IN THE SUPREME COURT OF FLORIDA

NO. 75037

GREGORY MILLS,

Petitioner,

v.

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

Respondent.

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

LARRY HELM SPALDING
Capital Collateral Representative

BILLY H. NOLAS

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

Counsel for Petitioner

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

A. JURISDICTION

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

This Court has consistently maintained an especially vigilant control over capital cases, exercising a special scope of review, **see** Elledse v. State, 346 So. 2d 998, 1002 (Fla. 1977); Wilson v. Wainwrisht, 474 So. 2d at 1165, and has not hesitated in exercising its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital trial and sentencing proceedings. Wilson; Johnson; Downs; Riley. This petition presents substantial constitutional questions which go to the heart of the fundamental fairness and reliability of Mr. Mills' capital conviction and sentence of death, and of this Court's appellate review. Petitioner's 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. Wainwrisht, 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. Wainwrisht, 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 proper on the basis of the claims herein presented.

B. REQUEST FOR STAY OF EXECUTION

Mr. Mills' petition includes a request that the Court stay his execution (presently scheduled for January 16, 1990). As will be shown, the issues presented are substantial and warrant a stay of execution. This Court has not hesitated in the past to stay executions when warranted to ensure judicious consideration of the issues presented by petitioners litigating during the

pendency of a death warrant. See, e.g., Riley V. Wainwriaht, 517 So. 2d 656 (Fla. 1987); Copeland v. State (Nos. 69,429 and 69,482, Fla., Oct. 16, 1986); Jones v. State (No. 67,835, Fla., Nov. 4, 1985); see also Downs V. Dugger, 514 So. 2d 1069 (Fla. 1987); Kennedv v. Wainwright, 483 So. 2d 426 (Fla. 1986). Cf. State v. Sireci, 502 So. 2d 1221 (Fla. 1987).

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

11. GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Petitioner submits that his capital conviction and his sentence of death were obtained and then affirmed during the Court's appellate review process in violation of his rights as guaranteed by the 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.

CLAIM I

RECENT DEVELOPMENTS IN THE LAW DEMONSTRATE THAT MR. MILLS' RIGHTS UNDER THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT WERE DENIED WHEN HE WAS NOT ALLOWED TO IMPEACH VINCENT ASHLEY WITH A PRIOR INCONSISTENT STATEMENT, AND THAT THIS ISSUE WAS ERRONEOUSLY DETERMINED ON DIRECT APPEAL, IN VIOLATION OF MR. MILLS' RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

At trial, defense counsel attempted to impeach Mr. Mills' co-defendant, Vincent Ashley, with a statement Ashley had made to his prior attorney's investigator. The trial court precluded this impeachment, holding that Ashley's attorney/client privilege was paramount to Mr. Mills' right to confrontation (R. 269-75).

An issue concerning this denial of the right of confrontation was raised on direct appeal. (Initial Brief of Appellant, Point 11). This Court denied the claim, holding that Davis v. Alaska, 415 U.S. 308 (1974) "does not require the result for which Mills argues." Mills v. State, 476 So. 2d 172, 176 (Fla. 1985).

> . . .[T]he attorney-client privilege weighs much more heavily against a defendant's cross-examination right than did the statutory exclusion at issue in Davis."

Id.

This Court failed to address the impact that Ashley's total immunity, for this and other crimes, had on his attorney/client privilege. The sole reason for withholding the disclosure is missing, since Ashley could no longer be charged with any crime.

Subsequent to this Court's opinion, the United States Supreme Court decided Delaware v. Fensterer, 474 U.S. 15, 106 S. Ct. 292 (1985) and Pennsylvania v. Ritchie, 107 S. Ct. 989 (1987). Fensterer and Ritchie are recent changes in the law occurring after the time of direct appeal.

In Ritchie, the Supreme Court analyzed the issue of whether the privilege protecting the confidentiality of child abuse records overrode the defendant's right of access to information necessary to formulate and prepare a defense. The Court ruled that the privilege of confidentiality is not unqualified.

> The Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination. Delaware v. Fensterer, 474 U.S. ___, ___, 106 S. Ct. 292, ___, 88 L.Ed. 15 (1985)(per curiam).

Pennsylvania v. Ritchie, 107 S. Ct. at 998. The Court went on t note that it has "upheld a Confrontation Clause infringement claim on this issue only when there was a specific statutory or court-imposed restriction at trial on the scope of questioning." Id. at 1000 (footnote omitted).

Unlike Fensterer and Ritchie, Mr. Mills' right to cross-examine Ashley was impeded by the trial court.

> "[T]he Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling attention to the factfinder the reasons for giving scant weight to the witness' testimony."

Delaware v. Fensterer, 474 U.S. at 22.

Mr. Mills prays that this Court revisit this issue in light of Delaware v. Fensterer, supra and Pennsylvania v. Ritchie, supra, and in light of the fact that Mr. Ashley was under both use and transactional immunity for this and other crimes at the time of Mr. Mills' trial. Thereafter, Mr. Mills' prays that this Court grant habeas relief and remand this case for a new trial at which his sixth amendment right to confrontation will not be violated.

CLAIM II

THE OVERRIDE IN THIS CASE WAS ARBITRARY AND CAPRICIOUS AND VIOLATED THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

The decision to impose the death penalty must be based on an individual assessment of the appropriateness of death for the particular crime and the particular defendant. The punishment in a capital case must be directly related to the personal culpability of the criminal defendant. Lockett v. Ohio, 438 U.S. 586 (1979); Eddings v. Oklahoma, 455 U.S. 104 (1982); Hitchcock v. Dugger, 107 S. Ct. 1821 (1987). If a death penalty scheme fails to afford the sentencer the opportunity to consider the character and individual characteristics of a defendant, then it is invalid. Greaa v. Georgia, 428 U.S. 153 (1976).

A. THE AGGRAVATING FACTORS IN THIS CASE ARE INSUFFICIENT TO SUPPORT A SENTENCE OF DEATH

In Florida, the sentencer's task is first to determine whether the aggravating circumstances proven beyond a reasonable

doubt are sufficient to support a death sentence. Section 921.141, Fla. Stat. Only if that threshhold is met may the jury move on to a balancing of mitigating circumstances. Id. The United States Supreme Court has allowed the individual states to so structure or guide the jury's determination of the appropriate punishment. See Franklin v. Lynaugh, 108 S. Ct. 2320 (1988).

The jury in Mr. Mills' case obviously found insufficient aggravating factors to justify a sentence of death in the first instance. The following discussion will include each of the three aggravating factors found to be proper by this Court. Mills v. State, 476 So. 2d 172 (Fla. 1985).

1. While in the Course of a Burglary

This case was tried solely on a felony murder theory. The State's theory was that Mr. Mills and Mr. Ashley went to the Wright house to commit a burglary, and in the course thereof, Mr. Wright was shot.

In a remarkably similar case, this Court held that the aggravating circumstance "in the course of a felony" is not sufficient by itself to justify a death sentence in a felony-murder case. Rembert v. State, 445 So. 2d 337, 340 (Fla. 1984). In fact, in a footnote, it was noted that the State conceded in oral argument that in similar circumstances many people receive a less severe sentence. Id. The facts of Rembert show that the defendant entered a bait and tackle shop, hit the elderly victim over the head once or twice with a baseball bat and took forty to sixty dollars from the victim's cash drawer. Id. at 338.

Similarly, in Proffitt v. State, 510 So. 2d 896, 898 (Fla. 1987), this Court said that "[t]o hold, as argued by the State, that these circumstances justify the death penalty would mean that every murder during the course of a burglary justifies the imposition of the death penalty." That case involved a defendant, during a burglary, who killed an occupant of a house

with one stab wound to the chest while the victim was lying in bed. Id. at 897.

Proffitt was distinguished from Mason v. State, 438 So. 2d 374 (Fla. 1983) because the defendant in Mason had previously been convicted of attempted murder, arson, as well as robbery and rape. "We think Mason's prior convictions for attempted murder and rape distinguish Mason from the present case." Id. at 898. Mr. Mills' previous conviction will be discussed in the next section.

Finally, the jury may not have given this aggravating factor much weight because it was automatic upon the finding of felony murder (see Claim IV).

2. Prior Crime of Violence

In the jury penalty phase, the prosecution introduced evidence of one prior conviction, for aggravated assault (Supp. Transcript, p. 51). The facts of that prior conviction are relevant to its weight as an aggravator:

> Testimony concerning the events which resulted in the conviction assists the jury in evaluating the character of the defendant and the circumstances of the crime so that the jury can make an informed recommendation as to the appropriate sentence.

Rhodes v. State, 547 So. 2d 1201, 1204 (1989).

The facts of Mr. Mills' prior conviction were merely that he ran a police car off the road with his car, while involved in a high speed chase. The incident did not involve a knife, a gun or other weapon of that sort. The jury was entitled to know the facts of that prior conviction. However, they were told only that Mr. Mills had previously been convicted of aggravated assault, which was defined as an offense involving the use or threat of violence to another person.

Either way, the jury may have given this aggravator little weight, since it was never proven, and could not be, that the prior offense involved heinous circumstances such as might flow

from the use of a knife or gun, or might flow from actual physical violence against another person's body.

Any additional prior convictions should not have been used by the judge to override the jury's recommendation of life. It is in derogation of a defendant's right to a jury recommendation of punishment for the prosecution to withhold evidence or argument for later use before the judge. This is an unconstitutional circumvention of the standard set out in Tedder v. State, 322 So. 2d 908 (Fla. 1985), and the Florida statutes. "[T]he sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant." Section 921.141(i), Fla. Stat. (emphasis added).

