IN THE SUPREME COURT OF FLORIDA

NO. 74,926

BRYAN FREDRICK JENNINGS,

Petitioner,

v.

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

Respondent.

AMENDED PETITION FOR EXTRAORDINARY RELIEF,
FOR A WRIT OF HABEAS CORPUS

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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. Jennings' capital conviction and sentence of death. In March, 1986, Mr. Jennings was sentenced to death. Direct appeal was taken to this Court. The trial court's judgment and sentence were affirmed. Jennings v. State, 512 So. 2d 169 (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. Wainwright, 498 So. 2d 938 (Fla. 1987); cf. Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Jennings to raise the claims presented herein. See, e.g., Jackson v. Dugger, 547 So. 2d 1197, (Fla., 1989); 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. Jennings' capital conviction and sentence of death, and of this Court's appellate review. Mr. Jennings' 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. Dugger, supra; Thompson v. Dugger, 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. Jennings' claims.

With regard to ineffective assistance, the challenged acts and omissions of Mr. Jennings' appellate counsel occurred before this Court. This Court therefore has jurisdiction to entertain Mr. Jennings' 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. Jennings 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. Jennings' claims are presented below. They demonstrate that habeas corpus relief is proper in this case.

II. GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Jennings 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. Jennings' 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. JENNINGS' JUDGE AND JURY CONSIDERED AND RELIED ON THE VICTIM'S PERSONAL CHARACTERISTICS, THE IMPACT OF THE OFFENSE ON THE VICTIM'S PARENTS, AND THE PROSECUTOR'S AND FAMILY MEMBERS' CHARACTERIZATIONS OF THE OFFENSE OVER DEFENSE COUNSEL'S TIMELY AND REPEATED OBJECTION IN VIOLATION OF MR. JENNINGS' EIGHTH AND FOURTEENTH AMENDMENT RIGHTS, BOOTH V MARYLAND, SOUTH CAROLINA V. GATHERS, JACKSON V. DUGGER, AND SCULL V. STATE.

Crimes against children are unparalleled in their capacity to evoke the human emotion of sympathy for the victim's parents while simultaneously engendering the emotional and unprincipled responses of rage, hatred, and revenge against the accused. The temptation to provoke such an unbridled and unprincipled emotional response from Mr. Jennings' judge and jury proved irresistible to the State. The Assistant State Attorney's opportunity to unleash these emotions at Mr. Jennings' trial came during the direct testimony of the victim's father, Mr. Robert Kunash, followed by testimony from the victim's school principal regarding the victim's participation in the school's May Day Pagent, their testimony was manipulated to elicit maximum emotional impact.

Having previously called the victim's mother, Mrs. Patricia Kunash, the State had elicited through her testimony those elements necessary to prove kidnapping and burglary. Directly after Mrs. Kunash's testimony, the State called Mr. Robert Kunash. Defense counsel for Mr. Jennings correctly anticipated the State's intention to elicit, and thereby contaminate Mr. Jennings' jury with, victim impact evidence and sought to insulate them from "contamination" as the following demonstrates:

> [THE PROSECUTOR]: Did you go to any other location to try to find Becky?
>
> [MR. KUNASH]: Yeah, I ran down to the school.
>
> Q. Was there a particular reason why you thought she might have gone to school?

MR. REYES [DEFENSE COUNSEL]: Judge, I am going to object. That's speculation.

MR. HOWARD [DEFENSE COUNSEL]: May we approach, Your Honor.

(Thereupon, the following proceedings were held out of the hearing of the jury as follows:)

MR. REYES: Judge, the objection is two grounds. It is not relevant as to why she was going to the school, it is prejudicial in this circumstance, and also --

THE COURT: I can't hear you, come forward.

MR. REYES: Judge, the primary objection is, it is prejudicial under the circumstances, and also it is speculation on the part of the father.

THE COURT: Well, I think if he has been asked to explain why he went to the school, I think that would be relevant as to why he thought the girl might be there. I think it could be highly relevant. Overrule the objection.

(Thereupon, the following proceedings were held in the hearing of the jury as follows:)

[THE PROSECUTOR]: Sir, could you explain to us why you though she might be at the school?

A. Becky was supposed to be the narrator of the first grade school play, because she learned how to read faster than anybody else, and she was really excited about it. I thought maybe there was some chance that, you know, she went there just, you know, because she told me all about the play and read me the whole story of it, and --

Q. When you went there, did you in fact find her?

A. No, sir, I didn't.

(R. 341-2)(emphasis added).

Having introduced the wholly irrelevant and highly prejudicial testimony from the victim's father regarding the victim's personal characteristics and participation in her school's May Day pageant under the ruse of explaining to the jury Mr. Kunash's attempts to locate his daughter, the State then abandoned even this thinly veiled pretext by calling the school's

principal to bolster the identical victim impact evidence already elicited from the victim's father. Once again defense counsel objected to no avail:

> [THE PROSECUTOR]: Would you please state your full name and spell your last name, for the benefit of the Court Reporter.
>
> A. Patricia Eyster, E-y-s-t-e-r.
>
> Q. And what is your home address?
>
> A. 1650 Central Avenue, Merritt Island, Florida.
>
> Q. What is your current occupation or profession?
>
> A. I am currently the Director of Primary Education for the Brevard County School System.
>
> Q. And how long have you held that position?
>
> A. I have been in this position for six and a half years.
>
> Q. Were you employed by the Brevard County School Board back on May 11th of 1979?
>
> A. Yes, I was.
>
> Q. And in what capacity were you employed by the School Board at that time?
>
> A. I was the Principal of Audubon Elementary School.
>
> Q. And where is Audubon Elementary School.
>
> A. Audubon Elementary School is on North Banana River Drive, on Merritt Island.
>
> Q. And in the course of your work at that school, did you come to know a child by the name of Rebecca Kunash?
>
> A Yes, I did.
>
> Q. I now show you what's previously been marked as State's Exhibit S for identification purposes, and ask you to take a look at this particular item. Do you recognize the person that you know as Rebecca Kunash in this photograph?
>
> A. Yes, I do.
>
> Q. And is this the individual who is standing or lying?

A. It is the individual that is lying.

Q. There appears to be two other individuals standings in the photographs. Do you know either of those two gentlemen?

A. No, I do not.

Q. So the only person you know is the child in this particular photograph?

A. Yes, sir.

Q. Is this a clear and accurate representation of -- or do you just recognize it as being her, at this time?

A. I recognize one part of her, her face there, I recognize Rebecca.

Q. How is it that you came to know Rebecca?

A. She was a first grade student as Audubon Elementary School.

Q. And are you related in any way to Rebecca Kunash, either by blood or by marriage?

A. No.

Q. Did it come to your attention at any particular time that she was missing?

A. Yes.

Q. And did you do anything in response to receiving that knowledge, to attempt to locate her?

A. Yes, we did. The janitor and I looked all around our building and on the grounds for Rebecca.

Q. And do you recall whether or not this is the same day or a different day that you learned about her disappearance?

A. This was the morning of the same day.

Q. Was there any particular activity going on in the school that day?

MR. HOWARD: Objection, Your Honor. May we approach, please?

(Thereupon, the following proceedings were had out of the hearing of the jury as follows:)

MR. HOWARD: Judge, we are going to object on the ground that this line of questioning is irrelevant and immaterial to the issue at hand, which is identification.

I anticipate after talking to the witness before the testimony, that her testimony is going to be concerning the school play and May Day. That's all fine and good, but the sole purpose would be to gain sympathy from the jury for the dead girl, and I know that we are going to have plenty of sympathy anyway, but I don't think that's a proper way to get it. She has identified the child it the photograph, the additional testimony is not going to aid in showing that she even knew the child or could identify her any better. She has already testified that she looked for the child high and low, she and the janitor both, and they did not find her.

MR. HOLMES: Your Honor, there has already been testimony that's been made in reference to that, her testimony would be that it was a major day at that school, in terms of the May Day and in terms of programs, and that she knew Rebecca Kunash and that she was a participant in those programs.

THE COURT: I think it is admissible to show or to explain why the parents thought that she might have gone to school prior to calling the sheriff, or looking around the home, and for that reason I'm going to permit it. Objection overruled.

MR. HOWARD: We would renew it on the additional ground that it is cumulative, Your Honor, Mr. Kunash already testified to that.

THE COURT: All right. Objection is overruled.

(Thereupon, the following proceedings were held in the hearing by the jury as follows:)

Q. (BY MR. HOLMES) Was there any particular activity that was planned to go on at school that day?

A. Yes, this was an annual event at Audubon, it was May Day.

Q. And you know whether or not Patricia (sic) was involved in any of those particular parts of the program?

A. Rebecca.

Q. I mean Rebecca, excuse me.

A. Yes, every child in the school was involved, in the first grade, they had a little program, Ms. Farmer, her teacher, they had a little program planned that day as part of the May Day festivities

MR. HOLMES: Thank you. No further questions of this witness.

(R. 487-92)(emphasis added).

The State's presentation of victim impact evidence before Mr. Jennings' jury and judge continued throughout the course of the proceedings. During the State's closing penalty phase argument the prosecutor sought a collective emotional response from Mr. Jennings' jury drawing upon the victim impact evidence and testimony adduced during guilt-innocence proceedings ultimately grounding the argument on the impact crimes against children have on their parents. Once again, defense counsel objected:

> [THE PROSECUTOR]: [E]ach one of those crimes are there to protect the things in society that we hold the most dear. What is more important than the security of a person's home, where parents can raise their children and have a safe place for them to sleep at night? What do we hold more dear? But yet in this case, that right, the right of the Kunashes to have this protection, the right of the child to be left alone in her home was violated by the act of the defendant.
>
> . . .
>
> MR. HOWARD [DEFENSE COUNSEL]: Your Honor, I must raise an objection. I think Mr. Holmes is coming perilously close to the Golden Rule argument, in that statement.
>
> THE COURT: I think it's proper argument. Overrule the objection.
>
> MR. HOWARD: Very well, Your Honor.
>
> MR. HOLMES: And this is a right that society recognizes and protects. And did the defendant violate that right? Absolutely. And not only that, who did he violate that right with? A six year old child. And who is society, who does society try to protect more than a child?

(R. 1658-9)(emphasis added).

The court was contaminated with additional and graphic victim impact evidence provided in the presentence investigation:

> Robert Kunash, father of the victim, states he thinks Jennings should receive the death penalty. He advises the incident literally tore his family apart. He states his wife still cries every night and does not want to go near a bridge. He and his wife were at the point of divorce but have been

> going to counseling and things have improved somewhat.

(Presentence Investigation at 10)(emphasis added). In addition, the presentence investigator offered his own characterization of the offense for the court's consideration:

> The instant offense must be considered the most atrocious and unconsciousable possible act to be perpetrated against another human being. There is little the Court nor any other agency can do to redress or recompense what has been done to the victim and her parents in this case but it is within the purview of the Court to insure that such an act will never be perpetrated by this defendant again. In view of the nature and gravity of the offense it is felt the maximum penalty is neither excessive nor inappropriate in this case.

(Id. at p. 11)(emphasis added).

Having properly preserved the issue at trial, counsel during the hearing on Mr. Jennings' motion for a new trial succinctly synthesized for the court the very basis upon which the United States Supreme Court, a year later, in Booth v. Maryland, 107 S. Ct. 2529 (1987), would preclude the use of victim impact evidence in capital trials. As defense counsel stated:

> MR. HOWARD: We felt that 3C, permitting the testimony concerning the participation of class play, was irrelevant to the issues in this case, that is, whether Mr. Jennings committed the crimes or not. It was unduly prejudicial in the sense that it impermissibly intended to elicit sympathy for the victim in the case, Rebecca Kunash, unlike civil cases where sometimes where day-in-the-life testimony is admissible. It is obviously not admissible in a criminal case except in the context of res gestae. There is no res gestae in connection between her being in the school play and her disappearance. The Court's ruling, as I recall, was it was relevant on the grounds that explained Mr. Kunash's actions in going to the school and to try to find her. But, again, we felt that in and of itself was irrelevant. She has disappeared. The disappearance was uncontested by the State. We did not contest identity in the case. The State proved it up. We did not stipulate to it. But had a stipulation been asked for it, we probably would have offered one.
>
> THE COURT: Do you have any case authority on that point, Mr. Howard?

MR. HOWARD: No, I don't. There has not been any case directly on point where this particular type of evidence has been admitted as I recall. Our argument is based on the general rule of evidence. That irrelevant [sic] evidence is admissible unless it is so prejudicial as to have the prejudicial effect outweigh the relevancy.

THE COURT: Well, it is your position that a victim in a crime must remain some plastic individual without any flesh being presented as to the personality of the victim?

MR. HOWARD: In some case, the personality of the victim becomes very important. As the Court is aware of self defense cases, things of this nature, the personality or the character of the victim is a material point in both the prosecution and the defense. There was no such defense raised here. The personality of the victim in this particular case, although I would not phrase it quite as the Court did, was irrelevant. Whether she was a nice little girl, a bad little girl, whether she was going out to just skip school would have made no difference in the consideration by the jury of the evidence.

THE COURT: All right. The Court still feels that the fact the the child was expected to be in the school play was relevant to the father's rushing to the school to look for her prior to calling the police. I still will stay with that ruling.

(R. 1716-18)(emphasis added).

In Booth, the United States Supreme Court held that "the introduction of [a victim impact statement] at the sentencing phase of a capital murder trial violates the Eighth Amendment." Id. at 2536. The victim impact statement in Booth contained descriptions of the personal characteristics of the victim, the emotional impact of crimes on the family and opinions and characterizations of the crimes and the defendant "creat[ing] a constitutionally unacceptable risk that the [sentencer] may [have] impose[d] the death penalty in a arbitrary and capricious manner." Id. at 2533 (emphasis added). Similarly, in South Carolina v. Gathers, 109 S. Ct. 2207 (1989), the court vacated the death sentence there based on admissible evidence introduced during the guilt-innocence phase of the trial from which the

prosecutor fashioned a victim impact statement during closing penalty phase argument. Booth and Gathers mandate reversal were the sentencer is contaminated by victim impact evidence or argument. The jury and judge relied on the victim impact evidence and argument in recommending a sentence of death. The trial court believed victims of crime need not remain "some plastic individual without any flesh being presented as to the personality of the victim." The court's own sentencing order expressly makes reference to the presentence investigation:

> The Court, having heard all the evidence in this case and having had the benefit of the updated presentence investigation and report conducted by the Florida Department of Corrections, Parole, and Probation Service, a complete copy having been provided to the Defendant and having had the benefit of an advisory sentence of death to be imposed upon the Defendant, the Court now makes its findings as to each of the aggravating and mitigating circumstances set forth in Florida Statutes and which were guidelines for the jury in its consideration of its advisory sentence.

(R. 1826)(emphasis added). Thus, Mr. Jennings' case presents not only the constitutionally unacceptable risk that the sentencer may have relied on victim impact evidence in violation of Booth, Gathers, and Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989), but actual reliance on victim impact evidence by the trial court. Scull v. State, 533 So. 2d 1137 (Fla. 1988). Zerquera v. State, ___ So. 2d ___, 14 F.L.W. 463 (Fla., Sept. 28, 1989).

