right to an effective mental health professional.

Despite this clear demonstration of a violation of Mr. Parker's constitutional right to the effective assistance of a mental health expert at the sentencing phase of his

trial and the lack of any response on the merits by the State, the court below failed to conduct an evidentiary hearing so that it could assess the expert testimony proffered by Mr. Parker in support of this claim. A hearing on this claim is mandated. See State v. sireci, 502 So. 2d at 1224. Such a hearing is necessary to enable Mr. Parker to demonstrate that Dr. Eddy's evaluation was "so grossly insufficient" that he is entitled to a new sentencing hearing. See id. In his motion and supplement, Mr. Parker plainly alleged sufficient facts to require such a hearing.

POINT IV

PROSECUTORIAL COMMENTS AND JURY INSTRUCTIONS THAT MANDATED A DEATH SENTENCE VIOLATED MR. PARKER'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO INDIVIDUALIZED AND RELIABLE SENTENCING

A. Introduction

After Mr. Parker's initial Rule 3.850 motion was filed, the United States Court of Appeals for the Eleventh Circuit decided Jackson v. Dugger, 837 F.2d 1469 (11th Cir.), cert. denied, 108 S. Ct. 2005 (1988), and the United States Court of Appeals for the Ninth Circuit decided Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988) (en banc), petition for certiorari filed, 57 U.S.L.W. 3655 (Docket No. 88-1553, March 20, 1989). Both cases, along with the United States Supreme Court opinion in Mills v. Maryland, 486 U.S. 367 (1988) -- also decided after Mr. Parker filed his first

Rule 3.850 motion -- make clear that prosecutorial comments and jury instructions at Mr. Parker's trial violated his Eighth and Fourteenth Amendment rights by essentially mandating that Mr. Parker receive the death penalty if the jury found one or more aggravating circumstances which were not outweighed by mitigating circumstances.

The court below thus erred in holding that this claim is procedurally barred because it could have been raised on direct appeal and was filed more than two years after Mr. Parker's judgment and sentence became final.

Likewise, the State incorrectly argued below that this issue could have been raised on direct appeal on the basis of Sandstrom v. Montana, 442 U.S. 510 (1979) and Francis v. Franklin, 471 U.S. 308 (1985). See Response at 26-27. Those decisions did not involve the constitutionality of mandating a death penalty in violation of the Eighth and Fourteenth Amendments, and afforded no authority for the claim raised here. Assuming, however, that this claim could have been raised at Mr. Parker's trial and on his direct appeal on the basis of these decisions, Mr. Parker's trial and appellate counsel violated Mr. Parker's Sixth and Fourteenth Amendment rights to the effective assistance of counsel under the standards of Strickland v. Washinston, 466 U.S. 668 (1984), by failing to raise this claim previously.

Moreover, assuming that this claim could have been raised previously, this Court's own decisions demonstrate that failure to raise a claim at trial or on the appeal of a death sentence does not preclude this Court from considering it on the merits. See, e.g., Davis v. State, 461 So. 2d 67, 71 (Fla. 1984) ("Section 921.141, Florida Statutes . . . directs this Court to review both the conviction and sentence in a death case, and we will do so here on our own motion.") (emphasis added); Elledae v. State, 346 So. 2d 998, 1002 (Fla. 1977) ("Admittedly the testimony of the police officer related to that confession was not objected to by appellant's trial counsel, but that should not be conclusive of the special scope of review by this Court in death cases.") (emphasis added). See also Griffin v. Wainwriaht, 760 F.2d 1505, 1517-18 (11th Cir. 1985), vacated on other grounds, 106 S. Ct. 1964 (1986).

Claims of fundamental errors at trial can also be raised for the first time in post-conviction proceedings, regardless of the failure to raise them on direct appeal. Thus, even assuming that the claim of the violation of Mr. Parker's fundamental Eighth and Fourteenth Amendment rights raised here could have been raised on Mr. Parker's direct appeal -- which Mr. Parker disputes -- the constitutional violation amounted to fundamental error and can be raised at this time. See, e.g., Johnson v. State, 460 So. 2d 954, 958 (5th DCA 1984), aff'd, 488 So. 2d 420 (Fla. 1986)

("fundamental error may be presented for the first time on appeal or collaterally attacked in post-conviction proceedings such as by motion under Rule 3.850").

On March 27, 1989 and June 5, 1989, the United States Supreme Court granted petitions for certiorari in Commonwealth v. Blvstone, 549 A.2d 81 (Pa. 1988), cert. aranted sub nom. Blvstone v. Pennsvlvania, 109 S. Ct. 1567 (1989) and People v. Bovde, 758 P.2d 25 (Cal. 1988), cert. sranted sub nom. Bovde v. California, 109 S. Ct. 2447 (1989). The issue squarely presented for Supreme Court review in these cases is whether state statutes, jury instructions and prosecutorial comments that require that the jury impose the death penalty if it finds at least one aggravating circumstance which is not outweighed by mitigating circumstances violate the Eighth Amendment's guarantees of individualized and reliable sentencing. The issue presented on this motion will thus be decided by the United States Supreme Court in the coming term.

In light of Jackson and Adamson, this Court should reverse the denial of Mr. Parker's Rule 3.850 motion and require a new sentencing proceeding. In the alternative, this Court should at least reserve decision on this claim pending the Supreme Court's decisions in Blvstone and Bovde.

B. Prosecutorial Comments And Jury Instructions Created A Presumption Of Death, In Violation Of Mr. Parker's Rights To Reliable And Individualized Sentencing

In Jackson v. Dugger, 837 F.2d 1469 (11th Cir.), cert. denied, 108 S. Ct. 2005 (1988), the Eleventh Circuit reviewed the constitutionality of a jury instruction at a capital sentencing proceeding in Florida. The challenged instruction informed the jury that death was presumed to be the appropriate penalty under certain circumstances:

> When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided.