For the same reasons, it was improper for the trial judge to consider and find aggravating circumstances not submitted or argued to the jury by the prosecution. These include great risk of death to many persons and pecuniary gain. Both of these aggravators were struck or merged by this Court on direct appeal, Mills v. State, supra, but they clearly formed the basis for the improper override of the jury's life recommendation.

Defense counsel had no opportunity to object to the judge's reliance on aggravating factors not presented to the jury, because it was not apparent until the judicial sentencing at which time the judge had already prepared his sentencing order.

Mr. Mills' rights under the eighth and fourteenth amendments and Article 1, sections 9 and 17 of the Florida Constitution were violated when the judge relied on two aggravating factors not presented to the jury and relied on previous convictions not submitted to the jury to negate the mitigating factor of no significant criminal history. See Bullington v. Missouri, 451 U.S. 430 (1981); Presnell v. Georgia, 439 U.S. 14 (1978).

The Florida capital sentencing scheme which has been approved (as set forth in the statute) by the Supreme Court, see Proffitt v. Florida, 428 U.S. 242 (1976), is a tripartite

process. Each stage is essential to the fair and constitutional application of the statute. Specifically, it is unconstitutional to deny the jury, even though its recommendation is only advisory, of the ability to comprehensively consider all the relevant aggravating and mitigating factors. See Richardson v. State, 437 So. 2d 1091, 1095 (Fla. 1983). As was stated in Messer v. State, 330 So. 2d 137, 142 (1976):

> It is clear that the Legislature in the enactment of Section 921.141, Florida Statutes, sought to devise a scheme of checks and balances in which the input of the jury serves as an integral part. The validity of the jury's recommendation is directly related to the information it receives to form a foundation for such recommendation.

This constitutional violation is particularly egregious where the State voluntarily conceded the inapplicability of the two factors to the jury. Having made its election as to the facts upon which it chose to rely, the State was bound by that decision and could not later seek to rely on aggravating factors it had explicitly conceded were inapplicable. See Bullington v. Missouri, supra; Chambers v. State, 339 So. 2d 204, 208 (Fla. 1976)(England, J., concurring).

In a very recent case, this Court found defense counsel ineffective, in part, for failing to object to the trial court reliance on aggravating factors not argued to the jury:

> Lastly, trial counsel failed to provide the trial court with an answer brief in response to the state's brief urging imposition of the death penalty. The prosecution's brief erroneously reported that Stevens had served one year in a Kentucky county jail for a felony conviction. It was further asserted that two aggravating factors applied which the state deliberately had chosen not to advance before the jury. The state went on to point out that trial counsel had made no attempt to offer evidence of a single mitigating factor. In his findings of fact, the trial judge relied on the two newly argued aggravating factors (that the murder was committed for the purpose of avoiding or preventing a lawful arrest and for pecuniary gain). In addition, he relied on the erroneous information concerning Stevens' prior criminal history.

> Trial counsel made no effort to correct the misstatements or errors made by the state.

Stevens v. Florida, ___ So. 2d ___, 14 F.L.W. ___ (Case Nos. 68,581; 69,112; 70,955, October 5, 1989)(emphasis added).

Similarly, the error in Mr. Mills' case was not corrected. This issue was raised on direct appeal, but not addressed by this Court.

3. Under Sentence of Imprisonment

Mr. Mills had been released from prison on his aggravated assault charge and was on joint probation and parole. The jury could rightfully have given this aggravating factor little weight because it essentially was cumulative to the prior conviction aggravating factor. Additionally, this was not a case involving escape from incarceration.

In Sonser v. State, 544 So. 2d 1010, 14 F.L.W. 262, 263 (Fla. 1989), this Court addressed the weight to be given to this aggravating factor:

> Even the gravity of the one aggravating factor is somewhat diminished by the fact that Songer did not break out of prison but merely walked away from a work release job.

Here, Mr. Mills was paroled after proper adjustment to a prison environment. **See** Skipper v. South Carolina, 476 U.S. 1 (1986).

In summary, the jury could easily have found little or no aggravation in this case. The judge's reliance on aggravating factors not even argued to the jury was improper, his reliance on nonstatutory aggravation, such as victim impact and future dangerousness, was improper and his refusal to recognize mitigation plainly appearing on the record was improper. The result is that Mr. Mills' right to a recommendation made by a jury of his peers was completely ignored by the sentencing judge. A new sentencing proceeding is required.

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

At the time of Mr. Mills' trial the eighth amendment required a capital sentencer, "not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978). While Mr. Mills' case was pending on direct appeal, Eddinss v. Oklahoma, 455 U.S. 104, 102 S. Ct. 869 (1982), was decided. Eddinss made it clear that "the sentencer may not refuse to consider or be precluded from considering "any relevant mitigation." Eddinss, supra at 114. Most recently in Mills v. Maryland, 108 S. Ct. 1860 (1988), the United States Supreme Court, in surveying the prime directive of Lockett and its prodigency, stressed the ability of the sentencer to consider all evidence of mitigation unimpeded.

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

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

In this case, the judge refused to consider substantial and unrebutted statutory and nonstatutory mitigation regarding, inter alia, Mr. Mills' youthful age, his impoverished youth, and his childhood. This Court's analysis on direct appeal was similarly skewed. Mr. Mills grew up in a very poor family. His family

lived in a ghetto, and he and his six brothers and sisters slept in the same room. When Mr. Mills was young, his father was shot and killed by his Aunt, so he was deprived of a male figure in his life. After that Mr. Mills' mother struggled in the fields six days a week from dawn till dusk to provide for her family. Because she spent so much time working, she had little time to raise the children. Mr. Mills was thus raised by his teen-age sister. He dropped out of high school before graduating, but later earned his GED after he was in prison. When he was released from prison, Mr. Mills quickly gained employment and was trusted by his employer. None of this mitigation was, or could be, rebutted by the state.

Additionally, Mr. Mills did not have a significant history of criminal convictions. The prosecution introduced only one prior conviction at the penalty phase. Also, Vincent Ashley, who was Mr. Mills' co-defendant, received total immunity for this and several other crimes. Disparate treatment of co-defendants has long been recognized as mitigating evidence.

As noted above, at the time of his arrest, Mr. Mills had obtained his GED, while in prison. After his release, he was working at a job where he was trusted. He had the support of his family, he had his own house, and his sister had helped him open a bank account.

As Eddings makes clear, **"[while]** a sentencer **. . .** may determine the weight to be given relevant mitigating evidence **. . .** [he] may not give it no weight by excluding such from [his] consideration." At 114-5.

Defense counsel at trial requested two alternative jury instructions based on Lockett, supra. (Supp. Transcript, p. **4).** The trial court indicated its belief that Lockett was the law. The record is not clear whether either of the requested instructions were given, or whether the judge believed the law to be covered by the standard instructions. (Supp. Transcript, p.

17). However, in his Order of Judgment and Sentence the judge made absolutely no mention of non-statutory mitigation. He simply listed the statutory mitigating factors, noted why he did not believe any of them applied and concluded that there were ". . . insufficient mitigating circumstances therein that a sentence of death is justified" (R. 642).

Any confusion concerning a trial judge's sentence must be resolved in favor of the defense. The court's written findings regarding mitigating circumstances constitute a integral part of its decision. Van Royal v. State, 497 so. 2d 625 (Fla. 1986). As in that case,

> This is even more true when, as here, we are faced with a jury override. Without these findings this Court cannot assure itself that the trial judge based the oral sentence on a well-reasoned application of the factors set out in section 921.141(5) and (6) and in Tedder v. State, 322 So. 2d 908 (Fla. 1975). Thus, the sentences are unsupported.

Id. at 629.

Recently this Court has had occasion to discuss ambiguous sentencing orders.

> In considering the other factors, the court concluded that none rose "to the level of a mitigating circumstance to be weighed in the penalty decision." This statement gives us pause. We have previously recognized the semantic ambiguities which result from reviewing and considering any and all nonstatutory mitigating evidence. Echols v. State, 484 So.2d 568, 576 (Fla. 1985), cert. denied, 107 S.Ct. 241 (1986). More recently, we stated:
>
> > There appears to be some confusion over the concept of mitigating as set forth in our death penalty statute, which requires "specific written findings of fact based upon [aggravating and mitigating] circumstances ... and upon the records of the trial and the sentencing proceedings." Section 921.141(3), Fla. Stat. (1985). However, a "finding" that no mitigating factors exists has been construed in several different ways: (1) that the evidence urged in mitigation was not factually supported by the record; (2) that the facts, even if established in the record, had no mitigating value; or (3)

> that the facts, although supported by the record and also having mitigating value, were deemed insufficient to outweigh the aggravating factors involved.
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> Rosers v. State, 511 So.2d 526, 534 (Fla. 1987, cert. denied, 108 S.Ct. 733 (1988). Mindful of the admonition that a trial court could not refuse to consider any relevant mitigating evidence, we found that
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> > the trial court's first task in reaching its conclusions is to consider whether the facts alleged in mitigation are supported by the evidence. After the factual findings has been made, the court then must determine whether the established facts are of a kind capable of mitigating the defendant's punishment, i.e., factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed. If such factors exist in the record at the time of sentencing, the sentencer must determine whether they are of sufficient weight to counterbalance the aggravating factors.
>
> Id. Under the circumstances here, and mindful that we have rejected one aggravating factor on which the court relied, we are not certain whether the trial court properly considered all the mitigating evidence or whether it found that the aggravation outweighed the mitigation. Accordingly, we reverse the death sentence and remand for reconsideration of the death sentence and resubmission of a new sentencing order, if appropriate. A new penalty phase is not necessary.

