IN THE

SUPREME COURT OF FLORIDA

CASE NO. ***74,788***

RICKEY BERNARD ROBERTS,

Petitioner,

versus

RICHARD L. DUGGER,

Respondent.

ON PETITION FOR A WRIT OF HABEAS CORPUS

BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

Before the Court in this proceeding is Mr. Roberts' petition for habeas corpus relief. Mr. Roberts will brief the issues presented in the habeas corpus proceeding.

The following symbols will be used to designate references to the record in the instant cause:

"R" -- Record on Direct Appeal to this Court;

All other citations will be self-explanatory or will be otherwise explained.

REQUEST FOR ORAL ARGUMENT

Mr. Roberts has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue, and Mr. Roberts through counsel accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On June 21, 1984, Mr. Roberts was charged by indictment with the first degree murder of George Napoles, sexual battery of Michelle Rimondi, and two counts of robbery and kidnapping of Michelle Rimondi. Mr. Roberts entered a plea of not guilty to the charges and was tried before a jury in December of 1985. After deliberating for twenty three (23) hours, the jury returned a verdict of guilty of first degree murder, sexual battery, and kidnapping.

The central issue at the trial was the credibility of Michelle Rimondi. She claimed that it was Rickey Roberts who killed Mr. Napoles and raped her, Ms. Rimondi at approximately 3:00 a.m. on June 4, 1984. Mr. Roberts testified in his own behalf and denied the charges, although admitting he had picked up a hitchhiking-Ms. Rimondi on the night on the murder. Mr. Roberts' defense was that Ms. Rimondi, a prostitute, and one or both of her male protectors killed Mr. Napoles, Ms. Rimondi's client, and then framed Mr. Roberts for the murder. However, the defense was precluded from presenting any evidence of Ms. Rimondi's sexual history because the trial court ruled that the Rape Shield Law prohibited its introduction. Even without this key information going towards Ms. Rimondi's motives to lie about her involvement in the murder and her relationship with the victim, the jury deliberated for twenty three (23) hours before convicting.

In the penalty phase of the trial, the court instructed the jury on several aggravating circumstances, but failed to include the appropriate qualifiers applicable to the various aggravating factors. The jury was also instructed regarding the statutory mental health mitigating factors. However, the jury was told that if the mental health mitigation did not rise to the statutory threshold level, only "other aspects" of Mr. Roberts character or background could be considered in mitigation. The trial was prior to the decision in Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), holding that a Florida sentencing jury must receive accurate and correct penalty phase instructions. After being erroneously instructed

and having deliberated, the jury, by a vote of seven to five (7-5), recommended that Mr. Roberts be sentenced to death for the first-degree murder conviction.

Prior to the sentencing hearing, the trial judge prepared his written findings as to the aggravating and mitigating circumstances surrounding the murder. At the conclusion of the sentencing, this order was entered. The aggravating circumstances found were as follows: (1) Mr. Roberts has previously been convicted of a violent felony; (2) Mr. Roberts was under sentence of imprisonment; (3) the murder was committed while Mr. Roberts was engaged in the crime of sexual battery; and (4) it was especially heinous, atrocious and cruel (R. 581-84). The court stated that it "has been unable to find anything about this offense or association with this defendant's to warrant mitigation" (R. 586). The court sentenced Defendant to death (R. 587).

On appeal this Court affirmed Mr. Roberts' conviction and sentence of death. Roberts v. State, 510 So. 2d 885 (Fla. 1987). On August 29, 1989, the Governor of Florida signed a death warrant setting Mr. Roberts' execution for Tuesday, October 31, 1989. On September 28, 1989, Mr. Roberts' filed an original action with this Court seeking habeas corpus relief and a stay of execution. Thereafter, this Court stayed Mr. Roberts' execution. This brief is submitted as to the habeas corpus petition.

SUMMARY OF ARGUMENT

I. Olden v. Kentucky, 109 S. Ct. 480 (1989), effectively overruled this Court's decision in Mr. Roberts' direct appeal. Under Olden, Mr. Roberts was denied his sixth amendment right to cross-examine the State's witness, Ms. Rimondi, as to her prostitution, which was material as to her motives to lie. Ms. Roberts' defense was that either Ms. Rimondi or her male protectors committed the murder and framed Mr. Roberts. Since the jury deliberated for twenty-three hours without knowing of Ms. Rimondi's prostitution, the limitation upon the cross-examination cannot be found to be harmless beyond a reasonable doubt, and a reversal is required.

II. Rock v. Arkansas, 107 S. Ct. 2407 (1987); Taylor v. Illinois, 108 S. Ct. 646 (1988); and Olden v. Kentucky, 109 S. Ct. 480 (1989), effectively overruled this Court's decision on direct appeal upholding the trial court's limitation on Mr. Roberts' ability to testify in his own behalf. Under these new decisions, Mr. Roberts was denied his constitutional right to testify in his own behalf and present relevant and material evidence. The exclusion of Mr. Roberts' testimony, that Ms. Rimondi told him that she was a prostitute, cannot be held to be harmless beyond a reasonable doubt since Ms. Rimondi's prostitution gave rise to a motive for her or her male protectors to have killed Mr. Napoles, her client.

III. Mr. Roberts was denied his right to trial by a jury that presumed him innocent when the State repeatedly referred to him by an alias. Mr. Roberts received ineffective assistance of appellate counsel when this issue was not raised on direct appeal.

IV. Mr. Roberts was denied his right of confrontation when the court limited cross-examination into pending charges against the State's witnesses. Mr. Roberts was denied the effective assistance of appellate counsel when counsel failed to raise this issue on appeal, and as a result, deprived Mr. Roberts of the reversal to which he was entitled to by virtue of the constitutional error.

