IN THE SUPREME COURT OF FLORIDA

NO. 75022

JOHN MILLS, JR.,

Petitioner,

v.

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

Respondent.

PETITION FOR EXTRAORDINARY RELIEF
AND FOR A WRIT OF HABEAS CORPUS

LARRY HELM SPALDING
Capital Collateral Representative

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PRELIMINARY STATEMENT

Mr. Mills' habeas corpus petition is being filed now, in accord with the direction of the Eleventh Circuit Court of Appeals, because recent decisions by this Court have established that Mr. Mills is entitled to habeas corpus relief, and that the prior dispositions of this action were in error.

On July 6, 1989, this Court ruled that Booth v. Maryland, 107 S. Ct. 2529 (1987), was a retroactive change in law under Witt v. State, 387 So. 2d 922 (1980). Jackson v. State, 547 So. 2d 1197 (Fla. 1989). Under this Court's analysis in Jackson, counsel for capital defendants could not have anticipated Booth and thus had no good faith basis for presenting Booth error to this Court for review prior to the decision itself. As a result, this Court concluded Booth claims were not barred in post-conviction proceedings. Under the analysis in Jackson, Mr. Mills seeks to have this Court determine his claim that Booth error appears of record. Mr. Mills' claim was before this Court in previous proceedings. This Court then rejected it, relying on its pre-Jackson analysis. Post-Jackson, review of the Booth issue is more than properly requested.

Mr. Mills was in the process of presenting his case to the United States Court of Appeals for the Eleventh Circuit when Jackson v. Dusser was issued, making clear that Mr. Mills' Booth claim was subject to renewed consideration (post-Jackson and post-Booth and Gathers) in the state courts. Undersigned counsel believed that it would be appropriate for Mr. Mills' claim to be initially passed on, post-Jackson, by this Court and filed a motion to that effect with the federal court of appeals (See App. 1). This Court has made it clear that it will direct a constitutionally proper sentencing proceeding when the initial capital sentencing proceedings violated the eighth amendment as interpreted in Booth v. Maryland. Thus, it is this Court that should initially pass on Mr. Mills' case. Permission was

therefore sought of the federal court, and the federal court granted Mr. Mills leave to present his case to this Court (See App. 2). Before the Eleventh Circuit, Mr. Mills submitted:

> [Allowing submission of Mr. Mills' Booth claim to the state courts] would also be in keeping with the
>
> > [c]onsiderations of federalism and comity [which] counsel respect for the ability of the state courts to carry out their role as the primary protectors of the rights of criminal defendants.
>
> Younser V. Harris, **401** U.S. **37 (1971),** quoted in Cabana v. Bullock, **106** S. Ct. **689, 699 (1986).** Booth did not exist when Mr. Mills presented his claims to the Florida courts. Now, post-Booth, it is Florida's courts which should initially provide Mr. Mills "with that which he has not yet had and to which he is constitutionally entitled," i.e., a determination of his Booth claims. See Bullock, **106** S. Ct. at **700,** relying on Jackson v. Denno, **378** U.S. **368, 393-94 (1964);** See also Rosers v. Richmond,, **365** U.S. **534, 548 (1961)** (State has "weighty interest in having valid federal constitutional criteria applied in the administration of its criminal law by its own courts.") These reasons are even more compelling where, as here, the state supreme court is actively considering similar issues.

(App. 1)

Mr. Mills' case is now before this Court. As this petition shows, relief is proper. In this regard, Mr. Mills has prepared consolidated appendices and record excerpts containing pertinent portions of the record and other factual matters which the Court should review and consider in conjunction with this petition. The appendices and record excerpts, like the full record contained in the Court's files, support the petitioner's claims and amply demonstrate why habeas corpus relief is proper in this case. Finally, given this Court's jurisdictional rules relating to habeas corpus actions and given other recent decisions by this Court and the United States Supreme Court, Mr. Mills has included certain other claims in his petition. These claims urge the court to correct fundamental constitutional errors which went uncorrected during prior proceedings in this case. These claims,

like Mr. Mills' Booth claim, also demonstrate his entitlement to habeas corpus relief.

For example, on July 6, 1989, this Court issued its decision in Rhodes v. State, 547 So. 2d 1201 (Fla. 1989). There, the Court explained that the "heinous, atrocious and cruel" aggravating circumstance can only be premised upon acts occurring before the murder which reflect torture towards the victim. Fundamental error occurred in Mr. Mills' case because the trial court expressly relied and the sentencing jury was asked to rely on acts occurring after the murder, and on the suffering of the victim's family, cf. Booth, supra, in concluding that this aggravating circumstance was present. Thus, under Mavnard v. Cartwright, 108 S. Ct. 1853 (1988), the sentencer's discretion was not narrowly tailored, and the eighth amendment was violated.

Also in Rhodes, this Court "reiterate[d] . . . that the sentencing order reflect that the determination as to which aggravating and mitigating circumstances apply under the facts of a particular case is the result of 'a reasoned judgment' by the trial court." Fundamental error occurred in Mr. Mills' direct appeal because this Court failed to find during its independent review of the sentence (and appellate counsel ineffectively failed to argue) that the sentencing order was inadequate in this regard. Thus, under Rhodes and Penrv v. Lynaugh, 109 S. Ct. 2934 (1989), it does not appear that a reasoned judgment to impose death occurred, and the eighth amendment was violated.

Additionally, in Hamblen v. Dugger, 546 So. 2d 1039 (Fla. 1989), this Court recognized that the question of whether a presumption of death was employed needed to be addressed on a case-by-case basis. This is consistent with the recent United States Supreme Court decision in Penrv v. Lynaugh, 109 S. Ct. 2934 (1989), where the United States Supreme Court recognized that a death sentence should not be carried out if there was the possibility that it resulted from the sentencer's inability to

give full effect to the mitigation which existed in the case. As in Hamblen, the merits of Mr. Mills' burden-shifting claim should now be reviewed.

In sum, by his petition Mr. Mills requests that this Court review the proceedings resulting in his capital conviction and sentence of death, and that on the basis of the reasons discussed in this petition, the Court grant him the habeas corpus relief to which he is entitled.

I. JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

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. Mills' capital conviction and sentence of death. Mr. Mills was sentenced to death. Direct appeal was taken to this Court. The trial court's judgment and sentence were affirmed. Mills v. State, 462 So. 2d 1075 (Fla. 1985). Thereafter, in Mills v. State, 507 So. 2d 602 (Fla. 1987), the Court affirmed the denial of Mr. Mills' Rule 3.850 motion and denied habeas corpus relief. Jurisdiction lies in this Court, see, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), because the fundamental constitutional errors challenged herein involve the appellate review process. See Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985); Baggett v. Wainwrisht, 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. Mills 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. Wainwrisht, 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. Meeks; Wilson; Johnson; Downs; Riley, supra. This petition presents substantial constitutional questions which go to the heart of the fundamental fairness and reliability of Mr. Mills' sentence of death, and of this Court's appellate review. Mr. Mills' 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. Wainwrisht, 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., Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987); Tafero v. Wainwrisht, 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. Wainwrisht, 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. Mills' claims.

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

11. GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Petitioner asserts that his sentence of death was 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. Mills' case, substantial and fundamental errors occurred in 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. MILLS' RIGHT TO A RELIABLE CAPITAL SENTENCING PROCEEDING WAS VIOLATED WHEN THE STATE URGED THAT HE BE CONVICTED AND SENTENCED TO DEATH ON THE BASIS OF VICTIM IMPACT AND OTHER IMPERMISSIBLE FACTORS, IN VIOLATION OF BOOTH V. MARYLAND, SOUTH CAROLINA V. GATHERS, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

This case presents about as egregious an example of prosecutorial overreaching in an attempt to obtain a death sentence that it is possible to imagine. From the very beginning, the atmosphere surrounding Mr. Mills' capital trial was rife with prejudice and with the potential for the unrestrained expression of passion and emotion. That potential was realized as a result of the prosecutor's persistent efforts throughout the proceedings to arouse passions, engender prejudice, and inflame emotions.

The offense here occurred in Wakulla County, a small, rural Florida county. The victim was white, the son of a well-known local Baptist minister; Mr. Mills is black and a Muslim; the jury was all white. The prosecutor relied upon every unconstitutional technique imaginable to get the most out of this situation -- the most being a death sentence for Mr. Mills. The prosecutor portrayed the white Baptist victim as a "sickly," "disabled" man, and a helpful citizen and neighbor; he put the victim's father, the Baptist minister, on the stand to relate emotional father-son stories; and he emphasized the anguish of the victim's family. Then, the prosecutor went even further, abandoning any sense of propriety or decorum, and mocked Mr. Mills for his race and

choice of religion, dropping to his knees in an impassioned plea for mob retribution, in uninhibited, free wheeling, prejudicial closing arguments which overstepped any legitimate bounds.

As a result of the prosecutor's efforts, Mr. Mills was sentenced to death in proceedings which allowed for the unchecked exercise of passion, prejudice and emotion. Here, as in South Carolina v. Gathers and Booth v. Maryland, the prosecutor's efforts were intended to and did "serve no other purpose than to inflame the jury [and judge] and divert [them] from deciding the case on the relevant evidence concerning the crime and the defendant." Booth v. Maryland, 107 S. Ct. 2529, 2535 (1987). Since a decision to impose the death penalty must "be, and appear to be, based on reason rather than caprice or emotion," Gardner v. Florida, 430 U.S. 349, 358 (1977)(opinion of Stevens, J.), such efforts to fan the flames are "inconsistent with the reasoned decision making" required in a capital case. Booth, 107 S. Ct. at 2536. Mr. Mills' death sentence stands in stark violation of the eighth and fourteenth amendments and must be vacated.

A. THIS ISSUE IS PROPERLY BEFORE THE COURT

This Court recently found that Booth v. Maryland, 107 S. Ct. 2529 (1987), is an unanticipated retroactive change in law:

> At the time of Jackson's direct appeal, the United States Supreme Court had not yet decided Booth v. Maryland, in which the Court held that presentation of victim impact evidence to a jury in a capital case violates the eighth amendment of the United States Constitution. The Court reasoned that evidence of victim impact was irrelevant to a capital sentencing decision because this type of information creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner . . .
>
> Under this Court's decision in Witt v. State, 387 So.2d 922 (Fla.), cert. denied, 449 U.S. 1067 (1980), Booth represents a fundamental change in the constitutional law of capital sentencing that, in the interests

> of fairness, requires the decision to be given retroactive application.

Jackson (Andrea) v. Dugger, 547 So. 2d 1197, 1198-99 (Fla. 1989).

At John Mills' capital trial, the State presented extensive, detailed evidence and arguments regarding the victim's personal characteristics and worth and the suffering endured by the victim's family, and made pointed comparisons between the worth of the victim and the worth of Mr. Mills, urging the jury and court to sentence Mr. Mills to death on the basis of precisely the types of unconstitutional victim impact evidence and argument condemned in Booth, South Carolina v. Gathers, 109 S. Ct. 2207 (1989), and Jackson, supra. The eighth and fourteenth amendments were violated in this case, as the record makes abundantly clear.[1]

Defense counsel objected. Cf. Jackson, supra. His objections to the improper evidence and arguments were overruled, and the State's unconstitutional presentation was allowed to continue unabated. When the issue was raised on direct appeal, this Court declined to reverse. See Mills v. State, 462 So. 2d 1075 (Fla. 1985). In prior post-conviction proceedings, Mr. Mills again attempted to have the Court review the errors complained of herein, and the Court declined on the basis of it earlier, pre-Boot, direct appeal ruling. See Mills v. State, 507 So. 2d 602 (Fla. 1987). Under Jackson, this issue should now be revisited, for the errors appear of record and have been previously presented to this Court. Jackson, 547 So. 2d at 1199 n.2. Under Booth, Gathers, and Jackson, the egregious constitutional errors discussed below require relief.

[1] As discussed below, the fifth and sixth amendments were also violated.

B. BACKGROUND

An understanding of the context in which the prosecutor's attack occurred is essential to understanding that attack and its potential for infecting the capital sentencing decision with inflammatory, irrelevant, and unconstitutional considerations. As noted previously, the offense and trial occurred in a small rural community. The victim and his family were widely known, the victim's father having been the local Baptist minister for a number of years and also an insurance agent. Many members of the jury venire knew the victim, his father, or other members of the victim's family (See, e.g., R. **494, 645, 654, 659, 679, 699, 705, 721, 733, 764, 873, 883, 895, 899,** 914, **949,** 955, **962, 980, 985, 1006, 1017, 1018, 1020, 1025-26, 1032, 1039).** Some of these jurors attended the church where the victim's father was pastor **(R. 705, 949, 1017, 1025-26),** while others had insurance business with the victim's father (R. **733, 899, 949, 1039).**

The offense had received widespread publicity in the local community (see R. **2068-2157** [Hearing on Motion for Change of Venue]), and community feelings were high. In fact, after the jury was selected and just before trial began, defense counsel emphasized to the court that there were "some problems obviously with security and I want to make sure that everybody is watched in that courtroom" (R. **1063).** Later in the trial, the court noted that it was **"in** the best interest of the defendant and all of the personnel of the courtroom to block off the first two rows of seats behind the counsel for the Defense and the State, for their welfare or the possibility of any violence, and the same was done" (R. **1402-03).**

In a case involving a victim whose family was well-known and well-regarded in the community, this atmosphere of obviously heightened community sentiment and hostility counseled for the greatest restraint and decorum in order to ensure fairness and reliability. However, in this highly charged atmosphere, the

prosecutor's tactics time after time injected further emotion, passion, and prejudice into the capital proceedings.

C. THE PROCEEDINGS VIOLATED BOOTH V. MARYLAND, SOUTH CAROLINA V. GATHERS, AND JACKSON V. DUGGER

The prosecutor's theme was established early and then repeatedly amplified and reinforced. In his opening statement, the prosecutor referred to the two months which passed before the victim's body was found, saying:

> And we're not going to dwell on the anguish that this caused this family durins this period of time, but it is important to remember that what happened between this time and the next major step in this case was nearly a two-month period. And during that time, everybody was trying to figure out what in the world had happened and had very little to work on in order to figure that out.

(R. 1092)(emphasis added).

Having drawn the jury's attention to the suffering of the victim's family, during the State's guilt phase case, the prosecutor then presented the testimony of both the victim's wife and his father, ostensibly to identify property taken from the victim's home. Cf. South Carolina v. Gathers (discussed below). The victim's wife testified first, identifying the property in question (R. 1454-60). Then the State put on the testimony of the victim's father, the minister, to identify the very same property. The father's testimony was filled with anecdotes, reminiscences, and characterizations of the victim:

> BY MR. KIRWIN:
>
> Q Mr. Lawhon, state your name, please.
>
> A Glenn Lawhon
>
> Q And you have been sworn in this matter before?
>
> A Yes.
>
> Q What is your occupation, sir?
>
> A An insurance agent.

Q Are you related to Les Lawhon?

A Yes.

Q And what was that relation?

A He was my son.

Q How would you characterize that relationship with your son?

A We were always very close. He was a boy that never save us any trouble from the time he was born. I didn't get a chance to hunt . . .

MR. RANDOLPH [Defense Counsel]: Your Honor, I have to object to this. I don't see the relevancy of this.

MR. KIRWIN: It is going to become relevant.

THE COURT: Connect it up as relevant.

Q (By Mr. Kirwin) Did you spend time with him?

A Yes, he spent a lot of time with us. He was a real home boy. He spent all the time he could with us.

Q Okay. Were you familiar with Les' home in Lake Ellen?

A Oh, yes, we were in it many time.

Q And were you familiar with the items that were in that home?

A Yes.

Q Before we go to home, do you know, had Les ever been shot in his life?

A No, sir, he had not.

Q Was he ever wounded in either wrist?

A No.

Q Did you and he ever hunt tosether?

A Yes. occasionally, not as often as I wish we could have but as often as I could.

Q Are you familiar with the weapons he used to hunt?

A Oh, yes. Most of them I gave to him.