Lamb v. State, 13 F.L.W. 530, 531-2 (Sept. 1, 1988). Mr. Mills' case similarly deserves reversal.

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. Brown, 479 U.S. 538, 545, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987)(concurring opinion). Moreover,

> Eddings makes clear that is is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence. Hitchcock V. Dugger, **481** U.S. **393, 107** S.Ct. 1821, **95** L.Ed.2d **347 (1987).** Only then can we be sure that the sentencer has treated the defendant as a "uniquely individual human **bein[g]"** and has made a reliable determination that death is the appropriate sentence. Woodson, **428** U.S., at **304,** 305.

109 S. Ct. at **2947** (emphasis added). The judge refused to comply with the dictates of Penry. These fundamental violations of eighth amendment jurisprudence demonstrate that habeas corpus relief is now appropriate. For each of these reasons discussed above the Court should vacate Mr. Mills' unconstitutional sentence of death.

This claim was raised on direct appeal but rejected under an analysis that this Court has since found to be improper. **See** infra. Habeas relief is proper now.

C. RECENT DECISIONS FROM THIS COURT MAKE MANIFEST THAT THE JURY OVERRIDE IN MR. MILLS' CASE RESULTED IN *AN* ARBITRARILY, CAPRICIOUSLY, AND UNRELIABLY IMPOSED SENTENCE OF DEATH, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The jury override procedure in Florida is constitutionally valid only to the extent that it is utilized within specific reliable procedural parameters, and so long as it does not lead to freakish and arbitrary capital sentencing. Spaziano V. Florida, **468** U.S. **447, 465 (1984).**

The override in this case was constitutionally wrong. The override in this case would not be allowed to stand today, thus demonstrating the unreliability and arbitrariness of Mr. Mills' sentence of death.

If the jury override here, and the method by which it was sustained, is acceptable under the Florida statute, then "the application of the jury override procedure has resulted in arbitrary or discriminatory application of the death penalty . . . in general . . . [and] in this particular case."

Spaziano, supra. To allow the override to stand in this case would indeed be to validate a procedure providing no meaningful basis upon which to distinguish between those persons who receive life (when a judge does not override, or when an override is reversed) and those who receive death. This violates the eighth and fourteenth amendments. Even though this issue was raised on direct appeal and rejected by this Court, this issue involves such a fundamental miscarriage of justice due to the unreliability and wrongfulness of Mr. Mills' death senteence that it should be reviewed again, in light of current pronouncements of this Court.

1. The Standards Attendant to Florida's Jury Override Procedure

The nature of Florida's capital sentencing process ascribes a role to the sentencing jury that is central and "fundamental", Riley v. Wainwright, 517 So. 2d 656, 657-58 (Fla. 1988); Mann, supra, 844 F.2d at 1452-54, representing the judgment of the community. Id. A Florida sentencing jury's recommendation of life is entitled to "great weight," and can only be overturned by a sentencing judge if "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975)(emphasis supplied). See also Mann, 844 F.2d at 1450-51 (and cases cited therein).

The standard established under Florida law is thus that if a jury recommendation of life is supported by *any* reasonable basis in the record -- such as a valid mitigating factor, albeit nonstatutory -- that jury recommendation cannot be overridden. See Mann, supra, 844 F.2d at 1450-54 (and cases cited therein); see also, Ferry v. State, 507 So. 2d 1373, 1376-77 (Fla. 1987); Wasko v. State, 505 So. 2d 1314, 1318 (Fla. 1987); Brookinas v. State, 495 So. 2d 135, 142-43 (Fla. 1986); Tedder, supra, 322 So. 2d at 910. Cf. Hall, supra, 14 F.L.W. 101. This is "the nature

of the sentencing process," Mann, supra, 844 F.2d at 1455 n.lO, under Florida law. This standard has in fact been recognized by the United States Supreme Court as a "significant safeguard" provided to a Florida capital defendant. Spaziano, supra, 468 U.S. at 465.

2. The Override in Mr. Mills' Case Resulted in an Arbitrarily, Capriciously, and Unreliably Imposed Death Sentence, in Violation of the Eighth and Fourteenth Amendments

Mr. Mills' jury recommended that he be sentenced to life. However, although mitigation was present in the record, and although there was much more than a reasonable basis for the jury's recommendation, the trial judge ignored the law and imposed death. This Court then refused to apply its own settled standards and affirmed that sentence. See Mills v. State, 476 So. 2d 173 (Fla. 1985). Here, the sentencing judge and this Court on direct appeal violated Mr. Mills' eighth amendment rights to a capital sentencing determination in accord with Florida's settled standards. See Mann, supra, 844 F.2d at 1455, n.lO. The record here demonstrates many reasonable bases for life.

Classic mitigating factors reflected in this record have been recognized by various courts of the State of Florida. The fact that a defendant comes from a broken home and suffered atrocious circumstances while a child has been recognized by many courts. State v. Scott, Case No. 78-10671 (11th Jud. Cir., Dade Co.); State v. Herring, Case No. 81-1957CC (7th Jud. Cir., Volusia Co.); see also Livingston v. State, 13 F.L.W. 187 (Fla. 1988), Nealy v. State, 384 So. 2d 881 (Fla. 1980). Being raised in poverty has been recognized in mitigation. State v. Scott, Case No. 78-10671 (11th Jud. Cir., Dade Co.); State v. Herring, Case No. 81-1957CC (7th Jud. Cir., Volusia Co).

This Court has considered, in reducing a death sentence to life imprisonment, that the experience of watching a family

member's death is a mitigating factor. Brookinas v. State, 495 So. 2d 135 (Fla. 1986). Mr. Mills' father was murdered by his aunt when he was less than 12 years old.

The fact that a defendant had a difficult childhood and entered the adult penal system at an early age was considered as mitigation by the trial court in State v. Bursh, Case No. 73-885CF (15th Jud. Cir., Palm Beach Co.). Evidence that a defendant has worked to better himself while imprisoned is also classic mitigation. See Skipper v. South Carolina, 476 U.S. 1 (1986); Valle v. State, 502 So. 2d 1225 (Fla. 1987). Mr. Mills received his GED while in prison, and had begun taking college courses.

Under the law as it now exists, if a Florida jury recommends life, death may not be imposed if there is any "reasonable basis in the record" -- such as a valid mitigating factor, albeit nonstatutory -- for the recommendation. Mann v. Duaaer, 844 F.2d 1446, 1450-54 (11th Cir. 1988) (in banc); Ferry v. State, 507 So. 2d 1373, 1376 (Fla. 1987); see also Hansbrough v. State, 509 So. 2d 1081, 1086 (Fla. 1987) ("a reasonable basis for the jury to recommend life" cannot be overridden); Fead v. State, 512 So. 2d 176, 178 (Fla. 1987) ("[O]only when there are no 'valid mitigating factors discernible from the record' is an override warranted"); Wasko v. State, 505 So. 2d 1314, 1318 (Fla. 1987) (no override "unless no reasonable basis exists for the opinion"); Duboise, supra (If a "fact could reasonably have influenced the jury," no override is proper). If any valid mitigating circumstances exists in the record, an override cannot be sustained. Fead, supra. The override in this case was improper, and its arbitrary affirmance by this Court violated the eighth amendment.

In addition, the jury could easily have given little or no weight to the aggravating factors advanced by the State. See infra.

Based on all of the above, it is quite plain that "reasonable people could differ as to the propriety of the death penalty in this case, [and thus] the jury's recommendation of life must stand." Brookings v. State, 495 So. 2d 135, 143 (Fla. 1986). There were numerous valid and eminently reasonable nonstatutory mitigating factors in this case, a case involving three aggravating factors. Whatever balance the trial judge may have struck, the jury's balancing and resulting life recommendation, were undeniably reasonable under Florida law. See Mann, supra, 844 F.2d at 1450-55; Ferry, supra; Wasko, supra. The trial judge and this Court on direct appeal, however, refused to provide Mr. Mills with the right which the law clearly afforded him: the right not to have a reasonable jury verdict overturned.

In fact, the trial judge failed to even explain why the jury had no rational basis for its recommendation, as Tedder requires. A jury life recommendation magnifies the sentencing judge's duty to actually consider statutory and nonstatutory mitigating factors, because the usual presumption in Florida that death is the proper sentence upon proof of one or more aggravating factors does not apply (and indeed is reversed) when a jury recommendation for a life sentence has been made. Williams v. State, 386 So. 2d 538, 543 (Fla. 1980).[1]

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[1]The judge considering an override must weigh aggravating circumstances "against the recommendation of the jury." Lewis v. State, 398 So. 2d 432, 439 (Fla. 1981). The overriding judge must make findings that explain why the jury was unreasonable, why no reasonable person could differ, and why death is proper. Tedder, supra. Neither this procedure, nor the substantive "no reasonable juror" determination, occurred in this case.

The Court's Order of Judgment and Sentence mentioned that the case was before the court after a) the conviction of the defendant and b) the jury's recommendation of life imprisonment, and the Order then continues with a listing of the aggravating and mitigating circumstances (R. 639). The Tedder standard was not mentioned, and, the jury was mentioned only in passing. The judge found six statutory aggravating circumstances, of which only three were sustained by this Court on direct appeal. The judge then considered only statutory mitigation, weighed statutory aggravation and mitigation, and imposed death. The judge made no findings regarding the unreasonableness of the jury, and did not explain why the jury's recommendation was not entitled to great weight. The judge did not consider the nonstatutory mitigation in the record, nonstatutory mitigation which formed an eminently reasonable basis for the jury's recommendation of life.

