IN THE SUPREME COURT OF FLORIDA

NO. 74797

RICKEY BERNARD ROBERTS

Petitioner,

v.

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

Respondent.

PETITION FOR EXTRAORDINARY RELIEF, FOR A WRIT OF HABEAS CORPUS, REQUEST FOR STAY OF EXECUTION, AND, IF NECESSARY, APPLICATION FOR STAY OF EXECUTION PENDING THE FILING AND DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. **0125540**

MARTIN J. MCCLAIN
Assistant CCR
Florida Bar No. **0754773**

LINDA FELDMAN
Staff Attorney

TOM DUNN
Staff Attorney

OFFICE OF THE CAPITAL
COLLATERAL REPRESENTATIVE
1533 South Monroe Street
Tallahassee, FL **32301**
(904) 487-4376

COUNSEL FOR PETITIONER

I. JURISDICTION TO ENTERTAIN PETITION, ENTER A STAY OF EXECUTION, AND GRANT HABEAS CORPUS RELIEF

A. JURISDICTION

This is an original action under Fla. R. App. P. 9.100(a). This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents constitutional issues which directly concern the judgment of this Court during the appellate process, and the legality of Mr. Roberts' capital conviction and sentence of death. In December, 1985, Mr. Roberts was sentenced to death. Direct appeal was taken to this Court. The trial court's judgment and sentence were affirmed. Roberts v. State, 510 So. 2d 885 (Fla. 1987). Jurisdiction in this action lies in this Court, see, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein involved the appellate review process. See Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); see also Johnson v. Wainwrisht, 498 So. 2d 938 (Fla. 1987); cf. Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Roberts to raise the claims presented herein. See, e.g., Jackson v. Dugger, ___ So. 2d ___, 14 F.L.W. 355 (Fla., July 6, 1988); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); Wilson, supra.

This Court has consistently maintained an especially vigilant control over capital cases, exercising a special scope of review, see Elledge v. State, 346 So. 2d 998, 1002 (Fla. 1977); Wilson v. Wainwright, 474 So. 2d at 1165, and has not hesitated in exercising its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital trial and sentencing proceedings. Wilson; Johnson; Downs; Riley. This petition presents substantial constitutional

questions which go to the heart of the fundamental fairness and reliability of Mr. Roberts' capital conviction and sentence of death, and of this Court's appellate review. Mr. Roberts' claims are therefore of the type classically considered by this Court pursuant to its habeas corpus jurisdiction. This Court has the inherent power to do justice. As shown below, the ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. See, e.g., Riley; Downs; Wilson; Johnson, supra. The petition pleads claims involving fundamental constitutional error. See Dallas v. Wainwright, 175 So. 2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So. 2d 362 (Fla. 1984). The petition includes claims predicated on significant, fundamental, and retroactive changes in constitutional law. See, e.g., Jackson v. Duqqer, supra; Thompson v. Duqqer, 515 So. 2d 173 (Fla. 1987); Tafero v. Wainwright, 459 So. 2d 1034, 1035 (Fla. 1984); Edwards v. State, 393 So. 2d 597, 600 n. 4 (Fla. 3d DCA), petition denied, 402 So. 2d 613 (Fla. 1981); cf. Witt v. State, 387 So. 2d 922 (Fla. 1980). The petition also involves claims of ineffective assistance of counsel on appeal. See Knight v. State, 394 So. 2d 997, 999 (Fla. 1981); Wilson v. Wainwright, supra; Johnson v. Wainwright, supra. These and other reasons demonstrate that the Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action. As the petition shows, habeas corpus relief would be more than proper on the basis of Mr. Roberts' claims.

With regard to ineffective assistance, the challenged acts and omissions of Mr. Roberts' appellate counsel occurred before this Court. This Court therefore has jurisdiction to entertain Mr. Roberts' claims, Knight v. State, 394 So. 2d at 999, and, as will be shown, to grant habeas corpus relief. Wilson, supra; Johnson, supra. This and other Florida courts have consistently

recognized that the Writ must issue where the constitutional right of appeal is thwarted on crucial and dispositive points due to the omissions or ineffectiveness of appointed counsel. See, e.g., Wilson v. Wainwright, supra, 474 So. 2d 1163; McCrae v. Wainwright, 439 So. 2d 768 (Fla. 1983); State v. Wooden, 246 So. 2d 755, 756 (Fla. 1971); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); Ross v. State, 287 So. 2d 372, 374-75 (Fla. 2d DCA 1973); Davis v. State, 276 So. 2d 846, 849 (Fla. 2d DCA 1973), affirmed, 290 So. 2d 30 (Fla. 1974). The proper means of securing a hearing on such issues in this Court is a petition for writ of habeas corpus. Baggett, supra, 287 So. 2d at 374-75; Powell v. State, 216 So. 2d 446, 448 (Fla. 1968). With respect to the ineffective assistance claims, Mr. Roberts will demonstrate that the inadequate performance of his appellate counsel was so significant, fundamental, and prejudicial as to require the issuance of the Writ.

Mr. Roberts' claims are presented below. They demonstrate that habeas corpus relief is proper in this case.

B. REQUEST FOR STAY OF EXECUTION

Mr. Roberts' petition includes a request that the Court stay his execution, presently scheduled for October 31, 1989. As will be shown, the issues presented are substantial and warrant a stay. This Court has not hesitated to stay executions when warranted to ensure judicious consideration of the issues presented by petitioners litigating during the pendency of a death warrant. See Spaziano v. Dugger (No. 74,675, Fla. Sept. 12, 1989); Tompkins v. Dugger (No. 74,098, Fla. June 2, 1989); Provenzano v. Dugger (No. 73,981, Fla. May 4, 1989); Jackson v. Dugser (73,982, Fla. May 4, 1989); Harich v. Dugger, (No. 73,931, Fla. March 28, 1989); Lightbourne v. Dusger (No. 73,609, Fla. Jan. 31. 1989); Marek v. Dugser (No. 73,175, Fla. Nov. 8, 1988); Gore v. Dusger (No. 72,202, Fla. April 28, 1988); Riley v.

Wainwright (No. 69,563, Fla., Nov. 3, 1986). See also Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Kennedy v. Wainwright, 483 So. 2d 426 (Fla. 1986); cf. State v. Sireci, 502 So. 2d 1221 (Fla. 1987); State v. Crews, 477 So. 2d 984 (Fla. 1985).

This is Mr. Roberts' first and only petition for a writ of habeas corpus. The claims he presents are no less substantial than those involved in the cases cited above. He therefore respectfully urges that the Court enter an order staying his execution, and, thereafter, that the Court grant habeas corpus relief.

II. GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Petitioner asserts that his convictions and his sentence of death were obtained and then affirmed during the Court's appellate review process in violation of his rights as guaranteed by the fourth, fifth, sixth, eighth and fourteenth amendments to the United States Constitution, and the corresponding provisions of the Florida Constitution, for each of the reasons set forth herein. In Mr. Roberts' case, substantial and fundamental errors occurred in both the guilt and penalty phases of trial. These errors were uncorrected by the appellate review process. As shown below, relief is appropriate.

CLAIM I

MR. ROBERTS' RIGHTS TO PRESENT A DEFENSE AND TO CONFRONT THE WITNESSES AGAINST HIM WERE DENIED WHEN THE COURT PROHIBITED THE CROSS EXAMINATION OF THE STATE'S KEY WITNESS, MICHELLE RIMONDI, ABOUT HER SEXUAL HISTORY AND WHEN THE DEFENDANT WAS FORECLOSED FROM TESTIFYING ABOUT HER SEXUAL HISTORY. OLDEN V. KENTUCKY, 109 S. CT. 480 (1988), ESTABLISHED THAT THIS COURT ERRED IN MR. ROBERTS' DIRECT APPEAL.

The defendant's rights to present a defense and to confront and cross examine the witnesses against him are fundamental

safeguards "essential to a fair trial in a criminal prosecution." Pointer v. Texas, 380 U.S. 403, 404 (1965). Mr. Roberts was denied his rights to present a defense and to confront and cross examine the witnesses against him when trial counsel was precluded from questioning Michelle Rimondi about her sexual history. Ms. Rimondi had a documented history of prostitution. As a witness for the State, Michelle Rimondi was called upon to recount the events surrounding the homicide (R. **2120**). She alleged that after the homicide she had been sexually assaulted by Mr. Roberts (R. **2194**). Prior to trial, the State's motion in limine to preclude testimony about Michelle Rimondi's sexual history was granted by the trial court (R. 661). The defense was that Ms. Rimondi with the help of her "boyfriend" and another male friend, who were both witnesses called by the State, actually killed George Napoles, and were accusing Mr. Roberts as part of the cover-up. The sperm found on Ms. Rimondi was the result of her prostitution and not the result of being raped, as she alleged.

Obviously, it was critical to the defense to fully explore this witness' credibility and to effectively impeach her testimony before the jury. However, effective cross-examination was never permitted since the trial court ruled that the Rape Shield Law prohibited inquiry into Michelle Rimondi's sexual history. The court's ruling misinterpreted the Rape Shield Law. The court found that evidence of specific acts and Michelle Rimondi's sexual history were not admissible since consent was not at issue. However, the court ignored the provision in the Rape Shield Law which allows the admission of this kind of evidence in order to explain the presence of sperm in a sexual assault victim Fla. Stat. sec. **794.022(2).** This Court on appeal affirmed, finding no violation of Mr. Roberts' confrontation rights. Since Mr. Roberts' trial, new case law has developed which establishes the error here and justifies under Jackson v.

Dugger, ___ So. 2d ___, 14 F.L.W. 355 (Fla. July 6, 1989) presentation of this issue in a Rule 3.850 motion. See Olden v. Kentucky, 109 S. Ct. 480 (1989).

There can be no doubt under Olden that this Court's decision violated the sixth amendment right of confrontation, which requires that a defendant be allowed to impeach the credibility of prosecution witnesses by showing the witness' possible bias or showing that there may be other reasons to doubt the State's reliance upon the witnesses' testimony. In Olden, Kentucky's rape shield law precluded cross-examination regarding the victim's sexual history. The United States Supreme Court's summary reversal of Olden's conviction was premised upon the Court's conclusion that the Kentucky court had "failed to accord proper weight to petitioner's Sixth Amendment right 'to be confronted with the witnesses against him.'" 109 S. Ct. at 482-83. The court found error saying:

> It is plain to us that "[a] reasonable jury might have received a significantly different impression of [the witness'] credibility had [defense counsel] been permitted to pursue his proposed line of cross-examination." Delaware v. Van Arsdall, supra, 475 U.S., at 680, 106 S.Ct., at 1436.

109 S. Ct. at 483.

The prejudice to Mr. Roberts resulting from this limitation of cross-examination and confrontation rights is manifest when the testimony of this witness is analyzed in the context of the testimony that may have been elicited during cross-examination. Michelle Rimondi had accused the defendant of sexual battery and kidnapping. She was the only eye-witness to the homicide. By precluding the defense from exploring specific bad acts, her reputation, and her sexual history, her account of the crime was left unchallenged. Her reasons by lying were left unrevealed. Cross examination of this witness would have disclosed that Michelle Rimondi's credibility was sorely lacking. She was a prostitute who lived from day to day, staying with various

friends in order to survive. Rimondi, although only sixteen at the time of the offense, did not attend school and did not have a legitimate source of income. She worked as an escort for Christine Ten's Escort Service. She had special male companions looking after her. The defense was that one or both of these male companions with Rimondi's assistance killed Napoles, and then decided to pin it on the petitioner. Ms. Rimondi's activity as a prostitute, and in picking up Napoles in the first place were important facts for the jury to know.

If the defense had been permitted to examine this witness about her reputation, the defense could have fully contradicted the allegation of a sexual battery. The State's evidence, a finding of sperm, would have been easily explained had the defense been able to inquire and present evidence about Michelle Rimondi's source of employment, prostitution. Consent may not have been an issue because petitioner denied sexual relations with Ms. Rimondi, but certainly the source of the sperm was an issue. The jury was deprived of the evidence necessary to properly evaluate her testimony. It was a very distinct possibility that no rape had occurred at all. Counsel should have been able to ask if the presence of sperm was not explainable by her work as prostitute.

A criminal defendant's right to cross-examination of witnesses is one of the basic guarantees of a fair trial protected by the confrontation clause:

> Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner had traditionally been allowed to impeach, i.e., discredit, the witness.

Davis v. Alaska, 415 U.S. **315, 317 (1972).**

The scope of cross-examination may not be limited to prohibit inquiry into areas that tend to discredit the witness:

> A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is "always relevant as discrediting the witness and affecting the weight of his testimony." 3A J. Wigmore, Evidence Section 940, p. 775 (Chadbourn rev. 1970). We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. Greene v. McElroy, 360 U.S. 474, 496, 79 S. Ct. 1400, 3 L.Ed.2d 1377 (1959).

Davis, supra at 316-17 (footnote omitted).

A limitation on the right to reveal a witness' bias or for testifying impermissibly prevents the jury from properly assessing the witness' testimony and prevents the defendant from developing the facts which would allow the jury to properly weigh the testimony. In Davis v. Alaska, supra, the Supreme Court found that a confrontation clause violation had occurred when the defendant was prevented from asking the witness questions that would reveal possible bias. In holding that the State's interest in protecting juvenile offenders did not override the defendant's right to inquire into bias or interest the court stated:

> In the instant case, defense counsel sought to show the existence of possible bias and prejudice of Green, causing him to make a faulty initial identification of petitioner, which in turn could have affected his later in-court identification of petitioner.
>
> We cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it. But we do conclude that the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Green's testimony which provided "a crucial link in the proof . . . of petitioner's act." Douglas v. Alabama, 380 U.S. at 419, 85 S. Ct. at 1077. The accuracy and truthfulness of Green's testimony were key elements in the State's

> case against petitioner. The claim of bias which the defense sought to develop was admissible to afford a basis for an inference of undue pressure because of Green's vulnerable status as a probationer, cf. Alford v. United States, 282 U.S. 687, 51 S. Ct. 218, 75 L.Ed. 624 (1931), as well as of Green's possible concern that he might be a suspect in the investigation.
>
> We cannot accept the Alaska Supreme Court's conclusion that the cross-examination that was permitted defense counsel was adequate to develop the issue of bias properly to the jury. While counsel was permitted to ask Green whether he was biased, counsel was unable to make a record from which to argue why Green might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial. On the basis of the limited cross-examination that was permitted, the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness or, as the prosecutor's objection put it, a "rehash" of prior cross-examination. On these facts it seems clear to us that to make any such inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. Petitioner was thus denied the right of effective cross-examination which "'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.' Brookhart v. Janis, 384 U.S. 1, 3, 86 S. Ct. 1245, 1246, 16 L.Ed.2d 314." Smith v. Illinois, 390 U.S. 129, 131, 88 S. Ct. 748, 750, 19 L.Ed.2d 956 (1968).

Id. at 318-19 (footnote omitted)(emphasis added).

Here, Mr. Roberts' cross-examination of Michelle Rimondi was limited as in Davis. The limitation of cross-examination was similarly based on the misinterpretation and misapplication of a state of evidence - the Rape Shield Law. Olden declared that Davis applied to rape shield laws and such laws could not limit the defendant's sixth amendment rights. This Court's interpretation of this evidentiary rule prevented the defense from challenging Michelle Rimondi's account of the offense. Counsel could not attack Ms. Rimondi's motives for lying about the rape, covering up her own criminal activity, or what had occurred between her and the victim which led to his death.

The application of the Rape Shield Law to limit the cross examination of Michelle Rimondi prevented Mr. Roberts from the opportunity of presenting a complete defense. State rules of procedure cannot override a defendant's right to elicit evidence in his defense. Olden specifically and emphatically so holds. Mr. Roberts was deprived of his opportunity to effectively challenge Michelle Rimondi's account of the offense.

The evidentiary ruling limiting the cross examination of Michelle Rimondi was erroneous. The trial court ruled that testimony bearing on Rimondi's sexual history and occupation as a prostitute was inadmissible since Mr. Roberts denied that the assault had occurred. Florida's evidentiary code allows the introduction of sexual history evidence when consent is an issue. The court ignored the exception that permits the introduction of this evidence to explain the presence of semen or Ms. Rimondi's motives in testifying in the fashion she did.

The constitutional error, here, contributed to Mr. Roberts' conviction. The error can by no means be deemed harmless beyond a reasonable doubt. Delaware v. Van Arsdall, **475** U.S. **673 (1986);** Chapman v. California, **386** U.S. **18 (1967).** The Court's ruling limiting the cross examination of this witness allowed the introduction of her unchallenged account of the events to survive "the crucible of meaningful adversarial testing" United States v. Cronic, **466** U.S. **648 (1984), 104 S.** Ct. **2039 (1984).**

This violation of the confrontation clause allowed the jury to assess her testimony without the knowledge that cross-examination would have revealed. The jury should have been granted the opportunity to properly weigh Michelle Rimondi's testimony. The limitation of cross-examination prevented the jury from reaching a reliable verdict. This error cannot be found to be harmless beyond a reasonable doubt when consideration is given to how difficult the deliberatioons were for the jury. It took twenty-three **(23)** long hours for the jury to return a

guilty verdict. The evidence that Ms. Rimondi was a prostitute and the permissible inference flowing from that, the basis for her acquaintance with the victim and her two male friends, would have resulted in a different outcome; hardly harmless beyond a reasonable doubt.

The limitation of cross examination also affected Mr. Roberts right to rebut the aggravating factors during the penalty phase. The State asked the jury to impose death because the homicide had occurred during the course of a sexual battery. The court also found in its sentencing findings that this aggravating factor was applicable. Sexual history was clearly relevant to rebut this aggravating factor; it was essential to challenge Ms. Rimondi's motives for charging rape as opposed to admitting criminal activity on her own part. The preclusion of this evidence resulted in the arbitrary imposition of a death sentence in violation of Mr. Roberts' eighth amendment rights. This error undermined the reliability of the jury's sentencing determination and prevented the jury from assessing the full panoply of mitigation presented by Mr. Roberts. For each of the reasons discussed above the Court should vacate Mr. Roberts' unconstitutional conviction and sentence of death.

This claim 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. This Court on direct appeal reached an erroneous conclusion, just as the Kentucky Court of Appeals did in Olden. However, the Supreme Court's decision has established the error, just as Booth v. Marvland, 482 U.S. 496 (1987), and South v. Gathers, 109 S. Ct. 2207 (1989), established the error in this Court's prior

analysis in Jackson v. Dugger, 14 F.L.W. 355 (Fla. **1989).** Under the principle of Jackson, this Court must revisit this issue decided on direc tappeal and reverse. Habeas relief is warranted. Mr. Robet's conviction and sentence of death must be vacated and a new trial ordered.

CLAIM 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 BOTH ROCK V. ARKANSAS, **107** S. CT. **2407 (1987);** AND OLDEN V. KENTUCKY, **109** S. CT. **480 (1989),** THIS COURT ERRED IN MR. ROBERTS' DIRECT APPEAL.

Mr. Roberts was tried and convicted for the murder of George Napoles and the sexual battery and kidnapping of Michelle Rimondi. The State's case was primarily based on Michelle Rimondi's account of the offense. Mr. Roberts steadfastly denied guilt for the offense. Throughout the trial, Mr. Roberts sought to develop a defense by discrediting Michelle Rimondi's account, and establishing that she either participated in the murder with one or two male friends or at least knew they committed the murder.

Michelle Rimondi gave various statements about the offense, all of which were conflicting about crucial events. The defense tried to impeach her credibility by introducing evidence about her prior sexual conduct. This evidence was relevant to dispel Michelle Rimondi's account of a sexual battery, to discredit her account of the offense, and to establish her motive for lying, i.e., fear of prosecution for prostitution, accessory to murder, or even murder.