Q Okay. I would like to show you one weapon in particular, sir. It's been moved into evidence as State's Exhibit No. 25. I

would like you to look at it and tell me if you recognize it.

A That is the first gun I ever gave him. I gave him that gun when he was either 14 or 15.

Q Are there any identifying characteristics about that gun?

A Well, he was a small boy at the time and the gun kicks pretty bad, being a .12-gauge, and the first time he tried to shoot it was pretty rough on him, so I put this boot on it, this shock-absorbing boot on it, just a few days after I bought it. That's one identifying characteristic. And another one, if you look inside the left barrel, you can see a small amount of -- you see the powder burns collects a little bit more profusely right along at this point.

Q The outside part of the left barrel?

A Yeah.

Q What, two or three inches up?

A About where my finger is, the best I can look inside and tell. At any rate, I noticed a little bit of rust or pitting -- I'm not sure if it's rust or pitting -- but there was a little roughness inside that barrel when I was looking at the gun. It was a used gun when I bought it and I asked the fellow's permission to buy it on approval so that I could take it to a gunsmith and have him look and make sure that was all right.

Q You noted that little defect in the gun prior to the time you bought it?

A Yes.

Q Now, the time that you spent at your son's home, did you ever notice whether or not they had any -- an entertainment center, for example?

A They had a TV and they had stereo equipment.

Q Are you familiar at all with the stereo equipment?

A Yes. As a matter of fact, I was the one that went with him when he picked it out. He had more confidence in my judgment on that type of equipment than he did his own. So he paid for it with his money and I was the one advised him on what to buy and hooked it up for him.

Q Okay.

MR. RANDOLPH: Your Honor, may we approach the bench?

THE COURT: Yes, sir.

(The following proceedings were held at the bench and outside the hearing of the Jury:)

MR. RANDOLPH: Your Honor, I would have to object to this testimony in the manner in which it is being given. It is only given in this manner to provoke sympathy from the jury.

MR. KIRWIN: That is not so.

MR. RANDOLPH: He is asking specific questions and doing so in a manner that will allow him to go on and keep telling things which are not necessarily relevant to this case. He was called, I thought, for identification. We have had all these items identified, and they have been moved in evidence, and it has been stated it is the same property. I don't see any useful purpose other than to evoke sympathy from the jury. That's what he is doing.

THE COURT: What is your purpose?

MR. KIRWIN: The only person that we have got to tell us this stuff came out of the Les Lawhon residence is Michael Frederick. That is the only purpose. He is the man who was most familiar with most of the stuff. He is about to say when he bought the stereo equipment and hooked it up himself.

I asked him about the one rifle because that is the extremely important rifle, and that's the one that was found at the Mills residence. There is no serial number on it. The man's familiarity with the weapon is important in identifying that as the weapon. And, Judge, just because it is moved into evidence does not mean Michael Frederick is not going to be subject to some cross examination about the gun.

MR. RANDOLPH: Your Honor, ownership of this property was never a question in this case from the beginning. It's already been admitted. It's been properly identified. I have stipulated to all of the---

THE COURT: The Court will allow a limited amount of it. But it's already admitted---

MR. KIRWIN: All I want to ask him about is the stereo equipment, Judge, and that's all I intend to ask him about.

THE COURT: All right.

(The following proceedings were held in open Court:)

Q (By Mr. Kirwin) Okay. Reverend Lawhon, you were telling us about the stereo equipment. How is it that you're familiar with that?

A Beg your pardon?

Q How are you familiar with the stereo equipment in your son's house?

A How was it I was familiar with it?

Well, as I said, I went with him when he purchased it. As a matter of fact, part of the equipment I purchased when he wasn't even alons at all. He trusted my judgment, and some of it I purchased when he wasn't even alons. And the rest of it, he was alons, but---

Q What pieces of stereo equipment did Les and Shirley have in their house?

A The first piece that I ever bought for him -- again, he paid for it -- was a Sony reel-to-reel tape recorder. This was before the days of cassette. And---

Q Let me interrupt you for just a second and ask you to look down here at this piece of evidence which has been marked for identification purposes and moved into evidence as State's Exhibit No. 26. Can you see it from there, sir?

A Yes, sir, the same make, model. As a matter of fact, I have used that very recorder suite a bit in recordins tapes for him and Shirley.

Q You're familiar with that?

A Definitely.

Q Does that appear in any way different from the tape recorder that you bought for Les?

A No different at all. It is the same one.

Q Okay. What other pieces did he have?

A He had a Techniques, manufactured by Panasonic, stereo receiver. A receiver is an instrument that receives radio signals. It also has a built-in amplifier into the same instrument, which amplifies whatever you're playing through it, whether it be a tape recorder, record player, or what.

Q Were you with him when that was bought?

A Yes, Sir.

Q Okay. I would like to show you this piece of evidence. Again, it's been moved into evidence as State's Exhibit No. 32. Can you tell us anything about that? Does that appear to be one that you were with Les when---

A It is the exact same make and model. And it is still hooked up, the wires are still hooked up on the back. The speaker cables are still hooked up on the back just like I did it.

Q You hooked up these wires on it?

A Right. I have a certain way of doing it, a color coding arrangement of doing it, so that I don't get confused between how I hooked it up at this end and how I hooked it up to the speakers at the other end. The wires are still hooked just the way I hooked them.

Q Any difference at all in that receiver?

A None at all.

Q Okay. Was there any other item in the stereo equipment?

A There was a record player, a dual record turntable and changer.

Q All right, sir. I would like you to take a look at this. It's been admitted into evidence as State's Exhibit No. 33. Do you recognize it?

A That's the same make, same model of record changer, and this is not the correct dust cover for it. It is the one that we got for it. But the one that really belonged on it, in order for it to use the automatic spindle, needed to be taller than this. They come with an automatic spindle which is taller, that you can stack records on. They also come with this little short one like that, that you can play one record at the time. With the tall spindle in it, this dust cover wouldn't close except along here somewhere.

Q The turntable that Les and Shirley had, were you with him when that was bought?

A Well, I bought that when he wasn't even with me.

Q Okay. Did that turntable have a dust cover that was too short?

A It had this dust cover.

Q Did you do any work on this particular record player?

A Well, I also bought the cartridge. The cartridge is this little assembly right here, about an inch long, I guess, which contains the needle. And this is a Sure high-track cartridge, which I installed for him. I bought it and installed it for him.

Q Okay. Is there anything at all different, sir?

A Another thing, the tracking portion and all that was recommended by the manufacturer for this stylus is still setting right where I left it.

Q Is there anything at all different between this turntable and the one that was in Les and Shirley's house?

A No. As a matter of fact, very few people would put that expensive a cartridge in this turntable.

(R. 1461-69)(emphasis added). Under the guise of identifying property -- property which had already been identified by the victim's wife (see R. 1454-60) -- the prosecutor thus placed before the jury evidence regarding the victim's character and his relationship with his father. Under the eighth amendment, this is flatly impermissible. See Booth v. Maryland, 107 S. Ct. 2529 (1987); South Carolina v. Gathers, 109 S. Ct. 2207 (1989); Jackson v. Duqger, 547 So. 2d 1197 (Fla. 1989); see also Rushing v. Butler, 868 F.2d 800 (5th Cir. 1989).

But the prosecutor's efforts did not stop there. In order to make his later not-so-subtle arguments regarding the comparable worth of the victim and Mr. Mills, the prosecutor of course needed to place before the jury and judge evidence regarding Mr. Mills' race and religion.[2] Thus, the State introduced evidence that supposedly showed Mr. Mills was "a Muslim," that he called white people "caucasians" or "crackers"

[2]Such matters are, of course, irrelevant to any capital sentencing decision or to what is at issue at a capital trial.

or "devils," and that he purportedly hated white people. These references appeared throughout the proceedings, rendering the entire trial and penalty phase fundamentally unfair and unreliable. Matters which have no place in a capital trial and sentencing were the core of the State's efforts to convict and obtain a death sentence.

During the testimony of the State's key witness, codefendant Michael Frederick, the State repeatedly elicited testimony purportedly showing that Mr. Mills was a Moslem and that he hated white people. For instance, regarding Mr. Mills introducing Frederick to Fawndretta Galimore, Mr. Mills' girl-friend, the prosecutor elicited the following:

> Q All right. And how did Boone Mills introduce you to Ms. Galimore?
>
> A He said, "Fawndretta is my queen." He said, "This is my queen here, Mike."
>
> Q What did he call her during the course of that introduction?
>
> A His queen.

(R. 1178-79). In the Moslem religion, the male member of a couple is referred to as "king," while the female is referred to as "queen."

The prosecutor's efforts continued, eliciting from Frederick purportedly anti-white statements made by Mr. Mills. Frederick testified that on the day of the offense, Mr. Mills supposedly suggested that the two of them "rip[] off some of these crackers" **(R. 1201).** Then the prosecutor asked:

> Q Okay. Now, did you all ever drive through any nonwhite areas?
>
> A No, sir, we didn't. Could you repeat that again?
>
> Q Did you all ever drive through any nonwhite areas after you had that conversation?
>
> A No, sir, we didn't.

(R. 1202). None of this was relevant to any legitimate issue, but the prosecutor continued to elicit such testimony. According

to Frederick, Mr. Mills also told the victim, "Shut up, cracker" (R. 1210), and "I'm going to do to you what your forefathers did to my forefathers" (R. 1216).

During the direct examination of State witness Fawndretta Galimore, the State's efforts to elicit prejudicial, irrelevant testimony regarding race and religion became even more intense. In response to a question, Galimore testified that she knew Mr. Mills as "Ans Serene" (R. 1563), a Muslim name. Then, throughout his questioning of Galimore, the prosecutor repeatedly referred to Mr. Mills as "Ans Serene" (see R. 1568, 1570, 1571, 1572, 1594, 1573, 1577, 1581, 1582, 1583, 1584, 1585, 1586, 1589, 1590, 1591, 1608, 1609, 1610). The prosecutor also asked:

> Q Okay. Now, let's go back to your relationship for just a second.
>
> Did Ans Serene refer to you in any special way?
>
> A As his queen.
>
> Q And how would he refer to himself?
>
> A As a king.

(R. 1565).

> Q What was his religious persuasion?
>
> A He was a Moslem.
>
> Q Did he ever discuss his religion with you?
>
> A Yes, he did.
>
> Q During the course of the discussions, did he ever mention white people?
>
> A Yes, he did.
>
> Q What did he refer to them as?
>
> A Caucasians.

(R. 1566). Through these questions, the prosecutor managed to imply that Mr. Mills' religion involved hatred of white people. In his final questions, the prosecutor asked about a letter Galimore had received from Mr. Mills:

Q Okay. Did he tell you anything else?

A Yes. He told me not to be afraid; that he has told me about those Caucasians time after time again.

Q All right. And what had he told you about them?

A That they were devils.

(R. 1591). Then, the prosecutor's first questions on redirect brought this up again:

Q Ms. Galimore, what did he refer to white people in the letter as?

A Caucasians.

Q And what did he tell you about those Caucasians in the letter?

A That he had told me about them. Don't be afraid of them.

(R. 1607).

The State's next witness, Major Hines, an acquaintance of Mr. Mills, continued this theme. The prosecutor asked about a conversation the witness had purportedly had with Mr. Mills:

Q What was the nature of that conversation. What did he say?

A Asked me if I---

COURT REPORTER: I didn't understand you.

Q (By Mr. Kirwin) You're going to have to speak up a little louder.

He asked you to do what?

A Knock some Caucasians off, do some burglaries.

Q To knock some Caucasians off doing burglaries?

A Yes.

(R. **1621).**

Finally, the State's case concluded with the testimony of an investigator regarding some statements Mr. Mills had allegedly made. According to this witness, when Mr. Mills was shown a photograph of the victim, he "flared up, and he says, 'This is a

white people's world. You crackers are trying to hang something on me'" (R. 1668).

None of the State's evidence regarding Mr. Mills' religion or supposed hatred of white people was relevant to any issue which the jury had to decide. What that "evidence" was "relevant" to -- as the State's later arguments made clear -- was urging the jury to convict and impose death based on the comparison between the victim -- the white son of a Baptist minister -- and Mr. Mills -- a black Muslim. But, as will be discussed below, it is precisely such arguments that are forbidden by the eighth and fourteenth amendments. The State used this "evidence" to its maximum effect, in closing arguments as improper and unconstitutional as it is possible to imagine.

The theme was set early in the prosecutor's guilt phase closing argument:

> You know, often we find ourselves so interested in protecting the defendant's constitutional rights, that we lose sight of the true purpose of the judicial system.
>
> The true purpose of the judicial system is to punish those who do wrong, protect innocent people from those who do wrong, and to keep those wrongdoers from doing so again.
>
> Les Lawhon was a sickly man, disabled, youns, early thirties. His wife was working full-time to help take care of him because he can't work. His family, all these are victims. All these are the people that we all too often lose sight of. Let's not lose sight of them tonight.
>
> We're going to talk about the defendant, we're going to talk about the State's witnesses. But let's all keep just a little piece of our vision on the victims, the people who suffered as result of that man.

(R. 1840-41)(emphasis added). According to this argument, the jury should convict (and later impose death) because of the victim's characteristics and because his family members were also "victims." The prosecutor urged the jury to "keep just a little piece of our vision on the victims, the people who suffered." This was flatly improper. See Booth; Gathers.

Interspersed with the prosecutor's sympathic references to the victim and his family were derogatory references to Mr. Mill's race and religion. For example, regarding the testimony of Major Hines, the prosecutor argued:

> Major Hines is a terrible witness. He was a terrible witness. He was put on the stand for a very specific reason. I wanted you to see another one of Boone Mills' friends.
>
> . . . .
>
> But the reason Major Hines was up there, you saw Major Hines. What did Boone Mills ask him about? He wanted to go do some burglaries, knock off some Caucasians.
>
> You know, picture in your mind Major Hines. Did that word "Caucasian" belong out of that mouth? Does he look like the type of man that is literate enough to know that big a word? You heard the rest of his vocabulary. He couldn't hardly string three words together in a row. That word "Caucasian" is what gives what he said the ring of truth. Because you know where he got that word? Right there, the man that refers to white people as Caucasians. Major Hines couldn't have fisured that word out in 20 Years.
>
> Think about the rest of his vocabulary. It just wasn't there, ladies and gentlemen. He got that word from one source, Boone Mills.
>
> You shall know them by their friends.

(R. 1853-54)(emphasis added).[3] According to this argument, the jury should convict (and later impose death) because of Mr. Mills' "vocabulary" and/or because Mr. Mills was "friends" with an illiterate black man who would not know a word like "Caucasian." The prosecutor's argument also mocked Mr. Mills' religion, referring to Galimore's testimony: "And she is Ans Serene's girlfriend. She is his queen; he is the king" (R. 1880); "Boone Mills never discussed his business with his queen

[3]Such guilt-by-association presentations cannot but lead to an unreliable sentence of death.

because he was the king" (R. 1890); "And what does she do? Just like the king ordered" (R. 1897).

Comparable worth arguments are forbidden by Booth and Gathers. However, having set up the comparison between the victim and Mr. Mills, the prosecutor repeatedly emphasized it:

> [Frederick] told you Boone Mills was on the phone and that Mr. Lawhon was seated in the dining room with Les Lawhon just a couple of feet from the phone, and he was looking through something. He said it might have been the directory, it might have been a newspaper.
>
> I'm going to suggest to you that Boone Mills used that same ploy: "Do you know where they live?"
>
> "No, but let me help you."
>
> "Can I use your phone?"
>
> "Sure."
>
> It is the last aood deed Les Lawhon did. Last time he helped a citizen or a neighbor, the last time he helped somebody that needed his help.

(R. 1864)(emphasis added). The comparison between the victim and Mr. Mills played upon the jury's fears, evoking their sympathy for the white victim and their fear of the supposedly white-hating defendant:

> And you know that when Les Lawhon saw them turn down that road, you know what was going throush his mind, and you know how we know that? Because he said at that time, "What are you going to do with me? What are you going to do with me?"
>
> And Boone Mills: "I'm going to do with you what your forefathers did to my forefathers."
>
> This is the same Boone Mills who told in a letter to Fawndretta Galimore, "I have told you time and time again about those Caucasians, what they'll do to you."
>
> "I'm going to do to you what you did to me, what your forefathers did to my forefathers."
>
> What do you think Les Lawhon was thinking them?