837 F.2d at 1473. The Eleventh Circuit held that because such an instruction informs the jury that, in certain cases, death is presumed to be the proper penalty, it "vitiates the individualized sentencing determination required by the Eighth Amendment." Id.

The Eleventh Circuit, citing the United States Supreme Court's repeated insistence that the capital sentencing procedure allow consideration of any relevant mitigating factors, reasoned that the jury instruction in Jackson created an unacceptable risk that mitigating factors would not be fully considered. 837 F.2d at 1474. Because the instruction at issue was "so skewed in favor of death that it fails to channel the jury's sentencing discretion

appropriately," 837 F.2d at 1474, the court granted the petition for a writ of habeas corpus.

In Adamson v. Ricketts, 865 F. 2d 1011 (9th Cir. 1988) (en banc), petition for certiorari filed, 57 U.S.L.W. 3655 (Docket No. 88-1553, March 20, 1989), the Ninth Circuit struck down the Arizona death penalty statute because it too created a presumption that a sentence of death was the appropriate penalty. In Adamson the death penalty statute at issue provided:

> In determining whether to impose a sentence of death or life imprisonment . . . the court shall take into account the aggravating and mitigating circumstances included in subsection F and G of this section and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection F of this section and that there are no mitigating circumstances sufficiently substantial to call for leniency.

Ariz. Rev. Stat. Ann. § 13-703(E) (Supp. 1983-84) (emphasis added). The Ninth Circuit held that the phrase "'sufficiently substantial to call for leniency'" imposed an unconstitutional "presumption of death," and required the defendant to establish mitigating circumstances which outweighed the aggravating circumstances once the court fo nd a single aggravating circumstance. 865 F.2d at 1041-43. Citing Jackson v. Dugger, and United States Supreme Court precedents, the Ninth Circuit held that the presumption of

death imposed by the Arizona death penalty statute interfered with the Eighth Amendment's requirement of individualized and reliable sentencing, as well as with the discretion needed to ensure that the appropriate penalty was imposed. **865** F.2d at **1041-43.**

At Mr. Parker's trial, the prosecutors' comments at voir dire and in summation created the same presumption of death found by the courts in Jackson and Adamson to violate the Eighth Amendment. In his comments to prospective jurors at the voir dire, the prosecutor repeatedly stated that the jury's first task at the penalty phase would be to determine whether the State had proved the existence of at least one statutory aggravating circumstance. See R **292-93; R 396-97.**

Then State Attorney Robert Stone repeatedly informed prospective jurors that, once they had first addressed the question of whether the State had proved the existence of an aggravating circumstance, Florida law required them to recommend the death penalty if mitigating circumstances did not exist which outweighed the aggravating circumstance or circumstances initially found to exist. (R **206,** 397, **480-81).** Thus, besides making clear that the jury's first consideration was the existence of at least one aggravating circumstance, Mr. Stone insistently asked:

> If the State proves to you on the death penalty, each of you, a circumstance, an aggravating circumstance or circum-

> stances, beyond a reasonable doubt, and you find that that aggravating circumstance, whether it be one, or aggravating circumstances how many ever it may be, are not outweighed by any mitigating circumstances, would you render an advisory sentence of death in this case?

R 206 (emphasis added). See also R **397, 480-81.**

Likewise, then Assistant State Attorney James Midelis admonished prospective jurors at the voir dire -- because it was their "duty" to do so -- that they "must" render an advisory sentence of death if they found one or more aggravating circumstances which were not outweighed by mitigating circumstances. R **215-16, 226, 343-44, 409.**

This constitutional violation was compounded by the prosecutors' summation to the jury at the penalty phase. Then Assistant State Attorney James Midelis reiterated that the jury was required by law to recommend the death penalty if the State proved the existence of at least one aggravating circumstance, and that circumstance was not outweighed by mitigating circumstances:

> I believe the Court is going to tell you that if one or more aggravating circumstances is established to your satisfaction that is beyond and to the exclusion of every reasonable doubt and that aggravating circumstance or circumstances are not outweighed by the mitigating circumstances, it is your duty under the oath you have taken to render an advisory verdict of death.

R 1443 (emphasis added). Once again the jury was informed that it had a duty to impose the death sentence. The trial court did nothing to dispel the impression created by the State Attorneys' comments that the jurors had a "duty" to render a sentence of death in those circumstances. R 1488-89.

Through the prosecutors' statements and the trial court's jury instructions, the jury was informed that Mr. Parker ought to receive the death penalty once aggravating circumstances were found to exist, unless the jury concluded that Mr. Parker had overcome that finding through other evidence. Absent such a finding, it remained, in the words of the State Attorneys, the jury's duty to recommend a death sentence, thus violating Mr. Parker's Eighth and Fourteenth Amendment rights is illustrated in Jackson and Adamson.

The State's argument below failed to distinguish Mr. Parker's case from Jackson and Adamson. The differences in the precise language of the California and Florida death penalty statutes are irrelevant. Isolated comments by the State Attorneys and trial court that the jury should determine whether "sufficient" aggravating circumstances exist to impose the death penalty on Mr. Parker are not of any curative import.

Rather, the significant factor rendering Mr. Parker's case analogous to Jackson and Adamson, ignored by

the State, is that the overwhelming majority of the State Attorney's comments and trial court instructions of Mr. Parker's trial impressed upon the jurors their legal obligation to impose the death penalty, once they found one or more statutory aggravating circumstances which were not outweighed by mitigating circumstances. It is indisputable that, as in Jackson and Adamson, absent mitigating circumstances, or mitigating circumstances which outweighed the aggravating circumstances, the jury at the penalty phase of Mr. Parker's trial was left with no option but to recommend the death penalty. As recently held in Jackson and Adamson, this violated Mr. Parker's rights under the Eighth and Fourteenth Amendments to individualized and reliable sentencing.