Rimondi presented a dubious account of a sexual battery. According to the State's witness, Joe Riley, Rimondi failed to reveal the sexual battery when she first told him about the offense. Michelle Rimondi was unsure about where the assault had

occurred. She told different people that she was assaulted in the car and then told others that the assault occurred on the ground. Even more specious is her story, not told until a year and half after the offense, of a second assault after leaving the crime scene. The grand jury obviously rejected this account as a recent fabrication and Roberts was not indicted for the second sexual assault. These various accounts given by Rimondi show that her credibility was more than in dispute; it was pivotal: as were her motives.

Rickey Roberts took the stand to testify on his own behalf. Roberts denied the sexual assault and the homicide. Roberts testified that he offered Michelle Rimondi a ride when she was hitchhiking. Although Rimondi testified about her conversation with the defendant, Mr. Roberts was precluded from revealing his account of the conversation, and his knowledge that Ms. Rimondi was a prostitute. Over defense counsel's vehement objections, the trial court granted the State's motion in limine to keep all evidence of Michelle Rimondi's character from the jury.

Based on the Rape Shield Law, the trial court limited the defendant's right to testify on his own behalf and to present evidence to support his claim of innocence. Recently, in Olden v. Kentucky, **109** S. Ct. **480 (1988),** the Supreme Court addressed the constitutionality of a ruling limiting the admission of impeachment evidence by the application of a Rape Shield Law. Traditionally, the Rape Shield Law limits prejudicial evidence about a witness. The confrontation clause assures the defendant the right to impeach a witness about bias or motivation to lie. This evidence is critical for the jury to adequately assess the reliability of a witness. It was error to apply the Rape Shield Law to limit the ability to examine the credibility of a crucial State witness. Olden, 109 S. Ct. at **484**. By depriving the jury of Mr. Roberts account of Michelle Rimondi's conversation, the defense was unable:

> to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness.'" **475** U.S. at **680, 106** S. Ct., at **1436,** quoting Davis, supra, **415** U.S., at **318, 94** S. Ct., at 1111.

Olden, **109** S. Ct. at **483.** The reasoning of Olden also applies to limitations on a defendant's ability to testify in her or her defense. Rock v. Arkansas, **107** S. Ct. **2704 (1987).**

In this case, Ricky Roberts consistently asserted that he never had sexual relations with Michelle Rimondi and that either Ms. Rimondi or a third person committed the homicide. Ricky Roberts asserted that Michelle Rimondi had implicated him in order to protect herself or the guilty party. It was his position that Rimondi lied when she told police, Riley, and the State Attorney various accounts of the offense and has continued to lie since. It is clear that had the Court properly admitted Roberts' account, "a reasonable jury would have received a significantly different impression of [Rimondi's] credibility." Delaware v. Van Arsdall, **475** U.S. **673, 680 (1986).**

The Rape Shield law was misapplied to limit the defense's ability to present evidence to discredit the State's proof. In this case, as in Olden, the Rape Shield Law was applied to limit testimony prejudicial to the witness but highly relevant to the witness' credibility. In Olden, the state court limited inquiry into the witness' extramarital relationship finding that the relationship would be unduly prejudicial. Olden, **109** S. Ct. at **482.** Similarly, in Mr. Roberts case, the trial court precluded Mr. Roberts from revealing his conversations with Rimondi about her sexual history. This evidence was crucial to rebut Rimondi's account and to attack her credibility.

Aside from her accounts of the offense, Rimondi gave contradictory statements about other relevant information bearing on her credibility. Rimondi often denied any drug use although at her deposition, she admitted to frequent drug use. Rimondi

was unable to conclusively testify about her residence. She gave three different addresses as her residence at the time of the offense. Rimondi was unsure of the most basic facts concerning the offense.

Rimondi's credibility was central and critical to the State's case. Her story varied and was inconsistent. Her account was corroborated only by the derivative accounts presented through the testimony of her friends. It was essential that Mr. Roberts was given the opportunity to rebut her account by testifying to his conversations with this witness. The application of the Rape Shield Law to exclude this evidence prevented the jury from having the essential tools to assess her credibility.

The ruling violated the defendant's right to testify in his own behalf, that right guaranteed by the fifth and sixth amendments. The State "may not apply a rule of evidence that permits a [defendant] to take the stand, but arbitrarily excludes material portions of his testimony." Rock v. Arkansas, **107 S.** Ct. **2704, 2711 (1987).** The court's ruling prohibiting Mr. Roberts from testifying about his conversations with Rimondi abridged his right to testify in his behalf. He was arbitrarily denied the opportunity to rebut Rimondi's account of her conversations with Ricky Roberts. The limitation imposed by the court unfairly restricted Mr. Roberts right to testify in his defense:

> The opportunity to testify is also a necessary corollary to the Fifth Amendment's guarantee against compelled testimony. In Harris v. New York, **401** U.S. **222, 230, 91** S.Ct. **643, 648,** 28 L.Ed.2d **1 (1971),** the Court stated: "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so." Id., at 225, **91** S.Ct., at **645.** Three of the dissenting Justices in that case agreed that the Fifth Amendment encompasses this right: "[The Fifth Amendment's privilege against self-incrimination] is fulfilled only when an accused is guaranteed the right 'to remain silent unless he chooses to speak in the

> unfettered exercise of his own will.' ... The choice of whether to testify in one's own defense ... is an exercise of the constitutional privilege." Id., at 230, 91 S.Ct., at 648, quoting Malloy v. Hogan, 378 U.S. 1, 8, 84 S.Ct. 1489, 1493, 9 L.Ed.2d 653 (1964). (Emphasis removed.)[10]

Rock v. Arkansas, 107 S. Ct. at 2710. Footnote 10 provided:

> On numerous occasions the Court has proceeded on the premise that the right to testify on one's own behalf in defense to a criminal charge is a fundamental constitutional right. See, e.g., Nix v. Whiteside, 475 U.S. 157, ---, 106 S.Ct. 988, 993, 89 L.Ed.2d 123 (1986); id., at ---, n.5, 106 S.Ct., at 995, n. 5 (BLACKMUN, J., opinion concurring in the judgment); Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312, 77 L.Ed.2d 987 (1983)(defendant has the "ultimate authority to make certain fundamental decisions regarding the case, as to whether to ... testify in his or her own behalf"); Brooks v. Tennessee, 406 U.S. 605, 612, 92 S.Ct. 1891, 1895, 32 L.Ed.2d 358 (1972)("Whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right").

Mr. Roberts was denied the right to present and develop evidence crucial to the jury's assessment of Michelle Rimondi's credibility. The application of the Rape Shield Law unconstitutionally limited Ricky Roberts' right to testify on his behalf. Mr. Roberts' capital conviction and death sentence were unconstitutionally obtained. Olden, supra, and Rock, supra, establish that the trial court's ruling and the affirmance on appeal were in error.

This claim 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. This Court on direct appeal reached an erroneous conclusion, just as the Kentucky Court of Appeals did in Olden and the Arkansas Supreme Court did in Rock. However, the Supreme Court's decision

has established the error, just as Booth v. Maryland, 482 U.S. 496 (1987), and South v. Gathers, 109 S. Ct. 2207 (1989), established the error in this Court's prior analysis in Jackson v. Dugger, 14 F.L.W. 355 (Fla. 1989). Under the principle of Jackson, this Court must revisit this issue decided on direc tappeal and reverse. Habeas relief is warranted. Mr. Robet's conviction and sentence of death must be vacated and a new trial ordered.

CLAIM 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.

The repeated reference to an alias used by a criminal defendant inserts into the trial impermissible factors for the jury's consideration and deprives the defendant of a fair trial. The reference to the alias suggests that the defendant has committed criminal acts other than the offense at issue in the trial. The defendant's criminal history is an impermissible factor for the jury's consideration because it suggests flight from prior misconduct but does not reveal the defendant's guilt or innocence for the particular offense on trial.

During all stages of a criminal trial the defendant is presumed innocent. It is the State's burden to prove each and every element of the crime. The elements of the crime must be shown by proof of guilt beyond a reasonable doubt. The State is relieved of its burden to show proof beyond a reasonable doubt when it introduces evidence of the propensity for the defendant to disobey the law. The evidence of other offenses committed by the defendant is irrelevant to any question of fact that the jury must determine. When the State repeatedly refers to the defendant's alias the State is attempting to inject evidence of criminal propensity. This evidence merely shows the likelihood

the defendant has reason to hide, i.e. consciousness of guilt, and fails to reveal his guilt for this particular offense.

The prior bad character of the defendant is wholly irrelevant to his guilt for the offense on trial. The use of an alias in no way reveals whether the defendant committed the crime charged but the State's reference to the defendant's alias implies that the defendant has a criminal history and therefore suggests that the defendant is not to be presumed innocent for the present offense.

During the trial, the State's repeated references to Mr. Roberts' alias relieved the State of the burden of proving guilt beyond a reasonable doubt. The jury was implicitly told that Mr. Roberts used an alias because he had something about his background that he wanted to hide. This suggested that Mr. Roberts was not a law abiding citizen and should not be presumed innocent for this offense. Use of aliases is only admissible when the alias is relevant to the consciousness of guilt. Merritt v. State, **523** So. 2d **573** (Fla. 1988). Use of an alias alone "is no more consistent with guilt than innocence." Merritt, supra, **523** So. **2d** at **524**. To be harmless, Merritt error must be harmless beyond a reasonable doubt.

The indictment for this offense names Mr. Roberts and specifies that he is also known as Less McCullars. Defense counsel filed a motion to have the alias stricken and to preclude the State from referring to the alias during trial (R. 79). Initially, this motion was denied (R. 80) and then later granted. However, despite the ruling foreclosing the State from referring to Mr. Roberts' alias, the State repeatedly used the alias during trial. Whenever a witness was questioned about Mr. Roberts, the State asked the witness if he knew Mr. Roberts or Less McCullars. The record reads as though the state attorney thought the defendant had two names. Over the course of the three week trial, the State repeatedly referred to the defendant as Less

McCullars or Rickey Roberts (R. **1639, 1641, 1659, 1939, 1937, 1995, 1996, 2395, 2396, 2804, 2963, 3089, 3088, 3099, 3100, 3107).** Again and again the State apparently "slipped" and for a moment "forgot" whether the defendant's name was Rickey Roberts or Less McCullars. When Juror Salas asked about the alias (R. **1668),** it was clear that the jurors were confused by the repeated use of both names. These repeated references to the defendant's alias were highly improper, and a flagrant violation of the Court's ruling.

This improper reference to the alias inferred that Mr. Roberts was not presumed innocent for this offense and effectively relieved the State of the burden of proving guilt beyond a reasonable doubt. This was a clear violation of Mr. Roberts' due process rights under the fifth, eighth, and fourteenth amendments.

This error obviously had significant bearing on the guilt determination since the jury deliberated for twenty-three hours before returning a verdict of guilt. Given the length of deliberations, the jury certainly had misgivings about Mr. Roberts' guilt. It cannot be said that the improper reference to Mr. Roberts' alias did not contribute to the jurors conclusion of guilt. Indeed, it decreased the State's burden of proof by improperly suggesting that Mr. Roberts had a predisposition to commit this offense. Had this improper evidence been excluded at trial as had been ordered by the court, the jury would most likely have resolved its doubts about Mr. Roberts guilt in his favor. This State's use of Mr. Roberts' alias resulted **in an** unjust conviction. Mr. Roberts' conviction was unconstitutionally obtained and must be vacated.

Merritt v. State, supra, establishes the error here is not harmless beyond a reasonable doubt. This claim 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. Wainwrisht, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error.

Moreover, the claim is now properly brought pursuant to the Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. This issue involved a classic violation of longstanding principles of Florida law. See 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. Wainwrisht, 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.

CLAIM 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.

To establish the credibility of the witnesses presented by the State, the defense is permitted to elicit on cross examination testimony revealing their credibility or motivation

to lie. Evidence that the State's witnesses had been arrested for crimes involving dishonesty or crimes relating to matters relevant at trial reveals a motivation by the witness to lie or curry favor with the State by enhancing their testimony against the Defendant.

Many of the State's witnesses who testified against Mr. Roberts had been arrested for offenses that were relevant to the issues in dispute at Mr. Roberts' trial. These charges were either pending at the time of trial or were disposed of immediately prior trial.

The belief that the testimony against Mr. Roberts would lead to a favorable disposition on a pending charge against themselves, undoubtedly motivated these witnesses to give testimony on behalf of the State. The Court refused to permit cross examination about these pending charges and ruled that evidence of arrests not yet resulting in convictions was inadmissible. However, this was fundamental constitutional error. The threat of pending prosecution must be allowed to be inquired into by defense counsel. Davis v. Alaska, 415 U.S. 308 **(1974).**

Throughout the trial, Mr. Roberts maintained his innocence for this offense. The defense sought to elicit, through cross examination of the State's witnesses, evidence that someone else had committed the offense. During his opening, defense counsel argued that two of the State's witnesses, Manny Cebey and Joe Ward, were the culpable parties. The defense maintained that the account given by the alleged eye witness, Michelle Rimondi, was fabricated to protect Cebey and Ward. Obviously, it was vital to the defense to attack the credibility of these witnesses.

The Court's decision to prevent the defense from inquiring about the other crimes committed by Ward, Cebey and Rimondi prevented the jury from obtaining the factual basis to accurately assess the credibility of these witnesses.

Three weeks before trial, Michelle Rimondi was arrested as a juvenile for the crime of grand theft (R. **664)** Over the defense objection, the Court granted the State's motion in limine to restrict testimony of this juvenile arrest (R. **665).** The defense argued that this arrest was admissible because the charge involved a crime of dishonesty.

> The case law -- and again, but I think I can tell you what I would propose, and I was going to file my own motion.
>
> That is as to Michelle, I be allowed to inquire about her confessed -- because given a written confession about dishonesty and grand theft and burglary. Even though with the Defendant, you can't ask unless he opens the door other than have you been convicted of a crime, blah, blah, blah. But that is the Defendant's protection.
>
> I will suggest in this case where we have the critical witness involved, that I be allowed to inquire about her confession or arrest and her subsequent confession or arrest and her subsequent confession to Detective Juan Coop because it is a crime of dishonesty.
>
> It is not aggravated battery.
>
> Burglary and grand theft are crimes of dishonesty and it goes to her credibility when she takes the stand and swears under oath when recently, within the last month or two, she has confessed to committing a crime of dishonesty.

(R. **664-665).**

The defense was denied the opportunity to reveal to the jury the factual basis for assessing Rimondi's credibility. The Court erred when it ruled that the juvenile offense was inadmissible. In Davis v. Alaska, U.S. ____, **94 S.** Ct. **1105 (1974),** the Supreme Court addressed the issue of whether the juvenile offense was admissible as impeachment. The Court discussed the importance of the defendant's sixth amendment right to cross examine witnesses:

> Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner has traditionally been allowed to impeach,

> i.e., discredit, the witness. One way of discrediting the witness is to introduce a prior criminal conviction of that witness. By so doing the cross-examiner intends to afford the jury a basis to infer that the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony. The introduction of evidence of a prior crime is thus a general attack on the credibility of the witness. A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is "always relevant as discrediting the witness and affecting the weight of his testimony." 3A J. Wigmore, Evidence Sec. 940, p. 775 (Chadbourn rev. 1970). We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. Greene v. McElroy, 360 U.S. 474, 496, 79 S. Ct. 11400, 1413, 3 L.Ed.2d 1377 (1959).

The Davis court ruled that a juvenile offense was relevant to prove bias of a witness:

> The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness. The State could have protected Green from exposure of his juvenile adjudication in these circumstances by refraining from using him to make out its case: the State cannot, consistent with the right of confrontation, require the petitioner to bear the full burden of vindicating the State's interest in the secrecy of juvenile criminal records. The judgment affirming petitioner's convictions of burglary and grand larceny is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

Davis, Id. Rimondi's juvenile offense for theft involved a crime of dishonesty. Her credibility was not adequately assessable without the evidence of her juvenile arrest. Her motive for saying whatever the prosecutor wanted in order to avoid prosecution herself was a relevant area of inquiry and one which, under Davis, had to be allowed. The pendency of the charges gave the State a hammer to force Ms. Rimondi to maintain her bogus

allegations that she had been raped by petitioner.

The defense was also precluded from cross examining two other State witnesses about arrests and the factual basis of their convictions. According to the testimony of Ian Riley, Joe Ward was a violent person (R. **1596, 1597).** He used cocaine and carried a weapon. The defense's theory of the case was that Ward committed the offense (R. **1597).** Before the State presented Ward's testimony, the State moved to limit cross examination about arrests and the underlying facts of his convictions. The defense argued that the jury needed to hear specific evidence of Ward's criminal history to support the defense's theory that Ward and not Rickey Roberts had committed the offense:

> You know you can go into it with him in terms of propensity for violence, crimes, drug related crimes, you know, his criminal history.
>
> He's been identified as one of two likely murderers by me. I think the jury has a right to know it. If they are going to call him, if they are going to call him to the stand, they are choosing to call him and its absolutely my right, as your Honor ruled with Ian Riley, to ask Riley about Ward, specifically Ward's criminal history, I can now ask Ward the specifics of that same history.

(R. **2013).**

During cross examination of Joe Ward, the defense attempted to impeach his credibility through cross examination regarding his prior criminal history. The defense sought to discredit Ward by eliciting an adjudication of crime:

> He has a court case number **72-5703,** dealing in stolen property. Certified copy that he was convicted and adjudicated and placed on five years probation.

(R. **2048).**

The defense argued this evidence was necessary -- not only to show Ward's reputation for truth telling but to prove the defense's theory of the case:

> It gets to the broader issue of your Honor prohibiting me from fully developing before the jury, one of two people that I have

identified as the real killer in this case.

> Whether the State chooses to accept it or not, that's still the theory of the defense, that he did not -- Rickey Roberts did not do it, that it could either be two killers, one of two killers, Cebey or Ward.

(R. **2050).** The Court granted the State's motion to exclude this conviction finding that it was inadmissible because Ward was placed on probation and not technically convicted for the offense (R. **2051)**

Ward had additional criminal charges that were not revealed to the jury. He was charged with a crime of violence which was not prosecuted because Ward offered the victim full restitution. Defense counsel explained the nature of the charges:

> MR. LANGE: Just for the purposes of appeal so there is no misunderstanding what you are saying, in terms of introducing these cases 80, **81, 82** leaving the scene of an accident, personal injury, ag assault, possession of a firearm while engaged in a criminal offense.

(R. 2050). The defense also tried to impeach Ward with another crime of violence that was ultimately nolle prossed by the State as part of a plea agreement. This charge arose from a confrontation between Ward and three Miami police officers. Defense counsel explained for the record the nature of this offense:

> **MR.** LANGE: This is where -- there was an outstanding case for carrying a concealed firearm, which caused -- there was a arrest warrant out for him.
>
> That's when the officers go to get the house and are battered by him and resisting.

(R. **2054).** Ward had also been charged with an additional crime of violence that was not prosecuted:

> MR. LANGE: June 30, **1978,** ag battery and again it indicates the case was dropped by the State but I think I should be allowed to inquire as the ag battery bears on his violent nature.

(R. **2055).**

The defense also sought to show that Manny Cebey was the perpetrator. In order to rebut the defense's theory of the case,

Manny Cebey appeared as a witness for the State during their case in chief. This witness had been charged with crimes that related to his reputation for truth telling. Over objection, these offenses were never revealed to the jury. The jury was denied the essential tools for assessing Cebey's credibility.