V. Mr. Roberts was deprived of his right to a jury not picked on a racial basis.

VI. Mr. Roberts was denied a fair trial and sentencing as a result of the prosecutor's improper arguments which contained vindictive and personal attacks on Mr. Roberts,

VII. The sentencing proceeding here, was tainted by the impermissible use of victim impact evidence in violation of Booth v. Maryland, 107 S. Ct. 2529 (1987), and South Carolina v. Gathers, 109 S. Ct. 2207 (1989), new case law.

VIII. Mr. Roberts' sentencing jury was not adequately instructed regarding the meaning of heinous, atrocious, or cruel. This violated the eighth amendment

under Mavnard v. Cartwrinht, 108 S. Ct. 1853 (1988), and Hitchcock v. Dunner, 107 S. Ct. 1821 (1987), new case law which is cognizable in collateral proceedings.

IX. Mr. Roberts' sentencing jury was incorrectly instructed that in order to recommend a life sentence, the jury had to find that the mitigating circumstances outweighed the aggravating circumstances. This claim is cognizable because of a change in law. Mills v. Maryland, 108 S. Ct. 1860 (1988), and Penry v. Lynaunh, 109 S. Ct. 2934 (1989).

X. The jury in Mr. Roberts' case was improperly led to believe that they could not consider sympathy for Mr. Roberts in determining the sentence. This was in violation of the eighth amendment and the principles set forth in Penry v. Lynaugh, 109 S. Ct. 2934 (1989).

XI. The jury was misled concerning its role in the sentencing of Mr. Roberts in violation of the eighth amendment new precedent established by Hitchcock v. Dunner, supra, and Caldwell v. Mississippi, 105 S. Ct. 2633 (1985).

XII. Mr. Roberts' jury was not adequately instructed regarding the weight of the "under sentence of imprisonment" in violation of the eighth amendment requirements set forth in Mavnard v. Cartwrinht, supra, and Hitchcock v. Dunner, supra, which are changes in the law.

XIII. Under Maynard v. Cartwright, supra, and Hitchcock v. Dugger, supra, changes in the law, Mr. Roberts' jury was not adequately instructed regarding the aggravating circumstance of "in the course of a felony."

XIV. New case law establishes that this Court erred on direct appeal and that Mr. Roberts' sentence of death is unreliable because the sentencers did not know to consider mental health mitigation not rising to the statutory threshhold as nonstatutory mitigation within the meaning of "any other aspect of the defendant's character."

XV. The trial court erred when it improperly limited Mr. Roberts' mental health expert's testimony in violation of Penry v. Lynaunh, supra, new case law.

XVI. Nonstatutory aggravating circumstances were presented to Mr. Roberts' jury and proper instructions were not given to disregard this argument as required by Maynard v. Cartwright, supra, and Hitchcock v. Dugger, supra.

XVII. Mr. Roberts received ineffective assistance of appellate counsel when the introduction of hearsay at the penalty phase was not challenged on appeal. Mr. Roberts was prejudiced because if the issue had been raised a new sentencing would have been ordered under Engle v. State, *438 So.* 2d *803* (Fla. *1983).*

ARGUMENT I

OLDEN V. KENTUCKY IS NEW CASE LAW WHICH ESTABLISHES THAT MR. ROBERTS WAS DEPRIVED OF HIS RIGHT TO CONFRONT WITNESSES AGAINST HIM WHEN THE TRIAL COURT PROHIBITED CROSS-EXAMINATION OF THE STATE'S WITNESS, MICHELLE RIMONDI, REGARDING HER WORK AS A PROSTITUTE AND HOW THAT LED TO THE VICTIM'S DEATH.

As to Claim I of the petition, Mr. Roberts relies on the petition, itself, and the argument contained in Argument I of the Initial Brief submitted in Case No. *74,920.*

ARGUMENT II

MR. ROBERTS WAS DENIED THE RIGHT TO PRESENT A DEFENSE WHEN THE COURT APPLIED THE RAPE SHIELD LAW TO LIMIT MR. ROBERTS' RIGHT TO TESTIFY IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS UNDER TAYLOR V. ILLINOIS, *108 S.* CT. *646 (1988);* ROCK V. ARKANSAS, *107 S.* CT. *2407 (1987);* AND OLDEN V. KENTUCKY, *109 S.* CT. *480* (1989), ALL OF WHICH ARE DECISIONS SUBSEQUENT TO THE SUBMISSION OF THIS CASE ON DIRECT APPEAL AND ESTABLISH A CHANGE IN LAW IN THAT THIS COURT ERRONEOUSLY RESOLVED THIS ISSUE.

As to Claim II of the petition, Mr. Roberts relies on the petition, itself, and the arguments contained in Argument II of the Initial Brief submitted in Case No. *74,920.*

ARGUMENT III

MR. ROBERTS WAS DENIED HIS RIGHT TO TRIAL BY A JURY THAT PRESUMED HE WAS INNOCENT WHEN THE STATE REPEATEDLY REFERRED TO HIM BY AN ALIAS IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS. MR. ROBERTS WAS DENIED THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WHEN THIS ISSUE WAS NOT RAISED ON DIRECT APPEAL.

As to Claim III of the petition, Mr. Roberts relies on the petition, itself, and the arguments contained in Argument IX of the Initial Brief submitted in Case No. 74,920. This issue should have been raised on direct appeal.