(R. 1867)(emphasis added). The prosecutor also played upon the

jury's sympathy for the victim's family:

> And you know what else he did? He left Les Lawhon's body out there on that airstrip as the family and friends were looking for it, when a simple anonymous phone call could have put a lot of anguish to end.

(R. 1879).

The prosecutor's guilt phase closing culminated in an all out incitement to the exercise of racial prejudice, passion, and fear:

> Ladies and gentlemen, the Defendant, John Mills, Jr., is consumed with hatred. He is consumed with hatred. And he hates the people who he thinks have been oppressing him. Listen to the testimony of Fawndretta Galimore. She said he called them devils. Major Hines --
>
> MR. RANDOLPH: Your Honor, I have to object. He has gone a long way in his closing argument. The closing statement he is making now is meant only for to show, to prejudice this jury against my client along those lines.
>
> THE COURT: Just stay with the facts, Counselor.
>
> MR. KIRWIN: Judge, I am staying with the facts, and I have no intention of prejudicing this jury or any other jury.
>
> He is consumed with hatred. He can't help but hate, and one man that he had no reason to hate, no reason to harm, the man that extended him a helping hand, the man that let him use the phone, the man that let him in his house, is dead at the hands of John Mills, Jr., this defendant.
>
> Ladies and gentlemen, the evidence in this case, I think, is more than just beyond a reasonable doubt. I think the evidence in this case is overwhelming. I suggest to you that each and every one of you can fulfill your solemn oath and return a verdict that speaks the truth. Find John Mills, Jr., guilty of murder in the first degree, premeditated murder, and I think you can do it with a clear conscience.
>
> Thank you.

(R. 1980-09)(emphasis added). At some point during this impassioned argument, the prosecutor actually got down on his knees, imploring the jury to express its outrage and passion (See R. 1975).

All of the prosecutor's closing arguments violated the eighth and fourteenth amendments. See Booth; Gathers; Jackson; Rushing v. Butler, 868 F. 2d at 804 (noting, "the admission of emotionally charged, live testimony regarding the victim's character, demeanor and reputation . . . were altogether irrelevant" to the sentencing decision and thus violated the eighth amendment). See also Wilson v. Kemp, 777 F.2d 621 (11th Cir. 1985); Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985)(in banc); Newlon v. Armontrout, 885 F. 2d 1328, 1338 (8th Cir. 1989), quoting Coleman v. Brown, 802 F. 2d 1227, 1239 (10th Cir. 1986)("'[a] decision on the propriety of a closing argument must look to the Eighth Amendment's command that a death sentence be based on a complete assessment of the defendant's individual circumstances . . . and the Fourteenth Amendment's guarantee that no one be deprived of life without due process of law"') (citations omitted). The arguments contaminated the proceedings with irrelevant, inflammatory, and prejudicial appeals to the jury's sympathy for the victim and his family, to racial prejudices, and to fears of black-on-white violence. Standing alone, the guilt phase argument requires a new trial or resentencing in this case. However, that argument does not stand alone, but was followed at the penalty phase by an even more impassioned and blatantly unconstitutional argument.

At the beginning of his penalty phase closing argument, the prosecutor urged the jurors to sentence Mr. Mills to death because of the victim's personal characteristics, tying this argument into an appeal to fear which urged the jurors to imagine what the victim experienced:

> At that time between 2:30 and 3:30, he was at home in his trailer. His wife had left. She had gone on on to work. He was disabled, unable to work. It was a rainy day. He had no Plans but to stay at home in his trailer. Les Lawhon would have been a lot better off had it been a sunny day and he had plans to be out. But as it was, he was there in his trailer minding his business and

bothering no one.

Some time between 2:30 and 3:00, a truck pulls up into his yard and a man comes to his door and knocks on the door. Now, remember what the plan was, ask for a residence. The man who came up and knocked on the door was John Mills, Jr. Les Lawhon, being the person that he was, allowed him to come inside and offered him the use of his telephone and sat down at the table -- you remember Michael Fredrick's' testimony -- looking through something. It might have been a directory. It might have been a newspaper. I suggest to you that Les Lawhon was trying to find this residence, whatever residence it was, that John Mills, Jr., told him he needed to find. He save the man a telephone to use and doing what he could do to help the man find where he wanted to go.

Les was sitting at the kitchen table doing what he has to do or doing what he wanted to do to help somebody. Another man comes in the house. It is Michael Fredricks. The next thing that Les Lawhon knows is that the phone has been thrown to the floor and a knife that was in the cake on the dining room table is now around his throat, held by John Mills, Jr. He doesn't know what's going on. He doesn't know what to do. So, Les says: Listen, don't hurt me. Take my property, but don't hurt me.

Then one of the social judgments that John Mills, Jr., made that day was to say, "Shut up, cracker."

Les sees Michael Fredricks going through the house looking for somebody else, to see if anybody else is there. While Michael Frederick is doing that, he still feels the blade of that knife across his throat. What was he thinkins? What was he thinking?

Then John Mills determines that it is time to go. It is time to get out. They are taking Les Lawhon out of his own house. Les says to them: Can I get my shoes? Not a complicated request. "You won't need your shoes where your are going." Another social judgment made by John Mills, Jr.

Then Mills gets the shotgun. Instead of having cold steel at his throat, Les Lawhon has the double barrell of a shotgun pressed against his head. He is marched out of his own house in his stocking feet in the pouring rain. What was he thinkins. What was he going throush? They put him in the truck, ladies and gentlemen. He is seated in the truck in the front seat. There is a shotgun pressed against his head. For seven long miles on a dark, rainy day, Les Lawhon is driven to his death. They turn onto to a desolate air strip where there is nobody

else. There are no cars in sight. It is heavily wooded. It is not well traveled. There are no houses in sight. It is a desolate area. What is Les Lawhon thinking now? We don't have to imagine what he was thinkins, ladies and sentlemen, because we know, number one, he was terrified. He was shaking, and he was trembling during that entire ride. As they turned onto that desolate strip, we know he was apprehensive about what was going to happen to him because he asked the question: What are you all going to do with me? John Mills, Jr., makes another social judgment and says, "I'm going to do to you what your forefathers did my my forefathers."

At that moment, ladies and gentlemen, Les Lawhon knew he dead. They drove him up the strip, and they turned around and stopped. Boone Mills said to get out of the truck. With Les Lawhon's own beat, he tied Les' hands behind his back and told him to kneel shoeless on that wet ground. What was Les Lawhon thinkins then? What was in his mind then?

As his head was bent forward slightly inclined, John Mills made another social judgment. He took a tire iron out of the cab part of his truck. He smashed that tire iron in the back of Les Lawhon's head hard enough to send Les down to the ground with blood pouring from the back of his skull. There was no warning, no provacation on the part of Les Lawhon. He smashed a tire tool on the back of his head. Then he stood there watching Les Lawhon lying on the ground bleeding.

Then the Defendant said: Let's go.

Who knows what thousht ran throush Les Lawhon's mind? Who knows if he was even really capable of thinking at that point. But something caused him to lurch up, his hands still tied behind his back, and to try and put as much distance between himself and his tormentors as he possibly could.

In another one of his social judgments, Boone Mills grabs the shotgun, the same one that he had pressed against Les Lawhon's head and chases him into the woods. The Defendant catches him in the ditch. He fights with him there. He even clubs him with the butt of the shotgun. Picture that fight in that ditch. Les Lawhon is fighting for his life. The only weapon he had to fend off this murderer was his head because his hands were still tied behind his back. He butted John Mills, Jr., in the stomach to try and keep him away from him. Then he ran up the hill and ran down the patch. Two shots were fired. We know that Les Lawhon didn't have a weapon. We know something else about one of

those shots, ladies and gentlemen. We know that one of those shots was fired directly into Les' face from extremely close range. Dr. Dailey said the scatter of the shots was no more than this (indicating). The Defendant stuck the shotgun into the front of Les Lawhon into his face and calmly pulled the trigger, extinguishing Les' life.

You know, when you heard today and you are going to be asked to show some mercy and show some compassion and show some pity, think to yourself what pity did he show to Les Lawhon? What pity did he show him when he hit him in the back of the head with a tire iron? What pity did he show him when he tracked him through the woods? What pity did he show him when he fired the shotgun inches from his fact? Is there remorse in John Mills, Jr.? Is there pity? There's none.

Those are the facts, ladies and sentlemen.

(R. 2306-11)(emphasis added).

At the end of his argument, the prosecutor again urged fear and the victim's personal characteristics as the reasons for imposing death:

The real scary thing about this -- and I've alluded to this before --is Les Lawhon is totally innocent in this case. Sometimes, you have murders that occur when there is an argument between two people that don't know each other or an argument between two spouses or father and son or people on the job or people that have come into contact in a store or in a car accident or some connection where you can look at the victim and say: Well, listen. He didn't deserve to die, but he's not exactly a shining rose. Les Lawhon's only crime in this whole matter is beins a compassionate human being who when asked for help, allowed people into his home to use his phone and to help them find out the information they needed. That is the one thins that he did wrong was to be compassionate and to help his fellow human beings. For that, he received a death sentence from John Mills, Jr., a death sentence.

You know, I sure with [sic] that when they took that drive out there and they got on that air strip, that Les could have said: Wait a minute. Wait a minute. Let's get my family doctor. He'll tell You that I'm sick and he'll tell you that I can be better. Somethins better can be done for me. Let's set my doctor and let him tell you about this. I wish he could have said: Let's go get my lawyer. Lord knows, my lawyer can give a good reason for me to be alive. My

lawyer can tell you I can be productive in society; that I can help; that I'm not beyond redemption. My lawyer will do a good job. Please, John Mills. Let's go get my lawyer. Or he could have said: Let my family be here. Let them be here, and let them argue for me, please. Let's get a jury from 12 people from Wakulla County and see if I deserve to die like this. See if I deserve to be treated like a mad dog. Please. Let's get that jury. I don't want to die.

But John Mills, Jr., made another one of those social judgments. He became the jury, the judge, the lawyers, the bailiffs, and the executioner. Les Lawhon asked for his life. He asked for it. He hadn't been convicted. He hadn't done a thins wrons. He had been a compassionate human being. Judge Mills decides to pass a sentence of death. No appeal. No revisit the case. No rules of evidence. No cross examination. Judge Mills declares death.

When Mr. Randolph gets up here and tells you: Don't be swayed by emotion. Don't be. But when he sets up here and he tells you why John Mills. Jr.. should not be condemned to death. Les Lawhon is right there. Every time he says to you that John Mills should not be condemned to death because he could be rehabilitated, think to yourself: Could Les Lawhon be rehabilitated? Did Les Lawhon deserve to die? Did he deserve to die in the way that he died?

Ladies and gentlemen, if this case does not cry out for the death penalty: if this case does not scream out to you that John Mills, Jr., deserves to die in the electric chair because of his conduct and because of his cruel, atrocious, his heinous conduct towards Les Lawhon in depriving Les Lawhon of the only thing he valued, that is his life; if this case does not call for that death penalty, no case does. I urge you to consider all the facts. Take that seven-mile ride out there with Les Lawhon. Put yourselves in the driver's seat of that truck -- passenger's seat. Excuse me -- with a shotgun to your head. Take that seven-mile drive and kneel down on that ground just like he did with your hands tied behind your back. Run down through that ravine and up that bank and watch that shotgun come at your face. If that doesn't call out to you for the death penalty, nothing ever will.

(R. 2321-24)(emphasis added).

The very matters paraded before the sentencing court and jury in Mr. Mills' case -- the victim's family's "sense of loss," Booth, 107 S. Ct. at 2534; the victim's personal worth, id. at

2534, the victim's value to the community and to his family, id. -- were the matters which the Supreme Court in Booth and Gathers determined to be impermissible considerations at the penalty phase of a capital trial. The eighth amendment was violated here, as it was in Booth and Gathers.

This record is replete with Booth error. Mr. Mills was sentenced to death on the basis of the very constitutionally impermissible "victim impact" and "worth of victim" evidence and argument which the Supreme Court condemned in Booth and Gathers. The Booth court concluded that "the presence or absence of emotional distress of the victim's family, or the victim's personal characteristics are not proper sentencing considerations in a capital case." Id. at 2535. These are the very same impermissible considerations urged on (and urged to a far more extensive degree) and relied upon by the jury and judge in Mr. Mills' case. Here, as in Booth, the victim impact information "serve[d] no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant." Id. Since a decision to impose the death penalty must "be, and appear to be, based on reason rather than caprice or emotion," Gardner v. Florida, 430 U.S. 349, 358 (1977)(opinion of Stevens, J.), such efforts to fan the flames are "inconsistent with the reasoned decision making" required in a capital case. Booth, 107 S. Ct. at 2536. See also Penry v. Lynaugh, 109 S. Ct. 2934, 2951 (1989)(death sentence cannot be premised on "an unguided emotional response").

Here, as in Gathers, "evidence" introduced at the guilt phase was then used as the basis for improper arguments at the penalty phase. See Gathers, 109 S. Ct. at 2211. In Gathers, the Supreme Court held that a prosecutor's reliance upon evidence properly admitted for another purpose to make improper victim impact or worth of victim arguments violates the eighth amendment. Id. Here, the "evidence" -- the victim's father's

testimony -- was not even properly admitted, and then formed the basis of unconstitutional comparable worth arguments. As Gathers held, "purely fortuitous" circumstances such as the victim's personal characteristics "cannot provide any information relevant to the defendant's moral culpability," and thus violate the eighth amendment. Id.; Booth. Comparable worth arguments such as the prosecutor presented here have been soundly condemned by Booth and Gathers. Such arguments are totally irrelevant to the defendant's "personal moral culpability," Penry, and thus serve only to divert the capital sentencer from making a sentencing decision based upon reason and the individual characteristics of the capital defendant. Both; Gathers; see also Rushing, supra. Comparable worth, however, was the focus of the prosecutor's argument for death in Mr. Mills' case, in flagrant disregard for the eighth amendment.

The prosecutor's arguments also violated the fourteenth amendment. Here, as in Newlon, supra, the due process violation requires relief:

> Considering the prosecutor's penalty argument in light of the totality of the circumstances, we find that Newlon was unfairly prejudiced by the prosecutor's improper argument. As the district court concluded, the prosecutor's argument:
>
> > infect[ed] the penalty proceeding with an unfairness that violates due process. The remarks were neither isolated nor ambiguous * * * By contrast, the jury was subjected to a relentless, focused, uncorrected argument based on fear, premised on facts not in evidence, and calculated to remove reason and responsibility from the sentencing process. This constitutional error requires that the sentence of death be vacated.
>
> **693** F.Supp. at **808** (emphasis added).

Newlon, **885** F.2d at **1338,** quoting Newlon v. Armontrout, **693** F. Supp. **799, 808** (W.D.Mo. **1988).** Moreover, the prosecutor's argument focused upon Mr. Mills' race and religion as bases for imposing death, thus implicating Mr. Mills' rights to be free

from racial discrimination and to the free exercise of his religion. See Darden v. Wainwright, 106 S. Ct. 2464, 2472 (1986) (prosecutor's argument which did not "implicate other specific rights of the accused" did not violate due process). This "relentless, focused," Newlon, argument exceeded all bounds of propriety and fairness, sought a death sentence on the basis of Mr. Mills' race and religion, and violated due process. Newlon; Wilson, supra; Drake, supra.

In addition to the improper evidence and argument presented to both jury and judge, the judge was presented with further such information. In October, 1982, the trial court received a pre-sentence investigation report (PSI) concerning Mr. Mills' co-defendant, Michael Fredrick.[4] Attached as part of the PSI were letters and statements from the victim's wife, sister, mother, and father (See Att. 6).