Likewise, trial counsel's contemporaneous observations of Mr. Jennings' jury during the testimony of Robert Kunash strongly suggest that there is more than a mere risk such evidence was actually considered in their recommendation of death. As trial counsel has stated in his affidavit which was filed with Mr. Jennings' Rule 3.850 motion:

> 7. During the trial the state presented testimony that the victim was the narrator of her school play, that she was excited about this prospect, that she loved school, that she learned to read faster than anyone in her class, and other similar evidence from both family members, and her

> school principal. I objected strenuously to the admission of this highly inflammatory and prejudicial testimony. I stated my reasons for objecting, made a motion for a new trial, based in part on this inflammatory and prejudicial testimony. I believe that this testimony had no probative value, was irrelevant, and was not material to any of the elements at issue in this case. When my objections were overruled and the jury heard the inflammatory victim impact statements it was clear from their collective reactions that the testimony had an adverse effect. The jury was visibly inflamed by this irrelevant victim impact testimony, and, as this material was being presented, would turn and glare at Mr. Jennings. The adverse effect was heightened due to the fact that this testimony was presented early in the State's case, and I feel that, thereafter, the jurors were irreversably biased against Mr. Jennings. This material was exactly the same type of information the United States Supreme Court found repugnant to the Eighth Amendment.

(App. 2).

Sentencing procedures in capital cases must ensure "heightened reliability in the determination that death is the appropriate punishment." Woodson v. North Carolina, 428 U.S. 280, 305 (1976). See also Gardner v. Florida, 430 U.S. 349 (1977). The central purpose of these requirements is to prevent the "unacceptable risk that 'the death penalty [may be] meted out arbitrarily or capriciously' . . ." Caldwell v. Mississippi, 472 U.S. 320, 344 (1985)(O'Connor, J., concurring). Here, the proceedings v calling into question the reliability of Mr. Jennings' penalty phase. The State's evidence and argument was a deliberate effort to invoke "an unguided emotional response" in violation of the eighth amendment. Penry v. Lynaugh, 109 S. Ct. 2934, 2952 (1989). The evidence in question had little if any probative value. Certainly "the danger of unfair prejudice" substantially outweighed whatever probative value existed. Under section 90.403 of the evidence code, Mr. Jennings' objection should have been sustained.

Florida law also recognizes the constitutionally unacceptable risk that a jury may impose a sentence of death in

an arbitrary and capricious manner when exposed to victim impact evidence. In Jackson v. Dugger, 547 So. 2d 1197, (Fla. 1989), the court held that the principles of Booth are to be given full effect in Florida capital sentencing proceedings. As in Jackson, defense counsel for Mr. Jennings vigorously objected during the State's repeated introduction of victim impact evidence (R. 341; 491; 1658). As in Jackson, this claim was raised on direct appeal pre-Booth and Gathers. See Jennings v. State, 512 So. 2d 169, 172 (Fla. 1987). Jackson dictates that relief post-Booth and Gathers is now warranted in Mr. Jennings' case. Compare Jackson v. State, 498 So. 2d 406, 411 (Fla. 1986) with Jackson v. Dugger, supra.

The same outcome is dictated by the Florida Supreme Court's decision in Scull v. State, 533 So. 2d 1137 (Fla. 1988), where the court, again relying on Booth, noted that a trial court's consideration of victim impact statements from family members contained within a presentence investigation as evidence of aggravating circumstances constitutes capital sentencing error. As noted above, this is precisely what transpired at Mr. Jennings' sentencing. Scull, viewed in light of the Florida Supreme Court's pronouncement in Jackson that Booth represents a significant change in law, illustrates that habeas corpus relief is wholly appropriate.

The question is whether the Booth errors in this case may have affected the sentencing decision. Where, as in Booth and Gathers, contamination occurred, there is the risk of unreliability. Sentences of death must be premised upon "a reasoned moral response" as opposed to an "unguided emotional" one. Penry v. Lynaugh, 109 S. Ct. 2934, 2952 (1989). Since the prosecutor's argument "could [have] resulted" in the imposition of death because of impermissible considerations, Booth, 107 S. Ct. at 505, habeas corpus relief is required.

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. Jennings. For each of the reasons discussed above the Court should vacate Mr. Jennings' unconstitutional sentence of death.

CLAIM II

MR. JENNINGS' 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.

The Florida Supreme 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); Herzog v. State, 439 So.2d 1372 (Fla. 1983). This statement was improper because it misled the jury.

Rhodes v. State, ___ So. 2d ___, 14 F.L.W. 343, 345 (Fla. July 6, 1989)(emphasis added). In Cochran v. State, 547 So. 2d 928, 931 (Fla., 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.

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

discretion and violated Maynard v. Cartwright, 108 S. Ct. 1853 (1988). In addition, the judge employed the same erroneous nonstandard when sentencing Mr. Jennings to death.

The jury instructions given in Cartwright were virtually identical to the instructions given to Mr. Jennings' 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. Cartwright, 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. 1699). The Tenth Circuit's en banc opinion (unanimously overturning the death sentence) explained that the jury in Cartwright received a more detailed but yet inadequate instruction:

> [t]he 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 Cartwright clearly conflicts with what was employed in sentencing Mr. Jennings to death. See also Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(en banc)(finding that Cartwright and the eighth amendment were violated when heinous, atrocious, or cruel was not sufficiently limited).

The Florida Supreme 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,

and the jury in this case was never apprised of such a limiting construction. Here, both the judge and the jury applied precisely the construction condemned in Rhodes and Cartwright.[1]

Of course, the role of a Florida sentencing jury is critical. The Eleventh Circuit 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

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[1]Oklahoma's "heinous, atrocious, and cruel" aggravating circumstance was founded on Florida's counterpart, see Maynard v. Cartwright, 802 F.2d at 1219, and the Florida Supreme Court's construction in Dixon was adopted by the Oklahoma courts. There as here, however, the constitutionally required limiting construction was never applied.

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 659 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[7] 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. Dugger, 515 So.2d 173, 175 (Fla.1987); Downs v. Dugger, 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.[2] As the en 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, 431 U.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").

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[2]Footnote 7 cited above, id. at 1452, provided:

> The Supreme Court of Florida has permitted resentencing without a jury where the error in the original proceeding related to the trial court's findings and did not affect the jury's recommendation. See, e.g., Melendez v. State, 419 So.2d 312, 314 (Fla.1982); Mikenas v. State, 407 So.2d 892, 893 (Fla.1981), cert. denied, 456 U.S. 1011, 102 S.Ct. 2307, 73 L.Ed.2d 1308 (1982); Magill v. State, 386 So.2d 1188, 1191 (Fla. 1980), cert. denied, 450 U.S. 927, 101 S.Ct. 1384, 67 L.Ed.2d 359 (1981); Fleming v. State, 374 So.2d 954, 959 (Fla. 1979).

> 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); Neary v. State, 384 So.2d 881, 885-88 (Fla. 1980); Malloy 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. Jennings' claim.

In Hitchcock v. Dugger, 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 [the Eleventh Circuit's] en banc decision in Hitchcock v. Wainwright, 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. Dugger, 863 F.2d 705, 708 (11th Cir. 1989). See also Hargrave v. Dugger, 832 F.2d 1528 (11th Cir. 1987)(en 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 have the Eleventh Circuit and the Florida Supreme Court. See Mann, supra; Riley v. Wainwright, 517 So. 2d 565 (Fla. 1987). In fact, the Florida

Supreme Court, recognizing the significance of this change in law, held Hitchcock was to be applied retroactively.

In reversing death sentences because of Hitchcock error the Florida Supreme 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. Wainwright, supra (improper instructions to sentencing jury render death sentence unreliable); Meeks v. Dugger, 548 So. 2d 184 (Fla. 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). Hitchcock established that Florida juries must receive correct and accurate penalty phase instructions. Instructional error is reversible where it may have affected the jury's sentencing verdict. Meeks, supra; Riley, supra. The bottom line here is that this jury was unconstitutionally instructed, Maynard v. Cartwright, supra, and that the State cannot prove the error harmless beyond a reasonable doubt.

Mr. Jennings is entitled to relief under the Florida Supreme Court's Rhodes opinion, the standards of Maynard v. Cartwright, 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 jury did not know acts after a victim was unconscious could not be considered. 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 Cartwright, 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. 1699). This did not embody the limiting constructions necessary to channel and limit the sentencer's discretion.

Mr. Jennings' trial counsel timely filed a proposed jury instruction which would provide the jury with some guidance.

> DEFENDANT'S SPECIAL REQUESTED JURY INSTRUCTIONS
>
> IN ADDITION TO THE STANDARD JURY INSTRUCTIONS
> PENALTY PHASE NO. 1
>
> In considering whether the crime committed by the defendant was especially heinous, atrocious or cruel, you are instructed that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile, and that cruel means designed to inflict a high degree of pain with utter indifference to, or even, enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies - the consciousless or pitiless crime which is unnecessarily torturous to the victim.
>
> Authority: State v. Dixon, 283 So. 2d 1 (Fla. 1973)
>
> Cooper v. State, 336 So. 2d 1133, 1141 (Fla. 1976).

(R. 3443). Trial counsel argued to the trial court that in order for the jury to understand the "heinous, cruel and atrocious" aggravator the interpretation given in Dixon v. State, 283 So. 2d 1, 9 (1973), was necessary. (R. 1648). The trial court noted that "heinous" might be confusing to the jurors, but ultimately denied Mr. Jennings' proposed instruction (R. 1651). Mr. Jennings' appellate counsel raised the trial court's denial of this proposed instruction on direct appeal. Without the benefit of Maynard v. Cartwright, 108 S. Ct. 1853 (1988), which was decided after Mr. Jennings' appeal, the court rejected this claim

without comment. Jennings v. State, 512 So. 2d 169, 176 (Fla. 1987).

Clearly, the Florida Supreme 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 the jury did not know what to balance in making its recommendation. In Mr. Jennings' 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. Cartwright, 108 S. Ct. 1853 (1988), first held that the principle of Godfrey v. Georgia, 446 U.S. 420 (1980), applied to a state where the jury weighs the aggravating and mitigating circumstance found to exist, and required the jury to receive instructions adequately channeling and narrowing its discretion. In Cartwright, 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, 547 So. 2d 630, 633 (Fla. 1989). In fact, Mr. Jennings' 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. Jennings' 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 Cartwright.

Florida law requires the jury to weigh the aggravating circumstances against mitigating evidence. In fact, Mr. Jennings' jury was so instructed. The Florida Supreme 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: 1) there had been no objection at trial, 2) the issue had not been raised on direct appeal, and 3) 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 the Florida Supreme 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, it is not harmless if 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, supra at 187 ("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, supra at 1128 ("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. Jennings' 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 sentencing process requires its sentencing discretion to be channeled and limited. The failure to provide Mr. Jennings' sentencing jury the proper "channeling and limiting" instructions violated the eighth amendment principle discussed in Maynard v. Cartwright.

In Maynard v. Cartwright, the Court held that "the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." 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. Georgia, 446 U.S. 420, 433 (1980). In Mr. Jennings' case, the jury was not instructed as to the limiting constructions placed upon of 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. Jennings' 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. Cartwright.

In Pinkney v. State, 538 So. 2d 329, 357 (Miss. 1988), it was recognized that "Maynard v. Cartwright dictates that our capital sentencing juries in [Mississippi] 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. Cartwright, juries must receive complete instructions regarding aggravating circumstances. State v. Hines, 758 S.W.2d 515 (Tenn. 1988). The court did not read Cartwright 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 in Brogie v. State, 760 P.2d 1316 (Okla. Crim. 1988), also found error under Maynard v. Cartwright. 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. Cartwright, Mr. Jennings' jury received inadequate instructions and his sentence of death violates the eighth amendment.

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

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

Cartwright is a significant change in law under the test set forth in Jackson v. Dugger. Cartwright establishes that this Court's analysis on this issue on direct appeal was in error.

The error cannot be found harmless beyond a reasonable doubt. 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. Jennings an individualized and reliable capital sentencing determination. Knight v. Dugger, 863 F.2d 705, 710 (11th Cir. 1989). There was a wealth of 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. Habeas corpus relief is warranted under Hitchcock, Cartwright and the eighth amendment. A new jury sentencing proceeding must be ordered.

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. The United States Supreme Court has also granted writs of certiorari to consider the failure of the Arizona courts to properly qualify "especially heinous, cruel or depraved." These cases may also have import for Mr. Jennings' case. See Walton v. Arizona, cert. granted, 46 Cr. L. 3014 (October 2, 1989); Ricketts v. Jeffers, cert. granted, 46 Cr. L. 3035 (October 10, 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. Jennings. For each of the reasons discussed above the Court should vacate Mr. Jennings' unconstitutional sentence of death. This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Jennings' 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.

CLAIM III

THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING CIRCUMSTANCE WAS IMPROPERLY ARGUED AND APPLIED TO MR. JENNINGS' CASE IN VIOLATION OF MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

Aggravating circumstance (5)(i) of Section 921.141, Florida Statutes, is unconstitutionally vague, overbroad, arbitrary, and capricious on its face, and is in violation of the sixth, eighth, and fourteenth amendments to the United States Constitution and

Article I, sections 2, 9 and 16 of the Florida Constitution. This circumstance is to be applied when:

> The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

921.141(5)(i), Florida Statutes.

This aggravating circumstance was added to the statute subsequent to the United States Supreme Court's decision in Proffitt v. Florida, 428 U.S. 242 (1976). The constitutionality of this aggravating circumstance has yet to be reviewed by the United States Supreme Court. The Supreme Court has set standards governing the function of aggravating circumstances:

> Statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition, they circumscribe the class of persons eligible for the death penalty.

Zant v. Stephens, 462 U.S. 862, 77 L.Ed 2d 235, 103 S. Ct. 2733 (1983). The Court went on to state that:

> An aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty.

Id. at 2742-2743. Thus, it is evident that certain aggravating circumstances can be defined and imposed so broadly as to fail to satisfy eighth and fourteenth amendment requirements.

Concern over the severity and finality of the death penalty has mandated that any discretion in imposing the death penalty be narrowly limited. Gregg v. Georgia, 428 U.S. 153, 188-89 (1976); Furman v. Georgia, 408 U.S. 238 (1972). The Court in Gregg interpreted the mandate of Furman as one requiring that severe limits be imposed due to the uniqueness of the death penalty:

> Because of the uniqueness of the death penalty, Furman held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner.

428 U.S. at 189. Capital sentencing discretion must be strictly guided and limited.

Although a state's death penalty statute may pass constitutional muster, a particular aggravating circumstance may be so vague, arbitrary, or overbroad as to be unconstitutional. Maynard v. Cartwright, supra. Section 921.141(5)(i), on its face fails in a number of respects to "genuinely narrow the class of persons eligible for the death penalty." The circumstance has been applied by this Court to virtually every type of first degree murder. Even where this Court has developed principles for applying the (5)(i) circumstance, those principles have not been applied with any consistency.

Section 921.141(5)(i), is unconstitutionally vague, on its face. Even the words of the aggravating circumstance provide no true indication as to when it should be applied. The terms "cold" and "calculated" highly subjective. The finding of this aggravating circumstance depends on a finding that the homicide is "cold, calculated, and premeditated." The terms cold and calculated are unduly vague and subjective. They provided no meaningful way of distinguishing those cases in which death is imposed from those premeditated murders in which it is not imposed.

This Court has discussed this aggravating factor. See Jent v. State, 408 So. 2d 1024, 1032 (Fla. 1982); McCray v. State, 416 So. 2d 804, 807 (Fla. 1982); Combs v. State, 403 So. 2d 418 (Fla. 1981). In Jent, supra, this Court stated:

> the level of premeditation needed to convict in the penalty phase of a first degree murder trial does not necessarily rise to the level of premeditation in subsection (5)(i). Thus, in the sentencing hearing the state will have to prove beyond a reasonable doubt the elements of the premeditation aggravating factor -- "cold, calculated...and without any pretense of moral or legal justification".