The override was thus predicated upon what the judge felt, and not upon any analysis of why there was no reasonable basis for the jury. That is not the law:

> The state, however, suggests that the override was proper here because the trial court judge is the ultimate sentencer and his sentencing order represents a reasonable weighing of the relevant aggravating and mitigating circumstances. According to the state's theory, this Court should view a trial court's sentencing order with a presumption of correctness and when the order is reasonable, this Court should uphold the trial court's sentence of death. We reject the state's suggestion. Under the state's theory there would be little or no need for a jury's advisory recommendation since this Court would need to focus only on whether the sentence imposed by the trial court was reasonable. This is not the law. Sub judice, the jury's recommendation of life was reasonably based on valid mitigating factors. The fact that reasonable people could differ on what penalty should be imposed in this case renders the override improper.

Ferry, 507 So. 2d at 1376-77 (emphasis added). Despite the presence of the significant mitigation cited above, this Court sustained the override. Mills v. State, supra. This was a

fundamental error of law, an error which deprived Mr. Mills of his eighth amendment rights.

Under Tedder, the trial judge could override a jury's verdict of life only when "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." 322 So. 2d at 910. Under the Florida Supreme Court's recent interpretations of the Tedder standard, a trial judge may not override a jury's verdict of life when there is a "reasonable basis" for that verdict. As discussed above, it is indeed apparent that Mr. Mills' jury had an eminently reasonable basis for its life recommendation. It is equally apparent that those "significant safeguards" recognized by the Spaziano court were not present in Mr. Mills' case, and that "application of the jury override procedure has resulted in arbitrary [and] discriminatory application of the death penalty" in his case. Spaziano, 104 S. Ct. at 3165. If the trial judge's override of Mr. Mills' jury recommendation for life passes state muster, the United States Supreme Court can no longer be confident that the Florida Supreme Court still "takes that [Tedder] standard seriously." 104 S. Ct. at 3165.

The same analysis applies to Mr. Mills' claim: the override scheme and the application of the Tedder standard were upheld in Spaziano on the basis of the "significant safeguard" provided by the Tedder standard, the Court's satisfaction that the Florida Supreme Court took that standard seriously, and the lack of evidence that the Florida Supreme Court had failed in its responsibility to perform meaningful appellate review. Spaziano, supra, 468 U.S. at 465-66. Mr. Mills' claim is that in his case the assurances upon which the Court relied in Spaziano have not been fulfilled. On the contrary, although an ample "reasonable basis" for the jury's life recommendation was present, the trial judge overrode that recommendation, and this Court failed to provide Mr. Mills the "significant safeguard" of

the Tedder standard, failed to take that standard seriously, and failed to provide Mr. Mills with the meaningful appellate review to which he was entitled. See Spaziano, supra; see also Magill v. Dugger, 824 F.2d 879, 894 (11th Cir. 1987)("Although Spaziano indicates that a state may allocate the sentencing power as it wishes between the judge and jury, it does not stand for the proposition that the state may arbitrarily alter this allocation as it applies to particular defendants.").

This Court has noted as much in Cochran v. State, 547 So. 2d 928, 14 F.L.W. 406 (Fla. 1989). In Cochran both the majority and the dissent agreed that the Tedder standard has been inconsistently applied. Dissenting from the reversal of the override in Cochran, Chief Justice Ehrlich cited three cases in which overrides were affirmed despite the presence of information which could have influenced the jury to recommend life, and argued that a "mechanistic application" of the Tedder standard "would have resulted in reversals of the death sentences in these cases." Cochran, supra, slip op. at 14. Though Chief Justice Ehrlich argued that the Tedder standard as construed today and as applied by the majority in Cochran is wrong and that the court should return to the standard employed in the earlier cases which he cited, he correctly noted that the shift in the standard has resulted in an eighth amendment violation under Furman v. Georgia, 408 U.S. 238 (1972). Cochran, supra, slip op. at 14. In response to Chief Justice Ehrlich's dissent, the majority wrote:

> Finally, we agree with the dissent that "legal precedent consists more in what courts do than in what they say." However, in expounding upon this point to prove that Tedder has not been applied with the force suggested by its language, the dissent draws entirely from cases occurring in 1984 or earlier. This is not indicative of what the present court does, as Justice Shaw noted in his special concurrence to Grossman v. State, 525 So.2d 833, 851 (Fla. 1988)(Shaw, J., specially concurring):

> During **1984-85,** we affirmed on direct appeal trial judge overrides in eleven of fifteen cases, seventy-three percent. By contrast, during **1986** and **1987,** we have affirmed overrides in only two of eleven cases, less than twenty percent. This current reversal rate of over eighty percent is a strong indicator to judges that they should place less reliance on their independent weighing of aggravation and mitigation . . . .
>
> Clearly, since **1985** the Court has determined that Tedder means precisely what it says, that the judge must concur with the jury's life recommendation unless "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." Tedder, **322** So.2d at **910.**

Cochran, supra, slip op. at **9-10.**

Today, "Tedder means precisely what it **says."** At the time of Mr. Mills' direct appeal, and at the time of Spaziano, Tedder did not mean what it said, although the United States Supreme Court relied upon Tedder and the Florida Supreme Court's assurances that it would give the Tedder standard effect in upholding the validity of Florida's jury override scheme. Today, Mr. Mills' death sentence would not be affirmed. **This is** arbitrary. This is capricious. This is not a reliable result. This death sentence violates the eighth and fourteenth amendments.

The trial court's override is constitutionally improper for the foregoing reasons, and also because it found in aggravation, two aggravating circumstances which were not even argued to the jury: great risk of death to many persons and pecuniary gain. See Bullington V. Missouri, **451** U.S. **430 (1981).** On direct appeal, three aggravators, great risk of death to many persons, pecuniary gain and heinous, atrocious or cruel, were struck. Mr. Mills' case at that point should have been reversed for

resentencing. Stevens v. State, supra.[2] The override is also improper for failure to set out the Tedder standard, and for failure to recognize the nonstatutory mitigation appearing plainly on the record. Hitchcock V. Dugger, 481 U.S. 393 (1987); Lockett v. Ohio, 438 U.S. 586 (1978). The trial court's override is thus based on improper aggravation, failure to recognize mitigation and refusal to follow the law.

The trial court also decided Mr. Mills' sentence and prepared a written order before the judge sentencing phase (R. 937). The sentencing hearing was therefore not full, fair and independent. Relief is appropriate.

CLAIM III

THIS COURT ERRED IN FAILING TO REVERSE MR. MILLS' SENTENCE OF DEATH AND REMAND FOR RESENTENCING UNDER THE ELLEDGE STANDARD UPON THE STRIKING OF THREE AGGRAVATING FACTORS, AND THUS DENIED MR. MILLS THE PROTECTIONS AFFORDED UNDER THE FLORIDA CAPITAL SENTENCING STATUTE, IN VIOLATION OF DUE PROCESS, EQUAL PROTECTION, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

In overriding the jury's recommendation of life imprisonment, the sentencing court found six aggravating circumstances. On direct appeal, this Court found that three of the aggravating factors, great risk of death to many persons, pecuniary gain, and heinous, atrocious or cruel, were not properly relied on by the sentencer, and thus struck them. Mills v. State, 476 So. 2d 172 (Fla. 1985). However, the majority opinion went on to state that the "purported mitigating circumstances claimed by Mills, but not found by the trial judge, are not sufficient to outweigh the aggravating circumstances." Id. at 179. On direct appeal, this Court's review of mitigating

[2] Clemons v. Mississippi, 109 S. Ct. 3184, 45 Cr. L. 4067 (1989), is now pending certiorari in the United States Supreme Court on a much less persuasive issue. Mr. Mills' execution should at least be stayed until resolution of Clemons.

evidence was constrained by the then prevailing statutory construction: only statutory mitigation was discussed by the majority while Justice McDonald stated:

> I dissent only from the affirmance of the death sentence. Were it not for the jury's recommendation, I would have little difficulty in upholding the death sentence. Valid aggravating circumstances existed, and the defense established the existence of no statutory mitigating circumstances.

Id. at 180 (McDonald, J., concurring in part, dissenting in part).

This, of course, is a constitutionally improper shifting of the burden to Mr. Mills to prove that life is appropriate. Mullaney v. Wilbur, 421 U.S. 648 (1975). (See Claim VI). In addition, this failure to reverse and remand for resentencing is in direct conflict with this Court's own longstanding standards. In Elledge v. State, 346 So. 2d 998, 1003 (Fla. 1977), this Court expressly held over ten years ago that if improper aggravating circumstances are found, "then regardless of the existence of other authorized aggravating factors 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." Accordingly, reversal is required when mitigation may be present and an aggravating factor is struck, and even when it is not, **see** Schaefer v. State, 537 So. 2d 988 (Fla. 1989); Nibert v. State, 508 So. 2d 1 (Fla. 1987), especially in an override case. That is a fundamental protection afforded to a capital defendant under Florida law.

Thus, when this Court found that three separate aggravating circumstances were improperly found, reversal of the death sentence was appropriate. This holds true even though three aggravating circumstances remained, because the record does **not** reflect that the sentencing judge found no mitigation: the sentencing court **did** find nonstatutory mitigating circumstances,

even though it did not think them sufficient to outweigh **six** aggravators.