This issue involved a classic violation of longstanding principles of Florida law. See Whitfield v. State, 452 So. 2d 548 (Fla. 1984). It virtually "leaped out upon even a casual reading of transcript." Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). This clear claim of per se error required no elaborate presentation -- counsel only had to direct this Court to the issue. The court would have done the rest, based on long-settled Florida and federal constitutional standards.

No tactical decision can be ascribed to counsel's failure to urge the claim. No procedural bar precluded review of this issue; the issue was preserved. See Johnson v. Wainwright, supra, 498 So. 2d 938. However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Roberts of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra. Accordingly, habeas relief must be accorded now.

ARGUMENT IV

MR. ROBERTS WAS DENIED HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS WHEN THE COURT LIMITED CROSS EXAMINATION INTO CRIMES COMMITTED BY THE STATE'S WITNESSES. MR. ROBERTS WAS DENIED THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WHEN APPELLATE COUNSEL FAILED TO RAISE THIS ISSUE ON APPEAL AND AS A RESULT DEPRIVED MR. ROBERTS OF THE REVERSAL OF HIS CONVICTION TO WHICH HE WAS ENTITLED TO BY VIRTUE OF THE CONSTITUTIONAL ERROR.

As to Claim IV of the petition, Mr. Roberts relies on the petition, itself, and the argument contained in Argument VII of the Initial Brief submitted in Case

No. **74,920.** This issue should have been raised on direct appeal. The failure to do **so** was ineffective assistance of counsel.

ARGUMENT V

THE PROSECUTOR PEREMPTORILY EXCUSED BLACK PROSPECTIVE JURORS SOLELY BASED UPON THEIR RACE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. MR. ROBERTS RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WHEN COUNSEL NEGLECTED TO RAISE THIS ISSUE ON DIRECT APPEAL.

This issue was raised at trial but not on direct appeal. After the trial proceedings and before the judgment on direct appeal became final, the United States Supreme Court decided Batson v. Kentucky, **476** U.S. **79 (1986),** in which new rules and prohibitions against discriminatory exercise of peremptory challenges were announced. Batson is applicable to litigation pending on direct state or federal review or not yet final when Batson was decided. Griffith v. Kentucky, **107** S.Ct. **708 (1987).** Batson is applicable to collateral review of convictions that were not final when Batson was decided. Teague v. Lane, **109 S.** Ct. **1060, 1067 (1989).** The trial court did not apply Batson, but applied pre-Batson analysis to deny Mr. Roberts' claim. In Griffith, Batson had been decided after a petition for writ of certiorari was filed, and the Supreme Court determined that Batson was to be applied. Under Batson, relief is mandated here. For these reasons and those already set out in Claim V of the petition for habeas corpus relief, Mr. Roberts' conviction and sentence of death must be set aside.

ARGUMENT VI

THE PROSECUTOR'S CLOSING ARGUMENT IN THE GUILT AND PENALTY PHASES DENIED MR. ROBERTS A FUNDAMENTALLY FAIR AND RELIABLE CAPITAL SENTENCING DETERMINATION AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The prosecutor distorted Mr. Roberts' trial and sentencing with improper closing arguments. He destroyed any chance of a fair trial by comparing Mr. Roberts to Ted Bundy (R. 3109), by calling Mr. Roberts a "bullshitter" (R. 3090), and by repeatedly calling Mr. Roberts, and even his counsel at one point, a liar (R. **2946, 2967, 2986, 2987, 2989).** The State's arguments at both the guilt and penalty phases

are filled with these vindictive and personal attacks on Mr. Roberts, designed to inflame the jury.

The Florida courts have held that "a prosecutor's concern 'in a criminal prosecution is not that it shall win a case, but that justice shall be done.' While a prosecutor 'may strike hard blows, he is not at liberty to strike foul ones.'" Rosso v. State, 505 So. 2d 611, 614 (Fla. 3rd DCA 1987) (quoting Berner v. United States).

These comments by the prosecutor went beyond the bounds of proper argument and clearly prejudiced Mr. Roberts' right to a fair trial as guaranteed by the sixth, eighth and fourteenth amendments. See United States v. Young, 470 U.S. 1 (1985). Appellate counsel rendered ineffective assistance by failing to raise this issue on appeal. Nero v. Blackburn, 597 F.2d 991 (5th Cir. 1979). For these reasons, and those already explained in Claim VI of the habeas corpus petition, Mr. Roberts' conviction and sentence should be set aside

ARGUMENT VII

MR. ROBERTS' RIGHTS TO RELIABLE CAPITAL TRIAL AND SENTENCING PROCEEDINGS WERE VIOLATED WHEN THE STATE URGED THAT HE BE CONVICTED AND SENTENCED TO DEATH ON THE BASIS OF VICTIM IMPACT AND OTHER IMPERMISSIBLE FACTORS, IN VIOLATION OF BOOTH V. MARYLAND, SOUTH CAROLINA V. GATHERS, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

As to Claim VII of the petition, Mr. Roberts relies on the petition, itself, and the argument contained in Argument XV of the Initial Brief submitted in Case No. 74,920.

ARGUMENT VIII

MAYNARD V. CARTWRIGHT AND HITCHCOCK V. DUGGER EFFECTIVELY OVERTURNED PRIOR PRECEDENT FROM THIS COURT THAT A CAPITAL SENTENCING JURY NEED NOT RECEIVE ACCURATE PENALTY PHASE INSTRUCTIONS REGARDING THE "HEINOUS, ATROCIOUS AND CRUEL" AGGRAVATING CIRCUMSTANCE TO BE WEIGHED AGAINST THE MITIGATING CIRCUMSTANCES.

