IN THE SUPREME COURT OF FLORIDA

NO. 75038

FRANK LEE SMITH,

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

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

A. JURISDICTION

This is an original action under Fla. R. App. P. 9.100(a). This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents constitutional issues which directly concern the judgment of this Court during the appellate process, and the legality of 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. Wainwriaht, 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., Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Riley v. Wainwrisht, 517 So. 2d 656 (Fla. 1987); Wilson, supra.

This Court has consistently maintained an especially vigilant control over capital cases, exercising a special scope of review, **see** 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; Jackson; Downs; Riley. This petition presents substantial constitutional questions which go to the heart of the fundamental fairness and reliability of Mr. Smith's 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; Jackson; Wilson; Johnson, supra.

The petition pleads claims involving fundamental constitutional error. See Dallas v. Wainwrisht, 175 So. 2d 785 (Fla. 1965); Palmes v. Wainwriaht, 460 So. 2d 362 (Fla. 1984).

The petition includes claims predicated on significant, fundamental, and retroactive changes in constitutional law. See, e.g., Jackson; 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. Smith's 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. Wainwright, 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. Duaaer, 514 So. 2d 1069 (Fla. 1987); Kennedy v. Wainwriaht, 483 So. 2d 426 (Fla. 1986). Cf. State v. Sireci, 502 So. 2d 1221 (Fla. 1987).

This is Mr. Smith's 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

MR. SMITH'S JUDGE AND JURY CONSIDERED AND RELIED ON THE VICTIM'S PERSONAL CHARACTERISTICS AND THE IMPACT OF THE OFFENSE ON THE VICTIM'S PARENTS, IN VIOLATION OF MR. SMITH'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS, BOOTH V. MARYLAND, SOUTH CAROLINA V. GATHERS, AND JACKSON V. DUGGER.

Crimes against children are unparalleled in their capacity to evoke the human emotion of sympathy for the victim's parents while simultaneously engendering the emotional and unprincipled responses of rage, hatred, and revenge against the accused. The temptation to provoke such an unbridled and unprincipled

emotional response from Mr. Smith's judge and jury proved irresistible to the State. The Assistant State Attorney's opportunity to unleash these emotions at Mr. Smith's trial came at virtually every stage of the proceedings but were especially evident during the direct testimony of the victim's mother, Dorothy McGriff, followed by testimony from the police officers who continually reminded the jury how devastated Ms. McGriff was. Clearly, their testimony was manipulated to elicit maximum emotional impact.

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

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

> At the time of Jackson's direct appeal, the United States Supreme Court had not yet decided Booth v. Maryland, in which the Court held that presentation of victim impact evidence to a jury in a capital case violates the eighth amendment of the United States Constitution. The Court reasoned that evidence of victim impact was irrelevant to a capital sentencing decision because this type of information creates a constitutionally unacceptable risk that the jury may impose

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

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

At Frank Smith's capital trial, the State presented evidence and arguments regarding the victim's personal characteristics and the suffering endured by the victim's family, Smith, urging the jury and court to sentence Mr. Smith to death on the basis of precisely the types of unconstitutional victim impact evidence and argument condemned in Booth, South Carolina v. Gathers, 109 S. Ct. 2207 (1989), and Jackson, supra. The judge was then presented with a presentence investigation report containing further emotional victim impact statements. The eighth and fourteenth amendments were violated in this case, as the record makes abundantly clear.[1]

Defense counsel objected. Cf. Jackson, supra. His objections to the improper evidence and arguments were overruled, and the State's unconstitutional presentation was allowed to continue. When the issue was raised on direct appeal, this Court declined to reverse. See Smith v. State, 515 So. 2d 182 (Fla. 1987). Under Jackson, this issue should now be revisited, for the errors appear of record and have been previously presented to this Court. Jackson, 547 So. 2d at 1199 n.2. Under Booth, Gathers, and Jackson, the egregious constitutional errors discussed below require relief.

Midway through trial, the defense attorney brought the following to the court's attention:

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

[DEFENSE ATTORNEY]: May I approach the bench, Your Honor?

I wanted to put on the record the incident that happened outside so it is on the record.