Moreover, contrary to the State's suggestion in its Response below (Q 635), to create a presumption of death in violation of Jackson and Adamson, it is not necessary that the words "presume" or "presumption" be used in the comments by the prosecutors or in the jury instructions. Mills v. Marvland, 108 S. Ct. 1860 (1988), establishes that the Constitution requires resentencing if a reasonable juror could have based his sentencing decision on an improper standard. In Mills, the defendant contended that the trial court's instructions and the verdict form used by the jury could have led the jurors to believe that they could consider a mitigating circumstance in their sentencing determination

only if they unanimously agreed on its existence. The Supreme Court invalidated the defendant's death sentence because it could not conclude that the jurors did not adopt this interpretation of the instructions and verdict form. 108 S. Ct. at 1860.

A reasonable jury could have concluded from the State Attorneys' comments and the trial courts' instructions that the finding of at least one statutory aggravating circumstance created a presumption that death was the appropriate penalty if Mr. Parker did not prove the existence of mitigating circumstances which outweighed the aggravating circumstance. As in Mills, this interpretation of the standard for applying the death penalty would have impermissibly limited the jury's full consideration of mitigating circumstances, contrary to Lockett v. Ohio, 438 U.S. 586 (1978), and Hitchcock v. Dusser, 481 U.S. 393 (1987). Because the jurors at Mr. Parker's trial might have concluded that Mr. Parker had the ultimate burden of proving that life was the appropriate sentence, and that only those mitigating factors which outweished the aggravating factors were entitled to full consideration, Mr. Parker's death sentence must be vacated.

C. This Court Should At Least Reserve Decision On This Claim Pending The Supreme Court's Decisions In Blystone and Boyde

The particular claims raised in the petitions for certiorari in Blystone and Boyde, which were recently granted by the United States Supreme Court, illustrate the critical importance to Mr. Parker's motion of the Supreme Court's review of those decisions. This Court should at least await the Supreme Court's decisions in those cases before addressing Mr. Parker's virtually identical claims.

In Blystone, the Supreme Court granted certiorari on the following issue:

> whether the mandatory nature of the Pennsylvania death penalty statute renders said statute facially unconstitutional or renders the death penalty imposed upon Petitioner unconstitutional because it improperly limits the full discretion the sentencer must have in deciding the appropriate penalty . . . ?

(Q 68, 75).

The Pennsylvania death penalty statute provides that "the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance . . . and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances." Commonwealth v. Blystone, 549

A.2d 81, 92 (Pa. 1988) (quoting 42 Pa. Cons. Stat. § 9711(c)(1)(iv) (emphasis added)).

Florida's death penalty statute provides, in part:

> (2) Advisory sentence by the jury. -- After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:
>
> (a) Whether sufficient aggravating factors exist as enumerated in subsection (5);
>
> (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
>
> (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

Fla. Stat. Ann. § 921.141(2) (West 1985). Although the Florida statute does not use the same mandatory language as the Pennsylvania statute, the Florida statute as a whole (and not the isolated portion cited by the State, Response at 30, n. 5) contemplates that the jury should recommend the death penalty unless the mitigating circumstances outweigh the aggravating circumstances. As interpreted by the State Attorneys in their comments to the Mr. Parker jury and the trial court in its penalty phase instructions, the Florida statute imposes a duty to recommend a death sentence under such circumstances.

The petitioner in Blystone also based his claim on the prosecutor's remarks to the jury. The prosecutor in Blystone stated in his closing argument:

> "Under the law, if you have an aggravating circumstance and no mitigating circumstances, it is your duty to impose the death penalty, or if you have an aggravating circumstance and it outweighs any mitigating circumstances you may find, it is your duty to impose the death penalty . . . ."

(Q 88). (emphasis added). Virtually identical statements were made by the prosecutors at Mr. Parker's trial. (Q 50-66).

As in Blystone, the presumption of death created by the prosecutors' remarks at Mr. Parker's trial, including their emphasis on the jurors' "duty," informed the jury that it was required to recommend the death penalty under certain circumstances, regardless of whether each juror personally concluded that it was the proper penalty in view of all of the evidence. As argued by the petitioner in Blystone, this violated Mr. Parker's rights under Lockett and Hitchcock to the jury's full consideration of all mitigating factors. The United States Supreme Court will address this issue during its coming term.

In Boyde, as in Blystone, the petitioner challenged the constitutionality of a death penalty statute which literally mandated the imposition of the death penalty under

certain circumstances. The jury instruction at issue in Boyde, which will be considered by the United States Supreme Court on its review of the California Supreme Court's decision, provided:

> "If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death."

758 P.2d at 48 (emphasis added). This instruction tracked the language of the California death penalty statute. See Cal. Ann. Penal Code §§ 190.2, 190.3 (West 1988).

On his appeal to the California Supreme Court, the defendant in Boyde argued that the jury instructions and prosecutor's comments violated the Eighth Amendment by requiring the jury to impose the death penalty if it concluded that aggravating circumstances outweighed mitigating circumstances. Although the majority opinion concluded that the jury was not misled as to its proper role and discretion in imposing the death penalty, the dissenting opinion, in which two justices concurred, clearly illustrates how the defendant's right to reliable and individualized sentencing under the Eighth Amendment was violated.

The dissent in Boyde emphasized the prosecutor's comments to the jurors which stressed their absolute legal obligation to impose the death penalty if they found that aggravating circumstances outweighed mitigating

circumstances, regardless of any other considerations. See People v. Bovde, 758 P.2d at 51-57. Thus, for example, in his penalty phase closing statement, the prosecutor stated:

> "We went through an extensive voir dire process in this case, and you were asked specifically, I think by myself, and I think I asked each and everyone of you, can you personally go along with this, personally commit yourself to the idea that even though you may have to make a difficult and emotionally touchy decision, can you do it, a personal commitment to what the law is going to require of you."