The letters and statements, in particular that from the victim's father, Rev. Glenn Lawhon, contained highly inflammatory material and threats. Because the material in the PSI was prejudicial and inappropriate for consideration by the trial court or any sentencing body, counsel for Mr. Fredrick moved to strike the letters and statements from Fredrick's PSI. The trial court granted Mr. Fredrick's motion to strike the letters and statements from the PSI on January 7, 1983, nearly three months after the PSI, including the stricken material, was received by the trial court, on the same date the Court sentenced Michael Fredrick.

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[4]This material was presented to, read by, and argued before the court but was at no time furnished to Mr. Mills. Relying upon information which is not disclosed to the defendant in imposing death violates Gardner v. Florida, 430 U.S. 349 (1977). Here, the information was inflammatory and prejudicial statements by the victim's family which infected the capital sentencing decision with impermissible factors. Booth. Thus, not only was Booth violated, but the sentencing court was exposed to information which Mr. Mills had no opportunity to explain or rebut. Gardner. See also Estelle v. Smith, 451 U.S. 454 (1981).

The trial court had sentenced John Mills two days earlier, on January 5, 1983. The material stricken from Fredrick's PSI two days after the court sentenced Mr. Mills was also included in Mr. Mills' post-sentence investigation report.

One of the items stricken from Fredrick's PSI by the trial court two days after it sentenced Mr. Mills was entitled "Father's Statement." Dated October 14, 1982, and addressed "To Whom It May Concern," the handwritten statement included the following passages:

> Both of these murderers deserve to be put to death swiftly and in some horrible way. The word of God commands that such "creatures" be stoned to death publicly. Even though there are many liberal (and crooked) federal judges who pretend to believe that capital punishment is unconstitutional, the Bible and the Constitution both make it clear that capital punishment is the law of God and of the United States of America. As a matter of fact, the 5th Amendment makes specific mention of "capital---crimes." The use of the 8th Amendment which prohibits the use of "cruel and unusual punishment," to justify the staying of executions is an insult to the intelligence of a moron and amounts to downright treason on the part of the federal judges who do it! They are outlaws!
>
> * * *
>
> I feel it might also be in order at this point to write a few words for the benefit of any parole board or commission that should ever consider letting this murderer out on parole. This would be a very unwise and unhealthy thing for them to do. If Fredrick's (sic) is ever paroled during my lifetime, I promise those who do so that they will regret that stupid decision!
>
> * * *
>
> Fredrick's (sic) could have made an anonymous phone call to the family or to any other citizen of the county and revealed the location of the body before it was eaten by wild hogs, racoons and buzzards. Our pleas and even offers of reward for information leading to the location of the body of Les so we could recover it in time to give him a proper burial were in the newspapers and on television. Yet Fredrick's (sic) was so uncaring and such a murderer at heart that he was not even moved to make an anonymous phone call. He is no better than a mad dog and should be shot down like one!

(Att. 6)(emphasis in original).

The "Father's Statement," stricken by the trial court two days after it sentenced Mr. Mills, told the trial court how it should sentence Fredrick:

> If it is not possible to give Fredrick's (sic) the death penalty because of our crooked criminal justice system, then he should <u>at least</u> be given the <u>maximum</u> possible number of years for each of the charges, and each of these sentences should run <u>consecutively</u> and with no possibility of parole. He should also be made to serve his time at hard labor to earn his keep instead of enjoying a lifetime of leisure in air conditioned comfort with other sexual perverts (queers) like himself.

(Att. 6)(emphasis in original). Although the trial court ordered "Father's Statement" stricken on January 7, 1983, the court on that date sentenced Fredrick to "the maximum possible number of years for each of the [five] charges" against him and ordered that they "run consecutively," Rev. Lawhon's exact request.

Although the stricken material was part of Fredrick's PSI, the material contained harmful, prejudicial material about Mr. Mills. The stricken material was before the trial court for nearly three months at the time it sentenced Mr. Mills. Under <u>Booth</u> and <u>Gathers</u>, it is of no moment that the material was in Frederick's PSI. Reversal is required where contamination may have occurred. <u>Booth</u>; <u>Gathers</u>. Contamination assuredly occurred here. Included in the material improperly and unconstitutionally considered are the following statements about Mr. Mills:

> A person wouldn't think anything of killing a jellyfish knowing of the possible sting it could bring and the useless purpose it serves. How much more should we think nothing of killing garbage like Michael Fredrick's and John Mills. They are far more deadly than the jellyfish and far more useless.
>
> * * *
>
> They are dangerous, worthless people and keeping them alive at tax payers expense wouldn't make as much sense as bringing a jellyfish home and feeding and caring for it, or spending several thousand dollars a year

to keep a mad dog alive. If Michael Fredrick's and John Mills do not get capital punishment for killing my brother, there is no justice.

* * *

There is as much difference in my brother and the two who killed him as dark is from light. My brother had the characteristics of light and brought comfort to those who knew him. His murderers have the characteristics of night. . . .

"Sister's Statement," October 5, 1982 (Att. 6).

The little finger of Les was worth more than all the mad dog murderer's like these two "creatures" on earth.

* * *

According to the statement given to law officers at the time of her arrest, the accomplice Galimore was present in the home of mad dog Mills (John Mills, Jr,), and witnessed the unloading and concealment of all the items stolen from Les and Shirley.

* * *

Even since her arrest she has been very uncooperative with the law officers. Indeed, it is my understanding that she and her lawyer have blackmailed the state into reducing the charges against her in order to get her to give testimony in the Mills' trial.

But in spite of her act of blackmail against the state, one way or another, she will pay for her crimes against Les and his family! This is a solemn promise!

"Father's Statement" (Att. 6).

It all seems so tragic to me. Les and his wife Shirley were so much in love and had such a rare and beautiful relationship and were so happy together. They had great plans for a future together including a home and children. We, his parents also looked forward to grand-children from Les and Shirley. Now, this can never be!

"Mother's Statement" (Att. 6).

Michael Fredrick's and John Mills have not only killed my brother . . . . [t]hey have hurt us, Les' family, beyond words of description. A part of us is dead too. And then, there are the things that are never to happen, the child that Les and Shirley wanted, never to be born. It is not only the things they have destroyed that was known it is also the things they have prevented by

murdering Les.

"Sister's Statement" (Att. 6).

> I feel that Fredricks and Mills intentionally killed my husband and that both of them deserve the electric chair, which at times I feel is even to swift and painless. I think they should have to suffer the mental and physical anguish that they made Les suffer before they killed him.
>
> You may think this is harsh of me to feel this way or think, I understand, after all it was her husband. Just let me say one thing. Put yourself in my shoes and in the shoes of the rest of his family. How would you feel if it were your husband, wife, son or daughter? I'm sure once you have actually encountered this never ending nightmare your feelings would be the same.

"Wife's Statement" (Att. 6).

There is no doubt that that PSI information and the evidence and argument presented during trial infected the trial court's sentencing decision with impermissible, unconstitutional considerations. At oral sentencing, the judge stated as part of the basis for imposing death:

> [The victim] was then left to the fowl of the air and the beast of the fields, there to remain for several days, until one of the members disclosed the whereabouts of his remains.
>
> Then to exaggerate these findings, they returned and continued to burglarize and to set fire to and destroy the property remaining of the family.

(R. 2395-96). The victim's family's anguish during the period before the victim's body was discovered, as well as the property loss suffered by the family, entered the court's decision to impose death. See Zerauera v. State, 14 F.L.W. 463, 464 (Fla. 1989)("the victim impact statements received by the trial judge and her reference to them in her sentencing order raise very serious questions concerning the validity of the death sentence").

Booth and Gathers set the parameters establishing the unconstitutionality of the victim impact evidence, the prosecutor's arguments and the PSI information, and the

consequent unreliability of Mr. Mills' death sentence. In Booth, the Supreme Court discussed the proper focus of a capital sentencing proceeding:

> It is well-settled that a jury's discretion to impose the death sentence must be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." . . . Although this Court normally will defer to a state legislature's determination of what factors are relevant to the sentencing decision, the Constitution places some limits on this discretion. . . . Specifically, we have said that a jury must make an "individualized determination" of whether the defendant in question should be executed, based on "the character of the individual and the circumstances of the crime." And while this Court has never said that the defendant's record, characteristics, and the circumstances of the crime are the only permissible sentencing considerations, a state statute that requires consideration of other factors must be scrutinized to ensure that the evidence has some bearing on the defendant's "personal responsibility and moral guilt." To do otherwise would create the risk that a death sentence will be based on considerations that are "constitutionally impermissible or totally irrelevant to the sentencing process."

Booth, supra, 107 S. Ct. at 2532-33 (citations omitted)(emphasis added). The constitutionally required focus on the defendant cannot occur when impermissible considerations such as victim impact are urged as a basis for a death sentence:

> [W]e cannot agree that [the impact upon the victim's family] is relevant in the unique circumstance of a capital sentencing hearing. In such a case, it is the function of the sentencing jury to "express the conscience of the community on the ultimate question of life or death." When carrying out this task the jury is required to focus on the defendant as a "uniquely individual human bein[g]." The focus of [the impact evidence], however, is not on the defendant, but on the character and reputation of the victim and the effect on his family. These factors may be wholly unrelated to the blameworthiness of a particular defendant. As our cases have shown, the defendant often will not know the victim, and therefore will have no knowledge about the existence or characteristics of the victim's family. Moreover, defendants rarely select their victims based on whether the murder will have an effect on anyone other than the person

> murdered. Allowing the jury to rely on a VIS therefore could result in imposing the death sentence because of factors about which the defendant was unaware, and that were irrelevant to the decision to kill. This evidence thus could divert the jury's attention away from the defendant's backsround and record, and the circumstances of the crime.

Booth, supra, 107 S. Ct. at 2533-34 (footnote and citations omitted)(emphasis added).

The same analysis applies to a prosecutor's victim impact argument. Gathers, supra. Of course, "divert[ing] the jury's attention away from the defendant's background and record" was precisely the intent of the prosecutor's improper evidence and arguments in Mr. Mills' case. As his penalty phase closing makes clear, the improper evidence and arguments were intended to divert the jury's attention away from proper considerations: "when [defense counsel] gets up here and he tells you why John Mills, Jr., should not be condemned to death, Les Lawhon is right there. Every time he says to you that John Mills should not be condemned to death because he could be rehabilitated, think to yourself: Could Les Lawhon be rehabilitated?" (R. 2323). Here, as in Rushing, 868 F.2d at 804, "[i]t is painfully apparent that this eulogistic articulation of grief . . . served one purpose and one purpose only -- to provide the jury with emotionally charged and inflammatory [argument regarding the victim's] admirable personal characteristics and the extent of emotional distress suffered by [the victim's] family and friends."

In Gathers, the Supreme Court applied the same considerations discussed in Booth to prosecutorial argument. The Court held such arguments unconstitutional because the victim's personal characteristics are "purely fortuitous, . . . cannot provide any information relevant to the defendant's moral culpability[,] . . . [and] cannot be said to relate directly to the circumstances of the crime." Gathers, 109 S. Ct. at 2211.

In Penry v. Lynaugh, 109 S. Ct. 2934 (1989), the Supreme Court again emphasized, albeit in another context, that the focus of a capital penalty phase must be solely on the personal culpability of the defendant:

> "In contrast to the carefully defined standards that must narrow a sentencer's discretion to impose the death sentence, the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to decline to impose the death sentence." Indeed, it is precisely because the punishment should be directly related to the personal culpability of the defendant that the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense. Rather than creating the risk of an unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential if the jury is to give a '"reasoned moral response to the defendant's background, character, and crime."' In order to ensure "reliability in the determination that death is the appropriate punishment in a specific case," the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background, character, or the circumstances of the crime.

Id., 109 S. Ct. at 2951 (citations omitted).

Together, Booth, Gathers, and Penry establish that a capital penalty phase must focus on the personal moral culpability of the defendant and must provide a jury with a vehicle for making a "reasoned moral response" to the defendant's background and character and to the circumstances of the offense. Factors which divert the jury from that task -- such as improper evidence, Booth, improper argument, Gathers, or inadequate jury instructions, Penry -- are unconstitutional because they are "inconsistent with the reasoned decisonmaking," Booth, 107 S. Ct. at 2536, required in capital cases. Such impermissible factors create the "'risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Penry, supra, 109 S. Ct. at 2952, quoting Lockett v. Ohio, 438 U.S. 586, 605 (1978).

This is precisely what occurred in Mr. Mills' case. All of the prosecutor's improper evidence and arguments urged consideration of factors completely unrelated to Mr. Mills' personal moral culpability. The comparison between Mr. Mills and the victim, the appeal to fear resulting from that comparison, the victim's personal qualities, and the impact of the offense upon the victim's family, were not factors involved in the ''reasoned moral response,'' Penry, supra, to Mr. Mills' background and character or to the circumstances of the offense which the penalty phase should have required the jury to make. Gathers; Booth. Rather, those factors were intended to divert the jury's attention from the proper (and required) considerations and to base its decision on considerations having nothing to do with Mr. Mills or the offense. The improper evidence and argument in Mr. Mills' case was the same as what was at issue in Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989). Here, as in Jackson, "[r]ather than focusing the jury's attention on the character of the defendant and the circumstances of the crime, the victim impact evidence [and argument] diverted the jurors' [and judge's] attention to the character and reputation of the victim and the effect of his death on [his family]." Jackson, 547 So. 2d at 1199.

Under Booth, reliance upon considerations which are ''irrelevant to a capital sentencing decision" requires resentencing when such considerations "create[] a constitutionally unacceptable risk that the jury *may* impose the death penalty in an arbitrary and capricious manner." Booth, supra, 107 S. Ct. at 2533 (emphasis added). Booth and Gathers establish that relief under the eighth amendment is required when contamination occurs. Contamination occurred in Mr. Mills' case.

A sentence of death cannot stand when it results from prosecutorial comments or judicial instructions which *may* mislead the jury into imposing a sentence of death, Booth; Caldwell v.

Mississippi, 472 U.S. 320, 105 S. Ct. 2633 (1985); Wilson v. Kemp, 777 F.2d 621, 626 (11th Cir. 1985), reh. denied, 784 F.2d 404 (11th Cir. 1986), and a defendant must not be sentenced to die by a jury which may have "failed to give its decision the independent and unprejudiced consideration the law requires." Wilson, 777 F.2d at 21, quoting Drake v. Kemp, 762 F.2d 1449, 1460 (11th Cir. 1985)(in banc); see also Potts v. Zant, 734 F.2d 526 (11th Cir. 1984). In short, a sentencing proceeding is flatly unreliable when the jurors are misled as to their role in the sentencing proceeding or as to the matters which they must consider in making their determination of what is the proper sentence under the circumstances. Wilson; Caldwell.

The prosecutor in this case, however, provided textbook examples of improper argument. He urged the jury and judge to consider matters that are not appropriate for deciding whether a defendant lives or dies, and the consideration of which rendered the sentencing proceeding fundamentally unreliable. That overall improper presentation must not be isolated from the Booth violations herein at issue.

As stated, both the jury and judge relied on improper victim impact evidence in sentencing Mr. Mills to death. Mr. Mills' sentence violates Booth. The burden of establishing that the error had no effect on the sentencing decision rests upon the State. See Booth, supra; Caldwell v. Mississippi, 105 S. Ct. 2633, 2646 (1985). In Caldwell, the Supreme Court discussed when eighth amendment error requires reversal: "Because we cannot say that this effort [the prosecutor's improper argument] had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires." Id., 105 S. Ct. at 2646. Thus, the question is whether the errors in this case may have affected the sentencing decision. As in Booth and Gathers, the State here cannot show that the improper argument had "no effect" on the jury's or judge's

sentencing decision. Mr. Mills presented a substantial case in mitigation, and the prosecutor's improper evidence and arguments served only to deflect the jury's attention away from the mitigating evidence and toward impermissible, irrelevant considerations. Since the prosecutor's arguments "could [have] result[ed]" in the imposition of death because of impermissible considerations, Booth, **107** S. Ct. at **2534,** relief is appropriate in Mr. Mills' case.