When they were bringing Mr. Smith up, apparently the little girl's mother, Dorothy McGriff, started losing control, yelling and screaming in the hallway and taking her shoe off trying to run after Mr. Smith with her shoe.

I personally didn't see that. I just heard yelling and screaming. This is what I was told. I wanted to make a record of that.

(R. **624-625).**

Then when court resumed:

[DEFENSE ATTORNEY:] I have an ore tenus motion in limine I would like to make. I would like you to instruct the next witness, Dorothy McGriff, to try and control herself and not have any outbursts if that is possible. If that isn't possible, to hold her in contempt of the Court or based upon the incident I told you about last Thursday

[PROSECUTING ATTORNEY:] Judge, every time she's come into contact with this Defendant or a picture of this Defendant or in one instance even had to talk about this case, she's become emotional. I don't know if you can instruct someone to be not emotional. It's not something that is deliberate. I will ask Ms. McGriff to look forward and not to look at the Defendant until I ask an identification type question. I would suggest we switch counsel tables this morning so that Mr. Smith is over here and I'm over there and maybe the bailiffs can be in the area between Ms. McGriff and Mr. Smith and I can ask her to walk straight in and look straight ahead.

[DEFENSE ATTORNEY:] Anything that would help, Judge. If you are not going to do that instruction I would ask you make some kind of instruction to her and try to have her calm down.

(R. 628-629).

Ms. McGriff then took the witness stand. During her testimony, she became emotionally overwrought, visibly displaying her grief to the jury:

Q Now, Mrs. McGriff, if you saw that man again today that you saw outside your

room back on April 14th, do you think you would be able to recognize him?

A Yes.

Q I know this is hard for you. I will ask you to look around the courtroom and see if you see the man?

A (The witness is crying.)

[DEFENSE ATTORNEY:] Judge, I will make a motion at this point to excuse the jury.

THE COURT: Denied.

Q (By Prosecuting Attorney) Take your time, Mrs. McGriff.

A (The witness is indicating.)

Q Do you see the man, Mrs. McGriff?

[DEFENSE ATTORNEY:] Again, Judge, she's not responsive to the question at this point.

THE COURT: Objection overruled. I'll treat it as an objection.

Q (By Prosecutor) I need to ask you for a yes or no answer. Do you see the man?

A Yes.

Q Would you point to him?

A (The witness is indicating.)

[PROSECUTOR:] Your Honor, let the record reflect the witness has identified the Defendant, Frank Lee Smith.

THE COURT: Granted.

Q (By Prosecutor) Ms. McGriff, are you sure that is the man you saw outside the window?

A Yes. My baby. my baby --

[DEFENSE ATTORNEY:] Judge, at this time I would like to renew my motion and again ask the jury be excused.

THE COURT: Denied at this time.

[DEFENSE ATTORNEY:] Again, Judge, I'm renewing my motion for the unsolicited comment.

THE COURT: Denied at this time.

Q (By Prosecutor) Ms. McGriff, when the police showed you those photographs, were you positive when you picked out the photographs?

A Yes.

Q Were you able to do that all on your own based on what you saw April 14th?

A Yes.

[PROSECUTOR:] Thank you, no further questions.

THE COURT: Bailiff, please show the jury to its room for a minute.

(Thereupon, the jury was excused.)

THE COURT: Mr. Washor?

[DEFENSE ATTORNEY:] Thank you, Your Honor. Judge, I would be making a motion for mistrial based on the actions of Mrs. McGriff. I know that the prosecutor tried to do everything he could to try and lessen it, however, he asked her a question, whether she could ID the person. It took an estimate between one and two minutes before she responded.

During that one to two minutes, she was crying the whole time. After she did finally point him out, she kept on mumbling, "My baby, my baby," which again she was right next to the jury. In my opinion it was tainting the jury, eliciting sympathy out of the jury and it was prejudicial, especially in light of the fact her previous testimony which I would be able to get out when I do cross-examination and based on that, I'm entitled to a mistrial.

[PROSECUTOR:] Your Honor, I think Ms. McGriff did excellent. I think she did a great job. It's obviously an emotional situation. I don't see any grounds for a mistrial at this point. Obviously, it was a tough thing for her to undergo.