408 So. 2d at 1032. The court in McCray stated:

> That aggravating circumstance [(5)(i)] ordinarily applies in those murders which are characterized as executions or contract murders, although that description is not intended to be all-inclusive.

416 So. 2d at 807. Although this Court has attempted to require more in this aggravating circumstance than simply premeditation, its definition had remained vague until 1987, as to what this circumstance required. More importantly, however, the jury here was not told what more was required.

In part because of the concerns discussed above, this Court in Rogers pulled out the dictionary and held that the legislature meant what the dictionary says it meant:

> We also find that the murder was not cold, calculated and premeditated, because the state has failed to prove beyond a reasonable doubt that Rogers' actions were accomplished in a "calculated" manner. In reaching this conclusion, we note that our obligation in interpreting statutory language such as that used in the capital sentencing statute, is to give ordinary words their plain and ordinary meaning. See Tatzel v. State, 356 So.2d 787, 789 (Fla.1978). Webster's Third International Dictionary at 315 (1981) defines the word "calculate" as "[t]o plan the nature of beforehand: think out ... to design, prepare or adapt by forethought or careful plan." There is an utter absence of any evidence that Rogers in this case had a careful plan or prearranged design to kill anyone during the robbery. While there is ample evidence to support simple premeditation, we must conclude that there is insufficient evidence to support the heightened premeditation described in the statute, which must bear the indicia of "calculation."

Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987). This Court's subsequent decisions have plainly recognized that cold, calculated and premeditated requires proof beyond a reasonable doubt of a "careful plan or prearranged design." See Mitchell v. State, 527 So. 2d 179, 182 (Fla. 1988)("the cold, calculated and premeditated factor [] requir[es] a careful plan or prearranged design."); Jackson v. State, 530 So. 2d 269, 273 (Fla. 1988)(application of aggravating circumstance "error under the principles we recently enunciated in Rogers.").

Trial counsel proposed a jury instruction that would have channeled discretion of Mr. Jennings' jury::

DEFENDANT'S REQUESTED PENALTY PHASE INSTRUCTION #4

> The alleged aggravating circumstances, that the capital felony is a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification, was not intended by the legislature to apply to all cases of premeditated murder. Rather, this circumstance exists where facts show, beyond a reasonable doubt, that there was a particularly lengthy, methodical or involved series of events, or a substantial period of reflection and thought by the perpetrator.
>
> Authority: 921.151(5)i
> Preston v. State
> 444 So. 2d 939 (Fla. 1984)
>
> Jent v. State
> 408 So. 2d 1024 (Fla. 1981)
>
> Mills v. State
> 462 So. 2d 1075

The trial court denied this instruction. This issue was raised on direct appeal, but before the decision in Cartwright. This Court affirmed without commenting on this issue even though Rogers had already been handed down. Under the analysis of Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989), Cartwright represents a fundamental change in the constitutional law of capital sentencing that requires the decision to be given retroactive application. This error undermined the reliability of the jury's sentencing determination.

Because Mr. Jennings was sentenced to death based on a finding that his crime was "cold, calculated and premeditated," but neither the jury nor trial judge had the benefit of the narrowing definition set forth in Rogers, petitioner's sentence violates the eighth and fourteenth amendments. The narrowing construction is absolutely required in order to limit this aggravating factor in conformity with eighth amendment principles. See, Maynard v. Cartwright, supra. Moreover, the decision in Rogers preceded the decision in Mr. Jennings' case by several months. Mr. Jennings is entitled to the benefit of the Rogers rule. The record in this case fails to disclose a shred of evidence which could support a finding of "careful plan" or

"prearranged design." In fact, the record establishes precisely the opposite. The judge did not require any "heightened" premeditation as required by McCray, supra, and certainly he did not properly construe the statutory language and understand the obvious legislative intent as explained in Rogers, supra.

The bottom line, however, is that what occurred here is precisely what the eighth amendment was found to prohibit in Maynard v. Cartwright, 108 S. Ct. 1853 (1988). In fact, these proceedings are even more egregious than those upon which relief was mandated in Cartwright. The result here should be the same as in Cartwright:

> Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert 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 (1972).

108 S. Ct. at 1859 (emphasis added).

The arbitrariness of this aggravating circumstance is further compounded by this Court's failure to provide a guiding interpretation to the phrase "without pretense of moral or legal justification." This Court has never defined the phrase or determined when it applies and when it does not.

Under Florida law, aggravating circumstances "must be proven beyond a reasonable doubt." Hamilton v. State, 547 So. 2d 630, (Fla. 1989). In fact, Mr. Jennings' 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. Jennings' jury received no instructions regarding the elements of the "cold, calculated and premeditated" aggravating circumstance submitted

for the jury's consideration. Its discretion was not channeled and limited in conformity with Cartwright.

Florida law requires the jury to weigh the aggravating circumstances against mitigating evidence. In fact, Mr. Jennings' 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 the Florida Supreme 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, 548 So. 2d 184, 187 (Fla. 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. Jennings' case the jury received no guidance as to the "elements" of this aggravating circumstance. 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. Jennings' sentencing jury the proper "channeling and limiting" instructions violated the eighth amendment principle discussed in Maynard v. Cartwright.

The Tennessee Supreme Court concluded that under Maynard v. Cartwright, juries must receive complete instructions regarding aggravating circumstances. State v. Hines, 758 S.W.2d 515 (Tenn. 1988). The court did not read Cartwright 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 in Brogie v. State, 760 P.2d 1316 (Okla. Crim. 1988), also found error under Maynard v. Cartwright. 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. Cartwright, Mr. Jennings' jury received inadequate instructions and his sentence of death violates the eighth amendment.

The striking of this additional aggravating factor requires resentencing. Schafer, supra. 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. Jennings an individualized and reliable capital sentencing determination. Knight v. Dugger, 863 F.2d 705, 710 (11th Cir. 1989).

Under Witt v. State, 387 So. 2d 922 (Fla.), cert. denied, 449 U.S. 1067 (1980), Cartwright represents a fundamental change in law, that in the interests of fairness requires the decision to be given retroactive application. The errors committed here cannot be found to be harmless beyond a reasonable doubt. 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. A new jury sentencing proceeding must be ordered.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Jennings' 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. Accordingly, habeas relief must be accorded now.

CLAIM IV

MR. JENNINGS' DEATH SENTENCE WAS IMPOSED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE HIS JURY WAS PREVENTED FROM GIVING APPROPRIATE CONSIDERATION TO, AND HIS TRIAL JUDGE REFUSED TO CONSIDER ALL EVIDENCE PROFFERED IN MITIGATION OF PUNISHMENT CONTRARY TO EDDINGS V. OKLAHOMA, MILLS V. MARYLAND, AND HITCHCOCK V. FLORIDA. MOREOVER, APPELLATE COUNSEL WAS INEFFECTIVE IN NOT ADEQUATELY ARGUING THIS ON DIRECT APPEAL.

At the time of Mr. Jennings' trial it was axiomatic that the eighth amendment required a capital sentencer, "not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Eddings v. Oklahoma, 455 U.S. 104, 110 (1982) quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978). No less clear was the fundamental tenant that "the sentencer may not refuse to consider or be precluded from considering any relevant mitigation." Eddings, supra, 455 U.S. at 114. Recently in Mills v. Maryland, 108 S. Ct. 1860 (1988), the United States Supreme Court in surveying the prime directive of Lockett and its progeny stressed the ability of the sentencer to consider all evidence of mitigation unimpeded.

> [I]t is not relevant whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by statute, Lockett v. Ohio, supra; Hitchcock v. Dugger, ___ U.S. ___ 107 S. Ct. 1821, 95 L.Ed. 2d (1987); by the sentencing court, Eddings v. Oklahoma, supra; or by evidentiary ruling, Skipper v. South Carolina, [476 U.S. 1 (1986)] . . . [w]hatever the cause, the conclusion would necessarily be the same: Because the [sentencer's] failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of Lockett, it is our duty to remand this case for resentencing."

Mills at 1866 quoting Eddings v. Oklahoma, 455 U.S. at 117 (O'Connor, J., concurring).

In Mr. Jennings' case, the judge refused to consider and his jury was precluded from considering substantial and unrebutted

statutory and nonstatutory mitigation regarding Mr. Jennings' drug and alcohol intoxication and his mental and emotional disturbance at the time of the offense. Similarly, no consideration was given to the improvement in Mr. Jennings' psychiatric condition at the time of his third trial in 1986.

Mr. Russell Schneider testified during the penalty phase that Mr. Jennings had consumed at least a gallon and a half of beer only hours prior to the instant offense and Mr. Jennings was still drinking at a bar where the witness left him at 2:30 a.m. (R. 1618). Catherine Music testified that Mr. Jennings clearly appeared intoxicated at 5:00 a.m. (less than an hour after the offense according to the state's theory at trial) that, Mr. Jennings had difficulty walking, stumbling against the walls leading to his bedroom, and reported to Mr. Jennings' mother that Mr. Jennings was too intoxicated to be driving. (R. 1613-15). In addition, Commander Jerome Hudepohl of the Brevard County Sheriff's Homicide Division, who searched the car utilized by Mr. Jennings on May 11, 1979, testified to the presence of multiple empty beer cans. Moreover the State did not challenge the mitigating evidence that Mr. Jennings was intoxicated.

Without question evidence of intoxication at the time of the offense under Florida law is a relevant nonstatutory mitigating circumstance which must be considered by the sentencer. Hargrave v. Dugger, 832 F.2d 1528, 1534 (11th Cir. 1987); Foster v. Dugger, 518 So. 2d 901, 902 n.2 (Fla. 1987); Waterhouse v. Dugger, 522 So. 2d 341, 344 (Fla. 1988). In Mr. Jennings' case the proffered evidence of involuntary intoxication was ignored by the court as a matter of law. The court found that it was not mitigating. This violated Eddings supra at 876. The sentencer may decide the weight to be given mitigation, but it cannot refuse to recognize its mitigating quality. Here, the court's erroneously applied a sanity threshold requirement on Mr. Jennings proffered evidence of intoxication before the court

would even consider Mr. Jennings' intoxication as a mitigating factor. As Mills instructs the actual impediment to consideration is irrelevant if the net result is the preclusion from the sentencer's consideration of all mitigation. Unmistakably the court in Mr. Jennings' case was so precluded as evidenced by its sentencing order:

> 6. Sec. 921.141(6)(f), Fla. Stat.: The Court finds that the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law WAS NOT substantially impaired. Although the Defendant had been drinking, the Court finds that at the time in question Defendant knew right from wrong, knew the nature, quality and consequences of his acts, was in control of his acts and appreciated the criminality of his acts. The Court finds that this statutory Mitigating circumstances is not present.

(R. 3462).

By imposing a sanity standard on the proffered evidence of intoxication the court effectively transformed evidence of Mr. Jennings' intoxication into a all or nothing proposition. By finding the evidence of intoxication insufficient to rise to the level of McNaughton insanity, a defense Mr. Jennings never raised during trial, the court thereby erroneously refused to consider any such evidence not only as a statutory mitigating factor but, as nonstatutory mitigation as well.

That the court's application of a strict McNaughton sanity standard in weighing evidence pursuant to subsection (6)(f) was erroneous is made patent not only by the statute's use of the qualifier "substantial", but the case law interpreting this mitigating factor. The Florida Supreme Court in Perri v. State, 441 So. 2d 606 (Fla. 1983), noted the proper standard to be applied with respect to this statutory mitigating factor:

> The trial court denied defendant's request for a psychiatric evaluation prior to the sentence proceeding. The trial court found the defense of insanity had not been raised and there was no indication or evidence that the defendant was incompetent. The court also found that the prior

psychiatric evaluation had determined that the defendant was competent.

Section 921.141(6)(b), Florida Statutes (1981), states that a felony committed while defendant was under the influence of extreme mental or emotional disturbance is a mitigating factor.

Section 921.141(6)(f) states that if the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired, a mitigating factor arises.

We explained these mitigating factors in State v. Dixon, 283 So.2d 1, 10 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974), as follows:

> Extreme mental or emotional disturbance is a second mitigating consideration, pursuant to Fla.Stat. Section 921.141(7)(b), F.S.A., which is easily interpreted as less than insanity but more than the emotions of an average man, however inflamed.
>
> * * *
>
> Mental disturbance which interferes with but does not obviate the defendant's knowledge of right and wrong may also be considered as a mitigating circumstance. Fla.Stat. Section 921.141(7)(f), F.S.A. Like subsection (b), this circumstance is provided to protect that person who, while legally answerable for his actions, may be deserving of some mitigation of sentence because of his mental state.
>
> * * *
>
> Perri did not testify during the guilt proceeding and did not testify during the sentence proceeding. His only testimony was given to the judge for the purpose of stating that he had been in mental institutions. This should be enough to trigger an investigation as to whether the mental condition of the defendant was less than insanity but more than the emotions of an average man, whether he suffered from a mental disturbance which interfered with, but did not obviate, his knowledge of right and wrong. A defendant may be legally answerable for his actions and legally sane, and even though he may be capable of assisting his counsel at trial, he may still deserve some mitigation of sentence because of his mental state.

Id. at 608-9. In fact, the prosecutor argued to the jury that there was no mitigation because Mr. Jennings knew right from

wrong (R. 1664). See, also, Amazon v. State, 487 So. 2d 8 (Fla. 1986)(inconclusive evidence that defendant had taken drugs the night of the offense and stronger evidence that the defendant had a history of drug abuse constitutes evidence that defendant could have acted under extreme mental or emotional distress).

Clearly the trial court's erroneous saddling of the defense with a threshold sanity requirement gave rise to the courts refusal to consider as a matter of law the proffered evidence on mitigation. Eddings makes plain that the trial court may not refuse to consider as a matter of law, any relevant mitigating evidence. By imposing the erroneous statutory sanity standard the trial court effectively precluded its consideration of this evidence by depriving Mr. Jennings of the individualized sentencing to which he is entitled. The court also refused to consider the unrebutted mitigation as a nonstatutory circumstance because it did not rise to the statutory threshold, and thus was not "any other aspect" of the crime.

The state mental health experts found the longstanding existence of Mr. Jennings' personality disorder. The essential difference between the testimony of Drs. Wilder and Pondos and that of Drs. Gutman and McMahon was whether or not Mr. Jennings' personality disorder in conjunction with the consumption of alcohol rose to the level that would "substantially" impair his ability to conform his conduct to the requirements of law or constituted "extreme" emotional disturbance. Compare, e.g., (R. 1448) with (R. 1551). Likewise, mental health experts for the state, including Dr. Wilder upon whom the court primarily relied, found improvement in Mr. Jennings' psychiatric condition (R. 1572), while Dr. McMahon characterized the improvement as surprising and significant (R. 1454). There is no question but that improvement during incarceration is mitigating and a basis for a sentence of less than death. Skipper v. South Carolina, 476 U.S. 1 (1986). But again, the judge found that this evidence

failed to establish that Mr. Jennings did not know right from wrong, and thus statutory mental health mitigation was not present. Since this evidence was toward a statutory mitigation, it was not "any other aspect" and was thus not considered as a nonstatutory mitigating factor.