As in Elledse,

> In order to have weighed the aggravating circumstances against the mitigating circumstances, the court must have found some of the latter. Likewise, in concluding "that insufficient mitigating circumstances exist to outweigh the aggravating circumstances" he implicitly found some mitigating circumstances to exist. But did the judge take into account in the weighing process the nonstatutory aggravating circumstance? He did.

346 So. 2d at **696.** There is no difference.

It should be noted here that the remaining aggravating factors may not have been considered by the jury to be sufficient in and of themselves to justify the death sentence. (**See** Claim 11). None at all were by the jury. Two of the remaining aggravators are essentially the same: previously convicted of another felony, aggravated assault, and under sentence of imprisonment, also on the aggravating assault. The third aggravator, during the commission of a burglary, is the very felony which gave rise to Mr. Mills' conviction of felony murder. (**See** Claim IV).

In opposition to these aggravators, there was a great wealth of evidence admitted in mitigation. This included the fact that Mr. Mills was only 22 years old at the time of the offense. He grew up in a ghetto, in low income housing. He dropped out of school in the seventh grade, but went on to work for and obtain his GED when he was in prison. When he was growing up, his family was very poor. His six sisters and brothers slept in the same room and the family could not afford medical care. When he was still very young, his father was murdered by his maternal aunt, and his mother was forced to do field work to support the family. She was away from the home from dawn to dusk, and thus he was raised by his teen-age sister. All of this has been recognized as classic mitigation, by this Court and by other

circuit courts in Florida, and none of it was, nor could have been, rebutted by the State.

The fact that a defendant came from a broken home and suffered atrocious circumstances while a child has been recognized by many courts. State v. Scott, Case No. 78-10671 (11th Jud. Cir., Dade Co.); State v. Herring, Case No. 81-1957CC (7th Jud. Cir., Volusia Co.); see also Livingston v. State, 13 F.L.W. 187 (Fla. 1988), Nealy v. State, 384 So. 2d 881 (Fla. 1980). Being raised in poverty has been recognized in mitigation. State v. Scott, Case No. 78-10671 (11th Jud. Cir., Dade Co.); State v. Herring, Case N. 81-1957CC (7th Jud. Cir., Volusia Co.).

This Court has considered, in reducing a death sentence to life imprisonment, that the experience of watching a family member's death is a mitigating factor. Brookings v. State, 495 So. 2d 135 (Fla. 1986). Mr. Mills' father was murdered by his aunt when he was less than 12 years old.

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Additionally, Mr. Mills' co-defendant was not even prosecuted for this crime, but was given complete immunity for this as well as other crimes, in exchange for his testimony. Disparate treatment of a co-defendant has certainly been recognized as mitigation in the past. Messer v. State, 403 So. 2d 341 (Fla. 1981); Herzos v. State, 439 So. 2d 1372 (Fla. 1983).

In light of this nonstatutory mitigation, this Court was in error in failing to reverse Mr. Mills' death sentence upon the striking of three improper aggravators under the standard announced in Elledse v. State, supra. This 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).

Indeed, the Florida Supreme Court is not the sentencer under Florida law. Reweighing by the sentencer is what the law requires and what the court should have ordered. As the in banc Ninth Circuit has explained:

> Post hoc appellate rationalizations for death sentences cannot save improperly channeled determinations by a sentencing court. Not only are appellate courts institutionally ill-equipped to perform the sort of factual balancing called for at the aggravation-mitigation stage of the sentencing proceedings, but, more importantly, a reviewing court has no way to determine how a particular sentencing body would have exercised its discretion had it considered and applied appropriately limited statutory terms. See Caldwell v. Mississippi, 472 U.S. 320, 330, 105 S.Ct. 2633, 2640, 86 L.Ed. 2d 231 (184) ("[A state] appellate court, unlike a capital sentencing jury, is wholly ill-suited to evaluate the appropriateness of death in the first instance"); Presnell v. Georgia, 439 U.S. 14, 16-17, 99 S.Ct. 235, 236, 58 L.Ed.2d 207 (1978)(reversing state appellate court affirmance of death sentence based on state court's own finding of an aggravating circumstance that had not been found by the sentencing jury)(per curiam).

Adamson V. Ricketts, 865 F.2d 1011, 1036 (9th Cir. 1988)(in banc). It was fundamentally wrong for this Court to reweigh the remaining aggravating factors against the mitigating factors and determine the balance. That is for the sentencer.

At the very least, this case should be stayed pending the decision of the United States Supreme Court in Clemons v. Mississippi, 109 S. Ct. 3184, 45 Cr. L. 4067 (1989). 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. Whether the sentencing authority in Florida rests with the trial court or the jury is of no moment. In petitioner's case, this Court unconstitutionally took over the sentencer's function, in direct contravention of its earlier rulings in which this Court held:

> Explaining the trial judge's serious responsibility, we emphasized, in State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed 2d 295 (1974):
>
> > [T]he trial judge actually determines the sentence to be imposed -- guided by but not bound by, the findings of the jury. To a layman, no capital crime might appear to be less than heinous, but a trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard criminal activity which can only be developed by involvement with the trials of numerous defendants. Thus, the inflamed emotions of jurors can no longer sentence a man to die.
>
> The fourth step required by Fla. Stat. sec. 921.141, F.S.A., is that the trial judge justifies his sentence of death in writing, to provide the opportunity for meaningful review by this Court. Discrimination or capriciousness cannot stand where reason is required, and this is an important element added for the protection of the convicted defendant.

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

This court has addressed the ramifications of a trial judge's failure to engage in a meaningful weighing of aggravating and mitigating circumstances before imposing a death sentence. In a number of cases, the issue has been presented where findings of fact were issued long after the death sentence was actually imposed. Nibert v. State, 508 So. 2d 1 (Fla. 1987); Muehleman v. State, 503 So. 2d 310 (Fla. 1987); Van Royal v. State, 497 So. 2d 625 (Fla. 1986). In Van Royal, this 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.

In Patterson v. State, 513 So. 2d 1257 (Fla. 1987), the court found that the trial judge failed to engage in any independent weighing process. Id. 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.

Recently, this Court again held that the sentencing responsibility rests at the trial court level:

> [W]e 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 that 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, 14 F.L.W. 343, 346 (Fla. 1989).

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 those protections, and was denied his eighth amendment rights. Moreover, appellate counsel rendered ineffective assistance in failing to argue Elledse, supra, on direct appeal. This claim involves fundamental error, and is plain from a reading of the record. The error should be corrected now, and Mr. Mills' case be reversed and remanded for resentencing.

CLAIM IV

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

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

Mr. Mills was indicted for murder committed while engaging in the perpetration or the attempt to perpetrate a burglary (R. 449). The jury was intructed only on felony murder:

> Murder in the first degree is the unlawful killing of a human being when committed by a person engaged in the perpetration or an attempt to perpetrate any of the following crimes: Arson, involuntary sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person over the age of eighteen years when such drug is proved to be the proximate cause of the death of the user.
>
> All right. That is the definition.

(R. 454).

The jury in this case recommended life. The trial judge, however, overrode that recommendation, finding that the murder was committed in the course of a robbery (R. 640). This issue was raised on direct appeal, and denied by this Court, as being without merit. Mills v. State, 476 So. 2d 172 (Fla. 1985). At the time of the direct appeal, the United States Supreme Court

had not yet addressed the problem of an automatic aggravating circumstances.

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

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

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

> "While Texas has not adopted a list of statutory aggravating circumstances the existence of which can justify the imposition of the death penalty as have Georgia and Florida, its action in narrowing the categories of murders for which a death sentence may ever be imposed serves much the same purpose . . . . In fact, each of the five classes of murders made capital by the Texas statute is encompassed in Georgia and

> Florida by one or more of their statutory aggravating circumstances . . . . Thus, in essence, the Texas statute requires that the jury find the existence of a statutory aggravating circumstance before the death penalty may be imposed. So far as consideration of aggravating circumstances is concerned, therefore, the principal difference between Texas and the other two States is that the death penalty is an available sentencing option--even potentially--for a smaller class of murders in **Texas." 428** U.S., at **270-271** (citations omitted).

The Court summarized:

> It seems clear to us from this discussion that the narrowing function required for a regime of capital punishment may be provided in either of these two ways: The legislature may itself narrow the definition of capital offenses, as Texas and Louisiana have done, so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by **jury** findings of aggravating circumstances at the penalty phase. See also Zant, supra, at **876,** n. 13, discussing Jurek and concluding, **"in** Texas, aggravating and mitigating circumstances were not considered at the same stage of the criminal prosecution."

Id. at **554-55** (emphasis added).

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

necessary.

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

Mr. Mills request that this Court reconsider this issue, and grant habeas corpus relief.

CLAIM V

REVERSIBLE ERROR OCCURRED IN VIOLATION OF MR. MILLS' RIGHTS UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTION 12 OF THE FLORIDA CONSTITUTION, WHEN THE COURT ADMITTED INTO EVIDENCE AS REBUTTAL, THE RESULTS OF A GUN RESIDUE TEST PERFORMED ON MR. MILLS

Direct examination of the Defendant concluded with the following set of questions and answers.

> Q. Directing your attention to the early morning hours of May 25th, did you ever, other than the time you were taken over there by the police, go in or near 445 Elliott Avenue?
>
> A. No, sir. Well, talking about that night --
>
> Q. Other than when the police took you over in the police car.
>
> A. No, sir.
>
> Q. Did you ever break in anybody's house?
>
> A. No, sir.
>
> Q. Did you ever shoot anybody?

A. No, sir.

MR. GREENE: I have no further questions.

CROSS-EXAMINATION

(R. 348).

The prosecutor began his cross-examination on somewhat the same subject matter.