THE COURT: Objection and motions are denied. Escort the jury in.

(R. 644-647)(emphasis added).

That display was not enough, however, and when Detective Amabile testified about his contact with Ms. McGriff, the State unnecessarily elicited the following:

Q Without relating her conversation to you, what was her emotional state of mind at that time?

A She was quite upset. She was very nervous, very scared.

(R. 876). Detective Amabile made it clear that the reason they had not asked Ms. McGriff to help with the composite drawing was because

> we felt [] that she was still a very emotionally distraught woman.

(R. ***886).***

When the composite had been completed, Detective Amabile presented it to Ms. McGriff:

> When it was displayed to her she gasped. She got very hysterical, very emotional, was crying. She pointed to photograph number two and made the statement, that is the man that did my baby. That is the man that did my baby.

(R. 907). Later in his testimony, Amabile reiterated:

> Due to her [Ms. McGriff's] emotional state at the time we felt it better to go with Gerald Davis and Chiquita Lowe.

(R. 931).

Not being satisfied with Detective Amabile's repeated references to Ms. McGriff's emotional distress, the State improperly elicited the same type of testimony from Detective Scheff:

Q What was her emotional state at that time?

A Very emotional, very upset.

(R. 960). Later in his testimony:

Q When she was shown the photographs what did she do?

A She screamed. She let out a scream, pointed her finger at photograph number two which is the photograph of the Defendant. And I believe her exact words were, this is the man that did my baby and she was crying hysterically.

Q How long did she remain emotional?

A About ten or fifteen minutes.

(R. 986-987).

These were completely improper and uncalled for comments about the victim's mother's emotional state. There was no one who ever claimed or even hinted that this mother was not truly devastated by her loss. But the State knew its case was extremely weak. There was no physical evidence at all against Frank L. Smith and only the nighttime identifications from three very questionable witnesses -- a distraught mother, a young neighborhood girl cruising the streets at night alone stopping to talk to a stranger in the area, and another neighborhood **"kid"** wandering the streets at night. The descriptions were extremely vague and conflicting and it took some effort to bring these three into consensus to make an identification. The prosecutor could not have been sure the witnesses would hold up under testimony and so, clearly another angle was needed to make sure of conviction. The State improperly and prejudicially badgered the jury with the distraught condition of this mother in hopes of inflaming them to the point of conviction even if there was reasonable doubt.

At closing, the State argued that "Little Shandra Whitehead":

> was a living human being and she was and she is and was entitled to the protection of the laws of the State of Florida just like every other person no matter what their stages in life, no matter where they live or no matter what they do for a living.
>
> She didn't deserve to die back on April 14th. Particularly in the fashion she died and I know that you are going to give her the same protection of the laws the State of Florida gives everyone and she's entitled to that. I know you will give her that.

(R. 1152), and that Dorothy McGriff:

> came in and testified and it was tough. She showed a lot of courage to have to relive her experiences . . . she started to crumble and started to look over there and it took her a long time to get it out.

(R. 1174-1175).

All of this set the stage for sentencing where by now the jury needed no further reminder of the tragedy that had befallen Ms. McGriff. The jury recommendation was for death. The court ordered a presentence investigation report, and the judge expressly stated that he considered that report (R. 1426) in making the sentencing decision.[2]

In his report, the probation officer wanted to make sure the judge abided by the jury's recommendation and so did everything he could to support that result. He listed each aggravating factor and gave his opinion to the court as to how it applied to Mr. Smith. **"Finding"** no mitigation, he then made his recommendation to the court:

> Clearly, the Aggravating Circumstances substantially outweigh the Mitigating Circumstances in this case. Thus it is respectfully recommended that the Court accept the jury's recommendation and sentence the subject, Frank Lee Smith, to Death for Count I, Murder in the First Degree for effecting the death of Shandra Whitehead, as per Statute.

(Presentence Investigation Report).