A capital sentencing jury must be properly instructed as to both the aggravating and mitigating circumstances which it is to consider in recommending life or death. Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); Maynard v. Cartwright,

108 S. Ct. 1853 (1988); Mills v. Maryland, 108 S. Ct. 1860 (1988); Penry v. Lynaugh, 109 S. Ct. 2934 (1989). At the time of Mr. Roberts' sentencing, this Court had failed to recognize that a capital jury must be correctly instructed. In fact, on the basis of Hitchcock, this Court has reversed instructional error where no objection to the inadequate instruction was asserted at trial. Meeks v. Dugger, 548 So. 2d 184 (Fla. 1989); Hall v. State, 541 So. 2d 1125 (Fla. 1989). This is because until Hitchcock, the importance of penalty phase jury instructions was not recognized. Because of the new case law not in existence at the time of Mr. Roberts' trial, Claim VIII of the habeas corpus petition is now cognizable.

As set forth in this claim, Mr. Roberts' sentencing jury was not adequately instructed regarding the meaning of heinous, atrocious, or cruel. This violated the eighth amendment principles embodied in Maynard v. Cartwright, supra. For these reasons, and those already explained in Claim VIII of the habeas corpus petition, Mr. Roberts' sentence of death is unreliable. A new sentencing proceeding is required.

ARGUMENT IX

PENRY V. LYNAUGH, MILLS V. MARYLAND, AND HITCHCOCK V. DUGGER EFFECTIVELY OVERTURNED PRIOR PRECEDENT FROM THIS COURT THAT A CAPITAL SENTENCING JURY NEED NOT RECEIVE ACCURATE PENALTY PHASE INSTRUCTIONS REGARDING THE *MANNER* IN WHICH AGGRAVATING CIRCUMSTANCES ARE TO BE WEIGHED AGAINST THE MITIGATING CIRCUMSTANCES.

A capital sentencing jury must be properly instructed as to both the aggravating and mitigating circumstances which it is to consider in recommending life or death. Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); Maynard v. Cartwright, 108 S. Ct. 1853 (1988). Further, the jury must not be denied a vehicle for giving effect to the mitigation. Mills v. Maryland, 108 S. Ct. 1860 (1988); Penry v. Lynaugh, 109 S. Ct. 2934 (1989). At the time of Mr. Roberts' sentencing, this Court had failed to recognize that a capital jury must be correctly instructed. In fact, on the basis of Hitchcock, this Court has reversed instructional error where no objection to the inadequate instruction was asserted at trial. Meeks v. Dugger, 548

So. 2d 184 (Fla. 1989); Hall v. State, 541 So. 2d 1125 (Fla. 1989). This is because until Hitchcock, the importance of penalty phase jury instructions was not recognized. Because of the new case law not in existence at the time of Mr. Roberts' trial, Claim IX of the habeas corpus petition is cognizable now.

As set forth in this claim, Mr. Roberts' sentencing jury was incorrectly instructed that in order to recommend a life sentence, the jury had to find that the mitigation outweighed the aggravation. This violated the eighth amendment principles embodied in Penry, supra, and Mills, supra. See Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988), cert. denied, 108 S. Ct. 2005; Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(in banc). For these reasons, and those already explained in Claim IX of the habeas corpus petition, Mr. Roberts' sentence of death is unreliable. A new sentencing proceeding is required.

ARGUMENT X

PENRY V. LYNAUGH AND HITCHCOCK V. DUGGER EFFECTIVELY OVERTURNED PRIOR PRECEDENT FROM THIS COURT THAT A CAPITAL SENTENCING JURY NEED NOT RECEIVE ACCURATE PENALTY PHASE INSTRUCTIONS REGARDING THE JURY'S ABILITY TO RECOMMEND MERCY BECAUSE OF SYMPATHY EVOKED BY THE EVIDENCE IN MITIGATION.

A capital sentencing jury must be properly instructed as to mitigating circumstances which it is to consider in recommending life or death. Hitchcock v. Dugger, 107 S. Ct. 1821 (1987). The jury must be allowed to fully consider and give effect to mitigation presented by the defense. Mills v. Maryland, 108 S. Ct. 1860 (1988). On the basis of the mitigation, the jury must be free to exercise mercy because of the sympathies evoked on behalf of the defendant. Penry v. Lynaugh, 109 S. Ct. 2934, 2951 (1989). At the time of Mr. Roberts' sentencing, this Court had failed to recognize that a capital jury must be correctly instructed. In fact, on the basis of Hitchcock, this Court has reversed instructional error where no objection to the inadequate instruction was asserted at trial. Meeks v. Dugger, 548 So. 2d 184 (Fla. 1989); Hall v. State, 541 So. 2d 1125 (Fla. 1989). This is because until Hitchcock, the importance of penalty phase jury instructions was not

recognized in Florida. Because of the new case law not in existence at the time of Mr. Roberts' trial, Claim X of the habeas corpus petition is now cognizable.

As set forth in this claim, Mr. Roberts' sentencing jury could reasonably have understood that feelings of sympathy evoked by the mitigating evidence could not be considered. This violated the eighth amendment principles embodied in Mills, supra. See Parks v. Brown, 860 F.2d 1545 (10th Cir. 1988)(in banc), cert. granted sub nom., Saffle v. Parks, 109 S. Ct. 1930 (1989). For these reasons, and those already explained in Claim X of the habeas corpus petition, Mr. Roberts' sentence of death is unreliable. A new sentencing proceeding is required.

ARGUMENT XI

CALDWELL V. MISSISSIPPI AND HITCHCOCK V. DUGGER EFFECTIVELY OVERTURNED PRIOR PRECEDENT FROM THIS COURT THAT A CAPITAL SENTENCING JURY NEED NOT RECEIVE ACCURATE PENALTY PHASE INSTRUCTIONS REGARDING THEIR ROLE IN THE SENTENCING PROCESS.