The Court's ruling limited the defense's ability to challenge the credibility of Ward, Cebey and Rimondi. It was essential to the defense to confront the accounts of these witnesses in order to establish the defense that Ward, Cebey and Rimondi acted in concert to falsely implicate Rickey Roberts in this homicide. The failure to admit this evidence deprived the jury of essential facts for assessing the witnesses' credibility. This testimony was essential to Mr. Roberts' claim of innocence. His capital conviction and death sentence were obtained in violation of the fifth, sixth, eighth and fourteenth amendments.

Davis v. Alaska, supra, and Olden v. Kentucky, **109 S.** Ct. **480 (1988),** establish that the trial court erred in not permitting the cross-examination in this case. Certainly where the jury deliberated twenty three hours the error cannot be found to be harmless beyond a reasonable doubt. Delaware v. Van Arsdall, **475** U.S. **673 (1986).**

This error undermined the reliability of the jury's sentencing determination and prevented the jury from assessing the full panoply of mitigation presented by Mr. Roberts. For each of the reasons discussed above the Court should vacate Mr. Roberts' unconstitutional conviction and sentence of death.

This claim 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 Davis v. Alaska, 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 onlv 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; this issue has been preserved for appeal. See Johnson v. Wainwright, supra, 498 So. 2d 938. However, counsel's failure, a failure which could not but have been based upon neglect or 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.

CLAIM V

THE PROSECUTOR PEREMPTORILY EXCUSED BLACK PROSPECTIVE JURORS SOLELY BASED UPON THEIR RACE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

This trial occurred in a racially charged atmosphere. Racial animosity was apparent, vengeance ruled the community, and a fair and impartial trial was impossible. Added to this powder keg was the State's intentional exclusion of black potential jurors for no reason other than that they were black.

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. Kentuckv, 106 S.Ct. **1712 (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 the analysis set out in Swain v. Alabama, **380** U.S. **202 (1965)** 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.

Mr. Roberts' defense counsel noticed the prosecutor's use of peremptory challenges because:

> I'm going to make a Neil argument at this point that Mr. Taylor is an absolutely acceptable juror, but for him being black and the reason for the State's strike of Mr. Taylor is that the defendant in this case is black; that the victim--alleged victim is Anglo-white. Alleged--actually, the murder victim is Hispanic-white and that Mr. Taylor, because he is black, is being stricken.
>
> There is nothing in his answers-- he is a plumber. He's with the Dade County School Board. If anything, he would be an established juror.
>
> I think your Honor should inquire under Neil and make the State tell you why it is not a racially motivated challenge.

(R. **1242-1243).**

Indeed, the State's examination of the veniremen was bland. Typically, it asked individual prospective jurors, black or white, the following questions:

> MR. GLICK: Mr. Taylor, how long have you lived in Dade County?
>
> MR. TAYLOR: Eighteen years I'd say.
>
> MR. GLICK: What section of town do you live in?
>
> MR. TAYLOR: Opa-Locka.

MR. GLICK: Are you employed?

MR. TAYLOR: Yes.

MR. GLICK: What type of work do you do?

MR. TAYLOR: Plumbing helper.

MR. GLICK: Who do you work for?

MR. TAYLOR: School Board.

MR. GLICK: How long have you worked for the School Board?

MR. TAYLOR: Eleven years.

MR. GLICK: Have you done that type of work most of your adult life?

MR. TAYLOR: Yes.

MR. GLICK: Are you married?

MR. TAYLOR: No.

MR. GLICK: Have you ever been in the mi1itary?

MR. TAYLOR: No.

MR. GLICK: Do you have any friends or relatives that are involved in law enforcement work?

MR. TAYLOR: No.

MR. GLICK: Have you ever been the victim of a crime?

MR. TAYLOR: No.

MR. GLICK: Have you ever served on a jury before?

MR. TAYLOR: No.

MR. GLICK: Is there any reason that you can think of why you cannot be a fair and impartial juror for both sides in this case?

MR. TAYLOR: No.

MR. GLICK: Do you, as an individual, have any ethical or moral religious objections to the death penalty?

MR. TAYLOR: No.

MR. GLICK: If you are satisfied at the close of the case that we have proven the defendant guilty, will you be able to vote him guilty regardless of the consequences?

MR. TAYLOR: Yes.

MR. GLICK: Would you have any problem in voting him not guilty if you felt we had not proven the case to the standard that the law requires?

MR. TAYLOR: No.

MR. GLICK: You have heard no evidence in this case whatsoever. So obviously, you cannot make a decision nor would anybody ask you to right now.

Will you agree to keep an open mind and wait until all of the evidence is in, all of the jury instructions are read to you and the lawyers have an opportunity to sum of their positions before you make a decision?

MR. TAYLOR: Yes.

MR. GLICK: Is there anything that you can think of about yourself, either employment or past history that would prevent you from making that decision?

MR. TAYLOR: No.

MR. GLICK: Have you or any member of your family ever been a witness or defendant in any criminal or civil case?

MR. TAYLOR: No.

MR. GLICK: Have you had any experience with firearms?

MR. TAYLOR: No, I haven't.

MR. GLICK: Is there any reason that you can't sit with us throughout the course of this week, maybe into next week and be a juror in this case?

MR. TAYLOR: No.

MR. GLICK: No problem? Okay.

Now, as I said to the other jurors, the penalty in this case, if the defendant is convicted of first degree murder is--the possibility of the death penalty.

Will you, as the other jurors will have to do, agree to set aside any thought of the penalty in deciding whether or not the defendant is guilty?

Can you do that? Will you do that?

MR. TAYLOR: Yes, I would.

MR. GLICK: Because the law says that what you have to do?

Do you have any problem in doing that?

MR. TAYLOR: No.

(R. **780-782**). Whatever other questions the prosecutor asked of the prospective jurors, he addressed to the panel, and the responses were uniformly the same among the jurors.

Nothing else distinguished this black prospective juror or any of the stricken black jurors from their white counterparts. There were black men (R. **1244**) and black women called (R. **1245**), and the black and the white women worked in the home (R. **772, 1147, 1299**). The blacks worked at jobs similar to the whites and from the record nothing exists to explain why these people were excused, other than their race. See R. **1052-1085**.

At the Neal hearing regarding how the prosecutor had exercised his peremptory challenges, the State explained the reason for excluding two prospective jurors. As should be expected, the prosecutor's explanation of the blacks he excused, Taylor and Moss, was superficial.

After initially accepting juror Taylor (R. **1014**) the State backstruck the juror (R. **1242**). The State offered the following reason for its excusal of Taylor:

> Mr. Taylor was acceptable to the State but as the day wore on yesterday, it became obvious that Mr. Taylor was a very hostile individual. He became very angry at the notion that the Court may recall that he was not allowed to be--having already been questioned when your Honor dismissed people in the audience. He was vocally opposed to that, and since that time, he has not--he has been hostile, and that caused us to re-think our position with regard to Mr. Taylor.

The court noted that the explanation given by the State for the excusal of this juror was not supported by its observation:

> THE COURT: I'm going to make the objection and the notation on the record that Mr. Taylor was struck by the State, did not in any way to me look hostile. He sat over there quietly through the second day.

(R. 1247).

The defense again asked the court to conduct an inquiry into the prosecutor's peremptory challenge of Ms. Moss, the other

black juror challenged:

> MR. LANGE: I will make the same Neil argument.
>
> Ms. Moss has--she had served on a criminal jury before. She happens to be black.
>
> She absolutely was clear because she went through all of this before in a verdict and deliberated and they reached a verdict. She can be fair on both the incidents and face--as well as on the death phase. I think that it is a pretext. I'm asking your Honor, under Neil, to inquire of the prosecutor; his reasoning now since there are two that I have identified as Neil people. Mr. Taylor that was accepted and backstriked. I would ask you that you inquire of the reasons under Neil why they have chosen the State's exercise.

(R. **1496-1497**).

The court held an inquiry to determine whether the State's peremptory challenges were racially motivated. The State asserted that Ms. Moss was excused because she was young, unemployed and single (R. **1497**). The State also argued that Mr. Taylor was excused because he appeared hostile:

> [MR. HOWELL]: It was later that we talked about the hostility that he exhibited and I know your Honor has made a finding that he was not verbally hostile, but obviously your Honor did not see Mr. Taylor's reaction.
>
> I don't know if Mr. Lange saw it or not.
>
> MR. LANGE: I didn't see any of it.
>
> MR. HOWELL: I did and Mr. Glick informed me he did too. We discussed it. His anger and hostility when he was told that some people were going to go--allowed to go home and he was not and at that time, we decided to exercise a peremptory challenge.
>
> THE COURT: Do you think he would be hostile to the--
>
> MR. HOWELL: He was a hostile individual.
>
> I really fear hostile people on a jury and he appeared to be hostile.

(R. **1498-1499**).

Based upon this evidence, the court found that Rickey

Roberts had not shown that the State had exercised its peremptory challenges solely on the basis of race (R. 1500) and that blacks were not systematically excluded (R. 1497). The test applied is different from the Batson test and, on this record, Batson requires relief.

Under the then existing Florida law, Mr. Roberts had to first convince a trial judge that there was a substantial likelihood that black peremptories were being used discriminatorily, before the State had any burden to demonstrate otherwise. State v. Neil, 457 So. 2d 481, 487 (Fla. 1984). That is not what Batson requires. Under Batson, a defendant need only show:

> 1. That they are members of a cognizable racial group.
>
> 2. That the prosecutor has exercised peremptory challenges to move from the venire members of the defendant's race.
>
> 3. That from these first two facts established by the defendant and other relevant facts, there is raised an inference that the prosecutor has used peremptory challenges to exclude his veniremen from the petit jury solely on account of their race.

Batson at 90 L.Ed.2d 87-88.

The standard set forth in Batson was further explained by the Florida Supreme Court in State v. Slappy, 522 So. 2d 18 (Fla. 1988). The court reasoned that the Constitution prohibits the exclusion of a juror based on race. The defense need not show a systematic exclusion of blacks. Slappy, 522 So. 2d at 21. The Court explained in Slappy that the challenge to a juror is suspect if the State did not question the juror on the issue asserted as the reason for his exclusion. Id. At Mr. Roberts' trial, the court employed the systematic exclusion standard set forth in Swain v. Alabama, 380 U.S. 202 (1965) and failed to correctly assess the prosecutor's use of peremptory challenges.

When the defense observes that the State has used peremptory challenges in a racially discriminating manner, the defense has a

duty to object and ask the court to inquire into the State's reasons for challenging a particular juror. State v. Neil, 457 So. 2d 481 (Fla. 1984). The State has the burden to establish that the particular juror has been excluded due to legitimate, neutral, non-discriminatory factors. State v. Slappy, 522 So. 2d 18, 22 (Fla. 1988).

When the State gives a suspect or merely pretextual explanation for the challenge to a particular juror there is an apparent concern that the exclusion of the prospective juror was discriminatorily motivated.

The State fails to meet this burden when the explanation for excluding a particular juror is based on a pretext not legitimately related to the issues at trial or a factor revealed by the answers to questions posed during voir dire. Id. Justice Marshall explained that unconscious racism influences the explanation for a challenge when the State characterizes a juror based on instinct:

> Nor is outright prevarication ... the only danger here. "[I]t is even possible that an attorney may be to himself in an effort to convince himself that his motives are legal." ... A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is "sullen," or "distant," a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported.... [P]rosecutors' peremptories are based on their "seat-of-the-pants instincts." ... Yet "seat-of-the-pants instincts" may often be just another term for racial prejudice. Even if all parties approach the Court's mandate with the best of conscious intentions, that mandate requires them to confront and overcome their own racism on all levels.
>
> Batson v. Kentucky, 476 U.S. at 106, 106 S.Ct. at 1728 (Marshall, J., concurring)(citations omitted).

The reasons offered by the State for challenging the blacks excused were superficial and pretextual. Defense counsel and the trial court noted that the reasons for the exclusion were

unsubstantiated. Mr. Roberts had proven his claim but the court employed the wrong standard to assess the issue.

This claim 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 principles of Florida law. See Neal and Batson, supra. It virtually "leaped out upon even a casual reading of transcript.'! Matire v. Wainwrisht, 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. Wainwrisht, 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. Wainwrisht, supra, 474 So. 2d at 1164-65; Matire, supra. Accordingly, habeas relief must be accorded now.

CLAIM 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), and by calling Mr. Roberts a "bullshitter" (R. 3090). 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.

At the guilt phase, the prosecutor repeatedly called Mr. Roberts a liar and worse. The prosecutor told the jury that Mr. Roberts lied to Vasquez (R. 2946). The prosecutor even attacked defense counsel:

> The defense said they'd reveal the real killers--but the defense of lying hits in the face.

(R. 2967). Then the prosecutor hurled insults at Mr. Roberts, stating that Mr. Roberts lied about being at Key Biscayne (R. 2986); that Mr. Roberts lied about his name when he got a traffic ticket (R. 2987); and that Mr. Roberts lied to protect himself. Stretching the insults even further, the prosecutor told the jury that Mr. Roberts' attempt to start a new life free of the opprobrium of his prior criminal conviction was an attempt to lie (R. 2989).

In the guilt phase rebuttal, the prosecutor told the jury that Mr. Roberts was a "bullshitter" (R. 3089). In a comment designed to strike at the jurors' fear and rage, the prosecutor compared Mr. Roberts to Bundy, "a cold-blooded emotionless killer" (R. 3109). The prosecutor again attacked Mr. Roberts' counsel, saying that the defense lawyer was picking at things that "don't have a damn to do with this case" (R. 3098). Further

references to Mr. Roberts as a liar also pervaded the rebuttal.

The State's outrageous attacks continued in sentencing. The prosecutor opened his penalty phase argument by stating Mr. Roberts was cold and unfeeling (R. 3448). The prosecutor pointed out how readily Mr. Roberts got out of prison in Maryland, implying he would do so again if a death sentence were not returned. In addition, the prosecutor focused on the victim's suffering (R. 3455). The prosecutor also remarked to the jury that Mr. Roberts did not report the crime (R. 3457). The remarks in this case violated the principles discussed in Rhodes v. State, ___ So. 2d , 14 F.L.W. 343 (Fla. July 6, 1989).

"[I]mproper prosecutorial comments will warrant a new trial . . . where a prosecutor indulges in personal attacks upon an accused, his defense, or his counsel. E.g., Waters v. State, 486 So. 2d 614 (Fla. 5th DCA) . . . Ryan v. State, 457 So. 2d 1084 (Fla. 4th DCA) . . . Jackson v. State, 421 So. 2d 15 (Fla. 3rd DCA 1982)," Rosso v. State, 505 So. 2d 611, 614 (Fla. 3rd DCA 1987). See also Gradsky v. United States, 373 F.2d 706 (1967); United States v. Lamerson, 457 F.2d 371 (1972).

The Rosso case went on to define a proper closing argument:

> The Florida supreme court has summarized thhe function of closing argument:
>
> > The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Conversely, it must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law.

Rosso V. State, id. at 614. The prosecutor's argument went beyond a review of the evidence and permissible inferences. He intended his argument to overshadow any logical analysis of the evidence and to generate an emotional response, a violation of Penry v. Lynaugh, 109 S. Ct. 2934 (1989).

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 Berser 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); Rhodes, supra.

This error undermined the reliability of the jury's sentencing determination and prevented the jury from assessing the full panoply of mitigation presented by Mr. Roberts. The results are "unreliable". See Penry v. Lynaugh, supra. 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. Robert's death sentence. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings, see Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error.

Moreover, the claim is now properly brought pursuant to the Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. This issue involved a classic violation of longstanding principles of Florida law. See Young, supra; Ross, supra; Rhodes, 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 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. 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.

CLAIM 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.

The Florida Supreme Court recently acknowledged that Booth v. Maryland, was an unanticipated retroactive change in law:

> Under this Court's decision in Witt v. State, 387 So.2d 922 (Fla.), cert. denied, 449 U.S. 1067 (1980), Booth represents a fundamental change in the constitutional law of capital sentencing that, in the interests of fairness, requires the decision to be given retroactive application.

Jackson v. Duaqer, ___ So. 2d , 14 F.L.W. 355 (Fla., July 6, 1989); see Zerauera v. State, ___ So. 2d ___, No. 70,751 (Fla. Sept. 28, 1989). In that same opinion this Court held that a habeas petition is an appropriate forum for the presentation of claims predicated upon Booth v. Maryland. Jackson, 14 F.L.W. at 355-56.

Mr. Roberts' death sentence was based on impermissible victim impact information. This claim is based on the Florida Supreme Court's recent pronouncement in Jackson v. State, supra, which held that the eighth amendment prohibitions set forth in Booth v. Maryland, 107 S. Ct. 2529 (1987) and South Carolina v. Gathers, 45 Cr. L. 3076 (June 12, 1989), forbid the introduction

of victim impact evidence and argument during a capital proceeding.

The impermissible victim impact statements at Mr. Roberts' case were introduced during the guilt, penalty, and sentencing phases of the trial. During the guilt phase of the proceedings, testimony was introduced about the impact of the crime upon the victim's girlfriend. Later, at penalty the prosecutor urged the jury to reconsider this testimony for a different reason.

Michelle Rimondi, a friend of the homicide victim testified for the State. She became emotionally overwrought while she was testifying. The witness began weeping uncontrollably. Twice the proceedings were recessed to allow Ms. Rimondi to compose herself (R. **2146, 2181).**

The State's entire account of the crime was retold through the eyes of Michelle Rimondi. The State's description of the offense emphasized the impact of the crime on Michelle Rimondi. The introduction of victim impact evidence commenced with the State's opening to the jury. The State told the jury that immediately after the offense Michelle Rimondi, "sat huddled in the corner of a bedroom, covered with a blanket, shivering and crying" (R. **1524).** During the State's cross-examination of Cherie Gillette, she was asked to describe Michelle Rimondi's condition immediately after the offense. Gillette reported that Michelle Rimondi was upset (R. **2718, 2732),** delirious (R. **2717)** and confused (R. **2735).** The defense objections to these comments were overruled (R. **2736).**

The most egregious victim impact comments were introduced at the penalty phase of the trial. Throughout the penalty phase the jury was asked to consider the suffering of the victim as a basis for sentencing Mr. Roberts to death. The State introduced evidence showing the pain and suffering experienced by the victim (R. **3265, 3266, 3268, 3455).** The State's closing at penalty asked the jury to consider the suffering of the victim (R. **3448).**

The penalty phase of the trial is replete with impermissible victim impact evidence. While bringing in evidence of Mr. Roberts' ten year old prior conviction, Sheriff Dyne described the impact of that crime on its victim. He explained that eleven years after the incident, the victim of the prior conviction continued to suffer:

> 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. **3303**). The defense objection to this testimony was overruled (R. **3303-04**). This violated this Court's holding in Rhodes v. State, ___ So. 2d ___, **14** F.L.W. **343, 345** (Fla. July **6, 1989**). During the State's closing at the penalty phase, the State asked the jury to consider this evidence during their deliberations (R. **3448**). During the sentencing phase, the State asked the Court to consider a letter from the victim of the prior conviction.

Booth error continued to pervade every aspect of Mr. Roberts' trial. During the sentencing proceeding, the State presented the testimony of Thomas Napoles, the victim's father (R. **3512**). Thomas Napoles described how the death of his son had traumatized his family and asked the court to impose a death sentence:

> Judge, I really would like you to consider the death sentence on Ricky Bernard Roberts because of all the aggravating circumstances that we have heard. There is one in particular that really touches me profoundly in my heard and my family, which is the fact that George Louis, my son, actually could have been saved if on the part of someone over there in this case, the first person that could have done something for him would have been Ricky Bernard Roberts. He did not chose to do so. He chose to continue on with his crime, so to speak.