Each of the mental health experts testified that Mr. Jennings was immature in comparison with other 20 year olds. (R. 1365) (Testimony of Dr. Gutman "immature approach to life); (R. 1425) (Testimony of Dr. McMahon "extremely immature young man and impulsive"); (R. 1518) (Testimony of Dr. Pondas "emotionally immature") (R. 1593) (Testimony of Dr. Wilder "less mature than other 20 year olds would be"). Notwithstanding this complete consensus of expert opinion the trial court in sentencing Mr. Jennings to death completely ignored this testimony, finding:

> 7. Sec. 912.141(6)(g), Fla. Stat.: The Court finds that the Defendant was twenty (20) years of age at the time of these offenses. He was home on leave from overseas assignment in Okinawa with the United States Marine Corps. Though of fairly young age, he was an adult of above average intelligence, and had accepted the obligations of adulthood by his Military Service. The Court finds that the Defendant's age is not a Mitigating Circumstance in this case.

(R. 3462-3).

As with the evidence of intoxication, the court simply refused to consider this statutory mitigating factor by erroneously concluding that subsection (6)(g) addresses itself exclusively to the chronological age of the defendant. The court's interpretation was once again just plain wrong. In Amazon v. State, supra, this Court, in declining to sustain a jury override by the trial court, noted:

> The trial judge found no mitigating factors. However, we are persuaded that the jury could have properly found and weighed mitigating factors and reached a valid recommendation of life imprisonment. We believe there was sufficient evidence for the jury to have found that Amazon acted under extreme mental or emotional disturbance. The defense theory in the guilt phase was that

> Amazon had acted from a "depraved mind," i.e. committed second-degree murder. There was some inconclusive evidence that Amazon had taken drugs the night of the murders, stronger evidence that Amazon had a history of drug abuse, and testimony from a psychologist indicated Amazon was an "emotional cripple" who had been brought up in a negative family setting and had the emotional maturity of a thirteen-year-old with some emotional development at the level of a one-year-old. Age could also be found as a mitigating factor. Although Amazon was nineteen, an age which we have held is not per se an mitigating factor Peek v. State, 395 So.2d 492 (Fla.1980), cert. denied, 451 U.S. 964, 101 S.Ct. 2036, 68 L.Ed.2d 342 (1981), the expert testimony about Amazon's emotional maturity suggests that the jury could have properly found age a mitigating factor in this case.

Id. at 13. See also Eddings, supra at 107 (testimony that Eddings was emotionally disturbed in general and that his mental and emotional development were at a level several years below his age). Mr. Jennings' extremely poor emotional maturity was unmistakably a proper mitigating factor improperly ignored by the trial court. As Eddings makes plain, "[while] a sentencer . . . may determine the weight to be given relevant mitigating evidence . . . [] they may not give it no weight by excluding such evidence from [its] consideration." Id. at 114-5. The court's flat refusal to consider the substantial and uncontroverted evidence of Mr. Jennings' emotional development stands in sharp contrast to this basic eighth amendment requirement. It also reflects how the jury may have understood the instructions. For example, after the statutory mitigators were listed, the jury was told it could consider "any other aspect." This was probably read as precluding mental health mitigation offered to prove statutory mitigation. Since mental health mitigation went towards a statutory mitigator, it did not constitute "any other aspect." Under Mills a resentencing is required.

The mental health experts were also in agreement that Mr. Jennings' psychiatric condition had improved since their original

evaluations in 1979. Dr. McMahon testified that her reevaluation in 1986 indicated surprising improvement:

> DR. MCMAHON: Yes, sir, I did. And I must admit that I was somewhat surprised, in terms of what I thought might happen. On the MMPI he looks, in essence, the same as he looked before. I did not see a significant change in that. Any changes were toward positive, in that he looks a little bit less angry, he looks a little bit more -- in his thinking is a little bit more in accord with society, his thinking in general. So any changes are in a positive degree, but the changes are not significant, there is not that much to be concerned about. In the Rorschach, however, one of the things that did come through is that Bryan responded in a way that is now, one, somewhat more mature, much less anger, I did not see the coiled-spring type of young man that I did see in '79. And I saw a young man who now is modulating, now is tempering his emotions, and they are not the impulsive kind that are just out there, that they were in 1979.
>
> I guess I am surprised because that is at a deeper level, and if I would have predicted, I would have predicted that on the more superficial level. He might have responded in a way that said, yes, I am not as angry, yes, I am not doing all these kinds of things. But what he has done is, he is saying, well, yeah, I am a little less angry, but what we are seeing at a deeper level, that is one that the individual can't simply tell you about, that's why we use things like Rorschach, because it gets at a level where most of us cannot just tell somebody else or even ourselves what is going on. At that level, he looks healthier. He looks more well modulated, more together, more integrated, more mature. That is a -- while it is still a guarded Rorschach which is something I don't like to see, somebody with his IQ, somebody with his intelligence ought to be responding with the Rorschach with thirty, thirty-five responses. The last time he gave, I think, twelve. This time he gave ten. He tends to give one response per card.
>
> I would like to see him be more open and give more responses. But with those that he does give, he is looking healthier now at a deeper level than he looked back then. And frankly, I am surprised.

(R. 1453-6).

So too, Dr. Wilder detected improvement in Mr. Jennings' condition from his original evaluation in 1979:

> MR. HOWARD: When you were engaged in that particular interview, did you find that any

> significant facets of Mr. Jennings' personality had changed?
>
> DR. WILDER: I don't know that they were significant, Mr. Howard, but I saw some difference in him.
>
> MR. HOWARD: What was that, Doctor?
>
> DR. WILDER: Well, he looked a little more mature. He looked a little more mellow, and he talked a little more mellow fashion.

(R. 1573). The testimony of Drs. Wilder and McMahon regarding Mr. Jennings' improved mental and emotional condition was classic nonstatutory mitigating evidence, "evidence concerning a defendant's emotional history . . . bear[s] directly on the fundamental justice of imposing capital punishment." Penry v. Lynaugh, 109 S. Ct. 2934, 2949 (1989) quoting Skipper v. South Carolina, 476 U.S. 1, 13-14 (1986)(opinion concurring in judgment). Rather than consistently crediting Dr. Wilder's testimony, the court once again engaged in a selective process of picking and choosing testimony supporting the court's views while ignoring this evidence proffered by Mr. Jennings for a sentence of less than death. The court refused to weigh this evidence against the aggravation because in the court's opinion it was not mitigating.

Mr. Jennings' jury was also precluded from considering the mitigating evidence. Drs. Gutman, McMahon, Pondas and Wilder all found that Mr. Jennings suffered from a personality disorder which affected him mentally and emotionally. Notwithstanding this evidence, a reasonable juror could have applied the sanity test applied by the judge and concluded Mr. Jennings' disabilities did not establish any statutory mitigating circumstances. Mr. Jennings' jury was instructed, that mental or emotional disabilities could be considered as mitigating circumstances if the evidence demonstrated that:

> 1. That the crime for which the defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance.

2. That the defendant acted under extreme duress or under the substantial domination of another person.

3. The capacity of the defendant to appreciate the criminality of his conduct, or to conform his conduct to the requirements of law was substantially impaired.

4. Age of the defendant at the time of the crime.

5. Any other aspect of the defendant's character or record, and any other circumstance of the offense.

(R. 1700). Defense counsel objected to these instructions and proffered his own, in order to try and better explain the law to the jury:

DEFENDANT'S SPECIAL REQUESTED JURY INSTRUCTIONS IN ADDITION TO THE STANDARD JURY INSTRUCTIONS PENALTY PHASE NO. 2

Mental disturbance which interferes with, but does not overwhelm the defenedant's knowledge of right and wrong may also be considered as a mitigating circumstance. This circumstance is provided to protect that person who, while legally answerable for his actions, may be deserving of some mitigation of sentence because of his mental state.

Authority: State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973).

Granted _____

Denied _____x_____

Granted as amended _____

Covered _____

(R. 3442).

In light of the conflicting expert opinion as to whether Mr. Jennings' disordered were "extreme," or whether they "substantially impaired" his capacity for controlling his behavior or appreciating its wrongfulness at the time of the offense, a reasonable juror could have found the disorders were not so severe that they met the statutory criteria. Nevertheless, a reasonable juror could still have found on the basis of the undisputed evidence that Mr. Jennings did suffer from a personality disorder, that he suffered from this disorder

from much of his life and that in conjunction with his alcohol intoxication, plainly contributed to his thinking and behavior to the time of the crime. As previously noted the Florida Supreme Court has recognized that a history of drug and alcohol addiction can be considered as a nonstatutory mitigating factor. Amazon, supra. Likewise that court has recognized that personality disorders may also be appropriate nonstatutory mitigation. Moody v. State, 418 So. 2d 989 (Fla. 1982).

In this overall context, a reasonable juror plainly could have believed that all of the evidence bearing upon Mr. Jennings' mental and emotional condition of the time of the crime was to be considered only in relation to the two statutory mitigating circumstances which addressed this concern. Hargrave v. Dugger, 832 F.2d 1528, 1534 (11th Cir. 1987); Messer v. Florida, 834 F.2d 890, 894-5 (11th Cir. 1987); Cf. Mills v. Maryland, 108 S. Ct. 1860, 1866 (1988).

The reasonableness of this interpretation of the instructions is supported by the trial courts findings in support of Mr. Jennings' sentence of death. As demonstrated by his findings, the trial judge considered the evidence of Mr. Jennings mental and emotional disabilities only in relation to the statutory mitigating circumstances which addressed this subject. Certainly a reasonable juror could likewise assume that consideration of Mr. Jennings' mental and emotional state were exclusively limited to the two enumerated statutory mental mitigating factors and nowhere else. In this respect, the preclusive instructions in Jennings' case which reasonable jurors could have interpreted in a "all or nothing" fashion thereby foreclosing further consideration of the effects of Mr. Jennings' personality disorder as nonstatutory mitigation operated in much the same fashion as the special circumstances in Penry v. Lynaugh, 109 S. Ct. 2934 (1989). In Penry the Court found that the use of the qualifier "deliberately" in Texas' functional

equivalent of a mitigating factor without further definition was insufficient to allow the jury to give effect to Johnny Penry's mitigating evidence of mental retardation.

In Penry the Court found that a rational juror could have concluded that Penry's mental retardation did not preclude him from acting deliberately, yet also conclude that Penry's mental retardation made him less culpable than a normal adult. In striking the sentence of death the Court noted:

> In this case, in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty, we conclude that the jury was not provided with a vehicle for expressing its "reasoned moral response" to that evidence in rendering its sentencing decision. Our reasoning in Lockett and Eddings thus compels a remand for resentencing so that we do not "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Lockett, 438 U.S., at 605, 93 S.Ct., at 879 (concurring opinion). "When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." Lockett, 438 U.S., at 605, 98 S.Ct., at 2965.

Penry, 109 S. Ct. at 2952. Here, reasonable jurors at Mr. Jennings' trial, having found that his personality disorder was neither "extreme" or "substantial" may still well have concluded that Mr. Jennings' mental and emotional immaturity reduced his moral culpability, but were left with no vehicle with which to give effect to that conclusion.

The trial court's findings thus establish not only that he failed to comply with Lockett in his own sentencing deliberations by refusing to consider Mr. Jennings intoxication, age, and improved psychiatric condition, but also that a reasonable juror, despite knowing that she might consider nonstatutory mitigating circumstances could believe that the evidence of mental health and emotional disability was properly considered only in relation to statutory mitigating circumstances. Ultimately the court's refusal to consider and the jury's reasonable mistake in failing

to consider meant that neither fully considered the mitigation in Mr. Jennings' favor. In his order, the judge rejected mitigation as a matter of law because it "did not contribute to the Defendant's actions on May 11, 1979." (R. 3463).

In Penry, the Supreme Court held:

> Underlying Lockett and Eddings is the principle that punishment should be directly related to the personal culpability of the criminal defendant. If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendnts who have no such excuse." California v. Brown, 479 U.S. 538, 545, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987)(concurring opinion). Moreover, Eddings makes clear that it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence. Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821, 95 L.Ed.2d 347 (1987). Only then can we be sure that the sentencer has treated the defendant as a "uniquely individual human bein[g]" and has made a reliable determination that death is the appropriate sentence. Woodson, 428 U.S., at 304, 305.

109 S. Ct. at 2947. The jury was not allowed and the judge refused to comply with the dictates of Penry. These fundamental violations of eighth amendment jurisprudence demonstrate that habeas corpus relief is now appropriate.

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. Jennings. For each of the reasons discussed above the Court should vacate Mr. Jennings' unconstitutional sentence of death.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Jennings' 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 law. See Lockett v. Ohio, 438 U.S. 586 (1978); Perri v. State, 441 So. 2d 606 (Fla. 1983). 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. Jennings 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 AGGRAVATING CIRCUMSTANCE THAT THE OFFENSE WAS COLD, CALCULATED AND PREMEDITATED WAS IMPROPERLY APPLIED RETROACTIVELY IN VIOLATION OF ARTICLE I, SECTION 10 OF THE UNITED STATES CONSTITUTION, THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. MOREOVER, APPELLATE COUNSEL WAS INEFFECTIVE IN NOT RAISING THIS ISSUE ON APPEAL.

The offense in this case occurred on May 11, 1979. At the time of the offense, the Florida capital sentencing statute did not contain, as a statutory aggravating circumstance, that the offense was committed in a cold, calculated and premeditated manner. This aggravator did not exist at the time of the offense. That circumstance was added by the Florida Legislature on July 1, 1979, by Chapter 79-353, Laws of Florida. This is a retroactive application, in violation of Article I, Section 10 of the United States Constitution, in violation of the fifth, sixth, eighth, and fourteenth amendments, in violation of due process and equal protection of law, and in violation of the corresponding provisions of the Florida Constitution.

In Miller v. Florida, 107 S. Ct. 2446 (1987), the Supreme Court set out the test (in Florida, coincidentally) for determining whether a statute is ex post facto. In so doing, the Court for the first time harmonized two prior court decisions, Dobbert v. Florida, 432 U.S. 282 (1977), and Weaver v. Graham, 450 U.S. 24:

> As was stated in Weaver, to fall within the ex post facto prohibtion, two critical elements must be present: First, the law "must be retrospective, that is, it must apply to events occurring before its enactment" and second, it must disadvantage the offender affected by it." Id., at 29. We have also held in Dobbert v. Florida, 432 U.S. 282, that no ex post facto violation occurs if a change does not alter "substantial personal rights," but merely changes "modes of procedure which do not affect matters of substance." Id., at 293.

Miller, supra 107 S. Ct. at 2451. Under the resulting new analysis, it is now clear that sec. 921.141(5)(j) operated as an

ex post facto law in Mr. Jennings' case, and that the application of this aggravator in this case was accordingly flatly improper.

A law is retrospective if it "appl[ies] to events occurring before its enactment." Weaver v. Graham, 450 U.S. at 29. The relevant "event" in this instance was the crime which occurred prior to the legislatively enacted change to sec. 921.141(5) at issue in this case. As the Miller court explained, retrospectivity concerns address whether a new statutory provision changes the "legal consequences of acts completed before its effective date." Miller v. Florida, 107 S. Ct. at 2451 (citations omitted). The relevant "legal consequences" include the effect of legislative changes on an individual's punishment for the crime of which he or she has been convicted. See Miller v. Florida, 107 S. Ct. at 2451.