A capital sentencing jury must be properly instructed as to their role in the sentencing process. Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); Caldwell v. Mississippi, 105 S. Ct. 2633 (1985); Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(in banc), cert. denied, 109 S. Ct. 1353 (1989). At the time of Mr. Roberts' sentencing, this Court had failed to recognize that a capital jury must be correctly instructed. In fact, on the basis of Hitchcock, this Court has reversed instructional error where no objection to the inadequate instruction was asserted at trial. Meeks v. Dugger, 548 So. 2d 184 (Fla. 1989); Hallv. State, 541 So. 2d 1125 (Fla. 1989). This is because until Hitchcock, the importance of penalty phase jury instructions was not recognized. Because of the new case law not in existence at the time of Mr. Roberts' trial, Claim XI of the habeas corpus petition is now cognizable.

As set forth in this claim, Mr. Roberts' sentencing jury was not adequately instructed regarding the significance of their sentencing verdict. Throughout Mr. Roberts' trial, the prosecutor's and judge's comments about the jury's role in the

sentencing process allowed the jury to attach less significance to their sentencing verdict, and therefore enhanced the risk of an unreliable death sentence. This violated the eighth amendment principles embodied in Caldwell v. Mississippi, supra, and Mann v. Dunner, supra. For these reasons, and those already explained in Claim XI of the habeas corpus petition, Mr. Roberts' sentence of death is unreliable. A new sentencing proceeding is required.

ARGUMENT XII

MAYNARD V. CARTWRIG'HT AND HITCHCOCK V. DUGGER EFFECTIVELY OVERTURNED PRIOR PRECEDENT FROM THIS COURT THAT A CAPITAL SENTENCING JURY NEED NOT RECEIVE ACCURATE PENALTY PHASE INSTRUCTIONS REGARDING THE "UNDER SENTENCE OF IMPRISONMENT" AGGRAVATING CIRCUMSTANCE TO BE WEIGHED AGAINST THE MITIGATING CIRCUMSTANCES.

A capital sentencing jury must be properly instructed as to both the aggravating and mitigating circumstances which it is to consider in recommending life or death. Hitchcock v. Dunner, **107 S**. Ct. **1821 (1987);** Maynard **v.** Cartwrinht, **108 S**. Ct. **1853 (1988);** Mills v. Maryland, **108 S**. Ct. **1860 (1988);** Penry V. Lynaugh, **109 S**. Ct. **2934 (1989).** At the time of Mr. Roberts' sentencing, this Court had failed to recognize that a capital jury must be correctly instructed. In fact, on the basis of Hitchcock, this Court has reversed instructional error where no objection to the inadequate instruction was asserted at trial. Meeks v. Dunner, **548 So**. 2d **184** (Fla. **1989);** Hall v. State, **541 So. 2d 1125** (Fla. **1989).** This is because until Hitchcock, the importance of penalty phase jury instructions was not recognized. Because of the new case law not in existence at the time of Mr. Roberts' trial, Claim XII of the habeas corpus petition is now cognizable.

As set forth in this claim, Mr. Roberts' sentencing jury was not adequately instructed regarding the weight of the "under sentence of imprisonment'' aggravating circumstance. This circumstance is less weighty where the defendant "did not break out of prison." Songer V. State, **544 So**. 2d **1010** (Fla. **1989).** The jury was not instructed as to this fact. This violated the eighth amendment principles embodied in Mavnard **v.** Cartwright, supra. For these reasons, and those already explained in

Claim XII of the habeas corpus petition, Mr. Roberts' sentence of death is unreliable. A new sentencing proceeding is required.

ARGUMENT XIII

MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER, AND LOWENFIELD V. PHELPS EFFECTIVELY OVERTURNED PRIOR PRECEDENT FROM THIS COURT THAT A CAPITAL SENTENCING *JURY* NEED NOT RECEIVE ACCURATE PENALTY PHASE INSTRUCTIONS REGARDING THE "IN THE COURSE OF A FELONY" AGGRAVATING CIRCUMSTANCE TO BE WEIGHED AGAINST THE MITIGATING CIRCUMSTANCES.

A capital sentencing jury must be properly instructed as to both the aggravating and mitigating circumstances which it is to consider in recommending life or death. Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); Maynard v. Cartwright, 108 S. Ct. 1853 (1988); Mills v. Maryland, 108 S. Ct. 1860 (1988); Penry v. Lynaugh, 109 S. Ct. 2934 (1989). At the time of Mr. Roberts' sentencing, this Court had failed to recognize that a capital jury must be correctly instructed. In fact, on the basis of Hitchcock, this Court has reversed instructional error where no objection to the inadequate instruction was asserted at trial. Meeks v. Dugger, 548 So. 2d 184 (Fla. 1989); Hallv. State, 541 So. 2d 1125 (Fla. 1989). This is because until Hitchcock, the importance of penalty phase jury instructions was not recognized. Because of the new case law not in existence at the time of Mr. Roberts' trial, Claim XIII of the habeas corpus petition is now cognizable.

As set forth in this claim, Mr. Roberts' sentencing jury was not adequately instructed regarding the "in the course of a felony" aggravating circumstance. This violated the eighth amendment principles embodied in Maynard v. Cartwright, supra, and Lowenfield v. Phelps, 108 S. Ct. 546 (1988).