> He not only could have saved him, as we heard the testimony, but the medical testimony said that he died slowly. He died not from, really, the blow, but from the blood clot that caused him to slowly die, all right, and he also prevented Michele who could have possibly done something, but she was impeded because Ricky Bernard Roberts was at that time, preventing her from doing anything. This is why me and my family feel that the death penalty is necessary, because the pain that we have suffered in the last year and a half since our son's death. We know that he is not going to come back, but we also would like to prevent someone else from going through what we have gone through.
>
> I feel this so bad, Your Honor. The pain is so bad that I do not wish to happen to my worst enemy.

(R. **3512-13**) (emphasis added).

A sentence of death cannot stand when it results from comments or judicial instructions which *may* mislead the jury into imposing such a sentence. South Carolina v. Gathers, **109** S. Ct. **2207 (1989)**. The prosecutors here nevertheless argued that the heinous, atrocious, or cruel aggravating circumstance was present not because of cruelty to the victim but because of cruelty to the victim's family and friends. This novel interpretation of that aggravating circumstance was left uncorrected by the court. Errors such as this are precisely what was forbidden by Booth v. Maryland, **107** S. Ct. **2529 (1987)**. See also South Carolina v. Gathers, **109** S. Ct. **2207 (1989)**. Nevertheless the prosecutor urged that a death sentence be imposed on Mr. Roberts because the victims left behind grieving family members.

The trial judge later in his formal written order found the presence of the heinous, atrocious, or cruel aggravating circumstance. Here, the sentencing judge also considered and relied upon what the prosecutor had urged to the jury, the pain and suffering of the victim and his family and friends. This is precisely what is forbidden under Booth and Gathers.

In Booth the United States Supreme Court held that "the introduction of [victim impact information] at the sentencing phase of a capital murder trial violates the Eighth Amendment."

Id. at 2536. The court further invalidated the Maryland statute requiring consideration of such a statement at a capital sentencing hearing and vacated Mr. Booth's death sentence because the statements had been considered. Similarly, in Gathers the death sentence was not allowed to stand because it may have resulted from the prosecutor's impermissible victim impact argument. Reversal is required where contamination may have occurred. Booth; Gathers. Contamination occurred in Mr. Roberts' case, before the jury and the judge.

In South Carolina v. Gathers, the Supreme Court held that the argument of the prosecutor alone violated Booth where the prosecutor "characterized the victim's personal qualities." Gathers, 45 Cr. L. at 3077, 109 S. Ct. 2207, 2210. The Supreme Court held that Booth was violated notwithstanding the fact that the prosecutor's argument was premised upon admissible evidence. In Mr. Roberts' case, as in Gathers, the prosecutor submitted victim impact evidence and argument in an attempt to justify the death penalty.

The very matters paraded before the sentencing court and jury in Mr. Roberts' case were the matters which the Supreme Court in Booth and Gathers determined to be impermissible considerations at the penalty phase of a capital trial. The eighth amendment was violated here, as it was in Booth and Gathers.

This record is replete with Booth error. Mr. Roberts was sentenced to death on the basis of the very constitutionally impermissible "victim impact" and "worth of victim" evidence and argument which the Supreme Court condemned in Booth and Gathers. The Booth court concluded that "the presence or absence of emotional distress of the victim's family, or the victim's personal characteristics are not proper sentencing considerations in a capital case." Id. at 2535. These are the very same impermissible considerations urged on (and urged to a far more

extensive degree) and relied upon by the jury and judge in Mr. Roberts' case. Here, as in Booth, the victim impact information "serve[d] no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant." Id. Since a decision to impose the death penalty must "be, and appear to be, based on reason rather than caprice or emotion," Gardner v. Florida, 430 U.S. 349, 358 (1977)(opinion of Stevens, J.), such efforts to fan the flames are "inconsistent with the reasoned decision making" required in a capital case. Booth, supra at 2536. See also Penry v. Lynaugh, 109 S. Ct. at 2952, (1989)(death sentence can not be premised on "an unguided emotional response"); Rhodes v. State, ___ So. 2d ___, 14 F.L.W. 343, 345 (Fla., July 6, 1989)(suffering of victims after the homicide is not relevant to heinous, atrocious, or cruel aggravating circumstance).

In Booth and Gathers the Supreme Court explained the eighth amendment error required reversal when victim impact evidence or argument was presented to the sentencer and "could" have affected its decision to impose death. Since the prosecutor's argument "could [have] resulted" in the imposition of death because of impermissible considerations, Booth, 107 S. Ct. at 505, relief is appropriate in Mr. Roberts' case.

This claim, founded on what the Florida Supreme Court has now recognized to be a retroactive change in law, Jackson, supra, is properly before the Court. This error undermined the reliability of the jury's sentencing determination and prevented the jury from assessing the full panoply of mitigation 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 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. This error was objected to at trial. Under Jackson v. Dusser, supra, it is now cognizable, and requires a resentencing.

CLAIM VIII

MR. ROBERTS' SENTENCING JURY WAS IMPROPERLY INSTRUCTED ON THE "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL'' AGGRAVATING CIRCUMSTANCE, AND THE AGGRAVATOR WAS IMPROPERLY ARGUED AND IMPOSED, IN VIOLATION OF MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

This Court has recently discussed the "heinous, atrocious and cruel" aggravating circumstance and explained:

> [T]he prosecutor argued that the fact that the victim's body was transported by dump truck from the hotel where she was killed to the dump where she was found supported the aggravating factor that the murder was heinous, atrocious, and cruel. We have stated that a defendant's actions after the death of the victim cannot be used to support this aggravating circumstance. Jackson v. State, 451 So.2d 458 (Fla. 1984); Herzos v. State, 439 So.2d 1372 (Fla. 1983). This statement was improper because it misled the jury.

Rhodes v. State, So. 2d , 14 F.L.W. 343, 345 (Fla., July 6, 1989)(emphasis added). In Cochran v. State, ___ So. 2d ___, 14 F.L.W. 406 (Fla., July 27, 1989), the Court stated:

> Our cases make clear that where, as here, death results from a single gunshot and there are no additional acts of torture or harm, this aggravating circumstance does not apply.

Slip op. at 6.

Mr. Roberts' jury was not advised of these limitations on the "heinous, atrocious or cruel" aggravating factor. Indeed, the unconstitutional constructions rejected by this Court are precisely what was argued to the jury and what the judge employed in his own sentencing determination. As a result the

instructions failed to limit the jury's discretion and violated Maynard v. Cartwriaht, 108 S. Ct. 1853 (1988). In addition, the judge employed the same erroneous standard when sentencing Mr. Roberts to death.

The jury instructions given in Cartwriaht were virtually identical to the instructions given to Mr. Roberts' sentencing jury. The eighth amendment error in this case is identical to the eighth amendment error upon which a unanimous United States Supreme Court granted relief in Maynard v. Cartwrisht, 108 S. Ct. 1853 (1988). The sentencing court here instructed the jury:

> The crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel.

(R. 3497). The Tenth Circuit's in banc opinion (unanimously overturning the death sentence) explained that the jury in Cartwrisht received a more detailed but yet constitutionally inadequate instruction:

> . . . the term **"heinous"** means extremely wicked or shockingly evil; **"atrocious"** means outrageously wicked and vile; **"cruel"** means pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the sufferings of others.

Cartwright v. Maynard, 822 F.2d 1477, 1488 (10th Cir. 1987)(in banc), affirmed 108 S. Ct. 1853 (1988). In Cartwright, the Supreme Court unanimously held that such an instruction did not "adequately inform juries what they must find to impose the death penalty." 108 S. Ct. at 1858. The decision in Cartwriaht clearly conflicts with what was employed in sentencing Mr. Roberts to death. See also Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(in banc)(finding that Cartwright and the eighth amendment were violated when heinous, atrocious, or cruel was not sufficiently limited).

This Court has held that the "especially heinous, atrocious or cruel" statutory language is directed only at "the consciousness or pitiless crime which is unnecessarily torturous

to the victim." State v. Dixon, 282 So. 2d 1, 9 (Fla. 1973). The Dixon construction has not been consistently applied, the jury in this case was never apprised of such a limiting construction, and the required limiting construction was never employed by the sentencing judge or state high court in Mr. Roberts' case.

Here, both the judge and the jury applied precisely the construction condemned in Rhodes and Cartwright. Of course, the role of a Florida sentencing jury is critical. The Eleventh Circuit Court in Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(in banc), cert. denied, 109 S. Ct. 1353 (1989), specifically discussed the fundamental significance of a Florida jury's sentencing role in a capital case:

> In analyzing the role of the sentencing jury, the Supreme Court of Florida has apparently been influenced by a normative judgment that a jury recommendation of death carries great force in the mind of the trial judge. This judgment is most clearly reflected in cases where an error has occurred before the jury, but the trial judge indicates that his own sentencing decision is unaffected by the error. As a general matter, reviewing courts presume that trial judges exposed to error are capable of putting aside the error in reaching a given decision. The Supreme Court of Florida, however, has on occasion declined to apply this presumption in challenges to death sentences. For example, in Messer v. State, 330 So.2d 137 (1976), the trial court erroneously prevented the defendant from putting before the sentencing jury certain psychiatric reports as mitigating evidence. The jury recommended death and the trial judge imposed the death penalty. The supreme court vacated the sentence, even though the sentence judge had stated that he had himself considered the reports before entering sentence. The supreme court took a similar approach in Riley v. Wainwright, 517 So.2d 565 (Fla.1987). There, the defendant presented at his sentencing hearing certain nonstatutory mitigating evidence. The trial court instructed the jury that it could consider statutory mitigating evidence, but said nothing about the jury's obligation under Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), to consider nonstatutory mitigating evidence. The jury recommended death and the trial judge imposed the death penalty. In imposing the death sentence, the trial judge expressly stated

that he had considered all evidence and testimony presented. On petition for writ of habeas corpus, the supreme court ordered the defendant resentenced. The court held that the jury had been precluded from considering nonstatutory mitigating evidence, and that the trial judge's consideration of that evidence had been "insufficient to cure the original infirm recommendation." Id. at 859 n. 1.

In light of this disposition of these cases, it would seem that the Supreme Court of Florida has recognized that a jury recommendation of death has a sui generis impact on the trial judge, an impact so powerful as to nullify the general presumption that a trial judge is capable of putting aside error. We do not find it surprising that the supreme court would make this kind of normative judgment. A jury recommendation of death is, after all, the final state in an elaborate process whereby the community expresses its judgment regarding the appropriateness of a death sentence.

844 F.2d at 1453-54 (footnote omitted).

The [Florida] supreme court's understanding of the jury's sentencing role is illustrated by the way it treats sentencing error. In cases where the trial court follows a jury recommendation of death, the supreme court will vacate the sentence and order resentencing before a new jury if it concludes that the proceedings before the original jury were tainted by error. Thus, the supreme court has vacated death sentences where the jury was presented with improper evidence, see Dougan v. State, 470 So.2d 697, 701 (Fla.1985), cert. denied, 475 U.S. 1098, 106 S.Ct. 1499, 89 L.Ed.2d 900 (1986), or was subject to improper argument by the prosecutor, see Teffeteller v. State, 439 So.2d 840, 845 (Fla.1983), cert. denied, 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 754 (1984). The supreme court has also vacated death sentences where the trial court gave the jury erroneous instructions on mitigating circumstances or improperly limited the defendant in his presentation of evidence of mitigating circumstances. See Thompson v. Dusser, 515 So.2d 173, 175 (Fla.1987); Downs v. Dusser, 514 So.2d 1069, 1072 (Fla.1987); Riley v. Wainwright, 517 So.2d 656, 659-60 (Fla.1987); Valle v. State, 502 So.2d 1225, 1226 (Fla.1987); Floyd v. State, 497 So.2d 1211, 1215-16 (Fla.1986); Lucas v. State, 490 So.2d 943, 946 (Fla.1986); Simmons v. State, 419 So.2d 316, 320 (Fla.1982); Miller v. State, 332 So.2d 65, 68 (Fla.1976). In these cases, the supreme court frequently focuses on how the error may have affected the jury's recommendation.

Id. at 1452 (footnote omitted). As the in banc Eleventh Circuit noted in earlier portions of the Mann opinion:

> A review of the case law shows that the Supreme Court of Florida has interpreted section 921.141 as evincing a legislative intent that the sentencing jury play a significant role in the Florida capital sentencing scheme. See Messer v. State, 330 So.2d 137, 142 (Fla. 1976)("[T]he legislative intent that can be gleaned from Section 921.141 [indicates that the legislature] sought to devise a scheme of checks and balances in which the input of the jury serves as an integral part."); see also Riley v. Wainwright, 517 So.2d 656, 657 (Fla.1987)("This Court has long held that a Florida capital sentencing jury's recommendation is an integral part of the death sentencing process."); Lamadline v. State, 303 So.2d 17, 20 (Fla.1974)(right to sentencing jury is "an essential right of the defendant under our death penalty legislation"). In the supreme court's view, the legislature created a role in the capital sentencing process for a jury because the jury is "the one institution in the system of Anglo-American jurisprudence most honored for fair determinations of questions decided by balancing opposing factors." Cooper v. State, 336 So.2d 1133, 1140 (Fla.1976), cert. denied, 431U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977); see also McCampbell v. State, 421 So.2d 1072, 1075 (Fla.1982)(the jury's recommendation "represent[s] the judgment of the community as to whether the death sentence is appropriate"); Chambers v. State, 339 So.2d 204, 209 (Fla.1976)(England, J., concurring)(the sentencing jury "has been assigned by history and statute the responsibility to discern truth and mete out justice").
>
> To give effect to the legislature's intent that the sentencing jury play a significant role, the Supreme Court of Florida has severely limited the trial judge's authority to override a jury recommendation of life imprisonment. In Tedder v. State, 322 So.2d 908, 910 (Fla.1975), the court held that a trial judge can override a life recommendation only when "the facts [are] so clear and convincing that virtually no reasonable person could differ." That the court meant what it said in Tedder is amply demonstrated by the dozens of cases in which it has applied the Tedder standard to reverse a trial judge's attempt to override a jury recommendation of life. See, e.g., Wasko v. State, 505 So.2d 1314, 1318 (Fla.1987); Brookings v. State, 421 So.2d 1072, 1075-76 (Fla.1982); Goodwin v. State, 405 So.2d 170, 172 (Fla.1981); Odom v. State, 403 So.2d 936, 942-43 (Fla.1981), cert. denied, 456 U.S. 925, 102 S.Ct. 1970, 72

> L.Ed.2d 440 (1982); Nearv v. State, 384 So.2d 881, 885-88 (Fla. 1980); Mallov v. State, 283 So.2d 1190, 1193 (Fla.1979); Shue v. State, 366 So.2d 387, 390-91 (Fla.1978); McCaskill v. State, 344 So.2d 1276, 1280 (Fla.1977); Thompson v. State, 328 So.2d 1, 5 (Fla.1976).

Mann, 844 F.2d at 1450-51. In light of these standards there can be little doubt that a Florida jury is the sentencer for purposes of eighth amendment analysis of Mr. Roberts' claim.

In Hitchcock v. Dusser, 107 S. Ct. 1821 (1987), the Supreme Court reversed a Florida sentence of death because the jury had been erroneously instructed not to consider nonstatutory mitigation. "In Hitchcock, the Supreme Court reversed this Court's in banc decision in Hitchcock v. Wainwrisht, 770 F.2d 1514 (1985) and held that, on the record of the case, it appeared clear that the jury had been restricted in its consideration of nonstatutory mitigating circumstances. . . ." Knight v. Dusser, 863 F.2d 705, 708 (11th Cir. 1989). See also Harsrave v. Dusser, 832 F.2d 1528 (11th Cir. 1987)(in banc); Stone v. Dugger, 837 F.2d 1477 (11th Cir. 1988). The Supreme Court treated the jury as sentencer for purposes of eighth amendment instructional error review, as has this Court. See Mann, supra; Riley v. Wainwrisht, 517 So. 2d 565 (Fla. 1987). In fact, this Court held Hitchcock was new law which was to be applied retroactively.

In reversing death sentences because of Hitchcock error this Court explained:

> It is of no significance that the trial judge stated that he would have imposed the death penalty in any event. The proper standard is whether a jury recommending life imprisonment would have a reasonable basis for that recommendation.

Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1989). See also Riley v. Wainwrisht, 517 So. 2d 656 (Fla. 1987)(improper instructions to sentencing jury render death sentence fundamentally unfair); Meeks v. Dusser, 14 F.L.W. 313 (Fla. June 22, 1989)(since it could not be said beyond a reasonable doubt that a properly instructed jury would not return a recommendation of life,

resentencing was required). Thus it is clear that, after Hitchcock, for purposes of reviewing the adequacy of jury instructions in Florida the jury is the sentencer. Instructional error is reversible where it may have affected the jury's sentencing verdict. Meeks, supra; Riley, supra. In Mr. Roberts' case, the jury returned a seven-five death recommendation. Under such circumstances one juror properly instructed could quite conceivably have concluded that the absence of the heinous, atrocious or cruel aggravating circumstance made death inappropriate and that the remaining aggravating factors were not sufficient to warrant a death sentence. See, e.g., Mills v. Maryland, 108 S. Ct. 1860 (1988). Such a change would have resulted in a binding life recommendation, and thus under Hall cannot be found to be harmless. The bottom line, however, is that this jury was unconstitutionally instructed, Maynard v. Cartwrisht, supra, and that the State cannot prove harmlessness beyond a reasonable doubt.

Mr. Roberts is entitled to relief under this Court's Rhodes opinion and the standards of Maynard v. Cartwrisht, and the holding in Hitchcock that jury instructions must meet eighth amendment standards. The jury was not instructed as to the limiting construction applicable to "heinous, atrocious or cruel." The jury did not know that the murder had to be "unnecessarily torturous to the victim." The judge also misapplied the law. As a result, the eighth amendment error here is plain.

What cannot be disputed is that here, as in Cartwrisht, the jury instructions provided no guidance regarding the "heinous, atrocious or cruel" aggravating circumstance. The jury was simply told:

> The crime for which the defendant is to be sentenced, was especially wicked, evil, atrocious or cruel.

(R. 3497).

In Cartwrisht, the Supreme Court unanimously held that such

an instruction did not "adequately inform juries what they must find to impose the death penalty." 108 S. Ct. at 1858. That which was found wanting in Cartwright is what Mr. Roberts' jurors received, and what his judge employed.

In Mr. Roberts' case, as in Cartwright, what was relied upon by the jury, trial court, and this Court did not guide or channel sentencing discretion. Likewise, here, no adequate "limiting construction" was ever applied by the jury to the "heinous, atrocious or cruel" aggravating circumstance. Under Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), and its progency, a Florida jury must be properly instructed under the eighth amendment. Following Hitchcock, the Florida Supreme Court held that prior to Hitchcock, objections to jury instructions were not necessary to preserve a challenge to their adequacy under the eighth amendments. In fact no objection was made to the instructions given in Hitchcock, or in most of the cases in which relief has been granted on the basis of Hitchcock. See Meeks v. Dusser, ___ So. 2d ___, 14 F.L.W. 313 (Fla. June 22, 1989); Hall v. State, 541 So. 2d 1125 (Fla. 1989); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); Morgan v. State, 515 So. 2d 975 (Fla. 1987); Thomoson v. Dugger, 515 So. 2d 73 (Fla. 1987).