758 P.2d at 55 (emphasis added).

Likewise, the prosecutors at Mr. Parker's trial stressed the jury's obligation to make the "difficult decision" of deciding Mr. Parker's fate solely on the basis of whether one or more aggravating circumstances were outweighed by mitigating circumstances. Thus, Mr. Stone impressed upon the prospective jurors at voir dire:

> We are not trying to make computers out of anybody. But we are looking for people who can sit in the jury box and base their decision on the law and the evidence even though it may be very, very difficult for them to do, nevertheless that's the law. Do you think you would do that, even though it would be a difficult decision that if you found that -- no matter how difficult it might be, that the State established aggravating circumstances beyond a reasonable doubt, could you believe that death could be imposed, if it is not outweighed beyond only mitigating circumstances ....

(R 480-81; Q 59).

Although Mr. Stone professed not to want to turn the jurors into "computers," the prosecutors' comments -- by effectively mandating that Mr. Parker receive the death penalty under certain circumstances -- had that result. Mr. Parker was deprived of his Eighth Amendment right to individualized and reliable sentencing because the jurors were repeatedly advised not to make personal moral judgments regarding whether Mr. Parker should receive the death penalty. In addition to restricting the impermissibly the jurors' full consideration of mitigating circumstances, the prosecutors' comments and jury instructions violated the Eighth Amendment by permitting the jurors to disregard their awesome responsibility to decide between life and death for Mr. Parker by doing what the law supposedly "forced" them to do. Cf. Caldwell v. Mississippi, 472 U.S. 320, 340 (1985) (minimizing sentencer's responsibility to determine whether the death penalty is appropriate is "fundamentally incompatible with the Eighth Amendment's heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case'") (quoting from Woodson v. North Carolina, 428 U.S. 280, 305 (1976)).

It is obviously not the actual decisions of the California Supreme Court in Bovde and the Pennsylvania Supreme court in Blvstone on which Mr. Parker relies, as

wrongly assumed by the State in its response to Mr. Parker's Rule 3.850 motion. (Q *635-636*). Rather, it is that these vital constitutional issues will soon be addressed by the United States Supreme Court. Accordingly, this Court should at least reserve decision on this issue pending the Supreme Court's decisions in Bovde and Blvstone.

POINT V

PROSECUTORIAL COMMENTS AND JURY INSTRUCTIONS SHIFTED TO MR. PARKER THE BURDEN OF PROVING WHETHER HE SHOULD LIVE OR DIE IN VIOLATION OF MR. PARKER'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS

In addition to violating his constitutional rights under the Eighth Amendment and Fourteenth Amendments, the State Attorney's comments throughout the trial and the trial court's instructions at the penalty phase violated Mr. Parker's Due Process rights under the Fifth and Fourteenth Amendments by effectively shifting to Mr. Parker the burdens of proof and persuasion on the issue of whether he should be sentenced to death.

Both the Eleventh Circuit's opinion in Jackson and the Ninth Circuit's opinion in Adamson recognized that the jury instructions at issue in those cases implicated the defendant's due process rights. In Jackson, the Eleventh Circuit reasoned that "[p]resumptions in the context of criminal proceedings have traditionally been viewed as

constitutionally suspect." Jackson v. Dusser, supra, 837 F.2d at 1474. In Adamson, the Ninth Circuit noted that the fact that the presumption of death was rebuttable "probably would not cure the infirmity of a death sentence brought about by the presumption." Adamson v. Ricketts, supra, 865 F.2d at 1043 n.53.

At Mr. Parker's trial, reasonable jurors could have concluded from the State Attorneys' comments and trial court's instructions that once the State established the existence of at least one statutory aggravating factor, death was presumed to be the appropriate penalty, and the burden shifted to Parker to prove that mitigating circumstances outweighed the aggravating factor. This shifting of the burdens of proof and persuasion to Mr. Parker on the ultimate issue of whether he should live or die violated his Due Process rights.

The State's Response to Mr. Parker's Rule 3.850 motion hopelessly confuses the distinction between the Due Process violation derived from the Fifth Amendment, and the Eighth Amendment violation of Mr. Parker's right to an individualized and reliable capital sentencing proceeding. (See Q 631-634). The State failed to recognize that violations of Mr. Parker's Fifth and Eighth Amendment rights occurred as a result of the State Attorney comments and the trial court's instructions. Those comments and instructions

violated Mr. Parker's Fifth Amendment rights by shifting to Mr. Parker the burden of proving that mitigating circumstances outweighed statutory aggravating circumstances, once the State proved the existence of aggravating circumstances.

The State -- in its singleminded rush to find procedural bars in order to avoid addressing the obvious merits of Mr. Parker's claims in a serious manner -- relied below on Mr. Parker's failure to raise the due process violation resulting from the shifting of the burden to Mr. Parker at the penalty phase within two years of the Supreme Court's decision in Sandstrom. (Q 632). Obviously, Mr. Parker could not have raised this claim in 1981, before his trial had even commenced.

More fundamentally, this claim could not have been raised on Mr. Parker's direct appeal or his initial Rule 3.850 motion because it was not until the recent decisions in Jackson and Adamson that the basis of this claim was reasonably available to Mr. Parker. Assuming that this claim was available to Mr. Parker at the time of his trial and direct appeal, however, his prior counsels' failure to raise this fundamental error at Mr. Parker's trial and on his direct appeal violated Mr. Parker's Sixth Amendment right to the effective assistance of counsel, and should thus be considered on the merits by this Court.

The State's argument below that Florida's statutory scheme "does not place the burden of proof, as to aggravating and mitigating circumstances on either the State or defendant" (Q 633) (emphasis in original), is directly refuted by the transcript of Mr. Parker's trial. At the penalty phase, the trial court instructed the jury that "each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision." R **1490.** The court then instructed the jury that

> a mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established.