According to this Court the aggravating circumstance of "in the course of a felony" is not sufficient by itself to justify a death sentence in a felony-murder case. Rembert v. State, 445 So. 2d 337, 340 (Fla. 1984)(no way of distinguishing other felony murder cases in which defendants "receive a less severe sentence"). Proffitt v. State, 510 So. 2d 896, 898 (Fla. 1987)("To hold, as argued by the State, that these circumstances justify the death penalty would mean that every murder

during the course of a burglary justifies the imposition of the death penalty."). However, here, the jury was instructed on this aggravating circumstance and told that it was sufficient for a recommendation of death unless the mitigating circumstances outweigh the aggravating circumstance. There is no way at this juncture to know whether the jury relied solely on this aggravating circumstance in returning its death recommendation. In Maynard v. Cartwright, 108 S. Ct. at 1858, the Supreme Court held that the jury instructions must "adequately inform juries what they must find to impose the death penalty." Hitchcock v. Dunner, 107 S. Ct. 1821 (1987), and its progeny require Florida sentencing juries to be accurately and correctly instructed in compliance with the eighth amendment. Under Mills v. Maryland, 108 S. Ct. 1860, 1870 (1988), "[t]he possibility that a single juror" read the instructions in an unconstitutional fashion requires a resentencing.

For these reasons, and those already explained in Claim XIII of the habeas corpus petition, Mr. Roberts' sentence of death is unreliable. A new sentencing proceeding is required.

ARGUMENT XIV

MR. ROBERTS' DEATH SENTENCE WAS IMPOSED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE HIS JURY WAS PREVENTED FROM GIVING APPROPRIATE CONSIDERATION TO, AND HIS TRIAL JUDGE REFUSED TO CONSIDER ALL EVIDENCE PROFFERED IN MITIGATION OF PUNISHMENT, CONTRARY TO HITCHCOCK V. DUGGER, MILLS V. MARYLAND, AND PENRY V. LYNAUGH, NEW CASES WHICH EFFECTIVELY OVERRULES PRIOR INCONSISTENT DECISIONS FROM THIS COURT.

Changes in Florida law, caused by decisions of the United States Supreme Court which effectively overrule prior decisions of this Court, are cognizable in collateral proceedings. In Claim XIV of his habeas corpus petition, Mr. Roberts presented his claim that Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), and Penry v. Lynaugh, 109 S. Ct. 2934 (1989), effectively overrule prior precedent of this Court and establish error in Mr. Roberts' sentence of death. As to this claim, Mr. Roberts relies on the petition, itself, and the argument contained in Argument IX of the Initial Brief submitted in Case No. 74,920.

ARGUMENT XV

THE PENALTY PHASE OF MR. ROBERTS' TRIAL WAS FUNDAMENTALLY FLAWED WHEN THE TRIAL COURT LIMITED THE TESTIMONY OF THE DEFENSE'S MENTAL HEALTH EXPERT IN VIOLATION OF HITCHCOCK V. DUGGER AND PENRY V. LYNAUGH.

During the penalty phase of a capital trial, the defense has the opportunity to present evidence relevant to the character of the offender and the nature of the offense. The trier of fact weighs the evidence to determine whether death or a sentence other than death is appropriate. Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), constituted a change in law by recognizing that the jury in Florida was a sentencer for eighth amendment purposes.

During the penalty phase of Mr. Roberts' trial, the defense presented the testimony of three mental health experts. These expert witnesses testified that Mr. Roberts suffered from an organic brain syndrome. The evidence of organic brain syndrome was offered to prove the mitigating factors of extreme emotional disturbance and the defendant's inability to conform his conduct to the requirements of the law. The defense presented the testimony of Dr. Stillman. He based his opinion of Mr. Roberts' mental health upon the contents of a letter he received from former defense counsel. The State's objection to the contents of this letter was sustained (R. 3377). The court improperly excluded testimony about the factual basis underlying the expert's opinion. The court ruled that the testimony was inadmissible because the State asserted the defendant's attorney-client privilege (R. 3377). This ruling was improper. The exclusionary rules of evidence applicable during the penalty phase of a capital trial are substantially more relaxed than those applied during guilt-innocence. For example, it is generally recognized that hearsay testimony is admissible during the penalty phase. The broader scope of evidence admissible at penalty allows the introduction of all evidence relevant to a sentencing decision. Tompkins v. State, 502 So. 2d 415, 420 (Fla. 1986).

The trial court erred by preventing the defense's expert from testifying to the factual basis of his opinion. This testimony was admissible and relevant to the

jury's penalty decision. Penry v. Lynaugh, **109 S. Ct. 2934 (1989).** This claim, Claim XV of the petition for habeas corpus relief, involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Roberts' death sentence and renders it unreliable. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings, **see** Wilson v. Wainwright, **474 So.** 2d **1163** (Fla. **1985),** and it should now correct this error.

Moreover, the claim is now properly brought pursuant to the Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. This issue involved a classic violation of longstanding principles of constitutional law. **See** Lockett, Eddings, supra. It virtually "leaped out upon even a casual reading of transcript." Matire v. Wainwright, **811** F.2d **1430, 1438** (11th Cir. **1987).** This clear claim of per se error required no elaborate presentation -- counsel only had to direct this Court to the issue. The court would have done the rest, based on long-settled federal constitutional standards.

No tactical decision can be ascribed to counsel's failure to urge the claim. No procedural bar precluded review of this issue. **See** Johnson v. Wainwright, supra, **498 So. 2d 938.** However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Roberts of the appellate reversal to which he was constitutionally entitled. **See** Wilson v. Wainwright, supra, **474 So. 2d** at **1164-65;** Matire, supra. Accordingly, habeas relief must be accorded now.