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

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

513 So. 2d at 662.

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

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

Floyd v. State, 497 So. 2d 1211, 1216 (Fla. 1986). There is no principled way to distinguish these cases from Mr. Roberts' case. He in fact objected to the jury instructions regarding "heinous, atrocious or cruel." This is more than was done in most of the cases in which Hitchcock relief was granted.

Clearly this Court has held that, under Hitchcock, the sentencing jury must be correctly and accurately instructed as to the mitigating circumstances to be weighed against aggravating circumstances. Under Maynard v. Cartwright, 108 S. Ct. 1883 (1988), the jury must also be correctly and accurately instructed regarding the aggravating circumstances to be weighed by it against the mitigation when it decides what sentence to recommend. In Mikenas v. Dugger, 519 So. 2d 601 (Fla. 1988), a new jury sentencing was ordered because the jury was instructed without objection that mitigating circumstances were limited by statute. A subsequent resentencing by trial judge alone did not cure the instructional error, although at the resentencing, the trial judge considered nonstatutory mitigation. The jury's recommendation was not reliable because it did not know what to balance in making its recommendation. In Mr. Roberts' case, the jury did not receive instructions narrowing aggravating circumstances in accord with the limiting and narrowing constructions adopted by the Supreme Court. Thus the jury, here, also did not know the parameters of the factors it was weighing.

Florida has adopted a statutory scheme in which the "jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose the death penalty," Zant v. Stephens, 462 U.S. 862, 890 (1983), unlike the scheme at issue in Stephens, which did not

require a weighing process. Maynard v. Cartwrisht, 108 S. Ct. 1853 (1988), first held that the principle of Godfrey v. Georsia, 446 U.S. 420 (1980), did apply to a state where the jury weighs the aggravating and mitigating circumstances found to exist and required the jury to receive instructions adequately channeling and narrowing its discretion. In Cartwrisht, the United States Supreme Court determined that error had occurred where the sentencing jury received no instructions regarding the limiting constructions of an aggravating circumstance.

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

Florida law requires the jury to weigh the aggravating circumstances against mitigating evidence. In fact, Mr. Roberts' jury was so instructed. This Court has produced considerable case law regarding the import of instructional error to a jury regarding the mitigation it may consider and balance against the aggravating circumstances. In Mikenas v. Dugger, the court ordered a new sentencing because the jury had not received an instruction explaining that mitigation was not limited to the statutory mitigating factors. The error was cognizable in post-conviction proceedings even though there had been no objection at trial, the issue had not been raised on direct appeal, and at a resentencing to the judge alone, the judge had known that

mitigation was not limited to the statutory mitigating factors. It was cognizable because this Court determined that Hitchcock required the sentencing jury in Florida to receive accurate information which channeled and limited its sentencing discretion, but allowed the jury to give full consideration to the defendant's character and background. Because of the weight attached to the jury's sentencing recommendation in Florida, instructional error is not harmless unless the reviewing court can "conclude beyond a reasonable doubt that an override would have been authorized." Mikenas, 519 So. 2d at 601. In other words, there was sufficient mitigation in the record for the jury to have a reasonable basis for recommending life and thus preclude a jury override.

Similar conclusions have been reached in other cases where the jury was erroneously instructed. Meeks v. Dugger, ___ So. 2d ___, 14 F.L.W. 313, 314 (Fla. June 22, 1989)("Had the jury recommended a life sentence, the trial court may have been required to conform its sentencing decision to Tedder v. State, 322 So. 2d 908 (Fla. 1975), which requires that, if there is a reasonable basis for the recommendation, the trial court is bound by it."); Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1989)("It is of no significance that the trial judge stated that he would have imposed the death penalty in any event. The proper standard is whether a jury recommending life imprisonment would have a reasonable basis for the recommendation."); Floyd v. State, 497 So. 2d 1211, 1216 (Fla. 1986)("In view of the inadequate and confusing jury instructions, we believe Floyd was denied his right to an advisory opinion. We cannot sanction a practice which gives no guidance to the jury for considering circumstances which might mitigate against death."). In Mr. Roberts' case the jury received no guidance as to the "elements" of the aggravating circumstances against which the evidence in mitigation was balanced. In Florida, the jury's pivotal role in the capital

process requires its sentencing discretion to be channeled and limited. The failure to provide Mr. Roberts' sentencing jury the proper "channeling and limiting" instructions violated the eighth amendment principle discussed in Maynard v. Cartwrisht.

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

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

The Tennessee Supreme Court concluded that under Maynard v. Cartwrisht, juries must receive complete instructions regarding aggravating circumstances. State v. Hines, 758 S.W.2d 515 (Tenn.

1988). The court did not read Cartwrisht as applying only to the heinous, atrocious, and cruel aggravating circumstance. The court there also found that ambiguity in the instructions regarding any limiting constructions of an aggravating circumstance violated Mills v. Maryland, 108 S. Ct. 1860 (1988). The court ruled that error under Maynard v. Cartwrisht and Mills could not be found to be harmless beyond a reasonable doubt.

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

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

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

The error cannot be found harmless beyond a reasonable doubt. In Florida, this Court remands for resentencing when aggravating circumstances are invalidated. See, e.g., Schafer v. State, 537 So. 2d 988 (Fla. 1989)(remanded for resentencing where three of five aggravating circumstances stricken and no mitigating circumstances identified); Nibert v. State, 508 So. 2d 1 (Fla. 1987)(remanded for resentencing where one of two aggravating circumstances stricken and no mitigating circumstances found); cf. Rembert v. State, 445 So. 2d 337 (Fla. 1984)(directing imposition of life sentence where one of two

aggravating circumstances stricken and no mitigating circumstances found). The striking of this aggravating factor requires resentencing. Schafer, supra.[1] Id. The "harm" before the jury is plain -- a jury's capital sentencing decision, after all, is not a mechanical counting of aggravators and involves a great deal more than that. The error denied Mr. Roberts an individualized and reliable capital sentencing determination. Knight v. Dugger, 863 F.2d 705, 710 (11th Cir. 1989). The errors committed here can not be found to be harmless beyond a reasonable doubt.[2] There was mitigating evidence before the jury which could have caused a different balance to be struck had this aggravating circumstances not been found and weighed against the mitigation. Certainly the jury had before it, a reasonable basis for a life recommendation that would have precluded an override. This error undermined the reliability of the jury's sentencing determination and prevented the jury from assessing the full panoply of mitigation 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 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

---

[1]The remaining aggravating circumstances are of less significance here. For example, Mr. Roberts was on parole at the time of the homicide but as the Florida Supreme Court recently explained "the gravity of [that] aggravating factor is somewhat diminished by the fact [the defendant] did not break out of prison." Songer v. State, So. 2d ___, 14 F.L.W. 262, 263 (Fla. 1989).

[2]Recently, a petition for a writ of certiorari was granted in Clemons v. Mississippi, U.S. ___, 45 Cr. L. 4067 (June 19, 1989), in order to resolve the question of when Cartwright error may be harmless.

So. 2d 1163 (Fla. 1985), and it should now correct this error, and order a resentencing before a new jury. Accordingly, habeas relief must be accorded now.

CLAIM IX

MR. ROBERTS' SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS SHIFTED THE BURDEN TO MR. ROBERTS' TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE SENTENCING JUDGE HIMSELF EMPLOYED THIS IMPROPER STANDARD IN SENTENCING MR. ROBERTS' TO DEATH.

A capital sentencing jury must be:

> [T]old that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed . . .
>
> [S]uch a sentence could be given if the state showed the aggravating circumstances outweighed the mitigating circumstances.

State v. Dixon, 283 So. 2d 1 (Fla. 1973)(emphasis added). This straightforward standard was never applied at the penalty phase of Mr. Roberts' capital proceedings. To the contrary, the burden was shifted to Mr. Roberts on the question of whether he should live or die. In Hamblen v. Dusser, __ So. 2d __, 14 F.L.W. 347 (Fla. 1989), a capital post-conviction action, the Florida Supreme Court addressed the question of whether the standard employed shifted to the defendant the burden on the question of whether he should live or die. The Hamblen opinion reflects that claims such as the instant should be addressed on a case-by-case basis in capital post-conviction actions. Mr. Roberts herein urges that the Court assess this significant issue in his case and, for the reasons set forth below, that the Court grant him the relief to which he can show his entitlement.

Shifting the burden to the defendant to establish that mitigating circumstances outweigh aggravating circumstances conflicts with the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), and Dixon, for such instructions unconstitutionally shift

So. 2d 1163 (Fla. 1985), and it should now correct this error, and order a resentencing before a new jury. Accordingly, habeas relief must be accorded now.

CLAIM IX

MR. ROBERTS' SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS SHIFTED THE BURDEN TO MR. ROBERTS' TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE SENTENCING JUDGE HIMSELF EMPLOYED THIS IMPROPER STANDARD IN SENTENCING MR. ROBERTS' TO DEATH.

A capital sentencing jury must be:

> [T]old that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed . . .
>
> [S]uch a sentence could be given if the state showed the aggravating circumstances outweighed the mitigating circumstances.

State v. Dixon, 283 So. 2d 1 (Fla. 1973)(emphasis added). This straightforward standard was never applied at the penalty phase of Mr. Roberts' capital proceedings. To the contrary, the burden was shifted to Mr. Roberts on the question of whether he should live or die. In Hamblen v. Dugger, ___ So. 2d ___, 14 F.L.W. 347 (Fla. 1989), a capital post-conviction action, the Florida Supreme Court addressed the question of whether the standard employed shifted to the defendant the burden on the question of whether he should live or die. The Hamblen opinion reflects that claims such as the instant should be addressed on a case-by-case basis in capital post-conviction actions. Mr. Roberts herein urges that the Court assess this significant issue in his case and, for the reasons set forth below, that the Court grant him the relief to which he can show his entitlement.

Shifting the burden to the defendant to establish that mitigating circumstances outweigh aggravating circumstances conflicts with the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), and Dixon, for such instructions unconstitutionally shift

to the defendant the burden with regard to the ultimate question of whether he should live or die. In so instructing a capital sentencing jury, a court injects misleading and irrelevant factors into the sentencing determination, thus violating Caldwell v. Mississippi, 472 U.S. 320 (1985); Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); Maynard v. Cartwright, 108 S. Ct. 1853 (1988). Mr. Roberts' jury was unconstitutionally instructed, as the record makes abundantly clear (See R. 3258, 3496, 3497, 3498, 3499).

At the penalty phase of trial, prosecutorial argument and judicial instructions informed Mr. Roberts' jury that death was the appropriate sentence unless "mitigating circumstances exist to outweigh any aggravating circumstances" (R. 3496). Such instructions which Mr. Roberts' objected to shifted to the defendant the burden of proving that life is the appropriate sentence, and violated the eighth and fourteenth amendments, as the Court of Appeals for the Ninth Circuit recently held in Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(in banc). As a result, Mr. Roberts' capital sentencing proceeding was rendered fundamentally unfair and unreliable.

In Adamson, 865 F.2d at 1041-44, the Ninth Circuit held that because the Arizona death penalty statute "imposes a presumption of death on the defendant," the statute deprives a capital defendant of his eighth amendment rights to an individualized and reliable sentencing determination. What occurred in Adamson is precisely what occurred in Mr. Roberts' case. See also Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988). The instructions, and the standard upon which the sentencing court based its own determination, violated the eighth and fourteenth amendments. The burden of proof was shifted to Mr. Roberts on the central sentencing issue of whether he should live or die. Moreover, the application of this unconstitutional standard at the sentencing phase violated Mr. Roberts' rights to a fundamentally fair and

reliable capital sentencing determination, i.e., one which is not infected by arbitrary, misleading and/or capricious factors. See Adamson, supra; Jackson, supra. The unconstitutional presumption inhibited the jury's ability to "fully" assess mitigation, in violation of Penry v. Lynaugh, 109 S. Ct. 2935 (1989), a decision which was declared, on its face, to apply retroactively to cases on collateral review.

The focus of a jury instruction claim is "what a reasonable juror could have understood the charge as meaning." Francis v. Franklin, 471 U.S. 307 (1985); see also Sandstrom v. Montana, 442 U.S. 510 (1979). Here, the jury was in essence told that death was presumed appropriate once aggravating circumstances were established, unless Mr. Roberts proved that the mitigating circumstances outweighed the aggravating circumstances. A reasonable juror could have well understood that mitigating circumstances were factors calling for a life sentence, that aggravating and mitigating circumstances had differing burdens of proof, and that life was a possible penalty, while at the same time understanding, based on the instructions, that Mr. Roberts had the ultimate burden to prove that life was appropriate. This violates the eighth amendment.

This error cannot be deemed harmless. In Mills v. Maryland, 108 S. Ct. 1860 (1988), the court concluded that, in the capital sentencing context, the Constitution requires resentencing unless a reviewing court can rule out the possibility that the jury's verdict rested on an improper ground. Id. 108 S. Ct. at 1866-67. Under Hitchcock, Florida juries must be instructed in accord with the eighth amendment principles. The constitutionally mandated standard demonstrates that relief is warranted in Mr. Roberts' case.

The United States Supreme Court recently granted a writ of certiorari in Blystone v. Pennsylvania, 109 S. Ct. 1567 (1989), to review a very similar claim. The question presented in

Blystone has obvious ramifications here. Under Pennsylvania law, the jury is instructed that where it finds an aggravating circumstance present and no mitigation is presented, it "must" impose death. However, if mitigation is found then the jury must decide whether the aggravating circumstances outweigh the mitigating. In Pennsylvania, the legislature chose to place upon a capital defendant a burden of production as to evidence of mitigation and a burden of persuasion as to whether mitigation exists. However, once evidence of a mitigating circumstance is found then the State bears the burden of persuasion as to whether the aggravating circumstances outweigh the mitigating such that a death sentence should be returned.

Under the instructions and standard employed in Mr. Roberts' case, once one of the statutory aggravating circumstances was found by definition sufficient aggravation existed to impose death. The jury was then directed to consider whether mitigation had been presented which outweighed the aggravation. Thus under the standard employed in Mr. Roberts' case, the finding of an aggravating circumstance operated to impose upon the defendant the burden of production and the burden of persuasion of the existence of mitigation, and the burden of persuasion as to whether the mitigation outweighs the aggravation. Certainly, the standard employed here was more restrictive of the jury's ability to conduct an individualized sentencing than the Pennsylvania statute at issue in Blystone. See also, Boyde v. California, 109 S. Ct. 2447 (Cert. granted June 5, 1989).

The effects feared in Adamson and Mills are precisely the effects resulting from the burden-shifting instruction given in Mr. Roberts' case. In being instructed that mitigating circumstances must outweigh aggravating circumstances before it could recommend life, the jury was effectively told that once aggravating circumstances were established, it need not consider mitigating circumstances unless those mitigating circumstances

outweighed the aggravating circumstances. This jury was thus constrained in its consideration of mitigating evidence, Hitchcock, 107 S. Ct. 1821 (1987), and from evaluating the "totality of the circumstances,'' Dixon v. State, 283 So. 2d 1, 10 (Fla. 1973), in determining the appropriate penalty. The jury was not allowed to make a "reasoned moral response" to the issues at Mr. Roberts' sentencing or to "fully" consider mitigation. Penry v. Lynaugh, supra. There is a "substantial possibility" that this understanding of the jury instructions resulted in a death recommendation despite factors calling for life. Mills, supra. The death sentence in this case is in direct conflict with Adamson, Mills, and Penry, supra. This error "perverted" the jury's deliberations concerning the ultimate question of whether Mr. Roberts should live or die. Smith v. Murray, 106 S. Ct. at 2668.

During the charge conference on the penalty phase defense counsel objected to this jury instruction (R. 3426). Under Hitchcock and its progeny, an objection, in fact, was not necessary to preserve this issue for review at this time. See discussion in Claim VIII, supra. This error undermined the reliability of the jury's sentencing determination and prevented the jury from assessing the full panoply of mitigation 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 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 Jackson v. Dusser, 14 F.L.W. 355 (Fla. 1989); 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 Mullaney, Lockett, 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, it was preserved for appeal. 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.

CLAIM X

THE PROSECUTOR IMPROPERLY ASSERTED THAT SYMPATHY TOWARDS MR. ROBERTS WAS AN IMPROPER CONSIDERATION FOR THE JURY, DEPRIVING MR. ROBERTS OF A RELIABLE AND INDIVIDUALIZED CAPITAL SENTENCING DETERMINATION, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS, PENRY V. LYNAUGH, 109 S. CT. 2934 (1989), AND PARKS V. BROWN, 860 F.2D 1545 (10TH CIR. 1988)(IN BANC).

In a capital sentencing proceeding, the United States Constitution requires that a sentencer not be precluded from "considering, as a mitigating factor, any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than." Lockett v. Ohio, 438 U.S. 586, 604 (1978); see also Hitchcock v. Dusser, 107 S. Ct. 1821, 1824

(1987). Because of the heightened "need for reliability in the determination that death is the appropriate punishment in a specific case," the eighth amendment requires "particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." Woodson v. North Carolina, 428 U.S. 280, 304 303 (1976).

In Wilson v. Kemp, 777 F.2d 621, 624 (11th Cir. 1985), the Court of Appeals found that statements of prosecutors which may mislead the jury into believing that feelings of mercy must be case aside violate constitutional principles:

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

otherwise, misrepresents this important legal principle.

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

In Mr. Roberts' case, the court instructed that sympathy toward Mr. Roberts should not be considered:

> Feelings of prejudice, bias or sympathy are not legally reasonable doubts and they should not be discussed by any of you in any way. Your verdict must be based on your views of the evidence, and on the law contained in these instructions.

(R. 3165). During voir dire examination the prosecutor told the entire panel that sympathy should not be considered:

> On the other hand, if that evidence convinces you beyond a reasonable doubt that the defendant is guilty, would you agree to set aside any sympathy you may feel for the defendant and return a verdict of guilty? Can you do that? Very good.

(R. 725).

> MR. HOWELL: Do you understand that, Mr. Lindeblad, at the same time that sympathy for someone or bias against some whether it be a witness or a judge or one of the court personnel or the attorney's or the defendant, that that really isn't evidence, right, because that's not testimony and that's not physical evidence like the pen?
>
> MR. LINDEBLAD: Uh-huh.
>
> MR. HOWELL: Because it is not evidence that sympathy for someone or that bias against someone else really can't come into play in your decision. Do you have any problem with that?
>
> MR. LINDEBLAD: No, sir.
>
> MR. HOWELL: Who feels that I kind of feel sorry for this guy and I really think that should be considered and we should be able to consider that and use that in reaching your decision?
>
> Mr. Nichols, do you feel like you should be able to use sympathy in helping you reach your verdict?
>
> MR. NICHOLS: No, I don't think so.

(R. 1078-79). The court instructed the jury to ignore any feeling of sympathy during their deliberations (R. 3165). At the penalty phase the jury was not instructed that sympathy or mercy

could be considered during their sentencing deliberations. Under Mills v. Maryland, 108 S. Ct. 1860 (1988), eighth amendment error occurred because the jurors may reasonably believe that sympathy and/or mercy was precluded from consideration. The record in its entirety, reflects the eighth amendment violation in Mr. Roberts' case.

In Penry v. Lynaugh, 109 S. Ct. 2934 (1989), the United States Supreme Court held that the jury's ability to make "a discretionary grant of mercy" is an eighth amendment requirement.