R 1490-91. The unmistakable message of these instructions was that it was the State's responsibility to prove aggravating circumstances and the defendant's responsibility to prove mitigating circumstances. At the penalty phase of Mr. Parker's trial, the State Attorneys attempted to establish the existence of statutory aggravating circumstances, and Mr. Parker's trial counsel attempted to establish countervailing mitigating circumstances. The State's arguments are thus entirely divorced from the reality of Mr. Parker's trial.

Similarly, the State's argument, in its response to Mr. Parker's Rule 3.850 motion, that aggravating and

mitigating factors are merely guides to "channel and restrict the sentencers [sic] discretion" (Q 633), even if correct as a normative principle of law, is not reflective of Mr. Parker's actual trial. At the sentencing phase, the presence or absence of statutory aggravating and mitigating circumstances, and whether Mr. Parker could prove that the mitigating circumstances outweighed the aggravating circumstances, was the exclusive focus of the jury's deliberations as a result of the State Attorneys' comments and the trial court's instructions. That the jury was not required to apply a "set formula" to the weighing process itself (see Q 633), does nothing to alter the fact that Mr. Parker bore the ultimate burden of proving to the jury that mitigating circumstances outweighed aggravating circumstances, in direct violation of his Fifth and Fourteenth Amendment rights to due process.

Moreover, this Court has itself held that the State bears the burden of proof and persuasion at the penalty phase of a capital trial. In State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943 (1974), the Court held that the statutory aggravating circumstances "actually define those crimes . . . to which the death penalty is applicable" and, therefore, the State bore the burden of proving their existence beyond a reasonable doubt. In Aranao v. State, 411 So. 2d 172 (Fla.), cert. denied, 457 U.S. 1140 (1982), the Court reasoned that, under the Due Process Clause, as

interpreted in Dixon and Mullaney v. Wilbur, 421 U.S. 684 (1978), the State is required to prove that the statutory aggravating circumstances outweighed the mitigating circumstances. In violation of these principles, founded on fundamental concepts of due process, the burden of proof was placed on Mr. Parker to demonstrate that the mitigating circumstances outweighed the aggravating factors found by the jury.

Accordingly, under the recent decisions in Adamson and Jackson, as well as Florida state law, the shifting of the burden to him on the ultimate issue of his sentence, violated Mr. Parker's Due Process rights, and requires that his death sentence be vacated.

POINT VI

MR. PARKER'S DEATH SENTENCE SHOULD BE VACATED AS AN UNCONSTITUTIONAL DEPRIVATION OF HIS RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO A JURY TRIAL ON THE ELEMENTS OF CAPITAL MURDER

In Adamson v. Ricketts, supra, the Ninth Circuit also held that the Arizona death penalty statute was unconstitutional as a deprivation of the defendant's right to a jury determination of "aggravating circumstances." 865 F.2d at 1023-29. This holding is clearly applicable to the Florida death penalty statute and demonstrates that Mr. Parker was deprived of his rights under the United States

Constitution and Florida law to a full jury trial. The court below properly considered this claim on the merits, but erred in holding that it was legally unfounded.

Under the Arizona death penalty statute in Adamson, the court makes the determination of the appropriate sentence on the basis of findings of statutory aggravating circumstances and mitigating circumstances. 865 F.2d at 1015-16 n. 2. The defendant is not eligible to receive the death penalty unless the judge finds at least one aggravating circumstance. 865 F.2d at 1025. Because a defendant is entitled to a jury determination of his guilt or innocence, see, e.g., Duncan v. Louisiana, 391 U.S. 145 (1968), and Due Process requires that the State prove every element of the charged offense beyond a reasonable doubt, see, e.g., In re Winship, 397 U.S. 358 (1970), the Ninth Circuit addressed the issue of whether a statutory aggravating circumstance should be deemed an element requiring a jury determination.

The Adamson court concluded that the statutory aggravating circumstances enumerated in the Arizona death penalty statute actually constituted elements of the distinct offense of "capital murder." 865 F.2d at 1025-27. The court reasoned that because a defendant could not receive the death penalty until the trial court found at least one aggravating circumstance, the practical effect of that finding was to

create a separate category of murder for which the death penalty could be imposed.

In holding that the so-called aggravating circumstances were really elements of a distinct crime, the Ninth Circuit noted that the circumstances had several of the attributes of elements of a crime. 865 F.2d at 1026. Thus, like elements, they had to be proved beyond a reasonable doubt, they informed the prosecutor of the elements of proof necessary for a conviction, and they were the subject of an adversarial hearing. The Ninth Circuit concluded that a jury trial was required on the existence of a statutory aggravating circumstance as an element of the crime.

The Florida death penalty statute, like the Arizona statute, also requires a finding of at least one statutory aggravating circumstance before the trial court can impose the death penalty on the defendant. See Fla. Stat. Ann. § 921.141 (West 1985); Barclay v. Florida, 463 U.S. 939, 953-54 (1983); Johnson v. State, 438 So. 2d 774, 779 (Fla. 1983), cert. denied, 465 U.S. 1051 (1984). The jury's verdict of guilty at the guilt phase does not, by itself, render the defendant subject to the death penalty. Under the reasoning of Adamson, the aggravating circumstances enumerated in section 921.141, Florida Statutes, constitute elements of the distinct offense of capital murder that

require a jury determination of proof beyond a reasonable doubt.

The conclusion that the aggravating circumstances enumerated in Section 921.141(5) of the Florida Statutes are elements of a distinct offense is supported by Florida case law. In State v. Dixon, 283 So. 2d at 9 (emphasis added), the Florida Supreme Court held:

> The aggravating circumstances of Fla. Stat. §921.141(6), F.S.A., actually define those crimes -- when read in conjunction with Fla.Stat. §§ 782.04(1) and 794.01(1), F.S.A. -- to which the death penalty is applicable in the absence of mitigating circumstances. As such, they must be proved beyond a reasonable doubt before being considered by judge or jury.