CLAIM II

THE INTRODUCTION OF NONSTATUTORY AGGRAVATING FACTORS SO PERVERTED THE SENTENCING PHASE OF MR. MILLS' 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 determining whether a punishment comports with human dignity, we are aided also by a second principle inherent in the [Cruel and Unusual Punishment] 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, 92 S.** Ct. **2726, 2744** (1972)(Justice Brennan concurring)(footnote omitted).

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

> While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of Furman are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or

> against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.
>
> The directions given to judges and jury by the Florida statute are sufficiently clear and precise to enable the various aggravating circumstances to be outweighed against the mitigating ones. As a result, the trial court's sentencing discretion is guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed.

Proffitt v. Florida, 428 U.S. 242, 96 S. Ct. 2960, 2969 (1976).

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

> This court, in Elledse v. State, 346 So.2d 998, 1003 (Fla. 1977) stated:
>
> > We must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death.
> >
> > Strict application of the sentencing statute is necessary because the sentencing authority's discretion must be "guided and channeled" by requiring an examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.
>
> Proffitt v. Florida, 428 U.S. 242, 258, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

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

In Mr. Mills' case, the State relied more heavily upon nonstatutory aggravating circumstances to justify the imposition of a death sentence than upon the statutory aggravation. Mr. Mills' jury returned a death recommendation. It is clear that consideration of these nonstatutory aggravating circumstances resulted in that recommendation. This violated Mr. Mills' constitutional guarantees under the eighth and fourteenth amendments.

The prosecutor's penalty phase argument was an undisguised appeal to racial prejudice, fear and disregard for the judicial procedures designed to channel the jurors' discretion. The prosecutor continued to press the racial themes which he used as persistently in the guilt/innocence phase of the trial. Using techniques reminiscent of revivalist preaching he argued that John Mills, Jr., should die because he was making a "social judgment" at every phase of the offense (R. **2307, 2309, 2310**). He appealed to the jurors' personal fears by telling them that they should put themselves in the victim's position and try to feel his fears (R. **2321-22, 2323**). He evoked their fears of future crimes by telling them that "The real scary thing about this. **. .**" was that the victim was a total stranger, implying that John Mills should die because the same type of crime might occur again (R. **2321**). This same appeal was made in regard to Mr. Mills' prior conviction for four burglaries when the prosecutor asked, "Do we have to wait for a more violent crime, a crime like murder. **. . ." (R. 2315**). The prosecutor argued that the jury should show no mercy and Mr. Mills should die because he showed no pity or remorse in the commission of the offense, while the victim was **"compassionate"** (R. **2311, 2321**). The prosecutor argued that the statutory mitigating circumstance that 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 did not apply because he knew the difference between right and wrong: "He understood what the law is and what it meant to break the law." (R. **2318**). Other arguments used to persuade the jury to give a death sentence based on nonstatutory aggravation were: Mr. Mills should die because he had been to state prison once before (R. **2319**); Mr. Mills treated the victim "like a mad dog" (R. **2322**); the victim could be rehabilitated (R. **2323**); and Mr. Mills was going to inherit $250,000 (R. **2319**).

However, the most sinister and egregious argument put forth by the prosecutor was that Mr. Mills should die because the laws of Florida and the United States guaranteed him the right to an attorney, witnesses in his behalf, trial by jury, appeal, rules of evidence, and cross-examination:

> You know, I sure with that when they took that drive out there and they got on that air strip, that Les could have said: Wait a minute. Wait a minute. Let's get my family doctor. He'll tell you that I'm sick and he'll tell you that I can be better. Something better can be done for me. Let's set my doctor and let him tell you about this. I wish he could have said: Let's so set my lawyer. Lord knows, my lawyer can give a sood reason for me to be alive. My lawyer can tell you I can be productive in society; that I can help; that I'm not beyond redemption. My lawyer will do a good job. Please, John Mills. Let's go get my lawyer. Or he could have said: Let my family be here. Let them be here, and let them argue for me, please. Let's set a jury from 12 people from Wakulla County and see if I deserve to die like this. See if I deserve to be treated like a mad dog. Please. Let's get that jury. I don't want to die.
>
> But John Mills. Jr., made another one of those social iudsments. He became the jury, the judge, the lawyers, the bailiffs. and the executioner. Les Lawhon asked for his life. He asked for it. He hadn't been convicted. He hadn't done a thing wrong. He had been a compassionate human being. Judse Mills decides to Pass a sentence of death. No appeal. No revisit the case. No rules of evidence. No cross examination. Judse Mills declares death.

(R. 2321-22)(emphasis added).

The prosecutor asked the sentencing jury to disregard the law. The prosecutor asked the jury to disregard the unrebutted testimony of the mental health expert that Mr. Mills was borderline retarded and could not make social judgments. The prosecutor asked the jury to disregard the arguments of defense counsel. The prosecutor asked the jury to sentence Mr. Mills to death because he had a right to a jury, appeal, cross examination and rules of evidence. The prosecutor asked the jury to disregard the constraints of the law and act only upon their

personal fears and emotions. Furthermore, he told the jury to disregard defense counsel's argument to set aside emotions and follow the constraints of the law:

> When Mr. Randolph gets up here and tells you: Don't be swayed by emotion. Don't be. But when he sets up here and he tells you why John Mills, Jr., should not be condemned to death, Les Lawhon is risht there. Every time he says to you that John Mills should not be condemned to death because he could be rehabilitated, think to yourself: Could Les Lawhon be rehabilitated? Did Les Lawhon deserve to die? Did he deserve to die in the way that he died?

(R. 2322-23)(emphasis added).

It is difficult to conceive of a more blatant appeal to emotions and disregard for the guidance of the law in the imposition of a death sentence. The appeal to the jurors' feelings of sympathy for the victim overwhelmed any jury consideration for the facts of the case. The prosecutor skillfully submerged Mr. Mills' evidence of mitigation in a sea of emotional pleas based upon nonstatutory aggravating factors.

At the time of sentencing by the trial court, the State relied on the argument made to the jury, which included the above quoted nonstatutory aggravating factors.

The prosecutor's introduction and use of, and the sentencers' reliance on, these wholly improper and unconstitutional nonstatutorv aggravating factors starkly violated the eighth amendment and the requirements for channeled discretion. Mr. Mills' sentence of death therefore stands in violation of the eighth and fourteenth amendments.

> Furman held that Georgia's then standardless capital punishment statute was being applied in an arbitrary and capricious manner; there was no principled means provided to distinguish those that received the penalty from those that that did not. E.G., id., at 310, 92 S.Ct., at 2762-2763 (Stewart, J., concurring); id., at 311, 92 S.Ct., at 2763 (WHITE, J., concurring). Since Furman, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the

> risk of wholly arbitrary and capricous action.

Mavnard v. Cartwrisht, 108 S. Ct. 1853, 1858 (1988).

Florida is a weighing state. The judge and the jury weigh narrowly defined and limited aggravating circumstances and the evidence offered in mitigation. The sentencers' discretion under Cartwrisht must be limited. Consideration of aggravators outside the appropriate limitations violated Cartwrisht. Under Cartwright, habeas corpus relief is warranted because the sentencer considered nonstatutory aggravators in the weighing process.

The reliance on nonstatutory aggravation is fundamental constitutional error going to the heart of the fundamental fairness and reliability of Mr. Mills' death sentence. Relief is now proper.

CLAIM III

MR. MILLS' 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 RHODES V. STATE, MAYNARD V. CARTWRIGHT AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

This Court recently 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, 547 So. 2d 1201 (Fla. 1989)(emphasis added). In Cochran v. State, 547 So. 2d 928 (Fla. 1989), this 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.

547 So. 2d at 931.

The jury was not advised of these limitations on the "heinous, atrocious or cruel" aggravating factor. Indeed, the unconstitutional constructions rejected by this Court are precisely what was argued to the jury and what the judge employed in his own sentencing determination. As a result the instructions failed to limit the jury's discretion and violated Maynard v. Cartwrisht, 108 S. Ct. 1853 (1988). This issue was raised and rejected on direct appeal, Mills v. State, 462 So. 2d 1075, 1080-81 (Fla. 1985), prior to Cartwrisht, Rhodes, and Cochran.

The jury instruction given in Cartwrisht was virtually identical to the instruction given to Mr. Mills' sentencing jury. The eighth amendment error in this case is absolutely indistinguishable from the eighth amendment error upon which a unanimous United States Supreme Court granted relief in Maynard v. Cartwright, 108 S. Ct. 1853 (1988). The trial court here instructed the jury:

> Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. Cruel means designed to inflict a high degree of pain, utter indifference to, or enjoyment of the suffering of others; pitiless.

(R. 2335). The Tenth Circuit's in banc opinion (unanimously overturning the death sentence) explained that the jury in Cartwriqht received virtually the identical instruction:

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

Cartwriqht v. Maynard, 822 F.2d 1477, 1488 (10th Cir. 1987)(in banc), affirmed, 108 S. Ct. 1853 (1988). In Cartwrisht, the Supreme Court unanimously held that such an instruction did not "adequately inform juries what they must find to impose the death penalty." 108 S. Ct. at 1858. The decision in Cartwright

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

This Court has held that the "especially heinous, atrocious or cruel" statutory language is directed only at "the conscienceless 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. The homicide here involved a shot to the head, clearly not "unnecessarily torturous to the victim."

In Maynard v. Cartwrisht, the victim had been killed by a shotgun blast. The victim's wife, also attacked, was "shot twice, her throat was cut and she was stabbed in the abdomen." Cartwrisht v. Maynard, 802 F.2d 1203 (10th Cir. 1987). In affirming the jury's finding of "heinous, atrocious or cruel" the Oklahoma Court of Criminal Appeals failed to apply the standard it had adopted from Dixon, supra,[5] that the offense to be "heinous, atrocious or cruel" had to be unnecessarily torturous to the victim. In Mr. Mills' case, the evidence established that the victim was never told he would be killed in advance of the actual gun shot. In fact, after striking him in the head, Mr. Mills announced his intention of leaving the scene. It was only the unexpected actions of the victim which provoked the subsequent chase and shooting of the victim. These facts did not constitute an "unnecessarily torturous'' killing. Mr. Mills' case is indistinguishable from Cartwrisht.

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[5]Oklahoma's "heinous, atrocious, and cruel" aggravating circumstance was founded on Florida's counterpart, see Maynard v. Cartwrisht, 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.

Here, both the judge and the jury applied precisely the construction condemned in Rhodes and Cartwright. Of course, the role of a Florida sentencing jury is critical. See Riley v. Wainwright, 517 So. 2d 565 (Fla. 1987); Mann v. Dugger, 844 F.2d 1446, 1450-54 (11th Cir. 1988)(in banc), cert. denied, 109 S. Ct. 1353 (1989). Thus, it is clear that for purposes of reviewing the adequacy of jury instructions in Florida, the jury is the sentencer. Instructional error is reversible where it may have affected the jury's sentencing verdict. Meeks v. Dugger, 548 So. 2d 184 (Fla. 1989); Riley, supra. In Mr. Mills' case, a properly instructed jury could well have concluded that a shot to the head was not "unnecessarily torturous to the victim." The jury, if properly instructed, could quite conceivably have concluded that the absence of the heinous, atrocious or cruel aggravating circumstance made death inappropriate and that the remaining aggravating factors were not sufficient to warrant a death sentence. See, e.g., Mills v. Maryland, 108 S. Ct. 1860 (1988). Such a change would have resulted in a binding life recommendation, and thus under Hall v. State, 541 So. 2d 1125 (Fla. 1989), cannot be found to be harmless. The bottom line, however, is that this jury was unconstitutionally instructed, Maynard v. Cartwright, supra, and that the State cannot prove harmlessness beyond a reasonable doubt.

Mr. Mills is entitled to relief under Rhodes and Cartwright. 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 prosecutor argued that events after the victim's death (e.g., the two months which passed before the victim's body was discovered) supported the death sentence. The judge also misunderstood 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. Defense counsel's objection to this aggravating circumstance was overruled (R. 2260-62), and then the jury was simply told:

> The crime for which the Defendant is to be sentenced was especially wicked, evil, atrocious, or cruel. The crime for which the Defendant is to be sentenced was committed in cold, calculated or premeditated manner without any pretense of moral or legal justification. Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. Cruel means designed to inflict a high degree of pain; utter indifference to; or enjoyment of the suffering of others, pitiless.

(R. 2335). Indeed, the trial court's mixing the "heinous, atrocious, or cruel" and "cold, calculated" aggravating circumstances could only have served to create further confusion in the jurors and to produce a greater lack of guidance.

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. That which was found wanting in Cartwright is what Mr. Mills' jurors received, and what his judge employed.

The United States Supreme Court affirmed the Tenth Circuit's grant of relief in Cartwright, explaining that the death sentence did not comply with the fundamental eighth amendment principle requiring the limitation of capital sentencers' discretion. The Court's eighth amendment analysis fully applies to Mr. Mills' case; proceedings as egregious as those upon which relief was mandated in Cartwright are present here. The result here should be the same as in Cartwright. See id., 108 S. Ct. at 1858-59.

In Mr. Mills' case, as in Cartwright, what was relied upon by the jury, trial court, and this Court did not guide or channel sentencing discretion. Likewise, here, no adequate "limiting construction" was ever applied to the "heinous, atrocious or cruel" aggravating circumstance. This Court did not cure the

unlimited discretion exercised by the jury and trial court by its affirmance of this aggravating factor. Relief is now proper.

CLAIM IV

THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING CIRCUMSTANCE WAS APPLIED TO MR. MILLS' CASE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE THE JURY WAS NOT ADEQUATELY INSTRUCTED ON THE ELEMENTS OF THIS AGGRAVATING CIRCUMSTANCE.

The sentencing court unconstitutionally found that the crime was committed in a cold, calculated and premeditated manner. The record reflects that the concerns of Maynard v. Cartwright, 108 S. Ct 1853 (1988), apply to the overbroad application of this aggravating circumstance. As the record in its totality reflects, the jury was never given, and the sentencing court and this Court on direct appeal never applied, the limiting construction of the cold, calculated aggravating circumstance required by Maynard v. Cartwright. This issue was raised on direct appeal and rejected. Mills v. State, 462 So. 2d 1075, 1081 (Fla. 1985).

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

The manner by which Florida (like most states) has attempted to guide sentencing discretion is through propounding aggravating circumstances. The United States Supreme Court has held that the aggravating circumstances must channel sentencing discretion by clear and objective standards:

> [I]f a state wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a State's responsibility in this regard is to define the crimes for which death may be the sentence in a way that

> obviates "standardless [sentencing] discretion." [Citations omitted.] It must channel the sentencer's discretion by "clear and objective standards" and then "make rationally reviewable the process for imposing a sentence of death."

Godfrey v. Georgia, 446 U.S. 420, 428 (1980).

In Godfrey, the Supreme Court held that capital sentencing discretion can be suitably directed and limited only if aggravating circumstances are sufficiently limited in their application to provide a principled, objective basis for determining the presence of the circumstances in some cases and their absence in others. Although the state courts remain free to develop their own limiting constructions of aggravating circumstances, the limiting constructions must, as a matter of eighth amendment law, be both instructed to sentencing juries and consistently applied from case to case by courts. Id. at 429-433. In Godfrey, the Court examined the use of one particular aggravating circumstance. It first found the jury instruction concerning this circumstance deficient for failing to limit the circumstance in any meaningful way. Id. at 428-29. The Court then examined the facts of the case and determined that while the Georgia Supreme Court had developed three criteria limiting the application of this circumstance, "[T]he circumstances of this case . . . do not satisfy the criteria laid out by the Georgia Supreme Court itself . . ." Id., at 432. Aggravating circumstances must be applied in a consistent, narrow fashion that is neither arbitrary nor capricious.

It is well established that, 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. People v. Superior Court (Engert), 647 P.2d 76 (Cal. 1982); Arnold v. State, 224 S.E.2d 386 (Ga. 1976). Aggravating circumstances must be subjected to special scrutiny for unconstitutional vagueness. Arnold.

Section 921-141(5)(i), on its face and as applied has failed 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, and has become a global or "catch-all" aggravating circumstance. Even where this Court has developed principles for applying the (5)(i) circumstance, those principles have not been applied with any consistency whatsoever, and here there was no attempt to instruct the jury regarding those limiting principles which are in essence elements of the aggravating circumstances.