Q. This isn't your shotgun?

A. Sir?

Q. This isn't your shotgun?

A. No.

Q. This isn't the one that was up over your bedroom doorsill up there?

A. No, sir.

Q. You've never seen it before today?

A. No, sir.

Q. At any time on May 24th or May 25th, did you fire this gun?

A. No, sir.

Q. At any time on May 24th or May 25th of this year did you fire any firearm?

A. No, sir.

Q. You're sure?

A. Positive.

Q. Have you ever seen that pouch before?

A. No, sir.

Q. Did you ever see a bunch of four ten --

A. No, sir.

Q. -- number six shells before?

A. No, sir.

(R. 349).

Q. You ever have any in your house?

A. No, sir.

Q. You ever hide any under a board in your front yard on Locust?

A. No, sir.

Q. You never went in that house?

A. No, sir.

Q. And you didn't take that shotgun and shoot and kill that man --

A. No, sir.

Q. -- when you saw something black in his hands?

A. No, sir.

Q. That you thought was a gun?

A. No, sir.

Q. And turned out to be a sock or a mitten?

A. No, sir.

(R. 350).

Once the defense completed its case, the court asked the prosecutor whether he had any rebuttal evidence.

(Whereupon, a bench conference was had with the Court Reporter out of the hearing of the Jury.)

MR. MARBLESTONE: Your Honor, at this time, if I could state, we would just proffer here . . . I intend, in rebuttal, to introduce the gunshot residue test performed on Mr. Mills. I believe the predicate has been laid. He's denied ever having fired a firearm durina those time spans.

THE COURT: I don't have to have the Jury out? Wasn't he forced to?

MR. MARBLESTONE: No.

THE COURT: Okay. You can make any objection, but only if it's proper rebuttal, only as rebuttal evidence.

MR. MARBLESTONE: Your Honor, I'd cite the case Dornau versus State, cited at 306 So. 2nd. 167, Walder versus United States of America, 347 United States 62, 98 Lawyers Edition, 503, Harris versus New York, 401 U.S. 222, 28, Lawyers Edition 2nd., page one.

(R. 376).

THE COURT: I think it's permissible as lona as no force or anything like that was used.

MR. GREENE: Your Honor, we're objecting to this.

THE COURT: I know.

MR. GREENE: On the record.

THE COURT: The Court will allow it provided the State shows there is no force as such used.

MR. MARBLESTONE: Okay. And, Franks versus Delaware 438 U.S. 154.

(R. 377) (emphasis supplied).

The state then introduced into evidence the results of a gunshot residue test conducted on Mr. Mills (R. 376-380, 383). The gunshot residue test had been suppressed during the state's case-in-chief, the court having ruled that it was illegally obtained without probable cause and exigent circumstances since Mr. Mills had been detained solely because of the "dragnet" for people on bicycles (R. 163-174).

The results of the test read slightly higher than normal (.05 and .07 micrograms of antimony on the defendant's hands, where .01 to .02 micrograms are considered normal), but much less than the .2 micrograms finding necessary to conclusively indicate that a gun had been fired (R. 384, 386-92).

According to the expert, Mills' test was positive since it revealed the presence of antimony in an amount not to be expected on a person who had not fired a gun, although it was not enough to prove conclusively that he had done so.

Unquestionably, the introduction of this evidence had a devastating impact on Mr. Mills' case. Circumstantial evidence usually is persuasive, but even more so when it involves physical evidence that carries with it the imprimatur of an expert.

The introduction of this evidence was patent error. What transpired was a gross perversion of the purpose and rule of Harris v. New York, 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 1

(1971). See also State v. Retherford, 270 So. 2d 363 (Fla. 1972); Walder v. U.S., 347 U.S. 62, 74 S. Ct. 354, 98 L. Ed. 503 (1954). Harris, of course, is designed to prevent a Defendant from turning the illegal method by which government evidence was obtained to his own advantage by letting him affirmatively resort to perjured testimony in reliance on the government's disability to challenge his credibility. On the other hand, the purpose of the exclusionary rule is similarly intended to prevent the government from profiting due to its own illegal conduct. In this instance, it was the government who transgressed the rule. The prosecutor, through his cross-examination, placed Mr. Mills between a rock and a hard place. Mr. Mills denied having fired a gun on the night in question. Rather than leave it for the jury to decide whether Mr. Mills' answer was or was not truthful, the Court apparently regarded it as a lie in direct contradiction of the results of the residue test. The harm to Mr. Mills as a result of the prosecutor's misconduct was compounded by the Court's error in admitting in evidence the results of the test.

The suppressed evidence (the residue test) does not disprove Mr. Mills' assertions that he did not fire a gun during the time in question. See Dornau v. State, 306 So. 2d 167, 170 (Fla. 2d DCA 1975); Angello v. U.S., 269 U.S. 20, 46 S. Ct. 4, 70 L. Ed. 145 (1925). As indicated above, the test results were inconclusive. The results therefore were as consistent with Mr. Mills not having fired a gun as they were with the converse. But a jury of lay persons probably missed this subtle distinction. The jury undoubtedly was more impressed with the way in which the prosecutor lured the unsuspecting Defendant into the fatal trap.

The rebuttal evidence should not have been admitted. Contrary to the state's assertion, "the predicate [i.e. perjury] [had not] been laid" (R. 376). At least not **"laid"** by the Defendant himself. The way by which the cunning prosecutor finagled this suppressed evidence into the trial exhibited a

complete disregard for the exclusionary rule and its purpose. Thus Mr. Mills was denied a fair trial in violation of his rights under the fourth and fourteenth amendments to the United States Constitution and Article 1, Sec. 12 of the Florida Constitution. The judgment and sentence must now be vacated.

In addition, the jury was never given a limiting instruction explaining that the gunshot shot residue test was to be considered only as impeachment material and not as substantive evidence of guilt. The Florida Supreme Court recognized this principle in Nowlin v. State, 346 So. 2d 1020 (Fla. 1977), relying on Harris v. New York, 401 U.S. 222, 91 S. Ct. 643, (1971), and Walder v. United States, 347 U.S. 64, 74 S. Ct. 354 (1954). The Florida Supreme Court further held that incriminating statements must be made voluntarily before they may be used for impeachment purposes. Nowlin, at 1024.

The principle that a prior inconsistent statement may be used only to impeach the credibility of a witness and not as substantive evidence has been reaffirmed many times. Dudley V. State, 545 So. 2d 857 (Fla. 1989); United States v. Whitson, 587 F.2d 948 (9th Cir. 1978)("[i]n no case is it permissible for the jury to use the impeaching evidence in deciding the defendant's guilt or innocence ..."); United States v. Hickey, 596 F.2d 1082 (1st Cir. 1979)(suppressed evidence may be used to impeach a defendant who testifies, on direct examination, contrary to such evidence). This claim involves significant fundamental error and should therefore be addressed on its merits.

Moreover, appellate counsel raised on direct appeal an issue directed to the reliability, and thus admissibility, of the gunshot residue test. However, he failed to raise the lack of an instruction on the proper use of the gunshot residue testimony, i.e. that it could only be admitted for impeachment purposes and not as substantive evidence. As a result, this Court's opinion did not reach the lack of an instruction either.

Appellate counsel's failure to fully litigate this claim was a failure to zealously represent Mr. Mills. This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Mills' death sentence. The caselaw was settled at the time of direct appeal. Appellate counsel simply failed.

Moreover, the claim is now properly brought pursuant to the Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. This issue involved a classic violation of longstanding principles of Florida law. See Nowlin, supra. It virtually "leaped out upon even a casual reading of transcript." Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). This clear claim of per se error required no elaborate presentation -- counsel only had to direct this Court to the issue. No procedural bar precludes review of this issue. See Johnson v. Wainwright, supra, 498 So. 2d 938. However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Mills of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra. Accordingly, habeas relief must be accorded now.

CLAIM VI

THE SENTENCING JUDGE SHIFTED THE BURDEN TO MR. MILLS TO PROVE THAT DEATH WAS INAPPROPRIATE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

This case involves a flatly unconstitutional presumption of death. In Hamblen v. Dugger, ___ So. 2d ___, 14 F.L.W. 347 (Fla., July 6, 1989), this Court suggested that the issues concerning the use of an unconstitutional presumption of death should be resolved on a case-by-case approach. Moreover, in Penry v. Lynaugh, 109 S. Ct. 2934, 45 Cr. L. 3188 (1989) the

United States Supreme Court condemned death penalty schemes which in any way impeded the sentencer from making a "reasoned moral response'' when deciding to impose death.

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 v. State, 283 So. 2d 1 (Fla. 1973). Mr. Mills' sentence of death was unconstitutionally premised upon this burden shifting, as the record makes clear.

In instructing the jury during the penalty phase of Mr. Mills' trial, the judge preliminarily stated:

> The State and Defendant may now present evidence relative to what sentence you should recommend to the Court.
>
> You're instructed that this evidence, when considered with the evidence you have already heard, it's presented in order that you might determine first whether or not such aggravating circumstances exist which would justify the imposition of the death penalty; and second, whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any. At the conclusion of the taking of the evidence and after argument of Counsel, you will be instructed on the factors in aggravation and mitigation that you may consider.