~~See also~~ Aranso v. State, 411 So. 2d at 174 ("In Dixon we held that the aggravating circumstances of section 921.141(6), Florida Statutes (1973), were like elements of a capital felony in that the State must establish them.").

Mr. Parker was entitled to a unanimous jury verdict regarding the existence of at least one statutory aggravating circumstance. Florida law explicitly requires unanimous jury verdicts, see Fla. Const. Art. 1, § 22; Fla. R. Crim. P. 3.440 (1973) and the United States Supreme Court has assumed the Sixth and Fourteenth Amendment right to jury trials also requires unanimous verdicts in capital cases. See Johnson v.

Louisiana, 406 U.S. 356 (1972); Apodaca v. Oreuon, 406 U.S. 404 (1972).

At the sentencing phase of Mr. Parker's trial, the jury voted eight to four to recommend the death penalty. It thus cannot be determined whether all twelve jurors found the existence of at least one aggravating circumstance beyond a reasonable doubt -- the four who voted for a life sentence might not have found any such circumstances. Accordingly, the non-unanimous jury recommendation amounts to a denial of Mr. Parker's right to a jury trial on the elements of the distinct crime of capital murder.

Although the United States Supreme Court's recent decision in Hildwin v. Florida, 109 S. Ct. 2055 (1989), suggests, in dicta, that the existence of an aggravating circumstance is not an element of the offense, the jury's recommendation in Hildwin was unanimous. The Court thus was not presented in Hildwin with the question squarely presented here and in Adamson -- whether a determination on the existence of an aggravating circumstance, other than one made by a unanimous jury, deprives a capital defendant of his right to a jury trial under the Sixth Amendment. The Supreme Court has not yet acted on the petition for certiorari in Adamson.

Neither do Bullington v. Missouri, 451 U.S. 430 (1981), nor Spaziano v. Florida, 468 U.S. 447 (1984), cited

by the State below (see Q 637), negate Mr. Parker's claim that he was denied his Sixth Amendment right to a jury trial because it cannot be concluded that the sentencing phase jury unanimously found at least one statutory aggravating circumstance.

On the contrary, Bullinston strongly supports Mr. Parker's contention. In Bullinston, the Supreme Court held that Missouri's capital sentencing proceedings, which, like Florida's, are conducted after the guilt phase,

> resembled and, indeed, in all relevant respects was like the immediately proceeding trial on the issue of guilt or innocence. It was itself a trial on the issue of punishment. . . .

451 U.S. at 438. The Supreme Court specifically noted that, as in the guilt phase, the prosecution "undertook the burden of establishing certain facts beyond a reasonable doubt in the quest to obtain the harsher of two alternative verdicts." Id.

Spaziano v. Florida, 468 U.S. 447 (1984), also does not foreclose Mr. Parker's claim because the Supreme Court in that case only addressed the constitutionality of the procedure under Florida law which permitted the trial court to override the jury's advisory verdict. As pointed out in Adamson, Spaziano was only concerned with the roles of the judge and jury in the weighing of aggravating and mitigating

circumstances and the ultimate determination of the appropriate punishment. See Adamson, supra, 865 F.2d at 1028-29. Spaziano, however, did not address the entirely separate issue of whether the Florida statute violates the defendant's right under the Sixth and Fourteenth Amendment to an initial jury determination on the existence of the elements of the offense charged. Id.

Under Adamson, the aggravating circumstances under Florida's death penalty statute in fact constitute elements of the distinct crime of capital murder which must be found by a unanimous jury. Because states cannot abridge a defendant's constitutional rights to a full jury trial by "redefin[ing] the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment," Mullaney v. Wilbur, 421 U.S. 684, 698 (1975), Mr. Parker's death sentence must be vacated.

On this vital constitutional issue, on which the Ninth Circuit in Adamson found a clear entitlement to a unanimous jury verdict, and on which the Supreme Court has not yet clearly ruled, this Court should, at the very least, defer a decision until the Supreme Court has acted on the petition for certiorari in Adamson.

POINT VII

THE PROSECUTORS' ANTI-SYMPATHY COMMENTS VIOLATED MR. PARKER'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS, AND THEIR FLORIDA COUNTERPARTS, TO INDIVIDUALIZED AND RELIABLE SENTENCING

After Mr. Parker's initial Rule 3.850 motion was filed, the United States Court of Appeals for the Tenth Circuit decided Parks v. Brown, 860 F.2d 1545 (10th Cir. 1988) (en banc), cert. sranted sub nom. Saffle v. Parks, 109 S. Ct. 1930 (1989). Parks demonstrates that the prosecutors' admonishments to the jury to exclude sympathy for Mr. Parker from their deliberations on sentencing, violated Mr. Parker's Eighth and Fourteenth Amendment rights, and his rights under Florida law, to individualized and reliable sentencing. These statements created an impermissible risk that the jury disregarded or failed to consider fully the mitigating evidence presented on Mr. Parker's behalf.

In Parks, the Tenth Circuit, sitting en banc, held that a jury instruction precluding consideration of sympathy at the sentencing phase created "an impermissible risk that the jury did not fully consider" mitigating evidence offered by the defendant. 860 F.2d at 1556. The instruction at issue was: "You must avoid any influence of sympathy, sentiment, passion, prejudice or other arbitrary factor when imposing sentence." Id. at 1552. The Parks court relied upon the requirement of the Eighth and Fourteenth Amendments

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.'" Id. at 1554 (quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978) (emphasis in original)). The court recognized that such mitigating factors are entitled to "individualized" consideration by the sentencer, and that relevant Supreme Court precedent shows that a capital defendant has a right to make, and have the jury consider, "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." Parks, 860 F.2d at 1555.