In another case directly on point (the retroactive application of the "cold, calculated, premeditated" aggravator to a defendant whose offense occurred before that circumstance was enacted) a federal district court in Florida has expressly held:

> The United States Constitution contains two ex post facto clauses, one applicable to the states, article 1, section 10, clause 1, and one to the federal government, article 1, section 9, clause 3. In this case, the Court is called upon to address the ex post facto clause applicable to the states: "No state shall . . . pass any . . . ex post facto law."
>
> The Supreme Court has held that three critical elements must be present to establish an ex post facto clause violation. First, the statute must be a penal or criminal law. Second, the statute must apply retrospectively. Finally, the statute must be disadvantageous to the offender because it may impose greater punishment. Weaver v. Graham, 450 U.S. 24 (1981); see also Miller v. Florida, ___ U.S. ____, 107 S. Ct. 2446, 2451 (1987). A law may violate the ex post facto prohibition even if it "merely alters penal provisions accorded by the grace of the legislature." Id. at 30-31. The challenged statute need not impair a "vested right" in order to be found violative of the ex post facto clause. Id. A law which is merely procedural and does not add to the quantum of punishment, however, cannot violate the ex

> post facto clause even if it is applied retrospectively. Id. at 32-33 & n. 17. See Dobbert v. Florida, 432 U.S. 282, 293 (1977) ("even though it may work to the disadvantage of a defendant, a procedural change is not ex post facto."). With these principles in mind, the Court will consider whether Mr. Stano has stated an ex post facto claim.
>
> In the instant case, Florida Statute sec. 921.141(5)(i) (1979) is clearly a penal or criminal statute since it deals with the quantum of punishment that may be imposed upon a person convicted of a capital felony. Section 921.141(5)(i) also operates retrospectively because it changes the legal consequences of acts completed before the effective date of July 1, 1979. That is, the change in the sentence statute allowed the trial judge to consider an additional aggravating factor which could increase the quantum of punishment from life imprisonment to death under Florida's sentencing scheme of weighing and balancing aggravating and mitigating factors. Finally, there is no doubt that the addition of a new aggravating factor could disadvantage a criminal defendant on trial for his or her life. Under Florida's capital sentencing scheme the trial judge and sentencing jury are charged with the duty of weighing and balancing all factors in aggravation and mitigation. Under such a delicate scheme, the presence or absence of an aggravating factor could be outcome determinative. Accordingly, this Court finds that Florida Statute sec. 921.141(5)(i) (1979), adding an additional aggravating factor to Florida's capital sentencing scheme, is unconstitutional as applied to Gerald Stano, whose crimes occurred before the statute's effective date.

Stano v. Dugger, No. 88-425-Civ.-Orl.-19 (M.D. Fla. May 18, 1988)(Fawsett, J.), slip op. at 37-40 (footnotes omitted).

In addressing the issue of retrospectivity, a court must examine the challenged provision to determine whether it operates to the disadvantage of a defendant, as the Miller decision clearly requires. See Miller v. Florida, 107 S. Ct. at 2452. In Miller, the Supreme Court examined both the purpose for the enactment of the challenged provision and the change that the challenged provision brought to the prior statute to determine whether the new provision operated to the disadvantage of Mr. Miller. Id.; see also Stano, supra. In applying that analysis to the challenged provision at issue here, it is clear that the

new provision is "more onerous than the prior law" (Dobbert v. Florida, supra) because it works a substantial disadvantage to the capital defendant.

When the Legislature enacted Chapter 79-353, the legislators expressly intended to add to Florida's capital sentencing statute an additional statutory aggravating factor. They expressly intended for the new provision to enhance the probability of imposing death on a capital defendant by adding an aggravating factor which could be found by a jury and judge. As explained above, prior to enactment of this legislation, such facts, standing alone, did not justify the finding of any of the original aggravating factors. Id. Thus, the purpose of the new legislation was expressly aimed at enhancing the probability of a death sentence and thereby disadvantaging the capital defendant.

The change which the new law brought to the sentencing statute operates to the disadvantage of the capital defendant. In Mr. Jennings' case, the jury and trial judge applied the new aggravating factor and weighed it in making the determination that death was the appropriate sentence. Under the law in effect at the time of the offense in this case, the jury and trial judge would not have been empowered to increase the probability of a death sentence in this manner because consideration of aggravating factors is strictly limited to those enumerated in the statute at the time of the offense. See, e.g., Fla. Stat. sec. 921.141(5).

If disadvantage caused by the effect of a new law is purely speculative, it is not onerous for purposes of ex post facto analysis. See Dobbert v. Florida, 97 S. Ct. at 2299 n. 7. But the increased exposure to a death sentence is demonstrably not speculative under Florida's capital sentencing procedures. See Stano, supra slip op. at 37-40. It is not speculative in this case. In Miller, the Supreme Court rejected the respondent's argument that a change in the sentencing statute for non-capital

defendants was not disadvantageous. See Miller v. Florida, 107 S. Ct. at 2452 (the defendant need not show "definitively that he would have gotten a lesser sentence."). Moreover,

> In assessing whether a provision is disadvantageous, courts must look to the challenged provision itself and ignore any extrinsic circumstances that may have mitigated its effect on the particular individual. Weaver v. Graham, 450 U.S. 24, 33 (1981); Dobbert v. Florida, 432 U.S. 282, 300 (1977). Ex post facto analysis "is concerned solely with whether a statute assigns more disadvantageous criminal or penal consequences to an act than did the law in place when the act occurred." Weaver, 450 U.S. at 30 n.13. In other words, the legislature must provide punishment for past conduct. See Fleming v. Nestor, 363 U.S. 603 (1960).

Stano, supra slip op. at 39 n.18.

Similar to the Miller defendant, Mr. Jennings was subjected to the probability of a more enhanced sentence because of the new law. Mr. Jennings presented substantial mitigation. The jury and trial court relied on this additional aggravating factor in finding that the statutory aggravating factors outweighed the mitigation. In this instance the more severe sentence was death instead of life. Mr. Jennings was therefore "substantially disadvantaged" by a retrospective law.

The third part of the Miller analysis requires examination of the sec. 921.141(5)(i) to determine whether it alters a substantial right. Miller v. Florida, 107 S. Ct. at 2452. As explained previously, Florida law limits the consideration of aggravating factors to those enumerated in the capital sentencing statute. This limitation affects the "quantum of punishment" that a capital defendant can receive because a jury and judge must balance aggravating circumstances against mitigating circumstances before arriving at a verdict of life or death. The right to limitation was altered when the jury and trial court, by operation of the new law, applied an additional statutory aggravating factor.

For the foregoing reasons, the law as applied to Mr. Jennings is ex post facto, and his sentence of death is therefore invalid. Miller v. Florida, 107 S. Ct. 2446 (1987). The application of this aggravating factor to Mr. Jennings' case violates due process and equal protection of law, and violates the fifth and sixth amendments and the eighth amendment's mandate of heightened scrutiny and reliability in capital sentencing. Under Miller, this Court's application of this aggravator is plain constitutional error. Under Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989), Miller was a significant change in law because it was inconsistent with this Court's prior rulings. Miller expressly overruled this Court's interpretation of the ex post facto clause.

Mr. Jennings' jury should have never been allowed to consider this aggravating factor. The state should not have been allowed to extensively argue that this aggravator was present and thus Mr. Jennings should die. Mr. Jennings has a right to an accurately instructed jury. Mills v. Maryland, 108 S. Ct. 1860 (1988). The consideration of this ex post facto aggravating factor denied Mr. Jennings his right to a jury advisory sentence. Floyd v. State, 497 So. 2d 1211 (Fla. 1986). Miller v. Florida, 107 S. Ct. 2446 (1987) is a fundamental change in Florida law. Mr. Jennings jury was inaccurately instructed. The trial court based his sentence on an unconstitutional jury advisory sentence and the trial court sentenced Mr. Jennings to die based on an ex post facto law.

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. Mr. Jennings' sentence of death is neither "reliable" nor

"individualized", since the jury was unconstitutionally instructed on 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. Jennings. For each of the reasons discussed above the Court should vacate Mr. Jennings' unconstitutional sentence of death.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Jennings' 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 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. Jennings 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 VI

MR. JENNINGS' RIGHTS TO PRESENT A DEFENSE AND TO CONFRONT THE WITNESSES AGAINST HIM WERE DENIED WHEN THE COURT LIMITED THE CROSS-EXAMINATION OF THE STATE'S KEY WITNESS, CLARENCE MUSZYNSKI, AND WHEN THE DEFENDANT WAS FORECLOSED FROM INTRODUCING EVIDENCE ESTABLISHING THAT EITHER MR. MUSZYNSKI WAS INSANE, A PERJURER, OR BOTH.

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. Jennings was denied his rights to present a defense and to confront and cross-examine the witnesses against him when trial counsel was precluded from introducing the prior sworn statement of Clarence Muszynski.

Perhaps the most damaging evidence presented by the State was the testimony of Clarence Muszynski, a four-time convicted felon, and former cellmate of Mr. Jennings (R. 623-684). Muszynski testified in great detail concerning a statement purportedly made to him by Mr. Jennings while they were both in the Brevard County Jail. This testimony included a physical demonstration of the manner in which Mr. Jennings picked up the victim by her legs and swung her over his head in order to bang her head into the pavement several times (R. 634-39). This testimony was specifically relied upon by the sentencing court as credible evidence establishing the exact manner in which the homicide occurred. In light of his damaging testimony, the credibility of Clarence Muszynski was absolutely critical. Trial counsel cross-examined the witness about two motions for post-conviction relief that Muszynski had filed in 1981 and 1982 regarding his murder conviction (R. 657-67). Muszynski admitted that he had alleged complete and total insanity at the time of the murder and trial. Muszynski admitted that this insanity claim was made under oath and was signed before a notary public.

Muszynski denied knowing that he was swearing to the truth of the contents of the motion by his signature. He also alleged in one motion that he was confined in a Houston mental ward less than one month prior to his 1979 trial. He claimed that he hallucinated and was treated with Thorazine while hospitalized. On the stand at Mr. Jennings' trial, Muszynski stated that the allegations in the motions were completely false (R. 657-67). Appellant sought to introduce the post-conviction motions into evidence, but the trial court refused to allow such a procedure during the State's case-in-chief (R. 678). At the close of the defense case-in-chief, defense counsel once again proffered the written motions for introduction into evidence. The State objected, contending that the motions contained much irrelevant material and were not proper impeachment. After hearing brief argument, the trial court refused to allow the evidence to be introduced (R. 1122-28). At the hearing on the motion for new trial, defense counsel contended that the trial court's refusal to allow the evidence to be introduced violated Mr. Jennings' constitutional rights under the fifth, sixth and fourteenth amendments.

Obviously, it was critical to the defense to fully explore this witness' credibility and to effectively impeach his testimony before the jury. However, effective cross-examination and impeachment was never permitted. The Court ruled that the impeachment were irrelevant, and in fact not even proper impeachment. Since Mr. Jennings' trial, new case law has developed which establishes the error here and justifies under Jackson v. Dugger, 14 F.L.W. 355 (Fla. July 6, 1989), presentation of this issue. See Olden v. Kentucky, 109 S. Ct. 480 (1989); Crane v. Kentucky, 476 U.S. 683 (1986).

There can be no doubt that the trial 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 witness's testimony. Here the defense sought to let the jury actually see the evidence that Mr. Muszynski had made a prior inconsistent statement under oath. The jury would be able to actually see whether Mr. Muszynski's claim that he did not know it was under oath was, in fact, credible. For that reason it has been recognized that:

> . . . denial of cross-examination [in such circumstances] would be constitutional error of the first magnitude and no amount of showing of want prejudice would cure it.

Smith v. Illinois, 390 U.S. 129, 131, 88 S. Ct. 748, 749, 19 L.Ed.2d 956, 959 (1968). The prejudice to Mr. Jennings resulting from this limitation of cross-examination and confrontation rights is manifest when the testimony of this witness is analyzed and the evidence that was not admitted is considered.

In Alford v. United States, 282 U.S. 687, 51 S. Ct. 218, 75 L.Ed. 624 (1931), the Supreme Court recognized that cross-examination of a witness is a matter of right, stating:

> [P]rejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. (Citations omitted)

Id., 282 U.S. at 692, 51 S. Ct. at 219, 75 L.Ed. at 628. 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 motivation for testifying prevents the jury from properly assessing the witness' testimony because the defendant cannot develop the facts which would allow the jury to properly weigh the testimony. In Davis v. Alaska, 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. Jennings' cross-examination was limited when the evidence used to conduct the cross-examination was not permitted to go to the jury so that it, the trier of fact, could fully consider how plausible Mr. Muszynski's story was.

State rules of procedure cannot override a defendant's right to elicit evidence in his defense. Crane v. Kentucky, supra at 688; Chambers v. Mississippi, 410 U.S. 284 (1973); Davis, supra. The Crane court explained that, even though state rules of procedure may allow the trial court the discretion to exclude evidence that is not relevant, rulings that limit the defendant's

opportunity to be heard, to present evidence bearing on credibility, or to elicit evidence "central to the defendant's claim of innocence" do not withstand constitution scrutiny:

> Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, Chambers v. Mississippi, supra, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, Washington v. Texas, 388 U.S. 14, 23, 87 S.Ct. 1920, 1925, 18 L.Ed.2d 1019 (1967); Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), the Constitution guarantees criminal defendant's "a meaningful opportunity to present a complete defense." California v. Trombetta, 467 U.S., at 485, 104 S.Ct., at 2532; cf. Strickland v. Washington, 466 U.S. 668, 684-685, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1984)("The Constitution guarantees a fair trial through the Due Process Clause, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment"). We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard. In re Oliver, 333 U.S. 257, 273, 68 S.Ct. 499, 507-508, 92 L.Ed. 682 (1948); Grannis v. Ordeal, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914). That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence. In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and "survive the crucible of meaningful adversarial testing." United States v. Cronic, 466 U.S. 648, 656, 104 S.Ct. 2039, 2045, 80 L.Ed.2d 657 (1984). See also Washington v. Texas, supra, 388 U.S., at 22-23, 87 S.Ct., at 1924-1925.

Crane, 476 U.S. at 690. Mr. Jennings was deprived of his opportunity to effectively challenge Mr. Muszynski's account of why he was testifying.

The constitutional error here contributed to Mr. Jennings' conviction. The error can by no means be deemed harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967); Satterwhite v. Texas, 108 S. Ct. 1972 (1988). The Court's ruling limiting the impeachment of this witness allowed the introduction of his account of the events without making that account survive "the crucible of meaningful adversarial testing." United States

v. Cronic, 466 U.S. 648, 104 S. Ct. 2039 (1984). The preclusion of this evidence resulted in the arbitrary imposition of a death sentence in violation of Mr. Jennings' eighth amendment rights. This issue was raised on direct appeal; however, new case law establishes Mr. Jennings' entitlement to relief. Under Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989), habeas corpus relief is appropriate.

CLAIM VII

MR. JENNINGS' SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS SHIFTED THE BURDEN TO MR. JENNINGS' TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE SENTENCING JUDGE HIMSELF EMPLOYED THIS IMPROPER STANDARD IN SENTENCING MR. JENNINGS' TO DEATH. MOREOVER, APPELLATE COUNSEL WAS INEFFECTIVE IN NOT RAISING THIS ISSUE ON APPEAL.

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 <u>if the state showed the aggravating circumstances outweighed the mitigating circumstances</u>.

State v. Dixon, 283 So. 2d 1 (Fla. 1973)(emphasis added). This straightforward standard was never applied at the penalty phase of Mr. Jennings' capital proceedings. To the contrary, the burden was shifted to Mr. Jennings on the question of whether he should live or die. In Hamblen v. Dugger, 546 So. 2d 1039 (Fla. 1989), a capital post-conviction action, this 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 one, should be addressed on a case-by-case basis in capital post-conviction actions. Mr. Jennings herein urges that the Court, in assessing this issue, should grant him the relief.