As if the sentencer had not already been repeatedly reminded of the tragedy of this case, the PSI pounded home again the impact to the victim's family:

> Victim's Statement:
>
> The victim's mother, Dorothy McGriff, stated there has been no rest for her or her son. Her son is now having trouble in school and received psychological counseling at Henderson Clinic. She stated she had lost her job due to time taken for Court appearances. Further, she stated everytime they enter their house they conduct a search for strangers, they are scared to be alone, and they sleep with the lights and television on. She feels the subject should be executed for what he did to her daughter.

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[2]The PSI was requested by this Court during Mr. Smith's direct appeal proceedings and is part of this Court's record in the direct appeal.

(PSI, supra). This is clearly and precisely what is forbidden by Booth.

In Booth, the United States Supreme Court held that "the introduction of [a victim impact statement] at the sentencing phase of a capital murder trial violates the Eighth Amendment." Id. at 2536. The victim impact statement in Booth contained descriptions of the personal characteristics of the victim, the emotional impact of crimes on the family and opinions and characterizations of the crimes and the defendant, "creat[ing] a constitutionally unacceptable risk that the [sentencer] *may* [have] impose[d] the death penalty in an arbitrary and capricious manner." Id. at 2533 (emphasis added). Similarly, in South Carolina v. Gathers, 109 S. Ct. 2207 (1989), the court vacated the death sentence there based on admissible evidence introduced during the guilt-innocence phase of the trial from which the prosecutor fashioned a victim impact statement during closing penalty phase argument. Booth and Gathers mandate reversal were the sentencer is contaminated by victim impact evidence or argument. Mr. Smith's trial contains not only victim impact evidence and argument but, in addition, characterizations and opinions of the crimes condemned in Booth.

The Booth and Gathers courts found the consideration of evidence and argument involving matters such as those relied on by the judge and jury here to be constitutionally impermissible, as such matters violated the well established principle that the discretion to impose the death penalty must be "suitably directed and limited so as to minimize the risks of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. 153, 189 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.); see also California v. Ramos, 463 U.S. 992, 999 (1983). The Booth court ruled that the sentencer was required to provide, and the defendant had the right to receive, an "individualized determination" based upon the "character of the individual and

the circumstances of the crime." Booth v. Marvland, supra; see also Zant v. Stephens, 462 U.S. 862, 879 (1983); Eddings v. Oklahoma, 455 U.S. 104, 112 (1982). Here, however, the judge and jury justified the death sentence through an individualized consideration of the victim's personal characteristics and impact of the crime on her family.

Sentencing procedures in capital cases must ensure "heightened reliability in the determination that death is the appropriate punishment." Woodson v. North Carolina, 428 U.S. 280, 305 (1976). See also Gardner v. Florida, 430 U.S. 349 (1977). The central purpose of these requirements is to prevent the "unacceptable risk that 'the death penalty [may be] meted out arbitrarily or capriciously' . . ." Caldwell v. Mississippi, 472 U.S. 320, 344 (1985)(O'Connor, J., concurring).

Here, the proceedings violated Booth and Gathers, thus calling into question the reliability of Ms. Smith's penalty phase. The State's evidence and argument was a deliberate effort to invoke "an unguided emotional response" in violation of the eighth amendment. Penry v. Lynaugh, 109 S. Ct. 2934, 2952 (1989).

Florida law also recognizes the constitutionally unacceptable risk that a jury may impose a sentence of death in an arbitrary and capricious manner when exposed to victim impact evidence. In Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989), the court held that the principles of Booth are to be given full effect in Florida capital sentencing proceedings. Jackson is procedurally and factually indistinguishable from the instant case, and demonstrates Mr. Smith's entitlement to relief. As in Jackson, defense counsel for Mr. Smith vigorously objected during the State's repeated introduction of victim impact evidence (R. 624-625, 628-629, 644-647). As in Jackson, this claim was presented pre-Booth and Gathers. See Smith v. State, 515 So. 2d 182 (Fla. 1987). Jackson dictates that relief post-Booth and

Gathers is now warranted in Mr. Smith's case. Compare Jackson v. State, 498 So. 2d 406, 411 (Fla. 1986), with Jackson v. Duaaer, 547 So. 2d 1197 (Fla. 1989).