Section 921.141(5)(i), is unconstitutionally vague, on its face. Even words of the aggravating circumstance provide no true indication as to when it should be applied. The requirement of commission in a "cold, calculated, and premeditated manner" gives little guidance as to when this factor should be found. While the word "premeditated" may be meaningful, the adjectives "cold" and "calculated" are vague, subjective terms directed to emotions. Webster's New Twentieth Century Unabridged Dictionary (Second Edition) provides at least fourteen definitions of "cold". Many of these meanings are highly subjective attempts to describe emotional states. Indeed, the very word "cold" is subject to many different interpretations, all of which are highly subjective. The word "calculated" is equally subjective. See Webster's, supra, at 255. 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. This is especially true when considered in the context of the special need for reliability in capital sentencing.

The requirement that the homicide be committed "without any pretense of moral or legal justification" is also vague and subjective. It is clear that no person convicted of first degree murder has a true legal justification; otherwise, the conviction

would be invalid. Although a true moral justification is theoretically possible, it is highly unlikely. Thus, the essence of this phrase depends on the existence of a "pretense" of moral or legal justification. The word "pretense" has several definitions. Webster's, supra, at 1425. This phrase is also unconstitutionally vague and subjective. There is the problem of ascertaining the offender's personal attitudes, as well as the problem of qualifying what level of justification rises to a "pretense" of justification.

This aggravating circumstance has been applied in such a way as to allow it to be applied to virtually any premeditated murder. Moreover, the few originally limiting principles developed by this Court have been applied in such an inconsistent manner as to render this circumstance arbitrary and capricious. 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); Herring v. State, 446 So. 2d 1049 (Fla. 1984); Harris v. State, 438 So. 2d 787 (Fla. 1983); Mason v. State, 438 So. 2d 374 (Fla. 1983); Hill v. State, 422 So. 2d 816 (Fla. 1982); Smith v. State, 424 So. 2d 726 (Fla. 1983); Justus v. State, 438 So. 2d 358 (Fla. 1983); Mann v. State, 420 So. 2d 578 (Fla. 1982); Cannady v. State, 427 So. 2d 723 (Fla. 1983); Preston v. State, 444 So. 2d 939 (Fla. 1984); Washington v. State, 432 So. 2d 44 (Fla. 1983); Johnson v. State, 438 So. 2d 774 (Fla. 1983). This circumstance is unconstitutional as applied. The original limits imposed by this Court have been applied so inconsistently that this circumstance has failed to narrow the class of persons eligible for the death penalty and has been arbitrarily and capriciously applied, in violation of the mandate of Furman, supra; Godfrey, supra; Cartwright, supra.

In part because of the concerns discussed above, since the time of Mr. Mills' direct appeal, this Court has redefined the "cold, calculated and premeditated" aggravating circumstance.

Rogers v. State, 511 So. 2d 526 (Fla. 1987). In Rogers, that Court held that "'calculation' consists of a careful plan or prearranged design." Id. at 533. Subsequent decisions have plainly recognized that Rogers requires proof beyond a reasonable doubt of a "careful plan or prearranged design." See Mitchell v. State, 527 So. 2d 179, 182 (Fla. 1988)("We recently defined the cold, calculated and premeditated factor as requiring 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.").

Because Mr. Mills 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 jury was not instructed on the elements of the aggravating circumstance. This failure was fundamental error. Under Maynard v. Cartwright, supra, the error cannot be considered harmless.

As noted above, the "cold, calculating and premeditated" aggravator is also defective under Maynard v. Cartwright, 108 S. Ct. 1853, 1859 (1988). At the time of petitioner's sentencing, there was no principle limiting application of "cold, calculating and premeditated" as required under Cartwright. In fact, the trial court neither gave the jury a limiting instruction as to the elements necessary to establish that the crime was "committed in a cold, calculated and premeditated manner" nor applied such a limiting construction itself. Although defense counsel objected to the jury being instructed on this aggravating circumstance because there was no definition of "cold" or "calculated" (R. 2262-63), the trial court overruled the objection (R. 2263), and instructed the jury on this circumstance without providing a limiting construction.

In Mr. Mills' case, the trial court compounded the vagueness problem by combining the instructions regarding "heinous, atrocious and cruel" with the instruction regarding "cold, calculated, and premeditated":

> The aggravating circumstances which you may consider are limited to such of the following as may be established by the evidence; . . . . The crime for which the Defendant is to be sentenced was especially wicked, evil, atrocious, or cruel. The crime for which the Defendant is to be sentenced was committed in cold, calculated or premeditated manner without any pretense of moral or legal justification. Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. Cruel means designed to inflict a high degree of pain; utter indifference to; or enjoyment of the suffering of others, pitiless.

(R. 2334-35). There is no way a reasonable juror could understand that a different standard applies to these aggravating circumstances, or that there was any limiting construction of the "cold, calculated and premeditated" circumstances.

Mr. Mills was denied his eighth and fourteenth amendment rights to have aggravating circumstances properly limited for the jury's consideration. The jury's discretion was unlimited. No limiting construction was ever applied. Since Cartwright is new law which was unavailable to the court at the time of direct appeal, the issue must be reconsidered in light of Cartwright and habeas corpus relief granted. This error cannot be found to be harmless beyond a reasonable doubt. A new sentencing before a new jury must be ordered.

When capital sentencing error is shown, relief is appropriate when the mitigation proffered by the petitioner provides a reasonable basis for a life recommendation. See Hall v. State, 541 So. 2d 1125 (Fla. 1989). There is a reasonable basis here, and habeas corpus relief is appropriate.

CLAIM IV

MR. MILLS' RIGHT TO A RELIABLE CAPITAL SENTENCE WAS VIOLATED WHERE HIS SENTENCING JURY DID NOT RECEIVE INSTRUCTIONS GUIDING AND CHANNELING ITS SENTENCING DISCRETION BY EXPLAINING THE LIMITING CONSTRUCTION OF THE PECUNIARY GAIN AGGRAVATING CIRCUMSTANCE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

This Court has held that, under Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), the sentencing jury must be correctly and accurately instructed as to mitigating circumstances. See, e.g., Mikenas v. Dugger, 519 So. 2d 601 (Fla. 1988). Sentencing juries must also be accurately instructed regarding aggravating circumstances. Maynard v. Cartwright, 108 S. Ct. 1853 (1988). However, in Mr. Mills' case, the jury did not receive instructions narrowing the pecuniary gain aggravating circumstance in accord with the limiting and narrowing construction adopted by this Court.

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. Thus, Stephens on its face is not controlling as to the significance of consideration of an improper aggravating circumstance by sentencers who do weigh aggravating against mitigating circumstances. 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 circumstances found to exist. In Cartwright, the Supreme Court determined that error had occurred where the sentencing jury received no instructions regarding the limiting constructions of an aggravating circumstance.

At the penalty phase of Mr. Mills' trial, four aggravating factors were submitted to the jury. Regarding the pecuniary gain circumstance, the jury was instructed:

> The aggravating circumstances which you may consider are limited to such of the following as may be established by the evidence . . . . The crime for which the defendant is to be sentenced was committed for financial gain.

(R. 2335).

The prosecutor made an impassioned, thinly-veiled argument that John Mills should die because he was a black Muslim who had killed a white man out of racial prejudice. Throughout his argument to the jury he characterized the killing as "social judgment" (See, e.g., R. 2307). The prosecutor's theory of motivation was clearly that John Mills was making a "social judgment" and not that the killing was committed for pecuniary gain.

In Peek v. State, 395 So. 2d 492 (Fla. 1981), this Court concluded that to find the aggravating circumstance of pecuniary gain it must be established beyond a reasonable doubt that the victim "was murdered to facilitate the theft, or that [the defendant] had [] intentions of profiting from his illicit acquisition." 395 So. 2d at 499. In Small v. State, 533 So. 2d 1137, 1142 (Fla. 1988), this Court explained that Peek held that "it has [to] be [] shown beyond a reasonable doubt that the primary motive for this killing was pecuniary gain." In Mr. Mills' case, the jury did not receive an instruction regarding this limiting construction of this aggravating circumstance. In fact, according to the prosecutor's argument no such limitation was applicable. As a result, the penalty phase instruction on this aggravating circumstance "failed[ed] adequately to inform [Mr. Mills'] jur[y] what [it] must find to impose the death penalty." Maynard v. Cartwright, 108 S. Ct. at 1858.

This fundamental error rendered Mr. Mills' death sentence unreliable. Appellate counsel was prejudicially ineffective in

failing to present this issue on direct appeal. Relief is now proper.

CLAIM VI

MR. MILLS WAS DENIED HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS BECAUSE THE SENTENCING JURY AND COURT USED THE IDENTICAL UNDERLYING PREDICATES TO FIND MULTIPLE AGGRAVATING CIRCUMSTANCES.

The United States Supreme Court recently held in a case declared to be retroactive on its face that a sentencer must make a "reasoned moral response to the defendant's background, character, and crime." Penry v. Lynaugh, 109 S. Ct. 2934, 2951 (1989). It is improper to create "the risk of an unguided emotional response." Id. A capital defendant should not be executed where the process creates the "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Id. 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." Id. Thus, Mr. Penry's claim was cognizable in post-conviction proceedings. Similarly, here, the decision in Penry requires the examination of the procedure in Mr. Mills' case where excess and inappropriate aggravating circumstances were submitted to the jury in order to invoke "an unguided emotional response."

This Court has consistently reversed the defendant's sentence of death in cases in which aggravating circumstances were "doubled". This case involved and involves the unconstitutionally classic types of doubling of the "heinous, atrocious and cruel" and "cold, calculated and premeditated" aggravating circumstances. It involves fundamental error, and

this Court should now correct the clear errors that it failed to correct when this issue was raised on direct appeal. Moreover, under Penry, the presentation of these extra aggravating circumstances guaranteed an "unguided emotional response" by the sentencing jury that was urged to disregard statutory and nonstatutory mitigation, and thus violated the eighth amendment. There is in fact a likelihood in this case that the death sentence was "imposed in spite of factors which [] call[ed] for a less severe penalty." 109 S. Ct. at 2952. Relief is now proper.

The sentencing order demonstrates that the sentencing judge and jury used identical underlying predicates to establish two separate aggravating factors. The court gave a lengthy recitation of the facts which it believed supported a finding of the heinous, atrocious and cruel aggravating factor. In finding cold, calculated and premeditated, the court simply made a perfunctory reference to the same facts:

> The capital felony (homicide) was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification. The facts as previously cited clearly demonstrate that the murder of Les Lawhon was cold, calculated and premeditated. Nowhere in the testimony is there even a shred of evidence of any moral or legal pretense for the killing.

(R. 270).

The sentencing order in this case thus involved the classically condemned unconstitutional "doubling up" and overbroad application of aggravating factors. Mr. Mills' sentence of death was and is fundamentally unreliable and unfair, and violates the eighth and fourteenth amendments. See Provence v. State, 337 So. 2d 783, 786 (Fla. 1976), relying on State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973). Cf. Maynard v. Cartwright, 108 S. Ct. 1853 (1988)(condemning overbroad application of aggravating factors). Such procedures flatly abrogate the constitutional mandate that a sentence of death not be arbitrarily imposed, and that the application of aggravating

factors "genuinely narrow the class of persons eligible for the death penalty." Zant v. Stephens, 462 U.S. 862, 876 (1983). This error cannot be characterized as harmless. See Meeks v. Dugger, 548 So. 2d 184 (Fla. 1989); Elledge v. State, 346 So. 2d 998 (Fla. 1977). See also Menendez v. State, 368 So. 2d 1278 (Fla. 1979); Riley v. State, 366 So. 2d 19 (Fla. 1978); Mann v. State, 420 So. 2d 578, 581 (Fla. 1982). Mr. Mills is entitled, pursuant to the eighth and fourteenth amendments, to the relief he seeks.

CLAIM VII

MR. MILLS' DEATH SENTENCE MUST BE VACATED BECAUSE THE COURT FAILED TO PROVIDE A FACTUAL BASIS IN SUPPORT OF THE PENALTY AND TO CONDUCT AN INDEPENDENT WEIGHING OF AGGRAVATING AND MITIGATING FACTORS, IN VIOLATION OF FLORIDA LAW AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

Florida law provides that for a death sentence to be constitutionally imposed there must be specific written findings of fact in support of the penalty. Fla. Stat. section 921.141(3). The legislature has mandated that the imposition of the death penalty cannot be based on a mere recitation of the aggravating or mitigating factors present, but must be supported by written findings regarding the specific facts giving rise to the aggravating and mitigating circumstances. The legislature has provided as part of the capital sentencing scheme:

> 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 sec. 775.082.

Fla. Stat. section 921.141(3); see also Van Royal v. State, 497 So. 2d 625 (Fla. 1986).

The duty imposed by the legislature directing that a death sentence may only be imposed when there are specific written findings in support of the penalty serves to provide for meaningful review of the death sentence and fulfills the eighth amendment requirement that a death sentence not be imposed in an arbitrary and capricious manner. See Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

Specific written findings allow the sentencing body to demonstrate that the sentence has been imposed based on an individualized determination that death is appropriate. Cf. State v. Dixon, 283 So. 2d 1 (1973). In Patterson v. State, 513 So. 2d 1257 (Fla. 1987), this Court reversed and remanded for resentencing, stating:

> . . . we 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. Explaining the trial judge's serious responsibility, we emphasized, in State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974):
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> . . . .
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> The fourth step required by Fla. Stat. Section 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 were reason is required, and this is an important element added for the protection of the convicted defendant.
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> . . . .
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> . . . the trial judge's action in delegating to the state attorney the responsibility to identify and explain the appropriate

> aggravating and mitigating factors raises a serious question concerning the weighing process that must be conducted before imposing a death penalty.

513 So. 2d at 1261-1262 (emphasis in original).

The error condemned and requiring reversal in Patterson is virtually the same as that committed by the trial court in sentencing Mr. Mills. Because of the grave constitutional magnitude of the error, Mr. Mills is entitled to the very same consideration and relief.

As this Court has recently stated:

> We reiterate . . . that the sentencing order should reflect that the determination as to which aggravating and mitigating circumstances apply under the facts of a particular case is the result of "a reasoned judgment" by the trial court. State v. Dixon, 283 So.2d 1, 10 (Fla. 1973), cert. denied, 416 U.S. 943 (1974). Weighing the aggravating and mitigating circumstances is not a matter of merely listing conclusions. Nor do the written findings of fact merely serve to "memorialize" the trial court's decision. Van Royal, 497 So.2d at 628. Specific findings of fact provide this Court with the opportunity for a meaningful review of a defendant's sentence. Unless the written findings are supported by specific facts and are timely filed, this Court cannot be assured the trial court imposed the death sentence based on a "well-reasoned application" of the aggravating and mitigating factors. Id.

Rhodes v. State, 547 So. 2d 1201, 1207 (Fla. 1989)(emphasis added). This is consistent with the United States Supreme Court's recent holding that the sentencer must make a "reasoned moral response" to the evidence when deciding to impose death. Penry v. Lynaugh, 109 S. Ct. 2934, 2951 (1989).

This Court has strictly enforced the written findings requirement mandated by the legislature, Rhodes, supra, and has held that a death sentence may not stand when "the judge did not recite the findings on which the death sentences were based into the record." Van Royal, 497 So. 2d at 628. The imposition of such a sentence is contrary to the "mandatory statutory requirement that death sentences be supported by specific

findings of fact." Id. The written findings serve to "assure [] that the trial judge based the [] sentence on a well-reasoned application of the factors set out in section 921.141(5) and 6." The

> written finding of fact as to aggravating and mitigating circumstances constitutes an integral part of the court's decision; they do not merely serve to memorialize it.

Id.