> The State conceded at oral argument in this Court that if a juror concluded that Penry acted deliberately and was likely to be dangerous in the future, but also concluded that because of his mental retardation he was not sufficiently culpable to deserve the death penalty, that juror would be unable to give effect to that mitigating evidence under the instructions given in this case. Tr. of Oral Arg. 38. The State contends, however, that to instruct the jury that it could render a discretionary grant of mercy, or say "no" to the death penalty, based on Penry's mitigating evidence, would be to return to the sort of unbridled discretion that led to Furman v. Georgia, 408 U.S. 238, 922 S.Ct. 2726, 33 L.Ed.2d 346 (1972) We disagree.
>
> * * *
>
> "In contrast to the carefully defined standards that must narrow a sentencer's discretion to impose the death sentence, the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to decline to impose the death sentence." McCleskey v. Kemp, 481 U.S. 279, 304, 107 S.Ct. 1756, 1773, 95 L.Ed.2d 262 (1987)(emphasis in original).

109 S. Ct. at 2951.

Requesting the jury to dispel any sympathy they may have had towards the defendant undermined the jury's ability to reliably weigh and evaluate mitigating evidence. Parks v. Brown, 860 F.2d 1545 (10th Cir. 1988)(in banc). The jury's role in the penalty phase is to evaluate the circumstances of the crime and the character of the offender before deciding whether death is an appropriate punishment. Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). An admonition

which may be understood as directing the jury to disregard the consideration of sympathy improperly suggests to "the jury that it must ignore the mitigating evidence about the [petitioner's] background and character." California v. Brown, 479 U.S. 538, 107 S. Ct. 837, 842 (1987)(O'Connor, J., concurring).

In this case, there exists a substantial possibility that the jury may have understood that it was precluded from considering sympathy or mercy. Cf. Mills v. Maryland, 108 S. Ct. 1860, 1867 (1988). This prevented Mr. Roberts' jury from providing Mr. Roberts the "particularized consideration" the eighth amendment requires. Undeniably, the presentation of evidence in mitigation of punishment involves the jury's human, merciful reaction to the defendant. See Penry, supra; Peek v. Kemp, 784 F.2d 1479, 1490 and n.12 (11th Cir. 1986)(in banc)(the role of mitigation is to present "factors which point in the direction of mercy for the defendant"); see also Tucker v. Zant, 724 F.2d 882, 891 (11th Cir.), vacated for reh'g in banc, 724 F.2d 898 (11th Cir. 1984), reinstatement in relevant part sub nom. Tucker v. Kemp, 762 F.2d 1480, 1482 (11th Cir. 1985)(in banc). Allowing the jury to believe that "sympathy" may not enter their deliberations negates any evidence presented in mitigation, for it forecloses the very reaction that evidence is intended to evoke, and therefore precludes the sentencer from considering relevant, admissible (even if nonstatutory) mitigating evidence, in violation of Penry, supra; Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); Skipper v. South Carolina, 476 U.S. 1 (1986); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978), and the eighth and fourteenth amendments. This error undermined the reliability of the jury's sentencing determination and prevented the jury from fully assessing the mitigation reflected in the record of Mr. Roberts' case. 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 and renders it unreliable. See Jackson v. Dugger, supra; Penry, supra. 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 Florida and federal constitutional standards.

No tactical decision can be ascribed to counsel's failure to urge the claim. See Downs v. Dugger, supra. 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.

CLAIM XI

MR. ROBERTS' SENTENCING JURY WAS REPEATEDLY MISLED BY INSTRUCTIONS AND ARGUMENTS WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED THEIR SENSE OF RESPONSIBILITY FOR SENTENCING, CONTRARY TO HITCHCOCK V. DUGGER, 107 S. CT. 1821 (1987); CALDWELL V. MISSISSIPPI, 105 S. CT. 2633 (1985); AND MANN V. DUGGER, 844 F.2D 1446 (11TH CIR. 1988), AND IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. MR. ROBERTS RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO ZEALOUSLY ADVOCATE AND LITIGATE THIS ISSUE.

In Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(en banc), cert. denied, 44 Cr. L. 4192 (1988), relief was granted to a capital habeas corpus petitioner presenting a Caldwell v. Mississippi claim involving prosecutorial and judicial comments and instructions which diminished the jury's sense of responsibility and violated the eighth amendment in the identical way in which the comments and instructions discussed below violated Mr. Roberts' eighth amendment rights. Ricky Roberts should be entitled to relief under Mann, for there is no discernible difference between the two cases. A contrary result would result in the totally arbitrary and freakish imposition of the death penalty and violate the eighth amendment principles.

Caldwell v. Mississippi, 472 U.S. 320 (1985), involved prosecutorial/judicial diminution of a capital jury's sense of responsibility which is far surpassed by the jury-diminishing statements made during Mr. Roberts' trial. The en banc Eleventh Circuit in Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988), and Harich v. Duager, 844 F.2d 1464 (11th Cir. 1988), determined that Caldwell assuredly does apply to a Florida capital sentencing proceeding and that when either judicial instructions or prosecutorial comments minimize the jury's role relief is warranted. See Mann, supra. Caldwell involves the most essential eighth amendment requirements to the validity of any death sentence: that such a sentence be individualized (i.e., not based on factors having nothing to do with the character of

the offender or circumstances of the offense), and that such a sentence be reliable. Id., 105 S. Ct. at 2645-46.

At all trials there are only a few occasions when jurors learn of their proper role. At voir dire, the prospective jurors are informed by counsel and, on occasion, by the judge about what is expected of them. When lawyers address the jurors at the close of the trial or a segment of the trial, they are allowed to give insights into the jurors' responsibility. Finally, the judge's instructions inform the jury of its duty. In Mr. Roberts' case, as in Mann v. Dusser, at each of those stages, the jurors heard statements from the judge and/or prosecutor which diminished their sense of responsibility for the awesome capital sentencing task that the law would call on them to perform.

Throughout the proceedings, the court and prosecutor frequently made statements about the difference between the jurors' responsibility at the guilt-innocence phase of the trial and their non-responsibility at the sentencing phase. As to guilt or innocence, they were told they were the only ones who would determine the facts. As to sentencing, however, they were told that they merely recommended a sentence to the judge.

Mann v. Dusser makes clear that proceedings such as those resulting in Mr. Roberts' sentence of death violate Caldwell and the eighth amendment. In Mann, as in Mr. Roberts' case, the prosecutor sought to lessen the jurors' sense of responsibility during voir dire and repeated his effort to minimize their sense of responsibility during his closing argument. In Mann, the en banc Eleventh Circuit held that "the Florida [sentencing] jury plays an important role in the Florida sentencing scheme," 844 F.2d at 1454, and thus:

> Because the jury's recommendation is significant . . . the concerns voiced in Caldwell are triggered when a Florida sentencing jury is misled into believing that its role is unimportant. Under such circumstances, a real danger exists that a resulting death sentence will be based at least in part on the determination of a

> decisionmaker that has been misled as to the nature of its responsibility. Such a sentence, because it results from a formula involving a factor that is tainted by an impermissible bias in favor of death, necessarily violates the eighth amendment requirement of reliability in capital sentencing.

Id. at **1454-55.** The comments and arguments provided to Mr. Roberts' jurors were as egregious as those in Mann and went far beyond those condemned in Caldwell. Pertinent examples are reproduced immediately below.

From the very start of the trial the role of the jury in sentencing was trivialized in a steady stream of misstatements. The jury was repeatedly told it was the court -- not the jury -- that decides the sentence (R. **731, 732, 742, 774, 836, 840, 1089, 1090, 1091, 1091, 1097, 1284, 1290, 1470).** What was emphasized to Mr. Roberts' jury was not, as required, that the jury's sentencing role is integral, central and critical. Rather they were told the "final decision" was the judge's (R. **732, 1091)** and that the jury only makes a **"recommendation."**

The State misinformed the jury concerning the seriousness of their role in determining whether Mr. Roberts' lived or was put to death. The prosecutor told the entire venire panel from which Mr. Roberts' jury was selected:

> This case as the Judge has indicated to you is a case where the grand jury has indicted the defendant for several charges.
>
> One of the charges is first degree murder. The State has charged the defendant with first degree murder, two counts of robbery and one count of armed kidnapping. Is there anything about the charges in and of themselves, first degree murder, robbery, kidnapping, anything about those charges in and of themselves that make it difficult or impossible for anyone of you to render a fair and impartial verdict in this case?
>
> The Court is going to tell you the lawyers are going to tell you, during the course of their questioning, that the potential penalty in this case is death by electrocution. This is a capital punishment case.
>
> The charge being first degree murder,

the State will be seeking the death penalty. The Court is going to explain to you that the process of the trial of this case involves two parts.

The first part is for the jurors who are selected; 12 in number to determine whether or not the defendant is guilty; guilty of first degree murder, robbery, kidnapping, sexual battery. If the jury finds that the defendant is in fact guilty of any or all of those charges and in particular the first degree murder charge, that jury, you folks that will be chosen, will then have to sit through a second part where that decision will have to be made as to the penalty on the first degree murder charge.

You will hear evidence and have to render a recommendation to Judge Solomon as to whether or not the defendant should be sentenced to death or life in prison with no parole, for 25 years as is established by the legislature.

So, two parts. First part, is he guilty or is he not. If he is guilty, recommended to the Court whether he be sentenced to death or the other penalty that is possible for first degree murder.

Now, generally speaking--and I will ask you individually.

Can each one of you listen to the evidence and make a decision as to the guilt or innocence or the defendant in this case knowing that there will be a second part where you have to make a recommendation to the Court? Understand one thing before you answer. It is recommendation. Only whether or not the sentence is death or life with no parole for 25 years. The jury is a recommendation only.

(R. 730-32)(emphasis added). The prosecutor continued in this vein:

There is basically almost an imaginary line with a wall, if you will, right down the middle about what the Judge is supposed to do and what the jury is supposed to do.

The Judge is sort of the trier of the lot. He presides over everything. He instructs the jury on the law and he makes sure that everybody follows the law. He rules on objections that the lawyers make and he does have things to do with the law.

At the same time, the Judse is the person who also sentences the defendant should he be found guilty at some later point in time.

A jury, if we go into a death phase, that the person is found guilty of murder, then first-degree murder--excuse me. Then you will come back and render that decision and then you will hear more evidence at that point and then you will go back in the jury room and make a recommendation of death or life with a 25 year minimum mandatory without the possibility of parole.

Do each of you understand that it is merely a recommendation and that it is the Judge's job to be--to actually follow that recommendation or to not follow that recommendation whatever the recommendation might be?

(R. 1089-1090)(emphasis added).

[JUROR]: It is up to the Judge to make the final decision. Responsible totally to --

[THE PROSECUTOR]: I'm sorry?

[JUROR]: We still make the recommendation and have the Judge make a decision? It should be up to the Judge.

[THE PROSECUTOR]: Ultimately it is.

* * *

Ultimately it is the Judge's decision about what the sentence will be.

All other cases that I can think of except first-degree murder, it is the Judge's decision what the sentence will be in the State of Florida. Some states are different. But in the State of Florida on all cases except first-degree murder, the Judge decides that the sentence would be because without any penalty hearing--in other words, the jury doesn't make recommendations on other cases. In a death case, on the other hand, the Supreme Court has said the--the Florida Supreme Court has said that there will be a recommendation by the jury in a case. It is a recommendation.

The Judge follows the recommendation or does not follow the recommendation. But one way or the other, you can recommend death and he can sentence the person to life and you can recommend life and he can sentence the person to death. There has to be legal findings, but the Judge could do that. Whether or not that is the best thing or not, the best thing I don't know if I can tell you that.

But that is one thing I was really asking about was whether or not you would be able to follow the law even though perhaps you don't think it is a good law maybe or the

best law or you don't like that particular law. Would you be able to follow the law?

* * *

[THE PROSECUTOR]: Yes. The jury recommends and the Judge sentences and it is not your right and that is maybe--that's why maybe the answer to Mr. Balmaseda's question and that's that there is--there is that buffer between the sentencing of the Court and the case itself and that is that the jury gets to get some input into it and it is not automatic. You are right.

(R. 1097).

The jury was lulled into a false and improper sense of non-responsibility for determining the sentence:

THE COURT: "Ladies and gentlemen of the jury, you have found the Defendant, Mr. Ricky Roberts, guilty of first-degree murder."

"The punishment for this crime is either death or life imprisonment without the possibility of parole for 25 **years."**

"The final decision as to what punishment should be imposed rests solely with the judge of the court, however, the law requires that you, the jury, present to the Court an advisory sentence as to what punishment should be imposed upon the Defendant."

"The State and the Defense may present evidence relative to the nature of the crime and the character of the Defendant."

* * *

"At the conclusion of the taking of the evidence and after argument of counsel, you will be instructed on the factors in aggravation and mitigation that you may consider."

(R. 3258-59). The Court instructed the jury during the penalty phase:

THE COURT: (Solomon, J.): "Ladies and gentlemen of the jury, it is now your duty to advise the Court as to what punishment should be imposed upon the Defendant for his crime of First-Degree Murder. As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge, however, it is your duty to follow the law that will now be given to you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the

imposition of a death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist."

"Your advisory sentence should be based upon the evidence that you have heard while trying the guilt or innocence of the Defendant and evidence that has been presented to you in these proceedings."

"The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence.

(R. 3496-3497).

Rather than stressing that the jury's sentencing decision is integral, and will stand unless patently unreasonable, the court and the prosecutor stressed to Mr. Roberts' jury that the "final decision" was the courts.

I don't remember a jury ever spending so much time sifting through the evidence in trying to reach a verdict that they found was a fair verdict.

I'm sure there were times when you were back there over the past three weeks in this court trial where you really wished this day wouldn't come. I believe you wished that you really didn't have to render this decision to make a recommendation to see justice done about, to sentence Ricky Roberts to death by electrocution or to recommend to Judge Solomon that Ricky Roberts be sentenced to life imprisonment, but that day is upon us and you do have to render that decision, you do have to render that recommendation, whatever that recommendation is.

Now, there is the possibility -- I don't know that that happened or didn't happen, but there is a possibility in discussing cases, in deliberating in the guilty phase. In fact, some of you may have contemplated, even discussed the possibility that, "Look, we're finding him guilty of first degree murder, but we're really not going to make a recommendation of death." That was -- whether that discussion was had or not, I don't know but let's assume for a moment that it was. It's a natural thing to do, in trying to reach a compromise or trying to work out something over a long period of time. It's a natural thing to do, to make those compromises, to make those agreements, but it's not a proper or legal thing to do because when we started the guilt phase of this case we all talked about keeping an open mind, how important it was to keep an open mind all the way through the jury

instructions and then go on to decide.

It's just as important, as you have seen, I believe to keep an open mind during the guilt phase that you really didn't know about -- excuse me --- things you learned in the penalty phase that you really didn't know about in the guilt phase.

You made that commitment to me prior to the sentences of imprisonment and all those things, so any agreements that were reached, if they were reached are not legal agreements and should not be held.

Let's consider the evidence that we have in reaching a legal decision.

Now there are basically two volumes, if you will, of evidence that you can consider in reaching your recommendation. The one volume of evidence is all those facts that you learned in the trial itself during the two week period that we had. Everything you learned there you can use in determining what the appropriate sentence should be.

You are not required to forget all that that you already know. In fact, you're required to use those things which you know.

The second body of evidence, the second volume of evidence and if you will, talks about, which can be used in rendering a decision, is that additional evidence which was presented in the penalty phase yesterday and today.

You use those, all that knowledge in determining what the appropriate recommendation would be.

Remember that you are renderins a recommendation; the judge, his Honor Judse Solomon deals with what the sentence actually is. You merely render a recommendation that you will give to Judse Solomon.

It does not have to be a unanimous agreement of all the jurors like you had to agree unanimously to the person who is guilty.

You so in there, you talk it over, and when you have reached that. how many of you are for death and how many of you are for life, then you just come out and tell Judse Solomon that, "We're nine-three," or "We're eight-four or "We're six and six for death or for life."

Then if it's death, that's a legal recommendation.

It isn't necessary for you to be 12-0 sitting for life or death.

> You discuss those points and when you have reached a decision you tell Judge Solomon how many of you are for life and how many of you are for, actually, for death, keeping in mind that if you say, if you split into six, six for life and six for death, then there is a recommendation under the law to Judge Solomon for a life sentence.

(R. 3438-3442).

Again and again, the jury was told it is the judge who "pronounces" sentence (E.g., R. **732, 1090, 1091, 1092, 3258, 3496).** The jury, as if their sentencing determination were but a political straw poll, were told that they were simply making a recommendation (R. **732, 1089, 1090, 1092, 1097, 3439, 3441, 3442),** providing a view which could be taken for whatever it was worth by the true sentencing authority who carried the entire responsibility on his shoulders -- the judge. At the guilt-innocence phase, the jury was instructed: "It is the judge's job to determine what a proper sentence would be if the Defendant is guilty." (R. **3165).** Then, at sentencing, they were time and again instructed that their role was merely advisory and only a recommendation which could be accepted or rejected as the sentencing judge saw fit. "[W]hen you have reached that, how many of you are for death and how many of you are for life, then you just come out and tell Judge Solomon." (R. **3441).**

These instructions, and the trial judge's earlier comments, like the instructions in Mann, "expressly put the court's imprimatur on the prosecutor's previous misleading statements." Id. at **1458.** Cf. Mann, **844 F.2d** at **1458** ("[A]s you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge." [Emphasis in original]).

In a capital case, the jurors are placed "in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice . . . Given such a situation, the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an

intolerable danger that the jury will in fact choose to minimize the importance of its role." Caldwell v. Mississippi, 105 S. Ct. 2633, 2641-42 (1985)(emphasis supplied). When we understand these factors, we can appreciate why comments and instructions such as those provided to Mr. Roberts' jurors, and condemned in Mann, served to diminish their sense of responsibility, and why the State cannot show that the comments at issue had "no effect" on their deliberations. Caldwell, 105 S. Ct. at 2645-46.

The comments here at issue were not isolated, but were made by prosecutor and judge at every stage of the proceedings. They were heard throughout, and they formed a common theme: the judge had the final and sole responsibility, while the critical role of the jury was substantially minimized. The prosecutor's and the judge's comments allowed the jury to attach less significance to their sentencing verdict, and therefore enhanced the risk of an unreliable death sentence. Mann v. Dugger; Caldwell v. Mississippi.

Under Caldwell the central question is whether the prosecutor's comments minimized the jury's sense of responsibility. See Mann, 844 F.2d at 1456. If so, then the reviewing court must determine whether the trial judge sufficiently corrected the prosecutor's misrepresentation. Id. Applying these questions to Mann, the en banc Court of Appeals found that the prosecutor did mislead or at least confuse the jury and that the trial court did not correct the misapprehension. Applying these same questions to Mr. Roberts' case, it is obvious that the jury was equally misled by the prosecutor, and that the prosecutor's persistent misleading and jury minimizing statements were not adequately remedied by the trial court. In fact, the trial court compounded the error.

Under Florida's capital statute, the jury has the primary responsibility for sentencing. In Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), the United States Supreme Court for the first

time held that instructions for the sentencing jury in Florida was governed by the eighth amendment. This was a retroactive change in law. See Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987), which excuses counsel's failure to object the adequacy of the jury's instructions and the impropriety of prosecutor's comments. Thus, the intimation that a capital sentencing judge has the sole responsibility for the imposition of sentence, or is in any way free to impose whatever sentence he or she sees fit, irrespective of the sentencing jury's own decision, is inaccurate, and is a misstatement of the law. See Mann v. Dugger, 844 F.2d at 1450-55 (discussing critical role of jury in Florida capital sentencing scheme). The judge's role, after all, is not that of the "sole" or "ultimate" sentencer. Rather, it is to serve as a "buffer where the jury allows emotion to override the duty of a deliberate determination" of the appropriate sentence. Cooper v. State, 336 So. 2d 1133, 1140 (Fla. 1976). While Florida requires the sentencing judge to independently weigh the aggravating and mitigating circumstances and render sentence, the jury's recommendation, which represents the judgment of the community, is entitled to great weight. Mann, supra; McCampbell v. State, 421 So. 2d 1072, 1075 (Fla. 1982). The jury's sentencing verdict may be overturned by the judge only if the facts are "so clear and convincing that virtually no reasonable person could differ." Tedder, 322 So. 2d at 910. Mr. Roberts' jury, however, was led to believe that its determination meant very little, as the judge was free to impose whatever sentence he wished. Cf. Mann v. Dugger.