The same outcome is dictated by this Court's decision in Zerauera v. State, 14 F.L.W. 463 (Fla. 1989), where the court, again relying on Booth, noted that a trial court's consideration of victim impact statements from family members contained within a presentence investigation as evidence of aggravating circumstances constitutes capital sentencing error. As noted above, this is precisely what transpired at Mr. Smith's sentencing. Zerauera, viewed in light of this Court's pronouncement in Jackson that Booth represents a significant change in law, illustrates that habeas corpus relief is wholly appropriate.

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

moral response." Penry, 109 S. Ct. at 2952. The sentencer must be properly guided and must be presented with the evidence which would justify a sentence of less than death.

In Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633 (1985), the Supreme Court discussed when eighth amendment error required reversal: "Because we cannot say that this effort had no effect on the sentence decision, that decision does not meet the standard of reliability that the Eighth Amendment requires." Id., 105 S. Ct. at 2646. Thus, the question is whether the Booth errors in this case may have affected the sentencing decision. As in Booth and Gathers, contamination occurred, and the eighth amendment will not permit a death sentence to stand where there is the risk of unreliability. Since the prosecutor's evidence and argument "could [have] result[ed]" in the imposition of death because of impermissible considerations, Booth, 107 S. Ct. at 2534, a stay of execution and, thereafter, habeas corpus relief are appropriate.

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

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Smith's death sentence. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings, see Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error. Accordingly, habeas relief must be accorded now.

CLAIM II

MR. SMITH'S DEATH SENTENCE WAS IMPOSED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE HIS JURY WAS PREVENTED FROM GIVING APPROPRIATE CONSIDERATION TO AND HIS TRIAL JUDGE FAILED TO CONSIDER ALL EVIDENCE PROFFERED IN MITIGATION OF PUNISHMENT, CONTRARY TO EDDINGS V. OKLAHOMA, MILLS V. MARYLAND, HITCHCOCK V. DUGGER, AND PENRY V. LYNAUGH.

At the time of Mr. Smith's trial, it was axiomatic that the eighth amendment required a capital sentencer "not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Eddings v. Oklahoma, **455** U.S. 104, **110** (1982), quoting Lockett v. Ohio, **438** U.S. **586, 604 (1978).** No less clear was the fundamental tenet that **"the** sentencer may not refuse to consider or be precluded from considering any relevant mitigation." Eddinas, **455** U.S. at **114.** Recently in Mills v. Marvland, **108** S. Ct. **1860** (1988), the United States Supreme Court surveyed the prime directive of Lockett and its progeny, and stressed that the ability of the sentencer to consider all evidence of mitigation must be 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, Eddinas v. Oklahoma, supra; or by evidentiary ruling, Skipper v. South Carolina, [476 U.S. **1 (1986)] . . .** [W]hatever the cause, the conclusion would necessarily be the same: Because the [sentencer's] failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of Lockett, it is our duty to remand this case for resentencing."

Mills, 108 S. Ct. at **1866,** quoting Eddinas v. Oklahoma, **455** U.S. at **117** (O'Connor, J., concurring).

In Mr. Smith's case, the judge failed to consider, Eddinas, supra; Hitchcock, supra; Mills, supra; Penrv v. Lynaugh, **109** S.

Ct 2934 (1989), and his jury was precluded from fully considering substantial and unrebutted statutory and nonstatutory mitigation regarding Mr. Smith's mental and emotional disturbances, addition to his background of impoverishment and neglect. This issue was presented on direct appeal, and the Court declined to reverse. See Smith v. State, 515 So. 2d 182, 185 (Fla. 1987). It is presented again herein because the United States Supreme Court's recent decision in Penry v. Lynaugh, 109 S. Ct. 2934 (1989), demonstrates that Mr. Smith was and is entitled to relief.

At the penalty phase of Mr. Smith's capital trial, the defense presented the testimony of a clinical psychologist and a psychiatrist. The psychologist, Dr. Krieger, testified that Mr. Smith was "seriously disturbed," and suffered from a "breakdown in his thinking" such that "he would say a sentence, but his thoughts weren't connected together logically" (R. 1303). Mr. Smith's behavior "was extremely variable"; "At times he became tearful. Sometimes he was extremely apprehensive, and other times hostile and guarded, and it really ran the gamut." Id. Mr. Smith gave "some indication of delusional material"; "his verbal conversation suggested he had hallucinations. He had ideas about reality that none of us would agree to." Id. Dr. Krieger diagnosed Mr. Smith as suffering from a "broad range of schizophrenic disorder with paranoid features" (R. 1304). The psychiatrist, Dr. Zager, categorized Mr. Smith's mental disorder as "paranoid schizophrenic disorder" (R. 1313).