The findings in support of Mr. Mills' death sentence fail to comport with the statutory mandate set out in section 921.141(3). The trial court based the death sentence on written Findings of the Court Re Death Sentence prepared by the State Attorney and signed off by the judge. The trial court that sentenced Mr. Mills to death did not make independent findings of fact in support of the death sentence. The court delegated to the state complete responsibility for identifying applicable aggravating and mitigating circumstances, justifying the existence of such circumstances, and weighing such circumstances. The State's handwritten document,[6] with extensive, inflammatory, detailed and biased findings, was typed up and the judge signed it without any independent consideration of the aggravating and mitigating factors.

It is clear that the court never conducted the type of proper independent weighing and consideration of aggravating and mitigating circumstances which this Court and the United States Supreme Court require. This is precisely what Rhodes and Penry prohibit. This death sentence is unlawful, and must be vacated. See Fla. Stat. section 921.141(3). Here, as in Rhodes, the record is wholly "inadequate", to demonstrate that Mr. Mills' death sentence is appropriate. Thus, there can be no

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[6]The state took an earlier sentencing order from the case of another death-sentenced inmate and just changed the form.

determination that the sentencer's decision was a "reasoned moral response" as required by Penry.

In his oral pronouncement of sentence, the court never referred to the weighing of aggravating and mitigating factors (See R. 2394-96). Instead the court gave a rambling and disjointed account of the facts, placing emphasis on such nonstatutory aggravating factors as the fact it was a rainy day and the body was not properly buried:

> The individuals, in one of the days, in this great State, which was raining, which is against all of our theory of a state of enjoyment, that a young man was taken from his home, in his bare feet.

(R. 2394-95).

> He was then left to the fowl of the air and the beast of the fields, there to remain for several days, until one of the members disclosed the whereabouts of his remains.

(R. 2495). The court then apparently signed off on the "findings" prepared by the State (See R. 2399). The record does not indicate that the court ever conducted an independent weighing of aggravation and mitigation before imposing sentence.

A capital sentencing scheme is only constitutional to the extent that it is applied in a consistent manner to all capital defendants. Mr. Mills was not afforded the protections noted above, and was denied his eighth amendment rights. In light of the statutory and nonstatutory mitigation in the record, the error deprived Mr. Mills of his rights to due process and equal protection by denying him the liberty interest created by Florida's capital sentencing statute. See Vitek v. Jones, 445 U.S. 480 (1980); Hicks v. Oklahoma, 447 U.S. 343 (1980). Mr. Mills was not afforded the protections provided under Florida's capital sentencing statute, and was denied his eighth amendment rights.

In Van Royal v. State, 497 So. 2d 625 (Fla. 1986), 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.Ed.2d 295 (1974), said with respect to the weighing process:
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> > 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.
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> 283 So. 2d at 10. (emphasis supplied).
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> 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.

In Patterson v. State, supra, this Court found that the trial judge failed to engage in an independent weighing process. 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. The record in Mr. Mills' case reflects that the requisite findings were not made at the

sentencing hearing and proper weighing by the circuit court sentencer was not afforded to Mr. Mills.[7]

As this Court again recently held, the sentencing responsibility rests at the trial court level. Rhodes v. State, supra. Errors in the actual consideration of aggravation and mitigation can only be found harmless in a "weighing" state where "no mitigating evidence" appears in the record. Coleman v. Saffle, 869 F.2d 1377 (10th Cir. 1989); Clark v. Dugger, 834 F.2d 1561 (11th Cir. 1987). Both statutory and nonstatutory mitigation appear in the record. Mr. Mills was mentally retarded. He suffered a reduced capacity to make social judgments. He did not have a normal, functional understanding of right and wrong. These factors were never weighed by the Court.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness and reliability of Mr. Mills' death sentence. See Rhodes; Penry, supra. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings, see Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error. Moreover, federal constitutional case law decided this year which is retroactive further establishes that this death sentence cannot stand because it is not clear from the record that there was a "reasoned moral response" to the evidence when the death sentence was imposed. Finally, this Court's recent pronouncements make clear that this Court's disposition of

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[7]Under these circumstances it is plain that the United States Supreme Court pending review in Clemons v. Mississippi, 109 S. Ct. 3184 (1989), is relevant to this issue. The question presented in Clemons is whether the eighth amendment permits an appellate court to save a sentence of death by reweighing aggravating and mitigating factors where the authority for capital sentencing under state law rests exclusively with the trial court sentencer. The Florida circuit court (jury and judge) is the only body authorized to weigh aggravating circumstances and mitigating circumstances under Florida law. In petitioner's case, the required weighing never occurred.

this issue in prior post-conviction proceedings was in error, and should now be corrected. Habeas corpus relief should now be afforded.

CLAIM VIII

THE TRIAL COURT ERRED BY FAILING TO CONSIDER THE EVIDENCE AND ARGUMENT PRESENTED IN MITIGATION BY MR. MILLS AS ESTABLISHING MITIGATING CIRCUMSTANCES, WHICH MUST BE CONSIDERED, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

In his sentencing order, the trial judge restricted his consideration of Mr. Mills' evidence of mitigation to a determination of whether the mitigation rose to the level of a statutory mitigating circumstance. The court found that this level of proof was not obtained, and so rejected any mitigating evidence. The judge refused to consider Mr. Mills' borderline retardation as a nonstatutory mitigating factor. The judge refused to consider any of the evidence offered by Mr. Mills as mitigating. Mr. Mills offered unrebutted evidence that he suffered from borderline retardation, that he had a nonviolent personality which would lead him to back away when upset, that Mr. Mills did not understand people or society or why we do what we do, that he could not always determine why something was right or wrong, and that he was rehabilitable (R. 2277-83). The judge dismissed all of this unrebutted testimony, stating there was "no evidence of any mitigating circumstances." This is fundamental eighth amendment error. This claim was presented to this Court on direct appeal and rejected. This fundamental error demonstrating the unreliability of Mr. Mills' death sentence should now be corrected.

Pursuant to the eighth and fourteenth amendments, a state's capital sentencing scheme must establish appropriate standards to channel the sentencing authority's discretion, thereby "eliminating total arbitrariness and capriciousness" in the imposition of the death penalty. Proffitt v. Florida, 428 U.S.

242 (1976). On appeal of a death sentence, the record should be reviewed to determine whether there is support for the sentencing court's finding that certain mitigating circumstances are not present. Magwood v. Smith, 791 F.2d 1438, 1449 (11th Cir. 1986). The sentencing judge may determine the weight to be given the mitigation; however, he is not free to refuse to consider it as mitigating. Eddings v. Oklahoma, 455 U.S. 104 (1982). Where that finding is clearly erroneous, the defendant "is entitled to resentencing." Magwood, 791 F.2d at 1450.

The sentencing judge in Mr. Mills' case found that no mitigating circumstances were present (R. 271). Finding five aggravating circumstances, the court imposed death (R. 1474). The court's conclusion that no mitigating circumstances were present, however, is belied by the record. Both statutory and nonstatutory mitigating circumstances are set forth in the record.

The judge refused to apply any of the statutory mitigating circumstances. He found that Mr. Mills' age at the time of the offense was not mitigating, when in fact Mr. Mills was mentally retarded and immature. He found 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, even though there was evidence that Mr. Mills' judgment was in fact impaired:

> His clearest weakness is in his ability to make social judgments and his limited conprehension of the basis or rationale for social regulations. He shows similarly impaired judgment in comprehending people and social interactions with even more ambigious cues. This impairment, no doubt, results in his making poor and inappropriate decisions, as well as probably having rather considerable difficulty in getting along with people.
>
> Responses on the psychological tests (MMPI and TAT) show him to be a rather insecure, lonely, and suspicious man. His difficulty in relating to people and his problems in comprehending social situations

> and regulations, probably results in his sense of alienation and basic distrust of people and of himself. There is little indication of impulsiveness or uncontrolled anger. The indications are that he is more likely to deal with his anger by social withdrawal rather than open attack. Despite his difficulty in understanding the rationale for moral judgments, he shows an astute sense of justice, right and wrong, and the capacity for a rather immature adherence to specific rules. He is likely to experience difficulty if faced with situations requiring complex moral judgments.
>
> John shows a tendency to become overwhelmed by emotionally-arousing situations, such as personal danger or even strong affection from another person. He responds to such situations by initially becoming confused and showing even greater impairment of judgment, and, eventually, just withdrawing from the situation physically and emotionally.

(R. 250)(emphasis added).

Despite the presence of clearly mitigating circumstances, the court concluded that no mitigating circumstances were present. This Court has recognized that such factors are mitigating. For example, this Court has found that an I.Q. in Mr. Mills' range is mitigating evidence and that evidence that a defendant is not a vicious or predatory-type criminal and that rehabilitation is likely is mitigating:

> According to expert testimony, appellant had an IQ of 70-75, classified as borderline defective or just above the level for mild mental retardation. At age ten, he had been placed in a school for the emotionally handicapped. Although chronologically eighteen, he had the emotional maturity of a preschool child. The psychologist concluded that both statutory mental mitigating factors applied, i.e., that the murder was an impulsive act committed while appellant was under the influence of serious emotional disturbance and while his capacity to appreciate the criminality of his conduct or conform his conduct to the law was substantially impaired. Additionally, there was testimony that appellant was not a vicious or predatory-type criminal and rehabilitation thus was likely. The potential for rehabilitation constitutes a valid mitigating factor. Francis v. Dugger, 514 So.2d 1097, 1098 (Fla.1987); Valle v. State, 502 So.2d 1225, 1226 (Fla.1987).

Brown v. State, 526 So. 2d 903, 908 (Fla. 1988)(footnotes

omitted). All of these factors were applicable in Mr. Mills' case.

In Eddings v. Oklahoma, 455 U.S. 104 (1982), by a 5-4 majority the Supreme Court reversed a death sentence. Justice O'Connor writing separately explained why she concurred in the reversal:

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

455 U.S. at 119-20. Justice O'Connor's opinion makes clear that the sentencer is entitled to determine the weight due a particular mitigating circumstance; however, the sentencer may not refuse to consider that circumstance as a mitigating factor. Here, that is undeniably what occurred. The judge said

mitigating circumstances were not present and did not consider them.

The trial court analyzed all of the mitigating evidence under a statutory mitigating framework, found that it would not fit the statute, and discarded it as unworthy of consideration. Plainly, the court did not consider whether petitioner's mental retardation, or the combination of his impaired judgment, retardation, and potential for rehabilitation, presented a circumstance that might foreclose application of the death penalty.

The trial court's analysis was constitutional error under Lockett v. Ohio, 438 U.S. 586 (1978), and Hitchcock v. Dugger, 107 S. Ct. 1821 (1987). In Woods v. State, 490 So. 2d 24 (Fla. 1986), the state supreme court wrote:

> That the trial court did not articulate how he considered and analyzed the mitigating evidence is not necessarily an indication that he failed to do so. We do not require that trial courts use "magic words" when writing sentencing findings, and we recognize that some findings are inartfully drafted. Davis v. State, 461 So.2d 67 (Fla. 1984) cert. denied, ___ U.S. ___, 105 S.Ct. 3540, 87 L.Ed.2d 663 (1985). The trial court did not restrict the presentation of mitigating evidence, and we find no indication in the findings of fact that the court ignored that evidence. We find no error in the trial court's failure to find more in mitigation in this case. See Stano v. State, 473 So.2d 1282 (Fla. 1985).

Woods, 490 So. 2d at 28. Of course, the sentencing order, here, does reveal that the sentencing court did ignore the evidence. Following Hitchcock v. Dugger, supra, which was rendered after Mr. Mills' direct appeal, this Court has abandoned the type of analysis used in Woods, supra, has specifically repudiated its "mere presentation" standard, and has agreed that jury or judge restriction of consideration to statutory mitigation is not inartful drafting, but constitutional error under Hitchcock. See Cooper v. Dugger, 526 So. 2d 900 (Fla. 1988); Zeigler v. Dugger,

524 So. 2d 419 (Fla. 1988); Foster v. State, 518 So. 2d 901 (Fla. 1988).

The sentencer in Mr. Mills' case committed fundamental eighth amendment error. Habeas corpus relief is proper.

CLAIM IX

THE PENALTY PHASE JURY INSTRUCTIONS FAILED TO PROVIDE THE JURY WITH A MEANS TO GIVE EFFECT TO JOHN MILLS, JR.'S MITIGATING EVIDENCE, IN VIOLATION OF PENRY V. LYNAUGH, 109 S. CT. 2934 (1989), AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

At the penalty phase, the defense presented the expert testimony of Dr. Akhbar. This testimony established that Mr. Mills was borderline retarded and has impaired ability to make social judgments (R. 2277-78). Dr. Akhbar also testified that Mr. Mills was a nonviolent personality and was rehabilitable (R. 2281, 2283). The state argued that all of this evidence should be disregarded since it did not meet the statutory requirements for mitigation:

> Number six, the capacity of the Defendant to appreciate the criminality of his conduct and to conform that conduct to the requirements of the law was substantially impaired. I think Mr. Randolph even asked the criminal psychologist that question: Was it substantially impaired? No, he has trouble making social judgments. But I asked him if he would understand what the law is and what it meant to break the law. He said yes, that's not quite the type of social judgments he would not be able to make. He understood the criminality of his act.
>
> * * *
>
> Can you seriously think that he did not appreciate the criminality of that act? He spent the better part of March, April, May, June and July, March, April and May trying to conver that by getting his girlfriend to get rid of the property and then providing her with an excuse why she had that property. He understood the criminality of his act.

(R. 2317-19).

By distorting the standards of law, the prosecutor misled the jury into believing that the evidence of retardation and

impaired judgment should be disregarded unless that evidence met the statutory mitigating criteria. The jury instructions did not correct this misconception.

In light of the expert's opinion as to whether Mr. Mills' disabilities 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. Mills did suffer from mental retardation, that he suffered from this disorder from much of his life, and that it impaired his ability to make social adjustments at the time of the crime. This Court has recognized that mental retardation can be considered as a nonstatutory mitigating factor. Brown v. State, 525 So. 2d 903 (Fla. 1988).

In this overall context, a reasonable juror plainly could have believed that all of the evidence bearing upon Mr. Mills' 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. See 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 court's findings in support of Mr. Mills' sentence of death. As demonstrated by his findings, the trial judge completely disregarded the evidence of Mr. Mills' mental and emotional disabilities. Certainly a reasonable juror could likewise assume that consideration of Mr. Mills' mental and emotional state were exclusively limited to the enumerated statutory mental mitigating factors and nowhere else. In this respect, the preclusive instructions in Mills' case,

which reasonable jurors could have interpreted in an "all or nothing" fashion thereby foreclosing further consideration of the effects of Mr. Mills' retardation and impairment 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. The issues involved in several cases currently pending before the United States Supreme Court will have import for the issue presented here. See Blystone v. Pennsylvania, 109 S. Ct. 1567 (1989); Boyde v. California, 109 S. Ct. 2447 (1989); Saffle v. Parks, 109 S. Ct. 1930 (1989).

In Penry, the Court found that a rational juror could have concluded that Penry's mental retardation did not preclude him from acting deliberately, but could also have concluded 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. Mills' trial, having found that his personality disorder was neither "extreme" or "substantial" may still well have concluded that Mr. Mills'

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 establish that he also failed to comply with Lockett in his own sentencing deliberations by failing to consider Mr. Mills' retardation, impaired judgment, and capacity for rehabilitation. In the sentencing order prepared by the State, the judge rejected mitigation as a matter of law because there was "no evidence" of any mitigating circumstance for Mr. Akhbar's testimony (R. 271). Ultimately the court's refusal to consider, and the jury's reasonable mistake in failing to consider, meant that neither sentencer fully considered the only evidence in Mr. Mills' favor in deciding whether he should live or die.

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 defendants who have no such excuse." California v. Brow, 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 being[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. This is fundamental constitutional error which goes to the heart of the fundamental fairness and

reliability of Mr. Mills' death sentence. Penry. Relief is now proper.

CLAIM X

THE PENALTY PHASE JURY INSTRUCTIONS SHIFTED THE BURDEN TO MR. MILLS TO PROVE THAT DEATH WAS INAPPROPRIATE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

A capital sentencing jury must be:

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

State v. Dixon, 283 So. 2d 1 (Fla. 1973)(emphasis added).