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), Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988), cert. denied, 108 S. Ct. 2005 (1988), 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 Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); Maynard v. Cartwright, 108 S. Ct. 1853 (1988). Mr. Jennings' jury was unconstitutionally instructed, as the record makes abundantly clear (See R. 1698-99, 1700). The prosecutor explicitly argued to the jury that Mr. Jennings' mitigation had to outweigh the aggravating circumstances before a life recommendation could be returned (R. 1662-63).

Such argument and instructions, which shift to the defendant the burden of proving that life is the appropriate sentence, violate the eighth and fourteenth amendments, as the Ninth Circuit Court of Appeals held in Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(in banc). This claim involves a "perversion" of the jury's deliberations concerning the ultimate question of whether Mr. Jennings should live or die. See Smith v. Murray, 106 S. Ct. 2661, 2668 (1986). No bars apply under such circumstances. This issue is currently pending in the United States Supreme Court on a writ of certiorari granted to resolve the split of authority between Adamson and the Arizona Supreme Court. Walton v. Arizona, 46 Cr.L. 3014 (October 2, 1989).

The jury instructions here employed a presumption of death which shifted to Mr. Jennings the burden of proving that life was the appropriate sentence. As a result, Mr. Jennings' 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. Jennings' 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. Jennings 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. Jennings' 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. Jennings proved that the mitigating circumstances existed which 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. Jennings 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. Hitchcock constituted a change in law in this regard. The constitutionally mandated standard demonstrates that relief is warranted in Mr. Jennings' 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 argument in Mr. Jennings' 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. Jennings' 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. Where as here, the prosecution contends that the jury finding of guilt establishes the "in the course of a felony" aggravating circumstance, a presumption of death automatically arises. 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. Jennings' 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. Jennings' sentencing or to "fully" consider mitigation, Penry v. Lynaugh, supra, particularly in light of the prosecutor's closing argument. 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. Jennings should live or die. Smith v. Murray, 106 S. Ct. at 2668.

Under Hitchcock and its progeny, an objection, in fact, was not necessary to preserve this issue for review because Hitchcock decided after Mr. Jennings' trial worked a change in law; Florida sentencing juries must be instructed in accord with eighth amendment principles. 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. Jennings. For each of the reasons discussed above the Court should vacate Mr. Jennings' unconstitutional sentence of death. Habeas relief must be granted.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Jennings' 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 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. 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. Jennings of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, supra, at 1164-65. Habeas relief must be accorded now.

CLAIM VIII

THE SENTENCING COURT ERRED BY FAILING TO INDEPENDENTLY WEIGH AGGRAVATING AND MITIGATING CIRCUMSTANCES, CONTRARY TO MR. JENNINGS' FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS. MOREOVER, APPELLATE COUNSEL WAS INEFFECTIVE FOR NOT RAISING THIS ISSUE ON APPEAL.

Mr. Jennings' sentence of death was illegally imposed because the Court failed to perform its statutorily mandated function of independently weighing aggravating and mitigating circumstances before imposing Mr. Jennings' death sentence. Florida's death penalty statute clearly outlines the bifurcated penalty and sentencing proceedings that must be followed in a murder case where the death penalty is sought. Fla. Stat. 921.141. The guidelines enacted by the legislature requires the Court to conduct an independent assessment of the propriety of the jury's recommendation if the penalty jury advises the Court to impose a death sentence. The statute provides:

> (3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.--Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set for

> in writing its findings upon which the sentence is based as to the facts:
>
> > (a) The sufficient aggravating circumstances exist as enumerated in subsection (5), and
> > (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.
>
> In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with S. 775.082

(Fla. Stat. 921.141(3)(emphasis added).

The Court, when sentencing Mr. Jennings to death, failed to recognize its independent role in the sentencing process. Rather than independently weighing aggravating and mitigating circumstances, the trial court merely adopted verbatim the sentencing order entered by Judge Johnson four years earlier in 1982. Compare Finding of Fact in Support of Sentence of Death (R. 3016-3021) with Findings of Fact in Support of Sentence of Death (R. 3459-3464). In fact, the court indicated it would simply rely on previous factfindings from trials where Mr. Jennings' confession was improperly considered (R. 1815).

The fundamental precept of this Court's and the United States Supreme Court's modern capital punishment jurisprudence is that the sentencer must afford the capital defendant an individualized capital sentencing determination. To this end, this court has mandated that capital sentencing judges conduct a reasoned and independent sentencing determination. This court has therefore consistently held that the trial judge must engage in an independent and reasoned process of weighing aggravating and mitigating factors in determining the appropriateness of the death penalty in a given case:

> Explaining the trial judge's serious responsibility, we emphasized, in State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973), cert.

denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed 2d 295 (1974):

> [T]he trial judge actually determines the sentence to be imposed -- guided by, but not bound by, the findings of the jury. To a layman, no capital crime might appear to be less than heinous, but a trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard criminal activity which can only be developed by involvement with the trials of numerous defendants. Thus the inflamed emotions of jurors can no longer sentence a man to die. . . .
>
> The fourth step required by Fla. Stat. sec. 921.141, F.S.A., is that the trial judge justifies his sentence of death in writing, to provide the opportunity for meaningful review by this Court. Discrimination or capriciousness cannot stand where reason is required, and this is an important element added for the protection of the convicted defendant.

Patterson v. State, 513 So. 2d 1257 (Fla. 1987)(emphasis added).

In this case the trial court merely parroted the findings made in 1982, despite the fact that no less than three additional witnesses testified on Mr. Jennings' behalf in mitigation during the 1986 trial who did not testify in 1982. Likewise, additional documentation was introduced during the penalty phase including Mr. Jennings' records from Florida State Prison which documented that Mr. Jennings was a model prisoner. The latter, a classic source of nonstatutory mitigation upon which a sentence of less than death could rest. Skipper v. South Carolina, 476 U.S. 1 (1986). The record here reflects that no independent weighing of aggravating and mitigating circumstances whatsoever was afforded by the sentencing judge.

The Florida Supreme Court has addressed the ramifications of a trial judge's failure to engage in a meaningful weighing of aggravating and mitigating circumstances before imposing a death sentence. In a number of cases, the issue has been presented where findings of fact were issued long after the death sentence was actually imposed. Nibert v. State, 508 So. 2d 1 (Fla. 1987);

Muehleman v. State, 503 So. 2d 310 (Fla. 1987); Van Royal v. State, 497 So. 2d 625 (Fla. 1986). In Van Royal, the Court set aside the death sentence because the record did not support a finding that the imposition of that sentence was based on a reasoned judgment. Chief Justice Ehrlich's concurring opinion explained:

> The statutory mandate is clear. This Court speaking through Mr. Justice Adkins in the seminal case of State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied sub nom. Hunter v. Florida, 416 U.S. 943, 94 S.Ct 1950, 40 L.Ed2d 295 (1974), said with respect to the weighing process:
>
> > It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present.
>
> 283 So. 2d at 10. (emphasis supplied).
>
> How can this Court know that the trial court's imposition of the death sentence was based on a "reasoned judgment" after weighing the aggravating and mitigating circumstances when the trial judge waited almost six months after sentencing defendant to death before filing his written findings as to aggravating and mitigating circumstances in support of the death penalty? The answer to the rhetorical question is obvious and in the negative.

497 So. 2d at 629-30.

Most disturbing is the fact that even the State's mental health experts, in addition to the defense mental health experts, found noticeable improvement in Mr. Jennings' emotional and mental health since their original evaluations. Even Dr. Lloyd Wilder, the very expert relied on in Judge Harris' sentence of death found that Mr. Jennings' condition had improved (R. 1572), while Dr. McMahon found Mr. Jennings' thinking more normative, he had matured, and appeared mentally and emotionally "more together." (R. 1454). Such "evidence concerning [] [Mr.

Jennings'] emotional history . . . bears directly on the fundamental justice of imposing capital punishment." Penry v. Lynaugh, 109 S. Ct. 2934, 2949 (1989) quoting Skipper, supra, 13-14 (opinion concurring in judgment). By adopting without modification the Findings of Fact in Support of Sentence of Death from 1982, the trial court in the instant case by necessity incorporated facts derived from the illegal confession obtained from Mr. Jennings, suppressed by the Supreme Court in Jennings v. Florida, 470 U.S. 1002 (1985), the very basis upon which the Florida Supreme Court ordered a new trial. Jennings v. Florida, 473 So. 2d 204 (Fla. 1985).

In Patterson v. State, 513 So. 2d 1257 (Fla. 1987), this Court was presented with a similar issue. The court there ordered a resentencing, emphasizing the importance of the trial judge's independent weighing of aggravating and mitigating circumstances. In Patterson, the trial judge failed to engage in any independent weighing process; the responsibility was delegated to the state attorney:

> [W]e find that the trial judge improperly delegated to the state attorney the responsibility to prepare the sentencing order, because the judge did not, before directing preparation of the order, independently determine the specific aggravating and mitigating circumstances that applied in the case. Section 921.141, Florida Statutes (1985), requires a trial judge to independently weigh the aggravating and mitigating circumstances to determine whether the death penalty or a sentence of life imprisonment should be imposed upon a defendant.

Patterson, supra, 513 so. 2d at 1261.

The Patterson court observed that in Nibert v. State, 508 So. 2d 1 (Fla. 1987), it had held that the judge's failure to write his own findings did not constitute reversible error "so long as the record reflects that the trial judge made the requisite findings at the sentencing hearing." Patterson, 513 So. 2d at 1262, quoting Nibert, 508 So. 2d at 4. Indeed, in Nibert, the judge made his findings orally and then directed the

State to reduce his findings to writing. 508 So. 2d at 4. The record in Patterson demonstrated that there the trial judge "delegat[ed] to the state attorney the responsibility to identify and explain the appropriate aggravating and mitigating factors." 513 So. 2d at 1262. This constitutes sentencing error because the Court fails to engage in independent assessment of the appropriate sentence.

Here, the trial court denied Mr. Jennings' right to an individualized and reliable sentencing determination by failing to conduct the independent weighing which the law requires. He merely adopted the findings from Jennings II which contained fundamentally different and illegal evidence. The trial judge here never exercised independent judgment. The Florida Supreme Court has made it clear in Dixon, supra, Van Royal, supra, and Patterson, supra, that the trial court must (a) engage in a reasoned weighing process of aggravating and mitigating circumstances, and (b) not delegate the responsibility for that weighing process to another entity.

The trial court here abdicated its responsibility. A trial court cannot impose a death sentence in an arbitrary or capricious manner:

> In order to satisfy the requirements of the eighth and fourteenth amendments, a capital sentencing scheme must provide the sentencing authority with appropriate standards "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. 2542, 258, 96 S.Ct. 2960, 2969, 49 L.Ed.2d 913, 926 (1976). After reviewing the psychiatric evidence that was before the state court, we must conclude that the state court's rejection of the two mental condition mitigating factors is not fairly supported by the record and that, as such, Magwood was sentenced to death without proper attention to the capital sentencing standards required by the Constitution.

Magwood v. Smith, 791 F.2d 1438, 1449 (11th Cir. 1986). In Magwood the court found that it was error for the trial court to

totally disregard evidence of mitigation. Similarly, the court here acted in an arbitrary and capricious manner in totally failing to provide any independent consideration to the mitigation set forth in the record.

In Ross v. State, 388 So. 2d 1191, 1197 (Fla. 1980), the defendant's death sentence was vacated when the trial judge did not make an "independent judgment of whether or not the death penalty should be imposed." The Court based its analysis on State v. Dixon, supra. The Florida Supreme Court found that failure to conduct an independent weighing, violates the dictates of Tedder v. State, 322 So. 2d 908 (Fla. 1975) stating:

> Although this Court in Tedder v. State, supra, and Thompson v. State, supra, stated that the jury recommendation under our trifurcated death penalty statute should be given great weight and serious consideration, this does not mean that if the jury recommends the death penalty, the trial court must impose the death penalty. The trial court must still exercise its reasoned judgment in deciding whether the death penalty should be imposed. The standard for our review of death sentences where the jury has recommended life was enunciated in Tedder v. State, supra, as follows:
>
> > In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.
>
> 322 So. 2d at 910. In LeDuc v. State, 365 So. 2d 149 (Fla. 1978), this Court considered the standard of review of a death sentence where the jury recommends death and stated:
>
> > The primary standard for our review of death sentences is that the recommended sentence of a jury should not be disturbed if all relevant data was considered, unless there appear strong reasons to believe that reasonable persons could not agree with the recommendation. On the record placed before the jury in this case, a recommended sentence of death was certainly reasonable. Indeed, the only data on which a life recommendation could have been made would have had to be grounded on the nonevidentiary recommendation of the prosecutor and the emotional plea of defense counsel.

> Id. at 151. Since it appears that the trial court did not make an independent judgment whether the death sentence should be imposed, we remand to the trial court to reconsider its sentence in light of this opinion.

Ross v. State, 386 So. 2d 1197-98.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Jennings' death sentence. Counsel was ineffective in failing to explain to the sentencing judge his obligation not to blindly follow a death recommendation. Mr. Jennings' sentence of death was imposed in violation of the sixth, eighth and fourteenth amendments. He respectfully urges that the error be corrected now. Habeas corpus relief must be afforded. The independent weighing set forth in Fla. Stat. sec. 921.141 is jurisdicational to the imposition of a death sentence. The failure to conduct an independent weighing is the failure to properly exercise sentencing discretion under Maynard v. Cartwright, 108 S. Ct. 1853 (1988), and Penry v. Lynaugh, 109 S. Ct. 2934 (1989).

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. 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. Jennings of the

appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, supra, at 1164-65; Matire, supra. Accordingly, habeas relief must be accorded now.

CLAIM IX

THE STATE'S MENTAL HEALTH EXPERTS RELIED ON A STATEMENT MADE BY MR. JENNINGS WHICH WAS UNCONSTITUTIONALLY OBTAINED BY THE STATE IN VIOLATION OF EDWARDS V. ARIZONA, ESTELLE V. SMITH, POWELL V. TEXAS, AND THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. MOREOVER, APPELLATE COUNSEL WAS INEFFECTIVE FOR NOT RAISING THIS ISSUE ON APPEAL.

In 1982, Mr. Jennings was convicted of first degree murder and sentenced to death. The Florida Supreme Court vacated the conviction and sentence because the State extracted a statement from Mr. Jennings in violation of his fifth and sixth amendment rights. Jennings v. State, 473 So. 2d 204 (Fla. 1985); Edwards v. Arizona, 451 U.S. 477 (1981). Subsequently, Mr. Jennings was retried, convicted and again sentenced to death. During the 1982 trial, the State called Dr. Wilder and Dr. Podnos to rebut evidence that Mr. Jennings committed the offense while under the influence of extreme emotional disturbance, that his capacity to conform his conduct to the law was substantially impaired, and that he was unable to form premeditation. These State witnesses based their opinions on the information contained in the statement that as a matter of law had been extracted from Mr. Jennings in violation of his fifth and sixth amendment rights. During the 1986 trial, the State again called the same experts to rebut Mr. Jennings' evidence of mental health mitigation and to prove aggravation. The testimony of the state experts in the trial at issue in this pleading was based on Mr. Jennings' suppressed statement.