ARGUMENT XVI

MAYNARD V. CARTWRIGHT AND HITCHCOCK V. DUGGER EFFECTIVELY OVERTURNED PRIOR PRECEDENT FROM THIS COURT THAT A CAPITAL SENTENCING JURY NEED NOT RECEIVE ACCURATE PENALTY PHASE INSTRUCTIONS LIMITING THE AGGRAVATING CIRCUMSTANCES TO BE WEIGHED AGAINST THE MITIGATING CIRCUMSTANCES.

A capital sentencing jury must be properly instructed as to both the aggravating and mitigating circumstances which it is to consider in recommending

life or death. Hitchcock v. Dugger, 107 S. Ct **1821 (1987);** Maynard v. Cartwright, **108 S.** Ct. **1853 (1988);** Mills v. Maryland, 108 S. Ct. 1860 **(1988);** Penry v. Lynaugh, **109 S.** Ct. **2934 (1989).** At the time of Mr. Roberts' sentencing, the prosecutor urged a sentence of death on the basis of nonstatutory aggravating circumstances. However, in Maynard v. Cartwrirzht, the Supreme Court said that eighth amentment error occurs where a jury is not adequately informed of the channeling and limiting principles applicable to its sentencing discretion. 108 S. Ct. at **1858.** Because of the new case law not in existence at the time of Mr. Roberts' trial, Claim XVI of the habeas corpus petition is now cognizable.

As set forth in this claim, Mr. Roberts' sentencing jury was not adequately instructed that it could not consider the nonstatutory aggravating circumstances paraded before them by the prosecutor and urged as a basis for a death recommendation. This violated the eighth amendment principles embodied in Maynard v. Cartwright, supra. For these reasons, and those already explained in Claim XVI of the habeas corpus petition, Mr. Roberts' sentence of death is unreliable. A new sentencing proceeding is required.

ARGUMENT XVII

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE **AS** *AN* ISSUE TRIAL COUNSEL'S OBJECTION TO THE INTRODUCTION OF HEARSAY STATEMENTS OF THE VICTIM OF THE PRIOR OFFENSE, IN VIOLATION OF MR. ROBERTS' SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

During the penalty phase of Mr. Roberts' capital trial, the State introduced into evidence testimony about his prior conviction. The State's evidence went beyond a mere recitation that Mr. Roberts was convicted of the prior offense. The State improperly presented hearsay testimony of the victim's account of the incident and further information from the victim which was irrelevant and highly prejudicial to Mr. Roberts' case. Trial counsel objected to the introduction of his highly prejudicial hearsay testimony but appellate counsel unreasonably failed to litigate this claim.

Although this Court has held that it is appropriate in the penalty phase of a capital trial to introduce testimony concerning the details of any prior felony conviction involving the use or threat of violence to the person rather than the bare admission of conviction, this is not without limits. Rhodes v. State, 547 So. 2d 1201, 1204 (Fla. 1989); Tompkins v. State, 502 So. 2d 415 (Fla. 1986); Stano v. State, 473 So. 2d 1282 (Fla. 1985). One of the limitations on this rule is the use of hearsay under circumstances which the defendant is not afforded fair opportunity to rebut the hearsay evidence. Rhodes, supra at 1204.

Testimony about the prior offense was presented through Chief of Police Coulbourn Dyne, the officer who initially investigated the crime. This testimony was not about observations that he made during his investigation of the crime. Over the defense objections, he presented extensive testimony about the victim's account of the prior offense (R. 3290-94). Beyond the hearsay testimony about the facts of the crime, Chief Dyne presented statements from the victim about her refusal to appear as a witness, her emotional suffering as a result of the crime and her "hysterical" reaction in learning that Mr. Roberts had been released (T. 3303). The statement should not have been admitted and deprived Mr. Roberts of his sixth amendment rights to confrontation.

The evidentiary rules at the penalty phase of a capital trial are more relaxed than during the guilt phase. Hearsay testimony is admissible during the penalty phase as long as the defendant has an opportunity to confront and rebut the testimony. Section 921.141(1), Fla. Stat. (1985). This Court has held that:

> The sixth amendment right of an accused to confront the witnesses against him is a fundamental right which is made obligatory on the states by the due process of law clause of the fourteenth amendment to the United States Constitution. Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d (1965). The primary interest secured by, and the major reason underlying the confrontation clause, is the right of cross-examination. Pointer v. Texas. This right of confrontation protected by cross-examination is a right that has been applied to the sentencing process. Specht v. Patterson, [386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967)].

Engle v. State, 438 So. 2d 803, 814 (Fla. 1983). In this case, Mr. Roberts had no opportunity to confront the hearsay statements of the victim of the prior offense. She was never produced as a witness, nor was she available to be subpoenaed. The admission of Chief Dyne's hearsay testimony was error.

This Court recently addressed precisely this type of error in Rhodes v. State, 547 So. 2d 1201 (Fla. 1989). In Rhodes, this Court recognized that it was proper to admit at the penalty phase of a capital trial evidence of the underlying factual basis of a prior felony conviction. Nevertheless, the dictates of the sixth amendment limit the scope of evidence admissible to prove the prior offense. Hearsay about the victim's account of the prior offense is inadmissible unless the victim is available for cross-examination. Clearly, under Rhodes, the statements by Chief Dyne explaining his conversation with the victim of the prior offense were inadmissible at Mr. Roberts' trial. This Court explained:

> This Court has held that it is appropriate in the penalty phase of a capital trial to introduce testimony concerning the details of any prior felony conviction involving the use or threat of violence to the person rather than the bare admission of the conviction. See Tompkins v. State, 502 So.2d 415 (Fla. 1986), cert. denied, 107 S.Ct. 3277 (1987); Stano v. State, 473 So.2d 1282 (Fla. 1985), cert. denied, 474 U.S. 1093 (1986). Testimony concerning the events which resulted in the conviction assists the jury in evaluating the character of the defendant and the circumstances of the crime so that the jury can make an informed recommendation as to the appropriate sentence. It was not error for the trial court to admit Captain Rolette's testimony.
>
> However, we do find error in the introduction of the tape recorded statement of the Nevada victim. While hearsay evidence may be admissible in penalty phase proceedings, such evidence is admissible only if the defendant is accorded a fair opportunity to rebut any hearsay statements. Sec. 921.141(1), Fla. Stat. (1985). The statements made by the Nevada victim came from a tape recording, not from a witness present in the courtroom.
>
> * * *
>
> Obviously, Rhodes did not have the opportunity to confront and cross-examine this witness. By allowing the jury to hear the taped statement of the Nevada victim describing how the defendant tried to cut her throat with a knife and the emotional trauma suffered because of it, the trial court effectively denied Rhodes this fundamental right of confronting and cross-examining a witness against him. Under these circumstances if Rhodes wished to deny or explain this testimony, he was left with no choice but to take the witness stand himself.

Rhodes, ***547 So.*** 2d at ***1204*** (footnote omitted).

The admission of Chief Dyne's extensive testimony about the victim's account of the prior offense was error. As in Rhodes, Mr. Roberts was denied the opportunity to confront this evidence because the out of court declarant was never available to testify. The mere fact that Rhodes involved tape recorded testimony cannot be a distinguishing feature, as argued by the State in their response to the habeas corpus petition. In Rhodes, the police officer witness who presented the tape recording at trial was the officer who conducted the taped interview with the victim. Just as in Mr. Roberts' case, the police officer witness in Rhodes presented the victim's testimony concerning the facts of the crime. In Rhodes, it was presented through a tape recorder. In Roberts, it was presented by the officer himself. This is no distinction as both police officers could be cross-examined about what each victim said because each officer conducted the interview. In fact, from a hearsay analysis, the tape recorded interview is much more reliable .. there is no possibility of poor memory by the officer, misinterpretation or inappropriate emphasis or exaggeration of fact. The information in Mr. Roberts' case is even more unreliable and thus equally improper.

Furthermore, as in Rhodes, Chief Dyne provided additional testimony that was unrelated to the facts of the case, but went to victim impact type evidence. As this Court in Rhodes stated:

> Not only did the introduction of the tape recording deny Rhodes his right to cross-examination, but the testimony was irrelevant and highly prejudicial to Rhodes' case. The information presented to the jury did not directly relate to the crime for which Rhodes was on trial, but instead described the physical and emotional trauma and suffering of a victim of a totally collateral crime committed by the appellant.

Rhodes, supra at ***1205.*** The same type of irrelevant and highly prejudicial testimony was presented in Mr. Roberts' case:

> Q. Mr. Lange asked you about this lady, Brenda Hardy; have you at our request or my request ever contacted Brenda Hardy?
>
> A. Yes.

I believe Mr. Sam Rayborn contacted her.

Q. Did you ask Brenda Hardy to come to Miami to participate in this hearing?

A. This was the first time I received this subpoena.

Yes, I was in contact with her and asked her if she would come down, travel down with me to participate, that's correct.

Q. Did you ask her that?

A. Yes, I did.

Q. Did you go out and see her?

A. I saw her at work and then called her at home.

Q. Was she willing to come in?

A. **No.**

Q. Can you tell us why?

A. She just said she never got over the assault. She fell apart when she found out that Ricky had been released from prison.

She thought he was in forever and she found out he was out and she was just lost, was hysterical, just about, and I had to go call her at home giving her a couple of days to settle down.

She just said she did not want to come. She said she couldn't face it again.

(R. 3302-3). As this Court indicated in Rhodes, this type of information was irrelevant and highly prejudicial.

Mr. Roberts' jury recommended a sentence of death by a bare majority of **7-5.** It is impossible to assess the effect of this error upon the penalty decision by the jury. This error undermined the reliability of the jury's sentencing determination and prevented the jury from accurately assessing the evidence presented by Mr. Roberts. For each of the reasons discussed above the Court should vacate Mr. Roberts' unconstitutional sentence of death.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Roberts' death sentence. This Court has not

hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings, see Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error.

Moreover, the claim is now properly brought pursuant to the Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. It appeared as Claim XVII of Mr. Roberts' habeas corpus petition. This issue involved a classic violation of longstanding principles of Florida law. It virtually "leaped out upon even a casual reading of transcript." Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). This clear claim of per se error required no elaborate presentation -- counsel only had to direct this Court to the issue. The court would have done the rest, based on long-settled Florida and federal constitutional standards.

No tactical decision can be ascribed to counsel's failure to urge the claim. No procedural bar precluded review of this issue; the issue was preserved for appeal. See Johnson v. Wainwright, 498 So. 2d 935 (Fla. 1987). However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Roberts of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra. Accordingly, habeas relief must be accorded now.

CONCLUSION

No claim or aspect of a claim which, given the time constraints, has not been fully briefed herein is waived or abandoned. Mr. Roberts' previous submission is incorporated hereby, and presented for this Honorable Court's review.

Mr. Roberts respectfully requests that this Honorable Court vacate his unconstitutional capital conviction and sentence of death for all of the reasons presented to this Court in this brief and in petitioner's prior submissions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by U.S. Mail, first class, postage prepaid, to Ralph Barreira, Assistant Attorney General, Department of Legal Affairs, 401N.W. 2nd Avenue, Suite N921, Miami, Florida 33128, this 16th day of November, 1989.

_____
Attorney