The Parks court then decided that "sympathy" was, like "'[m]ercy,' 'humane' treatment, 'compassion,' and consideration of the unique 'humanity' of the defendant," a relevant consideration in the penalty phase of a capital case. Accordingly, the instruction to the jury to disregard *any* influence of sympathy "improperly undermined the jury's ability to consider fully petitioner's mitigating evidence." Id. at 1555-56.

During voir dire at Mr. Parker's trial, the prosecutor repeatedly and expressly told the jury that

sympathy for the defendant must be excluded from their deliberations. **See** R 99-100; R 297-98; R 398. The prosecutor expressly told the jury that it must not consider sympathy in sentencing Mr. Parker:

> MR. STONE: May I ask this of the entire panel. Could you do that, in this case, regardless of what your emotional feelings might be, if you felt that the State had met it's burden and we establish those aggravating circumstances could you put aside any emotional sympathy and base it on the law and the evidence in this case? Could you do that?
>
> AFFIRMATIVE RESPONSE.

R 297-98.

* * *

> MR. STONE: Now, let me ask you this. Would you have any sympathy for him because he is black?

R 398.

In his closing argument at the sentencing phase of the trial, the prosecutor emphasized the State's position that any feelings of sympathy for Mr. Parker should be excluded from the jurors' deliberations on whether Mr. Parker should live or die:

> [Defense counsel will] probably tell you, he may tell you, hey, you know render an advisory sentence of life imprisonment. He'll probably plead for his life. Tell you to put him in a case for twenty-five years or for life. He'll say, you know, the Judge will sentence him to consecutive sentences, the bottom line is in twenty-five years he would be eligible for parole. He'll plead for it, okay?

> Based upon the evidence, there is no sympathy for J. B. Parker. The only sympathy I have is for the Campbell family. Because there will always be an empty chair at their house due to the act of one person, J. B. Parker, okay?

R 1463-64 (emphasis added). The trial court never counteracted the State Attorney's anti-sympathy statements and did not instruct the jury that it was appropriate and necessary to take into account all evidence in mitigation, including that which would tend to create sympathy for Mr. Parker.

The prosecutorial comments at Mr. Parker's trial, admonishing the jurors to put aside *any* sympathy they might feel for Mr. Parker in determining his sentence, had the same effect as the erroneous instruction in Parks. Those comments created a substantial risk that the jury would simply disregard the relevant mitigating evidence put forward by Mr. Parker.

The exclusion of any relevant mitigating evidence in a capital trial renders the trial fundamentally unfair. Riley v. Wainwright, **517** So. 2d 656, **660** n.2 (Fla. **1987).** "Unless it is clear beyond a reasonable doubt that the erroneous exclusion of evidence did not affect the jury's recommendation of death, the defendant is entitled to a new jury recommendation on resentencing." Valle v. State, 502 So. 2d 1225, 1226 (Fla. **1987).** Similarly, if relevant mitigating evidence is presented, but the sentencer restricts

its consideration only to statutory mitigating factors, the Constitution is offended. Hitchcock v. Dugger, 481 U.S. 393 (1987). Here, because it cannot be said to be clear beyond a reasonable doubt that the prosecutors' anti-sympathy comments and arguments did not affect the jury's consideration of mitigating evidence, the error is not harmless and the death sentence must be vacated.

Moreover, there is a substantial probability that, in the absence of the prosecutors' comments, the jury would have recommended a sentence of life imprisonment. "The possibility that petitioner's jury conducted its task improperly certainly is great enough to require resentencing." Mills v. Maryland, 486 U.S. 367, 108 S. Ct. 1860, 1870 (1988) (emphasis added).

Contrary to the State's argument below (Q 638-639), Mr. Parker does not argue that the prosecutor could not have properly admonished the jury not to consider "mere" sympathy, or other "'extraneous emotional factors' that were 'totally divorced from the evidence.'" Parks v. Brown, 860 F. 2d at 1553 (quoting California v. Brown, 479 U.S. 538, 542 (1987). His argument is rather that "sympathy that is based on the evidence is a valid consideration in sentencing that cannot constitutionally be precluded." Parks v. Brown, 860 F.2d at 1553 (emphasis in original).

The State has not denied that the mitigation evidence presented was calculated to appeal to the jury's sense of compassion, understanding and sympathy--all of which are factors that are entitled, contrary to the prosecutor's comments, to full consideration by the jury. Among other things, the mitigation evidence included testimony that Mr. Parker came from a poor family (R 1225-27); that intelligence testing of Mr. Parker had revealed "marked social, cultural deprivation" and borderline intellectual function (R 1249); that Mr. Parker suffered from deep-seated and profound feelings of rejection from early childhood and never knew his father (R 1252); that he was isolated emotionally (R 1253, 1259); and that he suffered from alcoholism (R. 1260, 1262). (See also Q 22). The prosecutor's comments improperly interfered with the jurors' ability fully to consider that evidence.

The State also argued below that because the anti-sympathy comments were contained in prosecutorial comment rather than jury instructions, there was no error. This is specious. The courts of this State have repeatedly condemned prosecutorial comments which operate to deprive the accused of fundamental rights. See, e.g., Dixon v. State, 430 So. 2d 949 (Fla. Dist. Ct. App.), petition denied, 440 So. 2d 353 (1983). This Court has held that defense counsel "may not contravene the law . . . in arguing to the jury." Cave v. State, 476 So. 2d 180, 186 (Fla. 1985), cert. denied, 476

U.S. 1178 (1986). This rule applies with equal if not greater force to the prosecutor. The State's argument should be rejected.

Parks v. Brown worked a fundamental change in the constitutional law of capital sentencing which should be applied in this case. The court below erred in determining that this claim is barred because it could have been heard on direct appeal or could have been asserted within two years after the conviction became final. (Q **666, ¶ 5).**

The United States Supreme Court has granted certiorari in Saffle v. Parks to determine the fundamental consitutional question of the propriety of the anti-sympathy instruction. This Court should, at a minimum, await the Supreme Court's decision before deciding Mr. Parker's claim.