The State's use of the suppressed statement against Mr. Jennings in order to obtain a sentence of death violated his fifth, sixth, eighth, and fourteenth amendment rights. The use of an unconstitutionally extracted statement to negate mitigation

and prove aggravation violated Mr. Jennings' fifth and sixth amendment rights. Estelle v. Smith, 451 U.S. 454 (1981); Powell v. Texas, 109 S. Ct. 3146 (1989); Edwards v. Arizona, 451 U.S. 477 (1981). Once a capital defendant is formally charged, the sixth amendment right to counsel precludes a State psychiatric examination concerning aggravation and mitigation based on illegally obtained evidence. Powell v. Texas, supra. Moreover, the State may not use statements obtained in violation of fifth amendment guarantees. Estelle v. Smith, supra.

Under Witt v. State, 387 So. 2d 922 (Fla. 1980), Powell represents a fundamental change of Florida law which requires retroactive application. Moreover, the failure to raise this issue at trial in light of Edwards and the reversal of Mr. Jennings' second trial was ineffective assistance of counsel. Kimmelman v. Morrison, supra. Additionally, the experts' reliance on the suppressed statement was fundamental error.

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. Jennings. This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Jennings' 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 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. 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. Jennings 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

DURING THE COURSE OF MR. JENNINGS' TRIAL THE COURT IMPROPERLY ASSERTED THAT SYMPATHY AND MERCY TOWARDS MR. JENNINGS WERE IMPROPER CONSIDERATIONS, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. MOREOVER, APPELLATE COUNSEL WAS INEFFECTIVE IN NOT RAISING THIS ISSUE ON DIRECT APPEAL.

The jury in Bryan Jennings' trial was repeatedly admonished and instructed by the trial court, that feelings of mercy or sympathy could play no part in their deliberations as to Mr. Jennings' ultimate fate. During voir dire, the court made it plain that considerations of mercy and sympathy were to have no part in the proceedings:

> THE COURT: On the other hand, if the evidence convinces you beyond and to the exclusion of a reasonable doubt that the Defendant is guilty, will you set aside any sympathy you may feel for the Defendant and return a verdict of guilty?
>
> PROSPECTIVE JURORS: (All answer in the affirmative.)

(R. 20)(emphasis added).

* * *

> THE COURT: Okay. Will you promise to accept and follow the Court's instructions to you on the law, even if you find that you

disagree with the law and wish it were different?

PROSPECTIVE JURORS: (All answer in the affirmative.)

THE COURT: You heard me tell you that the State has the burden of proof to prove its case to and beyond the exclusion of every reasonable doubt. Will you hold the State to that burden?

PROSPECTIVE JURORS: (All answer in the affirmative.)

THE COURT: <u>However, if the evidence does convince you as to the guilt of the defendant, will you set aside any feelings of sympathy that you may have and return a verdict of guilty</u>?

PROSPECTIVE JURORS: (All answer in the affirmative.)

(R. 172)(emphasis added).

Prior to the jury's guilt-innocence deliberations the court once again re-emphasized that sympathy and mercy were to play no part in Mr. Jennings' trial by expressly instructing them that such considerations were precluded by law and would result in a miscarriage of justice. Significantly, the following instructions were the only ones provided by the court with respect to the role that mercy or sympathy could play in deliberations:

This case must be decided only upon the evidence that you have heard from the answers of the witnesses and have seen in the form of exhibits in evidence and these instructions.

<u>This case must not be decided for or against anyone because you feel sorry for anyone, or are angry at anyone</u>.

(R. 1287)(emphasis added).

* * *

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

(R. 1288)(emphasis added). The jury was never informed that a different standard, one allowing for consideration of mercy or sympathy, was applicable at the penalty phase.

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

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

Wilson v. Kemp, 777 F.2d at 624. Requesting the sentencers to dispel any sympathy they may have had towards the defendant undermined the sentencers' ability to reliably weigh and evaluate

mitigating evidence. The sentencers' 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 to disregard the consideration of sympathy improperly suggests to the sentencer "that it must ignore the mitigating evidence about the [petitioner's] background and character." California v. Brown, 479 U.S. 538, 107 S. Ct. 837, 842 (1987)(O'Connor, J., concurring). The sympathy arising from the mitigation, after all, is an aspect of the defendant's character that must be considered:

> The capital defendant's constitutional right to present and have the jury consider mitigating evidence during the capital phase of the trial is very broad. The Supreme Court has held that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978) (emphasis in original). See also Woodson v. North Carolina, 428 U.S. 280, 304 (1976).
>
> The sentencer must give "individualized" consideration to the mitigating circumstances surrounding the defendant and the crime, Brown, 479 U.S. at 541; Zant v. Stephens, 462 U.S. 862, 879 (1983); Eddings v. Oklahoma, 455 U.S. 104, 111-12 (1982); Lockett, 438 U.S. at 605, and may not be precluded from considering "any relevant mitigating evidence." Eddings, 455 U.S. at 114. See also Andrews v. Shulsen, 802 F.2d 1256, 1261 (10th Cir. 1986), cert. denied, ___ U.S. ___, 107 S. Ct. 1964, 95 L. Ed. 2d 536 (1987).
>
> Mitigating evidence about a defendant's background or character is not limited to evidence of guilt or innocence, nor does it necessarily go to the circumstances of the offense. Rather, it can include an individualized appeal for compassion, understanding, and mercy as the personality of the defendant is fleshed out and the jury is given an opportunity to understand, and to relate to, the defendant in normal human terms. A long line of Supreme court cases shows that a capital defendant has a

constitutional right to make, and have the jury consider, just such an appeal.

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

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

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

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

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

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

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

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

. . .

> As we discussed above, sympathy may be an important ingredient in understanding and appreciating mitigating evidence of a defendant's background and character.

Parks v. Brown, 860 F.2d at 1554-57. On April 25, 1989, the United States Supreme Court granted a writ of certiorari in order to review the decision in Parks. See Saffle v. Parks, 109 S. Ct. 1930 (1989).

The United States Supreme Court recently held in a case declared to be retroactive on its face that a capital sentencer jury must make a "reasoned moral response to the defendant's background, character, and crime." Penry v. Lynaugh, 109 S. Ct. 2934, 2947 (1989). It is improper to create "the risk of an unguided emotional response." 109 S. Ct. at 2951. A capital defendant should not be executed where the process runs the "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Penry, 109 S. Ct. at 2952. There can be no question that Penry must be applied retroactively. The Court there concluded that, Jurek v. Texas, 428 U.S. 262 (1976), notwithstanding, the Texas death penalty scheme previously found constitutional, created the "risk that the death [would] be imposed in spite of factors which [] call[ed] for a less severe penalty." 109 S. Ct. at 2952. Thus Mr. Penry's claim was cognizable in post-conviction proceedings. Johnny Penry sought, and was granted relief, in part on the identical claim now pressed by Mr. Jennings. Penry alleged that under Texas' functional equivalent of aggravating factors his jury was precluded from considering a discretionary grant of mercy based on the existence of mitigating factors. Id., 109 S. Ct. at 2942. The Court found that, as applied to Penry, the failure to so instruct was not a legitimate attempt by Texas to avoid unbridled discretion, 109 S. Ct. 2951, but rather, an impermissible attempt to restrain the sentencer's discretion to decline to impose a death sentence. 109 S. Ct. 2951. In Mr. Jennings' case, the sentencer was expressly told that Florida law

precluded considerations of sympathy and mercy. The net result is the same: the unacceptable risk that the jury's recommendation of death was the product of the jury's belief that feelings of compassion, sympathy, and mercy towards the defendant were not to be considered in determining its verdict. The resulting recommendation is therefore unreliable and inappropriate in Mr. Jennings' case. This error undermined the reliability of the jury's sentencing verdict. Penry, supra.

Given the court's admonition, reasonable jurors could have believed that the court's original instructions during guilt-innocence (R. 921; 922) remained in full force and effect during penalty phase deliberations, cf. Booth v. Maryland, 107 S. Ct. 2529 (1987); Penry v. Lynaugh, supra, similarly removing the sentencing recommendation from the realm of a reasoned and moral response. The error here undermined the reliability of the sentencing determination. The court's instructions impeded a "reasoned moral response" which by definition includes sympathy. Penry v. Lynaugh, supra at 2952. For each of the reasons discussed above the Court should vacate Mr. Jennings' unconstitutional sentence of death. This claim involves fundamental constitutional error which goes to the heart of the reliability of Mr. Jennings' death sentence.

The retroactive opinion in Penry requires that this issue to be addressed and fully assessed at this juncture. The eighth amendment cannot tolerate the imposition of a sentence of death where there exists a "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Penry, 109 S. Ct. at 2952. 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. 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. Jennings. For each of the reasons discussed above the Court should vacate Mr. Jennings' unconstitutional sentence of death.

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 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. Jennings of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, supra at 1164-65; Matire, supra. Accordingly, habeas relief must be accorded now.

CLAIM XI

IN CONTRAVENTION OF MR. JENNINGS' CONSTITUTIONAL RIGHTS UNDER THE FOURTH, FIFTH, SIXTH AND FOURTEENTH AMENDMENTS, THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS AND ALLOWING INTO EVIDENCE ITEMS THAT WERE SEIZED AS A RESULT OF A WARRANTLESS ARREST.

Mr. Jennings filed a motion to suppress certain evidence, including his shoes seized from his home and fingerprint cards made at the time of his arrest (R. 3238-42). Mr. Jennings contended, inter alia, that the evidence was obtained as a direct

result of his illegal, warrantless arrest for an alleged Orange County traffic offense. A hearing on the motion to suppress was held prior to trial (R. 1896-1996). The trial court rendered an order denying the motion to suppress and found the following:

> (1) Testimony revealed that Jennings was arrested on an Orange County warrant for failure to appear on a driving without a license charge.
>
> (2) At the time of the arrest, the arresting officers did not have a copy of the warrant in hand, but instead relied on a computer check printout.
>
> (3) The issue . . . appears to be . . . whether or not, in fact, there was an outstanding warrant authorizing the arrest . . . .
>
> (4) The burden of proving that the outstanding warrant existed is on the State.
>
> (5) . . . [T]he State introduced the testimony of the officer who requested the computer check . . . verifying that a "hit" had come back prior to the arrest and then introduced a certified copy of the Orange County docket sheet reflecting the outstanding warrant during the appropriate period of time. An actual copy of the warrant was not found.

(R. 3289-90). The trial court found that the docket sheet reflected the existence of an outstanding warrant and was sufficient proof to justify the arrest of Mr. Jennings. However, it is clear that the alleged warrant was used as a pretext.

The testimony at the suppression hearing indicated that numerous law enforcement personnel were searching and canvassing the area surrounding the Kunash home shortly after the victim's disappearance was discovered. Mr. Jennings and a friend, Raymond Facompre, were seen in the general vicinity that morning pushing a motorcycle. Agent Wayne Porter of the Brevard County Sheriff's Department directed Deputy Craig Cain to conduct a routine field interrogation of these two individuals. During subsequent discussion among law enforcement personnel, Mr. Jennings' name was mentioned as one of the individuals who had been seen in the general vicinity that morning during the search for the girl.

One officer recognized Mr. Jennings' name as an individual who had had a prior brush with the law. Mr. Jennings' name was then run through the NCIC computer which resulted in a "hit" based upon an alleged failure to appear on a no valid driver's license charge in Orange County. Based upon this computer information, an officer was dispatched to Mr. Jennings' home to arrest him on the Orange County case. Mr. Jennings was eventually arrested for the Orange County offense at Raymond Facompre's home. Deputy James Bolick, the arresting officer, admitted that he had never seen a warrant or a teletype. The Orange County capias was reportedly returned unexecuted on February 13, 1980, eight months after Mr. Jennings' arrest. In fact, no warrant was ever found in spite of dilligent efforts by the State (R. 1899-1900). The case number on the docket sheet from Orange County did match the warrant number written on the arrest card by Brevard County deputies. The State never could produce a warrant for Mr. Jennings' arrest. A copy of the teletype was never produced by the State (R. 897-996).

The United States Supreme Court has granted a writ of certiorari to review the parameters of the taint of the poisonous tree doctrine from a warrantless arrest. New York v. Harris, cert. granted, 109 S. Ct. 1741 (1989). There can be no question that this must be treated as a warrantless arrest case. No warrant has been produced. Without a warrant, there is no way to determine what probable cause existed in support of the warrant. Under Franks v. Delaware, 438 U.S. 154 (1978), Mr. Jennings would have the right to attack the probable cause supporting the warrant. But where no warrant is produced, there is no opportunity to be fully and fairly heard as to the adequacy of the probable cause supporting the warrant. In Whiteley v. Warden, 401 U.S. 560, 564 (1971), it was held:

> The decisions of this Court concerning Fourth Amendment probable-cause requirements before a warrant for either arrest or search

> can issue require that the judicial officer issuing such a warrant be supplied with sufficient information to support an independent judgment that probable cause exists for the warrant.

Here, Mr. Jennings was arrested on the basis of a warrant no one has ever seen. There is no way to determine if the warrant supported by probable cause within its four corners. As a result of the warrantless arrest, photographs of Mr. Jennings were obtained and admitted into evidence in violation of the fourth amendment. These photographs of Mr. Jennings' penis were obtained theoretically as part of an inventory search of his person. State v. Wells, 539 So. 2d 464 (Fla. 1989), is new law that establishes absent a warrant inventory searches cannot be justified unless it is proved to be pursuant to standardized policy. This issue has not been fully or fairly presented or considered. The photos were obtained in violation of Mr. Jennings' fourth, fifth and sixth amendment rights. He was not provided counsel to advise him as to whether to submit to the picture-taking or whether to require a warrant. It must be now, and habeas corpus relief granted.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Jennings' conviction and 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. Accordingly, habeas relief must be accorded now.

CLAIM XII

MR. JENNINGS WAS DEPRIVED OF HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS WHEN JURORS WERE ADVISED OF MR. JENNINGS' PREVIOUS CONVICTIONS FOR THE VERY CRIMES AT ISSUE. COUNSEL INEFFECTIVELY ARGUED THIS ISSUE.

Mr. Jennings' jury was informed of his prior trials and convictions. One of the jurors, Ms. Chamberlain, explained:

> MS. CHAMBERLAIN: I heard -- actually I already gathered it from information we saw, but I heard that this case had been tried before, which we knew basically from the Lorraine Sylvain letter, it mentioned the previous trial, but I thought I should mention it.
>
> THE COURT: What concerning that previous trial, if anything, did you --
>
> MS. CHAMBERLAIN: The only thing someone said to me, that the case had been tried before, and I told them not to say anything more. So that's all I heard.

(R. 1324). Thus, the jury was informed through a letter introduced by the State over defense objection that Mr. Jennings had been tried and convicted before. This was fundamental prejudicial error, violating due process.

During its deliberations, the jury's written question to the court demonstrated that the jury knew that Mr. Jennings' convictions had been reversed twice, and two retrials ordered (R. 1704). The jury's knowledge of a void conviction, which had been obtained unconstitutionally, violated all notions of due process and fundamental fairness. The fourteenth amendment to the United States Constitution guarantees that the State of Florida cannot deprive an individual of life, liberty or property without due process of law. Recently, this guarantee has been read to focus increasingly upon the concept of fundamental fairness. Immigration and Naturalization Service v. Lopez-Mendoza, 468 U.S. 1032 (1984); Engle v. Issac, 456 U.S. 107, 131 (1982); Smith v. Phillip, 455 U.S. 209, 219 (1982). This concept is generally recognized as best explained in Rochin v. California, 342 U.S.