In Caldwell, 105 S. Ct. 2633, the Court held "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death lies elsewhere," id., 105 S. Ct. at 2639, and that therefore prosecutorial arguments which tended to

diminish the role and responsibility of a capital sentencing jury violated the eighth amendment. Because the "view of its role in the capital sentencing procedure" imparted to the jury by the improper and misleading argument was "fundamentally incompatible with the eighth amendment's heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case,'" the Court vacated Caldwell's death sentence. Caldwell, 105 S. Ct. at 2645. The same vice is apparent in Mr. Roberts' case, and Mr. Roberts is entitled to the same relief.

The constitutional vice condemned by the Caldwell Court is not only the substantial unreliability that comments such as the ones at issue in Mr. Roberts' case inject into the capital sentencing proceeding, but also the danger of bias in favor of the death penalty which such "state-induced suggestions that the sentencing jury may shift its sense of responsibility" creates. Id. at 2640. A jury which is unconvinced that death is the appropriate punishment might nevertheless vote to impose death as an expression of its "extreme disapproval of the defendant's acts" if it holds the mistaken belief that its deliberate error will be corrected by the 'ultimate' sentencer, and is thus more likely to impose death regardless of the presence of circumstances calling for a lesser sentence. See Caldwell, 105 S. Ct. at 2641. Moreover, a jury "confronted with the truly awesome responsibility of decreeing death for a fellow human," McGautha v. California, 402 U.S. 183, 208 (1971), might find a diminution of its role and responsibility for sentencing attractive. Caldwell, 105 S. Ct. at 2641-42. As the Caldwell Court explained:

> In evaluating the prejudicial effect of the prosecutor's argument, we must also recognize that the argument offers jurors a view of their role which might frequently be highly attractive. A capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument on the issue of whether another

> should die, and they are asked to decide that issue on behalf of the community. Moreover, they are given only partial guidance as to how their judgment should be exercised, leaving them with substantial discretion. Given such a situation, the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize its role. Indeed, one could easily imagine that in a case in which the jury is divided on the proper sentence, the presence of appellate review [or judge sentencing] could effectively be used as an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless give in.

Id. at 2641-42 (emphasis supplied).

The comments and instructions here went a step further -- they were not isolated, as were those in Caldwell, but as in Mann were heard by the jurors at each stage of the proceedings. These cases teach that, given comments such as those provided to Mr. Roberts' capital jury, the State must demonstrate that the statements at issue had "no effect" on the jury's sentencing verdict. Id. at 2646. This the State cannot do. Here the significance of the jury's role was minimized, and the comments at issue created a danger of bias in favor of the death penalty. Had the jury not been misled and misinformed as to their proper role, had their sense of responsibility not been minimized, and had they consequently voted for life, such a verdict, for a number of reasons, could not have been overridden -- for example, the evidence of non-statutory mitigation was more than a "reasonable basis" which would have precluded an override. See Hall v. State, 14 F.L.W. 101 (Fla. 1989); Brookings v. State, supra, 495 So. 2d 135; McCampbell v. State, supra, 421 So. 2d at 1075. The Caldwell violations here assuredly had an effect on the ultimate sentence. This case, therefore, presents the very danger discussed in Caldwell: that the jury may have voted for death because of the misinformation it had received. This case also presents a classic example of a case where no Caldwell error can be deemed to have had "no effect" on the verdict.

Additionally, Hitchcock, supra for the first time held that the eighth amendment applied to the Florida penalty phase proceedings in front of the jury and did not just apply to the proceedings before the judge. In other words, for eighth amendment purposes, the jury is a sentencer, too. This was a retroactive change in law, and thus, this issue is cognizable now. His sentence of death is neither **"reliable"** nor "individualized."

This error undermined the reliability of the jury's sentencing determination and prevented the jury from assessing the full panoply of mitigation 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 and renders it unreliable. See Penry v. Lynaugh, supra. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings, see Wilson v. Wainwright, **474** So. 2d **1163** (Fla. **1985),** and it should now correct this error.

Moreover, the claim is now properly brought pursuant to the Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. This issue involved a classic violation of longstanding principles of Florida law. See Pait v. State, **112** So. 2d **380** (Fla. **1959).** 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 onlv 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. 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.

CLAIM XII

THE AGGRAVATING FACTOR OF UNDER SENTENCE OF IMPRISONMENT WAS GIVEN UNDUE WEIGHT BY THE JURY AND THE COURT THAT IMPOSED MR. ROBERTS' DEATH SENTENCE IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS, AND MAYNARD V. CARTWRIGHT, 108 S. CT. 1853 (1988).

At the penalty phase of Mr. Roberts' capital trial, the State argued to the jury for the imposition of a death sentence based on the presence of the aggravating factor of under sentence of imprisonment. Mr. Roberts was not incarcerated at the time of this offense, he had been placed on parole for a 1974 conviction committed in Maryland.

The State presented substantial proof of the presence of this aggravating factor. Sheriff Dyle, the officer who initially investigated the Maryland offense testified at the penalty phase that Roberts had been placed on parole after serving a sentence for the offense (R. 3298). The State also introduced parole documents from Maryland (R. 3306-3307).

During the State's argument at the penalty phase, the prosecutor argued that the aggravating factor of under sentence of imprisonment was present because Mr. Roberts was on parole at the time of this offense:

> MR. LANGE: Three.
>
> MR. HOWELL: Three, three.
>
> The first aggravating circumstance that we see is the one that we're going to argue first, the crime for which the Defendant has to be sentenced and was committed while the Defendant was under sentence of imprisonment.

> If you find that to have been proven, then there is an aggravating circumstance which you certainly can consider. This is sort of a cut and dry type of thing.
>
> In other words, the defendant was at the time under sentence of imprisonment when he committed the offense, or he wasn't, and the documents that we have introduced into this trial and the testimony that you have heard shows you that the Defendant, Ricky Roberts, had been convicted in Maryland in **1974** and had been at that time sentenced to life imprisonment and had ultimately been paroled from that sentence after serving approximately eight and one-half years in prison.
>
> Once again, he was paroled.
>
> He then came to Florida ultimately and committed the crimes against George Napoles and Michelle Rimondi which you have heard during the course of this trial.
>
> You might think, for example, "Well, the guy who was on parole, he wasn't under sentence of imprisonment, he wasn't in prison, he was on parole."
>
> Even though this is true, but the law says that if you're on parole that is a functional equivalent of a sentence of imprisonment so, if you find the Defendant, Ricky Roberts, was, in fact, on parole, as I think you will when you examine these documents, then the State has proven that first aggravating factor, that, is the crime was committed by the Defendant while he was under sentence of imprisonment.

(R. **3446**). The State stressed to the jury that this aggravating factor was present even though the defendant was on parole and not incarcerated at the time of this offense. The jury instructions provided that the jury was to weigh the aggravating circumstances against the evidence in mitigation in making its recommendation. The court denied the State's request for an instruction that the defendant's parole status established that he was under sentence of imprisonment at the time of the offense (R. **3430**). The court's sentencing findings accepted the State's theory that the defendant was under sentence of imprisonment because he was on parole at the time of the offense (R. 58).

This Court recently addressed the scope of the under sentence of imprisonment aggravating factor. The Court held that

this factor is less significant when the defendant is on parole and has not escaped from custody. Sonser v. State, ___ So. 2d ___, 14 F.L.W. 262 (Fla. 1989). The jury was never informed that this factor was less significant because Mr. Roberts was on parole at the time of the offense. This despite the fact the jury was instructed to weigh the aggravating circumstances against the evidence in mitigation. Obviously this weighing cannot properly occur when the jury does not know to give this aggravator little weight. The death sentence resulting from the misapplication of this factor is unreliable. Mr. Roberts was sentenced to death in violation of the eighth and fourteenth amendments. See Hitchcock, supra, Cartwright, supra, Claim VIII, supra, Claim IX, supra.

The aggravating and mitigating factors set forth in Florida's capital sentencing scheme allow for the imposition of a death sentence when aggravating circumstances outweigh mitigating circumstances. Each factor is assessed individually and given independent weight. It is of the role of the jury and the sentencing court to assess the evidence presented and determine on balance whether death is appropriate. Neither the court or the jury was apprised of the proper standard set forth in Sonser limiting the weight accorded to the under sentence of imprisonment aggravating factor. Due to this error, the court and the jury were unable to conduct the weighing function delineated under Florida's capital sentencing scheme. The evidence presented in support of this aggravating circumstance was accorded undue weight. Mr. Roberts' death sentence was improperly imposed.

Resentencing is warranted to correct the erroneous application of this aggravating factor. The sentencing court and the jury were presented with significant mitigating evidence. The jury's penalty recommendation was by the slimmest majority of only 7-5 in favor of death. Only one vote determined the jury's

penalty recommendation. The jury certainly felt that the evidence did not establish an overwhelming case in favor of death. Properly instructed about the diminished weight of the sentence of imprisonment aggravating circumstance, the jury would have recommended a life sentence. Due to the significant mitigating factors present in the record, the court could not have overridden the life recommendation. Tedder, Hall. A new penalty proceeding before a jury is necessary to give proper weight to this aggravating circumstance.

This error undermined the reliability of the jury's sentencing determination and prevented the jury from assessing the full panoply of mitigation presented by Mr. Roberts. See Penry, supra. 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 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 Jackson v. Dugger, 14 F.L.W. 355 (Fla. 1989); 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 Godfrey V. Georgia, 446 U.S. 420 (1980). 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. Wainwrisht, 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.

CLAIM XIII

MR. ROBERTS' DEATH SENTENCE IS PREDICATED UPON THE FINDING OF AN AUTOMATIC, NON-DISCRETION-CHANNELING, STATUTORY AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Roberts was tried for three counts of first-degree murder and convicted for that offense. The State primarily relied on felony murder in seeking a first degree murder conviction. This automatically produced a statutory aggravating circumstance and Mr. Roberts thus entered the sentencing hearing already eligible for the death penalty, whereas other similarly (or worse) situated petitioners would not. Under these circumstances, petitioner's conviction and sentence of death violated his sixth, eighth and fourteenth amendment rights.

Mr. Roberts was indicted for first-degree murder pursuant to an indictment charging him in the usual form in Florida with killing "from a premeditated design" or "while engaged in the perpetration of, or in an attempt to perpetrate sexual battery and/or robbery and/or kidnapping" (R. 1). In Florida, the "usual form" of indictment for first-degree murder under sec. 783.04, Fla. Stat. (1987), is to "charg[e] murder . . . committed with a premeditated design to effect the death of the victim." Barton v. State, 193 So. 2d 618, 624 (Fla. 2d DCA 1966). The absence of felony murder language is of no moment: when a defendant is charged with a killing through premeditated design, he or she is

also charged with felony-murder, and the jury is free to return a verdict of first-degree murder on either theory. Blake v. State, 156 So. 2d 511 (Fla. 1963); Hill v. State, 133 So. 2d 68 (Fla. 1961). The jury returned a verdict of guilty of first degree murder as charged in the indictment (R. 47).

Throughout the State's case-in-chief and in closing argument, the prosecutor attempted to prove and urged the jury to convict Mr. Roberts of first-degree murder based upon felony murder. Thus, when the jury returned the guilty verdict, it had already found at least one aggravating circumstance upon which to sentence Mr. Roberts to death. In fact, during its penalty phase closing argument, the State noted this in arguing the existence of aggravating circumstances:

> The next one that does apply, however, is this one, that the evidence has been shown, in number four, the crime for which the Defendant is to be sentenced was committed while the Defendant was engaged in a sexual battery, or a kidnapping.
>
> You heard the evidence, you know the evidence in the trial that you heard.
>
> You know that Michelle Rimondi, that after George Napoles was killed, Michelle Rimondi was raped and she was actually kidnapped. Well, it requires, as you read that, it requires that this rape and this kidnapping, is murder to be aggravating circumstances to be done, for murder to be done while engaged in the rape or the kidnap -- we know that the rape and the kidnap occurred after the murder, so how can you commit a murder, I mean, how can you commit a murder while engaged in rape or kidnapping. Well, the murder has already occurred before the rape or the kidnap.
>
> I think to answer that question we should really look to the facts of the case to answer it, and not take these facts as isolated incidents, but to look at them as a whole.
>
> When Ricky Roberts was crossing over on Key Biscayne he was driving and he saw one head in the car. He could see the head of Michelle Rimondi because George Napoles was reclining in his seat. George Napoles was half passed out in the back seat. Obviously he could only see one female's head in the car and that's exactly what Ricky Roberts saw

> when he was going over to Key Biscayne, driving over on Key Biscayne that day.
>
> It was his intent at that moment to commit the forcible felony of rape, not murder. His intent to commit murder was formed later.
>
> He was intending to commit rape, that's why he was cruising in these lover lane areas. That's why he was driving at that time of night and that's why he was driving and cruising in this lover's lane. A few days before this murder a car looking like his was physically stopped over there right across the street from where the crime occurred.
>
> I think you also remember that once he had approached Michelle Rimondi, once things started to happen, everybody was out of the car, he started to pat Michelle Rimondi. He touched her, as I recall, on only two places: One was on the breast and one was near her waist or her crotch area there. I think it's indicative of the fact that he was there at that time intending to commit a sexual battery on Michelle Rimondi.
>
> It was George Napoles who stood in his way. It was George Napoles who was to prevent him from committing the rape that was on his mind, therefore, it was necessary to eliminate George Napoles in order to facilitate the commission of that rape.
>
> When you take all these factors into consideration I think the evidence will show that the Defendant committed the murder while he was engaged in the commission of a rape or a kidnapping.

(R. **3449-51**).

The judge likewise instructed the jury that they could rely upon their guilty verdict in determining, at the penalty phase, whether aggravating circumstances existed:

> Your advisory sentence should be based upon the evidence that you have heard while trying the guilt or innocence of the defendant and evidence that has been presented to you in these proceedings

(R. **3496**).

Because the jury was led to believe that it entered the penalty phase having already found at least one aggravating circumstance as a matter of law, petitioner's sentence of death is unconstitutional. This is so because the death penalty in

this case was predicated upon an unreliable automatic finding of a statutory aggravating circumstance -- the very felony murder finding that formed the basis for conviction. Automatic death penalties upon conviction of first degree murder violate the eighth and fourteenth amendments, as the United States Supreme Court explained in Sumner v. Shuman, 107 S. Ct. 2716 (1987). As the sentencing order makes clear, felony murder was found as a statutory aggravating circumstance. The sentencer was entitled automatically to return a death sentence upon a finding of guilt of first degree (felony) murder. Every felony-murder would involve, by necessity, the finding of a statutory aggravating circumstance, a fact which, under the particulars of Florida's statute, violates the eighth amendment: an automatic aggravating circumstance is created, one which does not "genuinely narrow the class of persons eligible for the death penalty," Zant v. Stephens, 462 U.S. 862, 876 (1983), and one which therefore renders the sentencing process unconstitutionally unreliable. Id. In short, if Mr. Roberts was convicted for felony murder, he then faced statutory aggravation for felony murder. This is too circular a system to meaningfully differentiate between who should live and who should die, and it violates the eighth and fourteenth amendments.

Recently, the United States Supreme Court addressed the problem of an automatic aggravating circumstance in Lowenfield v. Phelps, 108 S. Ct. 546 (1988), and the discussion in Lowenfield illustrates the constitutional shortcomings in Mr. Roberts' capital sentencing proceeding. The United States Supreme Court found that the definition of first degree murder under Louisiana law that was found in Lowenfield provided the narrowing necessary for eighth amendment reliability. The Court discussed the requirement that the capital-sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty" and went on to say:

> Under the capital sentencing laws of most States, the jury is required during the sentencing phase to find at least one aggravating circumstance before it may impose death. Id., at 162-164 (reviewing Georgia sentencing scheme); Proffitt v. Florida, 428 U.S. 242, 247-250 (1976) (reviewing Florida sentencing scheme). BY doing so, the jury narrows the class of persons eligible for the death penalty according to an objective legislative definition. Zant, supra, at 878 ("[S]tatutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty").

The court had upheld the death sentence in Zant v. Stephens, 462 U.S. 862 (1983), because the Georgia statute provided the appropriate "narrowing" required by the Constitution. But the Court made it clear that the narrowing function could be "performed by jury findings at either the sentencing phase of the trial or the guilt phase." (Id. at 554). That had been made clear by the opinion in Jurek v. Texas, 428 U.S. 262 (1976), which was quoted by the Lowenfield court:

> "While Texas has not adopted a list of statutory aggravating circumstances the existence of which can justify the imposition of the death penalty as have Georgia and Florida, its action in narrowins the catesories of murders for which a death sentence may ever be imposed serves much the same purpose . . . . In fact. each of the five classes of murders made capital by the Texas statute is encompassed in Georgia and Florida by one or more of their statutory aggravating circumstances . . . . Thus, in essence, the Texas statute requires that the jury find the existence of a statutory aggravating circumstance before the death penalty may be imposed. So far as consideration of aggravating circumstances is concerned, therefore, the principal difference between Texas and the other two States is that the death penalty is an available sentencing option--even potentially--for a smaller class of murders in Texas." 428 U.S., at 270-271 (citations omitted).

The Court summarized:

> It seems clear to us from this discussion that the narrowing function required for a regime of capital punishment may be provided in either of these two ways: The legislature may itself narrow the definition of capital offenses, as Texas and Louisiana have done,

> so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase. See also Zant, supra, at 876, n. 13, discussing Jurek and concluding, "in Texas, aggravating and mitigating circumstances were not considered at the same stage of the criminal prosecution."

Id. at 554-55 (emphasis added).

Thus, if narrowing occurs either in the conviction stage (as in Louisiana and Texas) or at the sentencing phase (as in Florida and Georgia), then the statute may satisfy the eighth amendment. However, as applied, the operation of Florida law in this case did not provide constitutionally adequate narrowing at either phase, because conviction and aggravation were predicated upon the same non-legitimate narrower -- felony-murder. The conviction-narrower state schemes require something more than felony-murder at guilt-innocence. Louisiana requires intent to kill. Texas requires intentional and knowing murders. This narrows. Here, however, Florida allows a first-degree murder death sentence to be based upon a finding that does not legitimately narrow -- felony murder. Mr. Roberts' conviction and sentence required only a finding that he committed a felony during which a killing occurred, and no finding of intent was necessary.

Clearly, "the possibility of bloodshed is inherent in the commission of any violent felony," Tison v. Arizona, 107 S. Ct. 1676, 1684 (1987), but rape, robbery or kidnapping, for example, are nevertheless offenses for which "a sentence of death is grossly disproportionate and excessive punishment." Coker v. Georgia, 433 U.S. 584, 591-92 (1977). With felony-murder as the narrower in this case, the statutory aggravating circumstance did not meet constitutional requirements. Here, there are no constitutionally valid criteria for distinguishing Mr. Roberts' sentence from those who have committed felony (or, more importantly, premeditated) murder and not received death.