POINT VIII

THE STATE ATTORNEY'S OFFICE, IN VIOLATION OF ITS OBLIGATIONS UNDER CHAPTER 119, FLORIDA STATUTES, AND IN VIOLATION OF MR. PARKER'S DUE PROCESS AND EQUAL PROTECTION RIGHTS, HAS DENIED MR. PARKER ACCESS TO ITS FILES AND RECORDS PERTAINING TO MR. PARKER

In total disregard of its obligations under Chapter **119,** Florida Statutes, the State Attorney's Office has refused to provide unconditional access to public records in its possession pertaining to Mr. Parker. Rather, the State Attorney's Office sought to condition such access on Mr.

Parker's agreement that the State will be provided equal access to the files of his counsel. In its refusal to grant access, the State did not rely on any of the statutory exceptions. The State Attorney's Office, instead, sought to impose a wholly unauthorized condition. Only after this claim was asserted in the court below did the State suggest for the first time, in its response to the motion, that access would be provided to its files. By that time, however, the court below had already denied Mr. Parker's motion, thus depriving him of any opportunity to review the State Attorney's files and include that information in the claims presented on the Rule **3.850** motion.

By letter dated December 8, **1987,** Parker's counsel requested the State Attorney's Office for the Nineteenth Judicial Circuit to provide access to public records pertaining to Parker pursuant to Section **119.01** et sea., Florida Statutes (Q **199-201).** The State Attorney's Office responded by letter dated December **28, 1987.** In that letter, Richard A. Barlow, Assistant State Attorney, stated:

> Please be advised that we will consent to your review of our trial file, with the understanding that we have the same reciprocal rights to inspect your files.

(Q 206).

By letter dated January 6, **1988,** Parker's counsel repeated its demand for disclosure under section **119** and made

clear that the State was neither entitled to receive, nor would it receive, reciprocal disclosure from Parker's counsel. (Q **209-210**). The State Attorney's office made no response.

In subsequent conversations between Parker's counsel and Mr. Barlow, the State Attorney's office stated, unequivocally, that, in its refusal to comply with Parker's request, it was not relying upon any statutory exception, but instead insisted that it could properly condition access to its files upon reciprocal access to the files of Parker's counsel. By letter dated January **12, 1988,** Parker's counsel confirmed the matters discussed in these conversations. (Q **212**). No response was ever received from the State Attorney's Office.

The refusal of the State Attorney's Office to provide Mr. Parker unconditional access to the files properly requested by Mr. Parker precludes Mr. Parker from determining whether the State has violated its obligations under Bradv v. Maryland, **373** U.S. **83 (1963)**. Only with full access to the files of the State Attorney's Office can Mr. Parker determine whether Bradv material has been withheld. The State apparently now concedes, there is no legal basis on which a public agency can condition, and thereby obstruct, access to public files in its possession as the State Attorney has done

with respect to Mr. Parker's request to review the public files relating to his arrest and conviction.

The State Attorney's unjustifiable and unacceptable attempt to condition access by Mr. Parker's counsel to public files relating to Mr. Parker's arrest and conviction has prevented his attorneys from completing their factual investigation of Mr. Parker's case. Without such access, Mr. Parker's counsel cannot determine whether this motion could or should be amended to include new claims, or to buttress claims already asserted. Mr. Parker's attorneys require immediate access to the files of the State Attorney's Office and time to review those files to determine whether Bradv material has been withheld. Although the State apparently has now agreed to provide access, that agreement was not communicated until after Mr. Parker's motion had already been denied.

The State's contention that any complaint by Mr. Parker that the State Attorney's Office was denying access to information should have been made at the time of the initial Rule 3.850 motion is puzzling, in light of the fact that the State Attorney did not try to impose his illegal condition on access until almost four weeks after that motion had been filed. Mr. Parker's undersigned counsel had no reason to suspect that the State Attorney would not meet his statutory obligations, and thus had no basis to assert in advance a

complaint that access was denied. That, coupled with the limited amount of time available to prepare the first Rule **3.850** motion, establishes that the facts upon which this claim is based were unknown to Parker's counsel and were not, despite counsel's diligent efforts, discovered until more than two years after the judgment and sentences became final.

The trial court's half-day recess at the hearing on the first Rule **3.850** motion--when Mr. Parker's counsel had only two days notice of the hearing--was permitted to give counsel some time to prepare <u>on the issues presented at that hearing</u>. That recess did not, and was not intended to, permit counsel to review the files as to which access had been denied. Since that denial of access came after the motion was filed, it was simply not an issue on that motion.

The State's assertion that Mr. Parker's counsel has, since the time the death warrant was signed, had access to the State's complete files on Mr. Parker, is simply not true. In connection with the recently conducted psychological examination of Mr. Parker, one of his representatives made an independent request for access to his <u>juvenile</u> records, which access was granted. The State, however, would have this Court believe that the State Attorney provided access to **all** records requested by his counsel on December **8, 1987,** and that is simply not true. The State Attorney <u>never</u> told Mr. Parker's counsel or

representative that he was reversing his position and was prepared to grant the unconditional access required by statute. If the State Attorney is now, at the eleventh hour, saying that the requested full and unconditional access will be permitted, at a minimum a stay should be granted to permit careful review of those files by Mr. Parker's counsel to determine whether they reveal any claims that may be made in his behalf.

The Circuit Court's decision that there was no legal justification for filing this claim more than two years after the judgment and sentence became final (Q 666, ¶ 7), was thus error, and should be reversed.

CONCLUSION

For the foregoing reasons, appellant, J.B. Parker, respectfully requests that the order of the court below denying relief be reversed: that Mr. Parker's scheduled execution be immediately and indefinitely stayed; and that Mr. Parker's motion pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure to vacate and set aside the judgments of conviction and sentence imposed by the trial