Shifting the burden to the defendant to establish that mitigating circumstances outweigh aggravating circumstances conflicts with the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), and Dixon, for such instructions unconstitutionally shift to the defendant the burden with regard to the ultimate question of whether he should live or die. In so instructing a capital sentencing jury, a court injects misleading and irrelevant factors into the sentencing determination, thus violating Caldwell v. Mississippi, 472 U.S. 320 (1985). Mr. Mills' jury was unconstitutionally instructed, as the record makes abundantly clear (See R. 3166; 3178; 3199; 3201). In Hamblen v. Dugger, 546 So. 2d 1039 (Fla. 1989), this Court held that this issue had to be resolved on a case-by-case basis. Accordingly, this claim is now properly presented to this Court.

At the penalty phase of trial, prosecutorial argument and judicial instructions informed Mr. Mills' jury that death was the appropriate sentence unless they determined that "the mitigating factors outweigh the aggravating factors" (R. 2304, 2335-36). Such instructions, which shift to the defendant the burden of

proving that life is the appropriate sentence, violate the eighth and fourteenth amendments, as the Court of Appeals for the Ninth Circuit recently held in Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(in banc). This claim involves a "perversion" of the jury's deliberations concerning the ultimate question of whether Mr. Mills should live or die. See Smith v. Murray, 106 S. Ct. 2661, 2668 (1986). No bars apply under such circumstances. Id.

The jury instructions here employed a presumption of death which shifted to Mr. Mills the burden of proving that life was the appropriate sentence. As a result, Mr. Mills' capital sentencing proceeding was rendered fundamentally unfair.

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. Mills' 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. Mills 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. Mills' 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. 2934 (1989), a decision which on its face applies 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. Mills proved that the mitigating circumstances outweighed the aggravating circumstances. A reasonable juror could have well understood that mitigating circumstances were factors calling for a life sentence, that aggravating and mitigating circumstances had differing burdens of proof, and that life was a possible penalty, while at the same time understanding, based on the instructions, that Mr. Mills 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. That constitutionally mandated standard demonstrates that relief is warranted in Mr. Mills' 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.[8] 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

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[8]Similar issues are also pending before the United States Supreme Court in a number of other cases. See Walton v. Arizona, 110 S. Ct. 49 (1989); Boyde v. California, 109 S. Ct. 2447 (1989); Hamblen v. Dugger, No. 89-5121; Kennedy v. Dugger, No. _____.

mitigation and a burden of persuasion as to whether mitigation exists. However, once evidence of a mitigating circumstance is found then the State bears the burden of persuasion as to whether the aggravating circumstances outweigh the mitigating such that a death sentence should be returned.

Under the instructions and standard employed here, once one of the statutory aggravating circumstances is found, by definition sufficient aggravation exists to impose death. The jury was then directed to consider whether mitigation has been presented which outweighed the aggravation. Thus under the standard employed in Mr. Mills' case, the finding of an aggravating circumstance operated to impose upon the defendant the burden of production and the burden of persuasion of the existence of mitigation, and the burden of persuasion as to whether the mitigation outweighs the aggravation. Certainly, the standard employed here was more restrictive of the jury's ability to conduct an individualized sentencing than the Pennsylvania statute at issue in Blystone.

The effects feared in Adamson and Mills v. Maryland, 108 S. Ct. 1860 (1988), are precisely the effects resulting from the burden-shifting instruction given in Mr. Mills' 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 v. Dugger, 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. Mills' sentencing or to "fully" consider mitigation. Penry v. Lynaugh,

supra. There is a "substantial possibility" that this understanding of the jury instructions resulted in a death recommendation despite factors calling for life. Mills, supra. The death sentence in this case is in direct conflict with Adamson, Mills, and Penry, supra. This fundamental error "perverted" the jury's deliberations concerning the ultimate question of whether Mr. Mills should live or die. Smith v. Murray, 106 S. Ct. at 2668. No bars apply. Relief is appropriate.

CLAIM XI

DURING THE COURSE OF MR. MILLS' TRIAL THE PROSECUTOR AND COURT IMPROPERLY ASSERTED THAT SYMPATHY AND MERCY TOWARDS MR. MILLS WAS AN IMPROPER CONSIDERATION, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The jury in Mr. Mills' trial was admonished by the State Attorney, and instructed by the trial court, that feelings of mercy or sympathy could play no part in their deliberations as to Mr. Mills' ultimate fate.

During his penalty argument, defense counsel asked the jury to show mercy to Mr. Mills:

> We are not here to try society. We are not here to judge society in the way they treated John Mills. We are here to determine whether there is anything whatsoever in John Mills, Jr., that is worth saving; that is worthy of your pity; that is worthy of your mercy.

(R. 2329). However, the State argued that the jury should not show mercy:

> You know, when you heard today and you are going to be asked to show some mercy and show some compassion and show some pity, think to yourself what pity did he show to Les Lawhon?

(R. 2311).

The court placed its imprimatur on the State Attorney's no mercy or sympathy admonishment to the jury by expressly instructing them prior to guilt-innocence deliberations 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:

> You are to lay aside any personal feelings you may have in favor of or against the State, and in favor of or against the Defendant. It is only human to have personal feelings or sympathy in matters of this kind, but any such personal feelings or sympathy has no place in the consideration of your verdict.

(R. 2003).

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

(R. 2004). 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 of prosecutors, 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]nothing 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 Eight 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]just 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]whatever 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.

Here, the petitioner did offer mitigating evidence about his background and character. Petitioner's father testified that petitioner was a "happy-go-lucky guy" who was "friendly with everybody." The father also testified that, unlike other people in the neighborhood, petitioner avoided violence and fighting; that he (the father) was in the penitentiary during the petitioner's early childhood; that petitioner was the product of a broken home; and that petitioner only lived with him from about age 14 to 19. Although the father admitted that petitioner once was involved in an altercation at school, he suggested that it was a result of the difficulties of attending a school with forced bussing. Record, vol. V, at 667-82.

Petitioner's counsel, in his closing argument, then relied on this testimony to argue that petitioner's youth, race, school experiences, and broken home were mitigating factors that the jury should consider in making its sentencing decision. In so doing, defense counsel appealed directly to the jury's sense of compassion, understanding, and sympathy, and asked the jury to show "kindness" to his client as a result of his background. Record, vol. V, at 708-723. . . . [There is] an impermissible risk that the jury did not fully consider these mitigating factors in making its sentencing decision.

. . .

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's resolution of Parks will undoubtedly establish standards for a determination of this claim.

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. John Penry sought, and was granted relief, in part on the identical claim now pressed by Mr. Mills. 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.

Mills' 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 an unguided emotional response and therefore unreliable and inappropriate in Mr. Mills' case. This error undermined the reliability of the jury's sentencing verdict.

Given the State Attorney's admonition that they should preclude mercy and sympathy as mitigating factors upon which a sentence of less than death could be returned, reasonable jurors could have believed that the court's original instructions during guilt-innocence (R. 2003; 2004) remained in full force and effect during penalty phase deliberations, cf. Booth v. Maryland, 107 S. Ct. 2529 (1987); Penry v. Lynaugh, 109 S. Ct. 2934 (1989), similarly removing the sentencing recommendation from the realm of a reasoned and moral response.

Trial counsel sought to evoke Mr. Mills' jury's sympathy. In light of the prosecutor's argument and in light of the inappropriate jury instructions, Mr. Mills' jurors could well have believed that there was no vehicle for expressing the view that John Mills, Jr. deserved mercy, i.e., that he deserved not to be sentenced to death. Penry, 109 S. Ct. at 2950.

The error here undermined the reliability of the sentencing determination and prevented the jury from assessing mitigation. The prosecutor's argument impeded a "reasoned moral response" which by definition includes sympathy and mercy. Penry v. Lynaugh, 109 S. Ct. 2934, 2949 (1989). 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.

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. Mills. This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Mills' death sentence. Penry requires this issue to be addressed now. The imposition of a sentence of death in this case presents a "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Penry, supra, 109 S. Ct. at 3195. Accordingly, habeas relief should be accorded.

CLAIM XII

THE ERRONEOUS JURY INSTRUCTION THAT A VERDICT OF LIFE MUST BE MADE BY A MAJORITY OF THE JURY MATERIALLY MISLED THE JURY AS TO ITS ROLE AT SENTENCING AND CREATED THE RISK THAT DEATH WAS IMPOSED DESPITE FACTORS CALLING FOR LIFE, AND MR. MILLS' DEATH SENTENCE WAS THUS IMPOSED IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The jury in Mr. Mills' sentencing trial was erroneously instructed on the vote necessary to recommend a sentence of death or life. As decisions of this Court have made clear, the law of Florida is not that a majority vote is necessary for the recommendation of a life sentence; rather, a six-six vote, in addition to a seven-five or greater majority vote, is sufficient for the recommendation of life. Rose v. State, 425 So. 2d 521 (Fla. 1982); Harich v. State, 437 So. 2d 1082 (Fla. 1983). However, Mr. Mills' jury throughout the proceedings was erroneously informed that, even to recommend a life sentence, its verdict must be by a majority vote. These erroneous instructions are also the type of misleading information condemned by Caldwell v. Mississippi, 105 S. Ct. 2633 (1985), in that they "create a misleading picture of the jury's role." Caldwell, 105 S. Ct. at 2646 (O'Connor, J., concurring). As in Caldwell, the instructions here fundamentally undermined the reliability of the sentencing determination, for they created the risk that the

death sentence was imposed in spite of factors calling for a less severe punishment, in violation of the most fundamental requirements of the eighth amendment.

There can be no question that the jury charged with deciding whether Mr. Mills should live or die was erroneously instructed. At the penalty phase, the trial court informed the jury that,

> In these proceedings, it's not necessary that the advisory sentence of the jury be unanimous. Your decision may be made by a majority of the jury. The fact that the determination of whether or not a majority of you recommend a sentence of death or a sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings.

(R. 2337-38). The Court went on to instruct the jury:

> If the majority of the jury determine that John Mills, Jr., should be sentenced to death your advisory sentence will be:
>
> A majority of the jury by a vote of blank to be filled in by you advise and recommend to the Court that it impose a death penalty upon John Mills, Jr. On the other hand, if six or more votes, the jury determines that John Mills, Jr., should not be sentenced to death, your advisory sentence will be the jury advises and recommends to the Court that it impose a sentence of life imprisonment upon John Mills, Jr., without the possibility of parole for 25 years.
>
> You will now retire to consideration of your recommendation. When seven or more of you are in agreement as to what sentence should be recommended to the Court, that form of recommendation should be signed by your foreman and returned to the Court.

(R. 2338-39). The trial court then immediately allowed the jury to retire for its sentencing deliberations.

The harmful effects of these instructions were compounded by similar misleading comments respecting the jury vote made throughout the course of the proceedings by both the court and the prosecutor. For example, during voir dire, the prosecutor explained:

> [PROSECUTOR:] You need to know that that, first of all, is an advisory opinion. The jury advises the judge what they feel is

> the proper penalty. Judge Harper will have the ultimate say. he is not bound by what the jury advises. He takes it into consideration.
>
> The second thing you need to know about that advisory opinion is that, unlike in the guilty phase where everybody has to vote for guilty or everybody has to vote for not guilty, your opinion does not need to be unanimous. If seven of the twelve jurors vote to recommend the death penalty, then that will be your recommendation to the judge. So you don't need to have all twelve.
>
> Does that pretty much comport with what you understood on how it would progress, the trial?
>
> MR. WARREN [Prospective Juror]: I just enough it would be 100 percent. I didn't know it was---
>
> MR. KIRWIN: Okay. That's why I wanted to bring that up.
>
> The second part, the penalty phase, does not need to be unanimous, only a majority. So if seven people voted for mercy, it would be mercy. If seven people voted for the death penalty, your recommendation would be that. Okay.
>
> MR. WARREN: Yes, sir.

(R. 352-53)(emphasis added). This theme is repeated numerous times throughout the proceedings (R. 385, 409, 487, 512, 526, 538, 546, 567, 584, 600, 621, 672). Throughout the proceedings, the Court and the prosecutor clearly informed the jury that their sentencing "recommendation" was to be made by a mere majority, and that that "recommendation" could be flatly rejected by the trial court. In fact, misleading comments regarding the jury vote and the jury's "advisory sentence" went hand-in-hand.

The trial court's erroneous instructions regarding the jury vote "create[d] a misleading picture of the jury's role." Caldwell, supra, at 2646 (O'Connor, J., concurring). This "misleading picture" may very well have diminished the importance the individual jurors placed on their "recommended" sentence. Caldwell, supra; Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988) (in banc). In any case, the jury's deliberations, its application of law to facts, its very weighing process, remain

untrustworthy. The results of this sentencing proceeding are not reliable.

Mr. Mills' jury was erroneously instructed. Although the record now reflects that a majority of the jurors recommended death, it is entirely possible that a six-to-six vote -- i.e., a life recommendation -- was reached at some point during deliberations only to be abandoned on the basis of the trial court's erroneous instructions. It is clear that the final instruction regarding the jury's vote, particularly when combined with the reinforcement previously received from the judge and the prosecutor misled the jury, and gave them the erroneous impression that they could not return a valid sentencing verdict if they were tied six to six. Jurors so instructed could quite logically believe that a tied jury was a hung jury. Such a mistaken belief could lead vacillating jurors to change their vote from life to death in order to avoid this eventuality.

In any event, it is the erroneous instruction itself that violated Mr. Mills' fifth, sixth, eighth, and fourteenth amendment rights. Mr. Mills may well have been sentenced to die because his jury was misinformed and misled. Such a procedure creates the substantial risk that a death sentence was imposed in spite of factors calling for a less severe punishment. Lockett v. Ohio, 438 U.S. 586, 605 (1978). Wrongly telling the jury that it had to reach a majority verdict "interject[ed] irrelevant considerations into the fact finding process, diverting the jury's attention from the central issue" of whether life or death is the appropriate punishment. Beck v. Alabama, 447 U.S. 625, 642 (1980). See Mills v. Maryland, 108 S. Ct. 1860 (1988). The erroneous instruction may have encouraged Mr. Mills' jury to reach a death verdict for an impermissible reason -- its incorrect belief that a majority verdict was required. The erroneous instruction thus "introduce[d] a level of uncertainty

and unreliability into the [sentencing] process that cannot be tolerated in a capital case." Beck, 447 U.S. at 643.

Because these instructions and comments, in their entirety, "create[d] a misleading picture of the jury's role," Caldwell, 105 S. Ct. at 2646, Mr. Mills need not show prejudice. The instructions and comments misled the jury, diminished the jury's sense of responsibility, injected arbitrary and capricious factors into the sentencing process, and undermined the reliability of that process. This was fundamental error which renders Mr. Mills' death sentence unreliable. Mr. Mills was denied his fifth, sixth, eighth, and fourteenth amendment rights. These errors must not be allowed to stand uncorrected. Relief is warranted.

CONCLUSION AND RELIEF SOUGHT

The claims discussed above raise 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. Mills' 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.

Many of the claims set out above involve, inter alia, ineffective assistance of appellate counsel, as well as fundamental error (Claims I, II, V, VII, IX, X, XI, XII). 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. 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. 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 bounds 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 simply failed to urge them on direct appeal. As in Matire, Mr. Mills is entitled to relief. See also Wilson v. Wainwright, supra; Johnson v. Wainwright, supra. The "adversarial testing process" failed during Mr. Mills' 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. Mills must show: 1) deficient performance, and 2) prejudice. Matire, 811 F.2d at 1435; Wilson, supra. As the foregoing discussion illustrates, he has.

WHEREFORE, John Mills through counsel, respectfully urges that the Court issue its writ of habeas corpus and vacate his

unconstitutional conviction and sentence of death. Since this action also presents question of fact, Mr. Mills 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. Mills 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 a true copy of the foregoing has been furnished by first class, U.S. Mail, postage prepaid, to Mark Menser, Assistant Attorney General, Department of Legal Affairs, Magnolia Park Courtyard, 111-29 North Magnolia Drive, Tallahassee, Florida 32301, this 15th day of November, 1989.

_____
Attorney