(R. 47-8)(emphasis added). Following the presentation of evidence, the judge instructed the jury as follows:

> THE COURT: Ladies and Gentlemen of the Jury, you've listened carefully to the arguments of the attorneys. I'm gonna ask you to listen to the law. It's your duty, now, to advise the Court as to what punishment should be imposed upon the Defendant for his crime of first degree murder. As you've been told, the final decision as to what punishmnent shall be imposed is the responsibility of the Judge. However, it is your duty to follow the law, which will now be given to you by the Court, and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.
>
> * * * *

> Should you find sufficient of these aggravating circumstances to exist, it will then be your duty to determine whether or not sufficient mitigatins circumstances exist to outweigh the asaravatina circumstances found to exist.
>
> * * * *
>
> . . . Your verdict must be based upon your finding of whether sufficient aggravating circumstances exist, and whether sufficient mitigating circumstances exist which outweigh any aggravating circumstances found to exist. Based on these considerations, you should advise the Court whether the Defendant should be sentenced to life imprisonment or to death.

(R. 116-121)(emphasis added).

The instructional error to the jury may be deemed harmless error, since the jury did return a recommendation of life. However, the trial judge overrode that recommendation. It is presumed that a trial judge's perception of the correct law "coincide[s] with the manner in which the jury [is] instructed." Zeialer v. Dugger, 524 So. 2d 419, 420 (Fla. 1988).

The law as applied by the sentencing judge violates 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 sentencing process 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.

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 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 judge's ability to "fully" assess mitigation, in violation of Penry v. Lynaugh, 109 S. Ct. 2934, 45 Cr. L. 3188 (1989), a decision which on its face applies retroactively to cases on collateral review.

The United States Supreme Court recently granted a writ of certiorari in Blystone v. Pennsylvania, 109 S. Ct. 1567 (1989), to review a very similar claim. The question presented in Blystone has obvious ramifications here. Under Pennsylvania law, the jury is instructed that where it finds an aggravating circumstance present and no mitigation is presented, it "must" impose death. However, if mitigation is found, then the jury must decide whether the aggravating circumstances outweigh the mitigating. In Pennsylvania, the legislature chose to place upon a capital defendant a burden of production as to evidence of mitigation and a burden of persuasion as to whether mitigation exists. However, once evidence of a mitigating circumstance is found, then the State bears the burden of persuasion as to whether the aggravating circumstances outweigh the mitigating such that a death sentence should be returned.

Under the standard employed here by the sentencing judge, once one of the statutory aggravating circumstances was found, by definition sufficient aggravation existed to impose death. The judge then found no mitigation and concluded that there were "insufficient" mitigating circumstances to justify a life sentence (R. 642). 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 judge's ability to conduct an individualized sentencing than the Pennsylvania statute at issue in Blystone.

The effects feared in Adamson and Mills are precisely the effects resulting from the burden-shifting in Mr. Mills' case. This judge was thus constrained in his consideration of mitigating evidence, Hitchcock, 107 S. Ct. 1821 (1987), and from evaluating the "totality of the **circumstances,"** Dixon v. State, 283 So. 2d 1, 10 (Fla. 1973), including sympathy and mercy for Mr. Mills, in determining the appropriate penalty. The judge did not make a "reasoned moral response" to the issues at Mr. Mills' sentencing and did not **"fully"** consider mitigation. Penry v. Lynaugh, supra. There is a "substantial possibility" that the judge's understanding of the sentencing process resulted in a death sentence despite factors calling for life. Mills, supra. The death sentence in this case is in direct conflict with Adamson, Mills, and Penry, supra. This error **"perverted"** the sentencer's deliberations concerning the ultimate question of whether Mr. Mills should live or die. Smith v. Murray, 106 S. Ct. at 2668.

In addressing the override claim raised on direct appeal, this Court indicated that it too was applying the incorrect standard.

> The purported mitigating circumstances claims by Mills, but not found by the trial judge, are not sufficient to outweigh the aggravating circumstances **...**

Mills v. State, 476 So. 2d 172, 179 (1985).

This claim was raised on direct appeal. The claim also involves fundamental constitutional errors and recent changes in

law and therefore should be addressed on the merits at this juncture. Moreover, and alternatively, it is respectfully submitted that the claim involves ineffective assistance of counsel on appeal.

Relief is appropriate. In the alternative, a stay of execution is appropriate until Blystone v. Pennsylvania, supra, is decided by the United States Supreme Court.

CLAIM VII

THE TRIAL COURT ERRED IN CONSIDERING AN IRRELEVANT AND PREJUDICIAL VICTIM IMPACT STATEMENT, AND STATEMENTS FROM COURT OFFICIALS THAT WERE INCLUDED IN THE PRESENTENCE INVESTIGATION REPORT, THUS DEPRIVING MR. MILLS OF HIS CONSTITUTIONAL RIGHTS TO A RELIABLE, MEANINGFUL, AND INDIVIDUALIZED CAPITAL SENTENCING DETERMINATION AND TO DUE PROCESS OF LAW, GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS

This Court recently found that Booth v. Maryland, 107 S. Ct. 2529 (1987), was an unanticipated retroactive change in law under Witt v. State, 387 So. 2d 922 (Fla. 1980):

> 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. Jackson now argues that the penalty phase testimony of Sheriff Dale Carson constitutes victim impact evidence, and thus she is entitled to a new sentencing proceeding under Booth. We agree.
>
> 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. Dusser, 547 So. 2d 1197, 14 F.L.W. 355 (Fla., July 6, 1989).

After Mr. Mills' jury recommended life, the trial judge requested a Pre-Sentence Investigation report which contained victim impact information in violation of Booth, South Carolina v. Gathers, 109 S. Ct. 2207 (1989), and Jackson, supra.

This Court has held that a sentencing judge may not rely on victim impact information during the sentencing process. Scull v. State, 533 So. 2d 1137, 1142-3 (Fla. 1988). Similarly, in reversing the conviction and death sentence in Zerquera v. State, ___ So. 2d ___, 14 F.L.W. 463, 464 (Sept. 28, 1989), this Court noted:

> ... that 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 that might be imposed in view of the United States Supreme Court's decision in Booth v. Maryland, 482 U.S. 496 (1987).

Included in the Presentence Investigation (PSI) that the state offered as an exhibit and which the court received in Mr. Mills' case (R. 921-922) were highly irrelevant, inflammatory and prejudicial statements made by the victim's spouse, law enforcement officials, and court officials.

The statements within the PSI regarding the emotional loss and grief suffered by the victim's spouse served no purpose other than to inflame the judge and divert him from deciding the case on the relevant evidence concerning the crime and the defendant. The same is true regarding the statements of the court officials. The information presented by the PSI is irrelevant to a capital sentencing decision, and its admission created a constitutionally unacceptable risk that the judge imposed the death penalty in an arbitrary and capricious fashion, thereby rendering the sentence of death unreliable. The emotionally charged victim impact statement and court officials' statements provided for unbridled judge consideration of facts not in evidence, and of non-statutory aggravating factors. The sentencing decision was therefore inconsistent with reasoned decision-making mandated in

capital cases, and violated the eighth and fourteenth amendments. To have required defense counsel to object to this material years before Booth was decided would be ludicrous.

The statement of Mrs. Wright, the victim's spouse, regarding her own emotional distress and her opinion on the appropriateness of the death penalty in this case was:

> **IV.** PERSONAI STATEMENTS:
>
> Victim: Mrs. James A. Wright, wife of the deceased victim, stated, "I was asked to testify in this case and I did testify although my children all asked me not to. It was a very traumatic experience. Since the trial, I have been asked many times about my feelings in this matter. To be honest, I am really emotionally drained and picking up my life after the terrible loss of my husband. It has been difficult, but I am progressing well and I intend to do the very best with what I have left in life.
>
> I would like to address myself to the death penalty. I discussed my feelings on this matter with my minister when he asked me how I felt. I do have mixed emotions, but it is my firm belief that the boy who did this must have had it in his mind to kill whoever interfered with him or he would not have armed himself with a gun. It also seems he had the alternative of running rather than shooting. In my mind, I do not believe my husband ever saw Mills, but was speaking to the other boy (Ashley) who was hiding just outside another window on the side of the house, and Mills, believing he was talking to him, got up from behind the couch and shot him. To return to my thouahts on capital punishment, I believe that it does act as a deterrent to other crimes of murder and I believe in this incident, Mills deserves the maximum penalty of the law. I would, though, accept whatever decision the Judge determines in this case."

(R. 661) (emphasis supplied).

The PSI also presented personal opinions of the prosecuting attorney and a police investigator as to what they believed would be the appropriate penalty for Mr. Mills. These opinions were irrelevant, non-probative on any sentencing issue, and highly prejudicial.

COURT OFFICIAL STATEMENTS:

> Prosecutor: Donald C. Marblestone, stated, "Mills is a cold-blooded murderer with a long history of violent crimes, including many as a juvenile.
>
> I recommend imposition of the death penalty. He has no remorse and no regrets. I believe he will definitely kill again if given the chance. If the Court should give life on the murder, I would hope that time on any other offenses of which he is convicted would be given consecutive." (Emphasis added.)
>
> * * * * *
>
> Law Enforcement: Karen Reynolds, Investigator, Sanford PD, stated, "He never would cooperate or admit any guilt. The evidence is overwhelming, the verdict was justified and I believe he should be sentenced to death. He is really just a cold-blooded killer.

(R. 661) (emphasis supplied).

The sentencing process is supposed to be an "individualized determination." Zant v. Stephens, 462 U.S. 862, 879 (1983)(emphasis in original). A sentencer is supposed to consider only those factors which pertain to the defendant's ''personal responsibility and moral guilt," Enmund v. Florida, 458 U.S. 782, 801 (1982), and the circumstances of the offense. The sentencing judge in this case specifically noted that he was relying on "the information contained in the Pre-Sentence Investigation Report prepared by the Department of Corrections" (R. 639).