165, 169 (1952). There, the United States Supreme Court observed:

> Regard for the requirements of the Due Process Clause inescapably [requires] an exercise of judgment upon the whole course of the proceedings leading to the conviction in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offense. [Citations omitted] These standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are so rooted in the traditions and conscience of our people as to be ranked as fundamental, or are implicit in the concept of ordered liberty.

Id. (citation and footnote omitted).

In United States v. Biswell, 700 F.2d 1310, 1319 (10th Cir. 1983), the Tenth Circuit Court of Appeals considered whether the admission of evidence of other "alleged earlier wrongs" was proper under Rules 403 and 404(b), F.R.E. The challenged evidence was summarized by that court as follows:

> Thus, at different times repeated references were made connecting Biswell with "ongoing investigations," with being "handled" for possessing stolen property, with "[g]ambling, stolen property, things like that . . ." and he was by implication placed in a group "involved in some kind of criminal activity."

700 F.2d at 1316. The court concluded that this evidence had been improperly admitted and that a new trial was necessary. In so doing, the court stated:

> On careful consideration of the record here we are convinced that the evidence of other crimes and misconduct as interjected was not justified under Rule 404(b). In any event we must hold that any probative value it had was also substantially outweighed by the danger of unfair prejudice so that its admission was an abuse of discretion under Rule 403. Moreover, "[i]mproper admission of evidence of a prior crime or conviction, even in the face of other evidence amply supporting the verdict, constitutes plain error impinging upon the fundamental fairness of the trial itself." United States v. Parker, 604 F.2d 1327, 1329 (10th Cir. 1978); see also United

States v. Gilliland, 586 F.2d 1384, 1391 (10th Cir. 1978).

Id.

Here, the prosecution introduced Mr. Jennings' prior convictions. This was fundamentally unfair at both the guilt and penalty phases. See Merritt v. State, 523 So. 2d 573 (Fla. 1988); Teffeteller v. State, 495 So. 2d 744 (Fla. 1986). Thus, habeas corpus relief is warranted. The jury was able to consider Mr. Jennings' prior conviction at both the guilt and penalty phases of his trial. In such circumstances, instructions to disregard are insufficient to cure the error. The admission over objection of Mr. Jennings' letter to Lorraine Sylvain discussing the previous proceedings was improper. The prejudice substantially outweighed the probative value. Section 90.403 of the Evidence Code. The failure to grant a mistrial was error. A new trial must now be ordered. This error undermined the reliability of the jury's sentencing determination. For each of the reasons discussed above the Court should vacate Mr. Jennings' unconstitutional sentence of death.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Jennings' conviction and 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. 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. Jennings 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. JENNINGS' DEATH SENTENCE RESTS UPON AN UNCONSTITUTIONAL AUTOMATIC AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF MAYNARD V. CARTWRIGHT, LOWENFIELD V. PHELPS, HITCHCOCK V. DUGGER, AND THE EIGHTH AMENDMENT.

In Florida, the "usual form" of indictment for first degree murder under sec. 783.04, Fla. Stat. (1987), is to "charge[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 1968). Mr. Jennings was charged with first-degree murder in the "usual form." An indictment such as this which "tracked the statute" charges felony murder: section 782.04 is the felony murder statute in Florida. Lightbourne v. State, 438 So. 2d 380, 384 (Fla. 1983).

In this case, it is likely that Mr. Jennings was convicted on the basis of felony murder. The State argued for a conviction based on the felonies charged, and argued that the victim was killed in the course of a felony. The jury received instructions on premeditation and felony murder. It returned a verdict of premeditated murder, felony murder, sexual battery, kidnapping and burglary. If felony murder was the basis of Mr. Jennings'

conviction, then the subsequent death sentence is unlawful. Cf. Stromberg v. California, 283 U.S. 359 (1931). This is because the death penalty in this case was predicated upon an unreliable automatic finding of a statutory aggravating circumstance -- the 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 was recently stated by the United States Supreme Court in Sumner v. Shuman, 107 S. Ct. 2716 (1987). In this case, felony murder was found as a statutory aggravating circumstance. The murder was committed while the defendant was engaged, or was an accomplice in the commission of a sexual battery and kidnapping (R. 1792). The sentencing jury was instructed that it was entitled automatically to return a death sentence upon its finding of guilt of first degree (felony) murder because the underlying felony justified a death sentence. The state argued to the jury that since the jury had found Mr. Jennings guilty of sexual battery and kidnapping the aggravation is automatic (R. 1659). According to the State's closing argument, 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 which does not narrow ("[A]n aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty . . . ." Zant v. Stephens, 462 U.S. 862, 876 (1983)). "[L]limiting [] 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." Maynard v. Cartwright, 108 S. Ct. 1853, 1858 (1988). In short, if Mr. Jennings 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.

The United States Supreme Court recently addressed a similar challenge in Lowenfield v. Phelps, 108 S. Ct. 546 (1988), and the discussion in Lowenfield illustrates the constitutional shortcoming in Mr. Jennings' capital sentencing proceeding. In Lowenfield, petitioner was convicted of first degree murder under Louisiana law which required a finding that he had "a specific intent to kill to inflict great bodily harm upon more than one person," which was the exact aggravating circumstance used to sentence him to death. The United States Supreme Court found that the definition of first degree murder under Louisiana law provided the narrowing necessary for eighth amendment reliability:

> To pass constitutional muster, a capital-sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1983); cf. Gregg v. Georgia, 428 U.S. 153 (1976). 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 use of "aggravating circumstances," is not an end in itself, but a means of genuinely narrowing the class of death eligible persons and thereby channeling the jury's discretion. We see no reason why this narrowing function may not be performed by jury findings at either the sentencing phase of the trial or the guilt phase. Our opinion in Jurek v. Texas, 428 U.S. 262 (1976), establishes this point. The Jurek Court upheld the Texas death penalty statute, which, like the Louisiana statute, narrowly

defined the categories of murders for which a death sentence could be imposed. If the jury found the defendant guilty of such a murder, it was required to impose death so long as it found beyond a reasonable doubt that the defendant's acts were deliberate, the defendant would probably constitute a continuing threat to society, and, if raised by the evidence, the defendant's acts were an unreasonable response to the victim's provocation. Id., at 269. We concluded that the latter three elements allowed the jury to consider the mitigating aspects of the crime and the unique characteristics of the perpetrator, and therefore sufficiently provided for jury discretion. Id., at 271-274. But the Court noted the difference between the Texas scheme, on the one hand, and the Georgia and Florida schemes discussed in the cases of Gregg, supra, and Proffitt, supra:

> "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 narrowing the categories 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).

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 as written. 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 a 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 conviction based upon a finding that does not legitimately narrow -- felony murder. Mr. Jennings' 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, and . . . is foreseen," Tison v. Arizona, 107 S. Ct. 1676, 1684 (1987), but armed robbery, for example, is nevertheless an offense "for which the death penalty is plainly excessive." Id. at 1683. The same is true of burglary, as Proffitt, 428 U.S. 242 (1976)(burglary felony murder insufficient for death penalty) and other Florida cases have made clear. With felony-murder as the narrower in this case, neither the conviction nor the statutory aggravating circumstance meet constitutional requirements. There is no constitutionally valid criteria for distinguishing Mr. Jennings sentence from those who have committed felony (or, more importantly, premeditated) murder and not received death.

According to this Court the aggravating circumstance of "in the course of a felony" is not sufficient by itself to justify a death sentence in a felony-murder case. Rembert v. State, 445 So. 2d 337, 340 (Fla. 1984)(no way of distinguishing other felony

murder cases in which defendants "receive a less severe sentence"); Proffitt v. State, 510 So. 2d 896, 898 (Fla. 1987)("To hold, as argued by the State, that these circumstances justify the death penalty would mean that every murder during the course of a burglary justifies the imposition of the death penalty"). However, here, the jury was instructed on this aggravating circumstance and told that it was sufficient for a recommendation of death unless the mitigating circumstances outweigh the aggravating circumstance. The jury did not receive an instruction explaining the limitation contained in Rembert and Proffitt. There is no way at this juncture to know whether the jury relied on this aggravating circumstance in returning its death recommendation. In Maynard v. Cartwright, 108 S. Ct. at 1858, the Supreme Court held that the jury instructions must "adequately inform juries what they must find to impose the death penalty." Hitchcock v. Dugger, supra, and its progeny require Florida sentencing juries to be accurately and correctly instructed in compliance with the eighth amendment. Under Mills v. Maryland, supra at 1870, "[t]he possibility that a single juror" read the instructions in an unconstitutional fashion requires a resentencing.

"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 an appellate court cannot utilize a basis for review of a conviction different from that which was litigated and determined by the trial court 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 the above quote from 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.

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. Jennings. For each of the reasons discussed above the Court should vacate Mr. Jennings' unconstitutional sentence of death.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Jennings' 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.

Accordingly, habeas relief must be accorded now.

CLAIM XIV

THE INTRODUCTION OF NONSTATUTORY AGGRAVATING FACTORS SO PERVERTED THE SENTENCING PHASE OF MR. JENNINGS' 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. Georgia, 408 U.S. 238, 274, (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.

Proffitt v. Florida, 428 U.S. 258 (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 Elledge 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 limitation of the sentencer's ability to consider aggravating circumstances specifically and narrowly defined by statute is required by the eighth amendment.

> [O]ur cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action.

Maynard v. Cartwright, 108 S. Ct. 1853, 1858 (1988).

As part of the penalty proceedings, the State informed the jury that they should consider all the evidence presented during the guilt phase as part of the evidence at the penalty phase. The problem with the consideration of guilt phase evidence is that the evidence presented during the guilt phase included nonstatutory aggravation. The court specifically instructed the

jury to consider guilt phase evidence during the penalty phase (R. 1698). As a result of the suggestion to consider guilt phase evidence when assessing the proper penalty, the jury and the court considered the improper nonstatutory aggravating factor of the alleged threat posed by the defendant to society at large.

The prosecutors argued to the jury that the guilt phase burglary verdict justified the death penalty:

> MR. HOLMES (prosecutor): . . .These are aggravating circumstances. Because each one of those crimes are there to protect the things in society that we hold the most dear. What is more important than the security of a person's home, where parents can raise their children and have a safe place for them to sleep at night? What do we hold more dear? But yet in this case, that right, the right of the Kunashes to have this protection, the right of the child to be left alone in her home was violated by the act of the defendant.

(R. 1657). Clearly the age of the victim does not constitute a statutory aggravating factor promulgated by the legislature. Burglary is not a sufficient aggravating factor to warrant death. Certainly interference with the parent-child relationship is not an aggravating circumstance. See Booth v. Maryland, supra. Intrusion into a home versus intrusion into a public place, or a place of work, is not an aggravating circumstance. See Tison v. Arizona, 107 S. Ct. 1676 (1987); Rembert v. State, 445 So. 2d 337 (Fla. 1984). Dr. Wilder also testified that Mr. Jennings had no remorse. (R. 1572). This was another non-statutory aggravating factor.

The State relied heavily upon nonstatutory aggravating circumstances to justify the imposition of a death sentence. Mr. Jennings' jury returned a death recommendation. It is clear that consideration of these nonstatutory aggravating circumstances resulted in that recommendation. This violated Mr. Jennings' constitutional guarantee under the eighth and fourteenth amendments. This error cannot be harmless in light of the substantial and unrefuted mitigation presented to the jury.

The prosecutor's introduction and use of, and the sentencers' reliance on, these wholly improper and unconstitutional non-statutory aggravating factors starkly violated the eighth amendment. Mr. Jennings' sentence of death therefore stands in violation of the eighth and fourteenth amendments, see Elledge v. State, 346 So. 2d 998, 1002-03 (Fla. 1977), and should not be allowed to stand.

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. Jennings. For each of the reasons discussed above the Court should vacate Mr. Jennings' unconstitutional sentence of death.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Jennings' 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. Accordingly, habeas relief must be accorded now.

CLAIM XV

MR. JENNINGS' 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. JENNINGS 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)(in 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. Jennings' eighth amendment rights. Bryan Jennings 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. Jennings' trial. The en banc Eleventh Circuit in Mann v. Dugger, 844 F.2d 1446 (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. 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.

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. Jennings' case, as in Mann v. Dugger, at each stage, 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, supra, makes clear that proceedings such as those resulting in Mr. Jennings' sentence of death violate Caldwell and the eighth amendment. In Mann, as in Mr. Jennings' case, the prosecutor sought to lessen the jurors' sense of responsibility during voir dire and repeated his effort to minimize their sense of responsibility. In Mann, the in 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. Jennings' jurors were as egregious as those in Mann and went far beyond those condemned in Caldwell.

Again and again, the jury was told it is the judge who "pronounces" sentence. The jury, as if their sentencing determination were but a political straw poll, were told that they were simply making a recommendation, 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.

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. Jennings' 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.

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 (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. Jennings' jury, however, was led to believe that its determination meant very little.

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. Jennings' case, and Mr. Jennings is entitled to the same relief.

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.

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. Jennings. For each of the reasons discussed above the Court should vacate Mr. Jennings' unconstitutional sentence of death.

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 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. Accordingly, habeas relief must be accorded now.

CLAIM XVI

MR. JENNINGS' JURY WAS IMPROPERLY INSTRUCTED RESULTING IN FUNDAMENTALLY UNFAIR CONVICTIONS AND SENTENCES IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS

Notwithstanding the fact that only one individual was killed, Mr. Jennings' jury was instructed and returned verdicts of guilt on no less than three counts of murder. (R. 3393) (premeditated murder); (R. 3394) (felony murder kidnapping); (R. 3395) (felony murder sexual battery). Under Florida law, Mr. Jennings could only be convicted and sentenced to one count of murder. Muszynski v. State, 392 So.2d 63 (Fla. 5th D.C.A. 1981).

As it is now impossible to determine which count of murder the jury actually convicted Mr. Jennings on, all these murder convictions and their respective sentences must now be vacated and the case remanded for a new trial with a properly instructed jury. It is impossible to determine how the jury understood these instructions; the jury might have believed that the elements of one charge could satisfy the elements of a different charge. Stromberg v. California, 283 U.S. 359 (1931). Muszynski, supra, holds that this error is fundamental. Such fundamentally unfair proceedings contravene the most basic

principles of double jeopardy and habeas corpus relief is now proper; a new trial must be ordered.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Jennings' conviction and 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. 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. Accordingly, habeas relief must be accorded now.

CONCLUSION AND RELIEF SOUGHT

Claims IV, V, VII, VIII, IX, X, XII, XIII, XIV, XV and XVI 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. Wainwright, 498 So. 2d 938 (Fla. 1987), notwithstanding the fact that in other aspects counsel's performance may have been "effective". Washington 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 every 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. Wainwright, 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. Jennings is entitled to relief. See also, Wilson v. Wainwright, supra; Johnson v. Wainwright, supra. The "adversarial testing process" failed during Mr. Jennings' direct appeal -- because counsel failed. Matire at 1438, citing Strickland v. Washington, 466 U.S. 668, 690 (1984).

To prevail on his claim of ineffective assistance of appellate counsel Mr. Jennings must show: 1) deficient performance, and 2) prejudice. Matire, 811 F.2d at 1435; Wilson, supra. As the foregoing discussion illustrates, Mr. Jennings 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. Jennings' capital conviction and sentence of death, and of this Court's appellate review, they should be determined on their merits. The relief sought herein should be granted.

WHEREFORE, Bryan Fredrick Jennings 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. Jennings 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. Jennings 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,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail, first class, postage prepaid, to Kellie Nielan, Assistant Attorney General, 210 North Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114, this 13th day of November, 1989.

Mart J. McCl
Attorney