> so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowins by jury findings of aggravating circumstances at the penalty phase. See also Zant, supra, at 876, n. 13, discussing Jurek and concluding, "in Texas, aggravating and mitigating circumstances were not considered at the same stage of the criminal prosecution."

Id. at 554-55 (emphasis added).

Thus, if narrowing occurs either in the conviction stage (as in Louisiana and Texas) or at the sentencing phase (as in Florida and Georgia), then the statute may satisfy the eighth amendment. However, as applied, the operation of Florida law in this case did not provide constitutionally adequate narrowing at either phase, because conviction and aggravation were predicated upon the same non-legitimate narrower -- felony-murder. The conviction-narrower state schemes require something more than felony-murder at guilt-innocence. Louisiana requires intent to kill. Texas requires intentional and knowing murders. This narrows. Here, however, Florida allows a first-degree murder death sentence to be based upon a finding that does not legitimately narrow -- felony murder. Mr. Roberts' conviction and sentence required only a finding that he committed a felony during which a killing occurred, and no finding of intent was necessary.

Clearly, "the possibility of bloodshed is inherent in the commission of any violent felony," Tison v. Arizona, 107 S. Ct. 1676, 1684 (1987), but rape, robbery or kidnapping, for example, are nevertheless offenses for which "a sentence of death is grossly disproportionate and excessive punishment." Coker v. Georgia, 433 U.S. 584, 591-92 (1977). With felony-murder as the narrower in this case, the statutory aggravating circumstance did not meet constitutional requirements. Here, there are no constitutionally valid criteria for distinguishing Mr. Roberts' sentence from those who have committed felony (or, more importantly, premeditated) murder and not received death.

The jury did not specifically find premeditation. "To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined by the trial court." Cole v. Arkansas, 333 U.S. 196, 202 (1948). The principle that a reviewing court cannot utilize a basis for review of a conviction different from that which was litigated and determined by the trial jury applies with equal force to the penalty phase of a capital proceeding. In Presnell v. Georgia, 439 U.S. 14 (1978), the United States Supreme Court reversed a death sentence where there had been no jury finding of an aggravating circumstance, but the Georgia Supreme Court held on appeal there was sufficient evidence to support a separate aggravating circumstance on the record before it. Citing Cole v. Arkansas, the United States Supreme Court reversed, holding:

> These fundamental principles of fairness apply with no less force at the penalty phase of a trial in a capital case than they do in the guilty/determining phase of a criminal trial.

Presnell, 439 U.S. at 18. Neither this Court, nor any other court, can "affirm"" based on premeditation when it cannot be said that the conviction was obtained based upon premeditation. Felony-murder could have been the basis for the jury's death verdict. See Mills v. Maryland, 108 S. Ct. 1860 (1988). This error undermined the reliability of the jury's sentencing determination and prevented the jury from assessing the full panoply of mitigation 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 and renders it unreliable. See Penry v. Lynaugh, supra. 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. 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.

CLAIM XIV

THE EIGHTH AMENDMENT WAS VIOLATED BY THE SENTENCING COURT'S REFUSAL TO FIND THE MITIGATING CIRCUMSTANCES CLEARLY SET OUT IN THE RECORD.

Pursuant to the eighth and fourteenth amendments, a state's capital sentencing scheme must establish appropriate standards to channel the sentencing authority's discretion, thereby "eliminating total arbitrariness and capriciousness" in the imposition of the death penalty. Proffitt v. Florida, 428 U.S. 242 (1976). On appeal of a death sentence the record should be reviewed to determine whether there is support for the sentencing

court's finding that certain mitigating circumstances are not present. Magwood v. Smith, 791 F.2d 1438, 1449 (11th Cir. 1986). Where that finding is clearly erroneous the defendant "is entitled to new resentencing." Id. at 1450.

The sentencing judge in Mr. Roberts' case found no mitigating circumstances (R. 55). Finding three aggravating circumstances the court imposed death (R. 58). The court's conclusion that no mitigating circumstances were present, however, is belied by the record, and in fact establishes that the trial court refused to weigh the mitigation presented. This violated Eddings v. Oklahoma, 455 U.S. 104 (1982), and Penry v. Lynaugh, 109 S. Ct. 2934 (1989).

Both statutory and nonstatutory mitigating circumstances were set forth in the record. The record clearly established that Mr. Roberts suffered from brain damage that seriously impaired his capacity to conform his conduct to the requirements of the law. While the evidence of organic brain syndrome may not have risen to the level of a statutory mitigating circumstance, evidence of mental illness was a nonstatutory mitigating factor.

Substantial evidence was presented through the testimony of mental health experts that established Rickey Roberts' history of drug abuse. Other evidence that was never presented at trial revealed that Mr. Roberts had been using cocaine and marijuana on the night of the offense. Clearly this was nonstatutory mitigating evidence.

The jury's penalty recommendation was by the slimmest of margins; 7-5 to impose death. Some of the juror's obviously felt that the defense had presented sufficient mitigating evidence to warrant a sentence other than death. There was mitigation presented. The State did not contest this evidence; however, the court refused to find this mitigation:

> In conclusion, this Court finds that there are no mitigating circumstances, either statutory or non-statutory, which apply in this case. This Court has reviewed the

entire record, including the testimony and evidence in the trial and sentencing proceeding to determine whether there might possibly exist anything whatsoever of a non-statutory mitigating nature, that could be considered by this Court in mitigation of the sentence. The Court, after having completely made such an exhaustive examination, finds the record completely devoid of any evidence which is suggestive of mercy or mitigating circumstances for the defendant.

(R. 58-59).

Despite the presence of clearly mitigating evidence, the court concluded that no mitigation was present. In Eddings v. Oklahoma, **455** U.S. **104 (1982),** by a **5-4** majority the Supreme Court reversed a death sentence. Justice O'Connor writing separately explained why she concurred in the reversal:

> In the present case, of course, the relevant Oklahoma statute permits the defendant to present evidence of any mitigating circumstance. See Okla. State., Tit. **21,** Section 701.10 **(1980).** Nonetheless, in sentencing the petitioner (which occurred about one month before Lockett was decided), the judge remarked that he could not "in following the law. **. .** consider the fact of this young man's violent background." App. **189.** Although one can reasonably argue that these extemporaneous remarks are of no legal significance, I believe that the reasoning of the plurality opinion in Lockett compels a remand so that we do not "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." **438** U.S., at **605, 98** S. Ct., at **2965.**
>
> I disagree with the suggestion in the dissent that remanding this case may serve no useful purpose. Even though the petitioner had an opportunity to present evidence in mitigation of the crime, it appears that the trial judge believed that he could not consider some of the mitigating evidence in imposing sentence. In any event, we may not speculate as to whether the trial judge and the Court of Criminal Appeals actually considered all of the mitigating factors and found them insufficient to offset the aggravating circumstances, or whether the difference between this Court's opinion and the trial court's treatment of the petitioner's evidence is "purely a matter of semantics," as suggested by the dissent. Woodson and Lockett require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court.

455 U.S. at **119-20.** See Lamb v. State, **532** So. 2d **1051, 1054**

(Fla. 1988)(Resentencing required where unclear whether trial judge refused to consider mitigation or merely gave it little weight.)

Justice O'Connor's opinion makes clear that the sentencer is entitled to determine the weight due a particular mitigating circumstance; however, the sentencer may not refuse to consider that circumstance as a mitigating factor. Here, that is undeniably what occurred. The judge said mitigating circumstances were not present and held that they were not to be considered.

Under Eddinss, supra, Lamb, supra, and Magwood, supra, the sentencing court's refusal to accept and find the statutory and non-statutory mitigating circumstances which were established was error. Mitigating circumstances that are clear from the record must be recognized or else the sentencing is constitutionally suspect. The required balancing cannot occur when the "ultimate" sentencer has failed to consider obvious mitigating circumstances. This error undermined the reliability of the judge's sentencing determination and prevented the judge from assessing the full panoply of mitigation presented by Mr. 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 and renders it unreliable. See Eddinss, supra. 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. Wainwrisht, 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. Wainwrisht, 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. Wainwrisht, supra, 474 So. 2d at 1164-65; Matire, supra. Accordingly, habeas relief must be accorded now.

CLAIM 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.

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 the fact weighs the to determine whether death or a sentence other than death is appropriate.

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 information was revealed by an attorney. This ruling upheld the State's assertion of 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. Lynaush, 109 S. Ct. 2934 (1989). Mr. Roberts was denied the right to present the jury with substantial information relevant to their penalty decision. This error undermined the reliability of the jury's sentencing determination and prevented the jury from assessing the full panoply of mitigation 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 and renders it unreliable. See Penry, supra. 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.

CLAIM XVI

THE INTRODUCTION OF NONSTATUTORY AGGRAVATING FACTORS SO PERVERTED THE SENTENCING PHASE OF MR. ROBERTS' TRIAL THAT IT RESULTED IN THE TOTALLY ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

In considering whether the death penalty constitutes cruel and unusual punishment in violation of the eighth and fourteenth amendments, Justice Brennan wrote:

> In determining whether a punishment comports with human dignity, we are aided also by a second principle inherent in the Clause--that the State must not arbitrarily

> inflict a severe punishment. This principle derives from the notion that the State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others. Indeed, the very words "cruel and unusual punishments" imply condemnation of the arbitrary infliction of severe punishments. And, as we now know, the English history of the Clause reveals a particular concern with the establishment of a safeguard against arbitrary punishments. See Granucci, "Nor Cruel and Unusual Punishments Inflicted": The Original Meaning, 57 Calif.L.Rev. 839, 857-60 (1969).

Furman v. Georsia, 408 U.S. 238, 274, 92 S. Ct. 2726, 2744 (1972)(Justice Brennan concurring)(footnote omitted).

When then faced with a challenge to Florida's capital sentencing scheme, the Supreme Court found it passed constitutional muster:

> While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of Furman are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.
>
> The directions given to judges and jury by the Florida statute are sufficiently clear and precise to enable the various aggravating circumstances to be outweighed against the mitigating ones. As a result, the trial court's sentencing discretion is guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed.

Gress v. Georsia, 428 U.S. 242, 96 S. Ct. 2960, 2969 (1976).

Thus, aggravating circumstances specified in the statute are exclusive, and no other circumstances or factors may be used to aggravate a crime for purposes of the imposition of the death penalty. Miller v. State, 373 So. 2d 882 (Fla. 1979).

> This court, in Elledse v. State, 346 So.2d 998, 1003 (Fla. 1977) stated:
>
> > We must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death.

> Strict application of the sentencing statute is necessary because the sentencing authority's discretion must be "guided and channeled" by requiring an examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.
>
> Proffitt v. Florida, **428** U.S. **242, 258, 96** S.Ct. **2960, 49** L.Ed.2d **913 (1976).**

Miller v. State, supra. See also Riley v. State, **366** So. 2d **19** (Fla. **1979),** and Robinson v. State, **520** So. 2d **1** (Fla. **1988).**

The prosecutor in his closing argument on penalty repeatedly referred to Mr. Roberts' lack of remorse, a factor that cannot be considered as an aggravating circumstance. The prosecutor in his description of the crime told the jury that Mr. Roberts stabbed the victim and then went home, showered, and went to work (T. **3448).** The prosecutor repeatedly remarked that Mr. Roberts was apathetic and had no remorse, no feeling for others (T. **3457-57; 3461).** In describing an alleged prior rape by Mr. Roberts the prosecutor told the jury that Mr. Roberts had raped a girl, choked her and left her for dead then calmly went to work (T. **3495).** The prosecutor stressed Mr. Roberts' lack of remorse in an attempt to elicit an emotional response from the sentencer.

The jury may have been swayed by this factor, and it is also clear that the court itself reacted emotionally as well. In its Findings in Support of Death Sentence the court noted that Mr. Roberts "continued to strike the helpless victim even after his purpose was accomplished." Findings in Support of Death Sentence, p. 10. The Court also determined that Mr. Roberts could:

> commit crimes with no care for the victims. This is evidenced by the testimony of the sexual battery victim as to the Defendant's attitude and demeanor after the murder. There is and was not one shred of caring or mercy for George Napoles by Rickey Roberts and after the beating. The Defendant could have summoned help, even anonymously, when he was away from the scene, but he did not.

Findings, p. 14. The Court fell prey to the State's emotional attack: it failed to make a reasoned sentencing decision comporting with statutory requirements.

The State's presentation of and the sentencer's consideration of nonstatutory aggravating circumstances prevented the constitutionally required narrowing of the sentencer's discretion. See, Maynard v. Cartwrisht, 108 S. Ct. 1853, 1858 (1988) and Lowenfield v. Phelps, 108 S. Ct. 546 (1988). Instead this impermissible aggravating factor evoked a sentence that was "an unguided emotional response," a clear violation of Mr. Roberts' constitutional rights. Penry v. Lynaugh, 109 S. Ct. 2934 (1989)

This error undermined the reliability of the jury's sentencing determination and prevented the jury from assessing the full panoply of mitigation 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 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 Florida law. See Miller, Riley, supra. It virtually "leaped out upon even a casual reading of transcript." Matire v. Wainwrisht, 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. See Johnson v. Wainwriaht, 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.

CLAIM 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.

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 presented hearsay testimony of the victim's account of the incident. Trial counsel objected to the introduction of his highly prejudicial hearsay testimony but appellate counsel failed to litigate this claim.

Testimony about the prior offense was presented through Sheriff Dyne, the officer who initially investigated the crime. Prior to Mr. Roberts' capital trial Sheriff Dyne interviewed the victim of the prior offense. Over the defense objections he presented extensive testimony about the victim's account of the prior offense (R. 3299).

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.

The defendant 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 Sheriff Dyne's hearsay testimony was error.

This Court recently addressed precisely this type of error in Rhodes v. State, 14 F.L.W. 342 (Fla. July 6, 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. 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 Sheriff 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. In Engle v. State, 4338 So.2d 803, 814 (Fla. 1983), cert. denied, 465 U.S. 1074 (1984), we stated:
>
> 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 923 (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 (1967)].
>
> 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, 14 F.L.W. at 344-345 (footnote omitted).

The admission of Sheriff Dyne's extensive testimony about the victim's account of the prior offense was error. Mr. Roberts was denied the opportunity to confront this evidence because the out of court declarant was never available to testify.

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. Wainwrisht, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error.

Moreover, the claim is now properly brought pursuant to the Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. This issue involved a classic violation of longstanding principles of Florida law. 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, 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.

CONCLUSION AND RELIEF SOUGHT

Claims III, IV, V, VI, IX, X, XI, XII, XIII, XV, XV, XVI and XVII set out above, all involve, inter alia, ineffective assistance of appellate counsel, as well as fundamental error. The appellate level right to counsel also comprehends the sixth amendment right to effective assistance of counsel. Evitts v. Lucey, 105 S. Ct. 830 (1985). Appellate counsel must function as "an active advocate," Anders v. California, 386 U.S. 738, 744, 745 (1967), providing his client the expert professional . . .

assistance . . . necessary in a system governed by complex laws and rules and procedures. . . ." Lucey, 105 S. Ct. at 835 n.6.

Even a single, isolated error on the part of counsel may be sufficient to establish that the defendant was denied effective assistance, Kimmelman v. Morrison, 106 S. Ct. 2574, 2588 (1986); United States v. Cronic, 466 U.S.S 648, 657 n.20 (1984); see also Johnson (Paul) v. Wainwrisht, 498 So. 2d 938 (Fla. 1987), notwithstanding the fact that in other aspects counsel's performance may have been "effective". Washinston v. Watkins, 655 F.2d 1346, 1355 (5th Cir.), reh. denied with opinion, 662 F.2d 1116 (1981).

Moreover, as this Court has explained, the Court's "independent review" of the record in capital cases neither can cure nor undo the harm caused by an appellate attorney's deficiencies:

> It is true that we have imposed upon ourselves the duty to independently examine each death penalty case. However, we will be the first to agree that our judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate. It is the unique role that advocate to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deviations from due process. Advocacy is an art, not a science. We cannot, in hindsight, precisely measure the impact of counsel's failure to urge his client's best claims. Nor can we predict the outcome of a new appeal at which petitioner will recieve adequate representation. We are convinced, as a final result of examination of the original record and appeal and of petitioner's present prayer for relief that our confidence in the correctness and fairness of the result has been undermined.

Wilson v. Wainwright, 474 So. 2d 1162, 1165 (Fla. 1985). "The basic requirement of due process," therefore, 'is that a defendant be represented in court, at everv level, by an advocate who represents his client zealously within the bouds of the law." Id. at 1164 (emphasis supplied).

Appellate counsel here failed to act as an advocate for his client. As in Matire v. Wainwrisht, 811 F.2d 1430, 1438 (11th Cir. 1987), there simply was no reason here for counsel to fail to urge meritorious claims for relief. Counsel ineffectively and through ignorance of the facts and law simply failed to urge them on direct appeal. As in Matire, Mr. Roberts is entitled to relief. See also, Wilson v. Wainwrisht, supra; Johnson v. Wainwright, supra. The "adversarial testing process" failed during Mr. Roberts' direct appeal -- because counsel failed. Matire at 1438, citing Strickland v. Washinston, 466 U.S. 668, 690 (1984).

To prevail on his claim of ineffective assistance of appellate counsel Mr. Roberts must show: 1) deficient performance, and 2) prejudice. Matire, 811 F.2d at 1435; Wilson, supra. As the foregoing discussion illustrates, Mr. Roberts has.

There are also presented as independent claims raising matters of fundamental error and/or are predicated upon significant changes in the law. Because the forgoing claims present substantial constitional questions which go to the heart of the fundamental fairness and reliability of Mr. Roberts' capital conviction and sentence of death, and of this Court's appellate review, they should be determined on their merits. At this time, a stay of execution, and a remand to an appropriate trial level tribunal for the requisite findings on contested evidentiary issues of fact -- including inter alia appellate counsel's deficient performance, -- should be ordered. The relief sought herein should be granted.

WHEREFORE, Rickey Bernard Roberts through counsel, respectfully urges that the Court issue its writ of habeas corpus and vacate his unconstitutional conviction and sentence of death. He also prays that the Court stay his execution on the basis of, and in order to fully determine, the significant claims herein presented. Since this action also presents question of fact, Mr. Roberts urges that the Court relinquish jurisdiction to the trial court, or assign the case to an appropriate authority, for the resolution of the evidentiary factual question attendant to his claims, including inter alia, questions regarding counsel's deficient performance and prejudice.

Mr. Roberts urges that the Court grant him habeas corpus relief, or alternatively, a new appeal, for all the reasons set forth herein, and that the Court grant all other and further relief which the Court may deem just and proper.

RESPECTFULLY SUBMITTED,

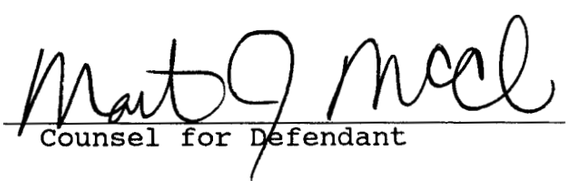
LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. **0125540**

MARTIN J. MCCLAIN
Assistant CCR
Florida Bar No. **0754773**

LINDA FELDMAN
Staff Attorney

TOM DUNN
Staff Attorney

OFFICE OF THE CAPITAL COLLATERAL
REPRESENTATIVE
1533 South Monroe Street
Tallahassee, FL **32301**
(904) 487-4376

By: 
Counsel for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by first class, U. S. Mail, postage prepaid to the Office of the Attorney General, Department of Legal Affairs, 401 N.W. 2nd Avenue, Suite N921, Miami, Florida 33128, this 28th day of September, 1989.

Matt J Mael
Attorney