Mr. Smith's aunt, Bertha Irving, testified that Mr. Smith was raised partially in a foster home and partially by his grandmother (R. 1315-16). Mr. Smith's father died when Mr. Smith was a baby, and his mother was "raped and killed." Id. During the year before the offense, Mr. Smith had lived with Ms. Irving and had interacted well with her children (R. 1316). Another aunt, Lela Mae Andrews, testified that Mr. Smith never knew his father, and was raised in a foster home or by his grandmother,

who was 65 years old when she began caring for Mr. Smith (R. 1321). Another aunt testified similarly (R. 1323-24).

Despite the existence of what was undoubtedly mitigating evidence, the jury instructions failed to provide a "vehicle" for the jury's "full consideration" of this evidence. Penry v. Lynaugh, 109 S. Ct. at 2951-52. After being instructed regarding the statutory mitigating factors, the jury was told it could consider "any other aspect" of Mr. Smith's background or character. Since the statutory mitigating factors specifically list certain mental health factors, the jury could reasonably have concluded that "any other aspect" did not include mental health factors. See Penry; Smith v. Maryland, 108 S. Ct. 1860 (1988).

Notwithstanding the mental health evidence, a reasonable juror could have found that Mr. Smith's mental illness did not establish any statutory mitigating circumstances. Mr. Smith's jury was instructed, in accord with Florida's death penalty statute, that mental or emotional disabilities could be considered as mitigating circumstances if the evidence demonstrated:

> 1, the crime for which the defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance.
>
> . . . .
>
> 3, the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(R. 1356). A reasonable juror could have found that Mr. Smith's mental illness was not so severe that it met the statutory criteria. Nevertheless, a reasonable juror could still have found on the basis of the undisputed evidence that Mr. Smith did suffer from a mental disorder and that the disorder plainly contributed to his thinking and behavior at the time of the crime. Defense counsel requested additional instructions

regarding nonstatutory mitigation, but those requests were denied (R. 1513, 1516).

In this overall context, a reasonable juror plainly could have believed that all of the evidence bearing upon Mr. Smith's mental and emotional condition was to be considered only in relation to the two statutory mitigating circumstances which addressed this concern. Harsrave v. Dugger, 832 F.2d 1528, 1534 (11th Cir. 1987); Messer v. Florida, 834 F.2d 890, 894-95 (11th Cir. 1987); Cf. Smith v. Maryland, 108 S. Ct. 1860, 1866 (1988).

The reasonableness of this interpretation of the instructions is supported by the trial court's findings in support of Mr. Smith's sentence of death. Although the court's order never specifically addresses the mental health testimony, the court rejected the statutory mental health mitigating factors (R. 1436-38). Significantly, in the discussion of nonstatutory mitigation, the court specifically addressed several potential factors but never mentioned the mental health testimony (R. 1438-39). Certainly, a reasonable juror could likewise assume that consideration of Mr. Smith's mental and emotional state was exclusively limited to the two enumerated statutory mental mitigating factors and nowhere else. In this respect, the preclusive instructions in Mr. Smith's case which reasonable jurors could have interpreted in an "all or nothing" fashion, thereby foreclosing further consideration of the effects of Mr. Smith's mental illness as nonstatutory mitigation, operated in much the same fashion as the special circumstances in Penry v. Lynaush, 109 S. Ct. 2934 (1989). In Penry, the Court found that the use of the qualifier "deliberately" in Texas' functional equivalent of a mitigating factor without further definition was insufficient to allow the jury to give effect to Johnny Penry's mitigating evidence of mental retardation. The issues involved in several cases currently pending before the United States Supreme Court will have import for the issue presented here. See

Blystone v. Pennsylvania, 109 S. Ct. 1567 (1989); Boyde v. California, 109 S. Ct. 2447 (1989); Saffle v. Parks, 109 S. Ct. 1930 (1989).