The decision to impose the death penalty, the gravest of sanctions, must "be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 358 (opinion of Stevens, J.). In Booth v. Maryland, 107 S. Ct. 2529, 2533 (1987), the United States Supreme Court found that introduction of evidence of "the emotional impact of the crimes on the family" violates the eighth amendment. The victim's family in Booth "noted how deeply the [victims] would be missed," id. at 2531, explained the "painful and devastating memory to them," id. at 2531-2532, and spoke generally of how the crime had

created "emotional and personal problems [to] the family members . . ." Id. at 2531. Booth's rejection of such statements reaffirmed the directive that the sentencing body's discretion to impose death be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. 153, 189 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.); California v. Ramos, 463 U.S. 992, 999 (1983). The Court reiterated the need for an "individualized determination" of whether an individual should be executed, weighing such factors as "the character of the individual and the circumstances of the crime." Zant v. Stephens, 462 U.S. 862, 879 (1983)(emphasis in original). See also Booth v. Maryland, 107 S. Ct. 2529, 2532 (1987); Eddings v. Oklahoma, 455 U.S. 104, 112 (1982). In imposing the penalty of death, it is vital that the sentencer consider only those factors which directly pertain to the defendant's "personal responsibility and moral guilt." Enmund v. Florida, 458 U.S. 782, 801 (1982); Booth v. Maryland, 107 U.S. at 2533. To take into account extraneous matters such as those suggested by the presentence investigation report in this case creates the risk that the death sentence will be based on factors that are "constitutionally impermissible or totally irrelevant to the sentencing process." Zant v. Stephens, 462 U.S. at 885; Booth v. Maryland, 107 S. Ct. at 2533.

The Florida Supreme Court has applied the holding in Booth to sentencing proceedings before the judge alone. Patterson v. State, 513 So. 2d 1263 (Fla. 1987). Grossman v. State, 525 So.2d 833 (Fla. 1988). The Supreme Court in Patterson held that the introduction of similar evidence was reversible error:

> Further, the record reflects that the victim's niece who had responsibility for the children after her death, testified at the sentencing hearing before the judge alone concerning the effect of the victim's death on the children and expressed her opinion that the death penalty was appropriate. Allowing this type of evidence in aggravation appears to be reversible error in view of the

United States Supreme Court decision in Booth v. Maryland, 107 S. Ct. 2529 (1987). (emphasis added).

Id. at 1263.

In arriving at the sentencing determination, the judge is directed to focus his attention on the defendant as a "uniquely individual human being." Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.). Booth v. Maryland, 107 S. Ct. at 2533.

The opinions expressed within Mills' PSI were not addressed to the character of Mr. Mills. The report instead impermissibly portrayed the character of Mrs. Wright and the effect her husband's death had on her life. The PSI also functioned incorrectly as a record for the intemperate rantings of two biased court officials. Their shared opinions as to the propriety of the death sentence were totally unrelated to Mr. Mill's culpability. The objectionable remarks and opinions in the PSI diverted the judge's attention from focusing on whether the death penalty was appropriate in light of the unique characteristics of the defendant, his background and record, and injected irrelevant and highly prejudicial considerations regarding the circumstances of the crime into the judge's sentencing deliberations. The victim impact statement and the court officials' statements created an impermissible risk that Mr. Mills was sentenced in an arbitrary manner.

Booth provides a minimal threshold test for reversal -- whether the death sentence *"may* turn on the unconstitutionally introduced and argued evidence." The "risk" that it "may" required a per se rule of excluding "victim impact information." Id. at 2534. The Court's decision in Booth adopted and refined the standard of review previously enunciated in Caldwell v. Mississippi, 105 S. Ct. 2633 (1985). Caldwell held that the state may not urge the sentencing body to consider facts which are constitutionally excluded from their consideration, and which

could not be introduced into evidence. The test set forth in Caldwell was similar to that in Booth: where the error in Booth "may" have affected the result, in Caldwell, the state failed to show that the error had "no effect on the sentencing decision," and thus "that decision [did] not meet the standard of reliability that the Eighth Amendment requires." Id. at 2646. The PSI in this case provided clear-cut examples of improper irrelevant evidence. The report implicitly urged the judge to consider matters that were totally inappropriate in his sentencing determination, thereby rendering the proceeding fundamentally unreliable. The improper factors "may" have affected the sentencing decision, Booth, supra, and they certainly cannot be said to have had "no effect" on sentencing, Caldwell, supra. The United States Supreme Court's recent decisions in Caldwell and Booth, and the Florida Supreme Court's recent decision in Jackson, are controlling and were not available to Mr. Mills at the time of his trial and direct appeal.

The trial judge's reliance upon the irrelevant and prejudicial evidence presented in the presentence investigation report violated Mr. Mill's eighth and fourteenth amendment rights. Because the irrelevant and inflammatory victim impact statement and court officials' statements cannot be said to have had "no effect," but rather did in fact affect the result of the Court's sentencing decision, a new sentencing hearing is required.

Sentencing procedures in capital cases must ensure "heightened reliability in the determination that death is the appropriate punishment." Woodson v. North Carolina, 428 U.S. 280, 305 (1976). See also Gardner v. Florida, 430 U.S. 349 (1977). The central purpose of these requirements is to prevent the "unacceptable risk that 'the death penalty [may be] meted out arbitrarily or capriciously' . . . or through 'whim or mistake.'"

Caldwell v. Mississippi, 472 U.S. 320, 344 (1985)(O'Connor, J., concurring), quoting California v. Ramos, 463 U.S. 992, 999 (1983), and Eddings v. Oklahoma, 455 U.S. 104, 118 (1982). The decision to impose the death sentence must "be, and appear to be, based on reason rather than caprice or emotion." Gardner, 430 U.S. at 358.

To ensure this heightened reliability, the eighth amendment requires a capital sentencer to make "an individualized determination on the basis of the character of the individual and the circumstances of the crime." Zant v. Stephens, 462 U.S. 862, 879 (1983). See also Eddings v. Oklahoma, 455 U.S. 104, 112 (1982); Woodson, supra, 428 U.S. at 304. The decision to impose the death penalty "must be tailored to [the defendant's] personal responsibility and moral guilt." Enmund v. Florida, 458 U.S. 782, 801 (1982). Any other approach would run the risk that the death penalty will be imposed because of considerations that are "constitutionally impermissible or totally irrelevant to the sentencing process." Zant v. Stephens, supra, 462 U.S. at 885.

Because of the requirement of heightened reliability and the focus on individual culpability, a sentence of death cannot stand when it results because of the personal characteristics of the victim, and a defendant must not be convicted and sentenced to die by a judge who may have "failed to give [his] decision the independent and unprejudiced consideration the law requires." Wilson, 777 F.2d at 626, quoting Drake v. Kemp, 762 F.2d 1449, 1460 (11th Cir. 1985)(en banc); see also Potts v. Zant, 734 F.2d 526 (11th Cir. 1984). In short, a capital proceeding is flatly unreliable when the judge erroneously relies upon forbidden matters in making the determination to impose a sentence of death. Booth v. Maryland, 107 S. Ct. 2529 (1987); Wilson v. Kemp, supra.

Here the judge violated Booth, Gathers, Zerquera, and Jackson, and called into question the reliability of the penalty

phase. Booth requires that the court disallow the "risk" of impermissible information which "may" influence the capital sentencing determination. In petitioner's case, that risk actualized -- Mr. Mills' capital sentence was imposed in "violat[ion of the] principle that a sentence of death must be related to the moral culpability of the defendant." South Carolina v. Gathers, 45 Cr. L. 3076 (June 12, 1989). See also Enmund v. Florida, supra, 458 U.S. at 801; see also id. at 825 (O'Connor, J., dissenting)('[P]roportionality requires a nexus between the punishment imposed and the defendant's blameworthiness'); Tison v. Arizona, 481 U.S. 137, 149 (1987)('The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender'). Here, the trial judge overrode the jury's life recommendation and imposed death. This may have been the result of sympathy for Mrs. Wright and her grief over the death of her husband.

It is respectfully submitted that the claim involves ineffective assistance of counsel on appeal. Further, it involves fundamental constitutional error and recent changes in the law, and therefore should be addressed on the merits at this juncture.

For these reasons, Mr. Mills' sentence of death should be vacated, and a life sentence imposed. Habeas corpus relief is proper.

CONCLUSION AND RELIEF SOUGHT

The claims presented herein involve ineffective assistance of counsel, fundamental error and significant changes in the law. Because the foregoing claims present substantial constitutional questions which go to the heart of the fundamental fairness and reliablity of Mr. Mills' capital conviction and sentence of death, and of this Court's appellate review, they should be

determined on their merits. At this time, a stay of execution, and a remand to an appropriate trial level tribunal for the requisite findings on contested evidentiary issues of fact -- including inter alia appellate counsel's deficient performance -- should be ordered. The relief sought herein should be granted.

WHEREFORE, Gregory Mills, through counsel, respectfully urges that the Court issue its writ of habeas corpus and vacate his unconstitutional conviction and sentence of death. he also prays that the Court stay his execution on the basis of, and in order to fully determine, the significant claims herein presented. Since this action also presents questions 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 questions 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,

LARRY HELM SPALDING
Capital Collateral Representative

BILLY H. NOLAS

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

By: Billy H. Nolas /by jr
Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail, first class, postage prepaid to Margene Roper, Assistant Attorney General, Department of Legal Affairs, 125 North Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014, this 17th day of November, 1989.

Billy H. Nolas / by JM
Attorney