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

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

Here, reasonable jurors at Mr. Smith's trial, having found that his mental illness did not meet the statutory criteria, may still well have concluded that Mr. Smith's mental illness reduced his moral culpability, but were left with no vehicle with which to give effect to that conclusion.

The trial court's findings thus establish not only that the judge failed to comply with Lockett in his own sentencing deliberations by refusing to consider Mr. Smith's mental illness, but also that a reasonable juror, despite knowing that she might consider nonstatutory mitigating circumstances, could believe that the evidence of mental disability was properly considered only in relation to statutory mitigating circumstances. Ultimately, the court's failure to consider and the jury's reasonable mistake in failing to consider meant that neither

fully considered the only evidence in Mr. Smith's favor in deciding whether he should live or die.

In Penry, the Supreme Court held:

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

109 S. Ct. at 2947. The jury was not allowed and the judge failed to comply with the dictates of Penry. This issue was raised on direct appeal and rejected. Penry, declared retroactive on its face, demonstrates the fundamental violations of eighth amendment jurisprudence which occurred in Mr. Smith's case.

Additionally, Hitchcock, suara, for the first time held that the eighth amendment applied to Florida penalty phase proceedings in front of the jury and did not just apply to the proceedings before the judge. In other words, for eighth amendment purposes, the jury is a sentencer, too. This was a retroactive change in law and, thus, is cognizable now. Mr. Smith's sentence of death is neither **"reliable"** nor "individualized." This error undermined the reliability of the jury's sentencing determination and prevented the jury from assessing the full panoply of

mitigation presented by Mr. Smith. For each of the reasons discussed above, the court should vacate Mr. Smith's unconstitutional sentence of death. Habeas corpus relief is proper.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Smith's death sentence. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings, **see** Wilson v. Wainwright, **474** So. 2d 1163 (Fla. 1985), and it should now correct this error. Accordingly, habeas relief must be accorded now.

CLAIM III

THE SENTENCING COURT'S FAILURE TO FIND THE MITIGATING CIRCUMSTANCES CLEARLY SET OUT IN THE RECORD VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS.

The eighth and fourteenth amendments require that a state's capital sentencing scheme establish appropriate standards to channel the sentencing authority's discretion, thereby "eliminating total arbitrariness and capriciousness" in the imposition of the death penalty. Proffitt v. Florida, 428 U.S. 242 (1976). A reviewing court should determine whether there is support for the original sentencing court's finding that certain mitigating circumstances are not present. Maqwood v. Smith, 791 F.2d 1438, 1449 (11th Cir. 1986). If that finding is clearly erroneous the defendant "is entitled to resentencing." Id. at 1450.

Mr. Smith's sentencing judge found five aggravating factors and no mitigation. This oral sentencing and the written finding of no mitigation are improper. The record reveals that substantial and significant mitigation was before the court and the court failed to fully consider this mitigation.

In addition to what the court had observed of Mr. Smith's mental condition throughout trial, the defense presented at penalty phase the testimony of two mental health professionals. Dr. Seth Krieger and Dr. Arnold Zager had both evaluated Mr. Smith pretrial.

Dr. Seth Krieger, the pretrial confidential defense expert, stated that in his opinion "if you just took one look at him, you would see this is a man that is severely disturbed" (R. **1303**). Dr. Krieger had observed a "breakdown in [Mr. Smith's] thinking" (R. 1303), after only spending an hour with him.

> [H]is thoughts weren't connected together logically.
>
> There was some indication of delusional material. That is, he though that - although not a symptomatic conspiracy was against him, he was very suspicious. Let me put it that way. He was very suspicious, guarded, and he didn't trust his attorney, didn't trust me, accused me of having information I didn't have, and so forth.
>
> *Q* How would you describe his behavior at that time? Agitated? Mild?
>
> A It was extremely variable. At times he became tearful. Sometimes he was extremely apprehensive, and other times hostile and guarded, and it really ran the gamut and was quite variable over the course of an hour.
>
> *Q* Any hallucinations on that date?
>
> A As I said, his verbal conversation suggested he had hallucinations. He had ideas about reality that none of us would agree to. Hallucinations, I thought, would be extremely likely, given the nature of the things he was saying and his behavior.

(R. 1303-1304).

* * *

> Q What was your diagnosis, as to his mental disorder on this particular day that you saw him? What kind of mental disorder would you characterize it as?
>
> A It would appear to me to be one broad range of schizophrenic disorder with paranoid features.

(R. 1304).

Dr. Krieger went on to state that after a second, very brief interview, he had recommended that further evaluation regarding Mr. Smith's competency be done (R. **1305).** Pretrial, Dr. Krieger had found Mr. Smith to be **"marginally** competent" (R. **1306).**

Dr. Arnold Zager had been court appointed to evaluate Mr. Smith's competency pre-trial. While having found Mr. Smith competent to proceed, his opinion that Mr. Smith clearly had serious disorders made it obvious that his testimony would be important for the defense to present at penalty. Dr. Zager believed Mr. Smith to be suffering from a "paranoid schizophrenic disorder" (R. 1313).

The court should certainly have been aware of Mr. Smith's questionable competency since defense counsel brought it to the court's attention on more than one occasion:

> [PROSECUTOR]: One other thing, Judge, just maybe housekeeping, before I got on the case I understand that there were motions to have this defendant prescreened and evaluated psychologically, psychiatrically and my understanding is that there is no question as to his competency. Now that has been determined that any issue as to his competency to stand trial or at the time of the offense is not being raised.
>
> THE COURT: Insanity; my understanding is competency is not an issue in this case, at the time of the alleged offense, now and at all the times in between: is that a full, fair, accurate statement of the Court?
>
> [DEFENSE ATTORNEY}: Judge, the Court ruled that way and the psychiatrists basically determined that after examining Mr. Smith.
>
> THE COURT: It's no longer an issue now at this time to be raised before the jury.
>
> [DEFENSE ATTORNEY]: I have my own personal doubts as to Mr. Smith but **it's** not going to be raised as a defense if that is what you are asking.

(R. 154). During voir dire:

> [DEFENSE ATTORNEY]: Without going into what Mr. Smith was saying, there is times during the trial he's acting very irrational. I want the Court to be apprised of it because if he keeps on I may have to have the Court inquire as to whether he's competent at this

period in time.

He's saying things to me I don't understand what he's saying to me, to be honest with you. I wanted to put that on the record.

[PROSECUTOR]: I have no objection with Mr. Washor taking as much time as he needs to talk to Mr. Smith. If he's not satisfied after that consultation, to bring it up to the Court and the Court can make an inquiry.

[DEFENSE ATTORNEY]: That is what I will do.

[PROSECUTOR]: He's been determined competent in other hearings. If we have to address that issue again, fine, but that is clearly going to put a hold on any speedy trial. Hopefully we can avoid that.

[DEFENSE ATTORNEY]: Exactly. I would rather go through the complete trial but I don't know how he's going to act.

THE COURT: All right. Everything seems to be okay. Is that correct?

[DEFENSE ATTORNEY]: I have to keep on calming him down. He just has off the wall comments and things that don't make sense.

(R. 364-366). And before sentencing:

[DEFENSE ATTORNEY]: The first one I have, Judge, is a Motion to Continue Sentencing.

After being with the Defendant last week and speaking to him, basically his present demeanor and conduct creates doubt as to his mental condition as to whether he can actually be sentenced today, and I would like him to be evaluated before you pronounce sentence on him by at least three psychiatrists.

(R. 1375).

The court was certainly aware of these mental health concerns and in fact appointed experts to re-evaluate Mr. Smith's sanity for sentencing (R. 1376). The court also had reports from the appointed experts reflecting a severe mental disorder. But even understanding all of this, the court refused to find any mitigation at all, specifically with regard to the mental health mitigators. This mental health evidence was, however, mitigation and cannot simply be ignored.

The defense also called Mr. Smith's aunt, Bertha Irving. Ms. Irving testified briefly about Mr. Smith's tumultuous family life. Both Mr. Smith's parents died when he was young. Mr. Smith's mother was "raped and killed" (R. **1315).** Mr. Smith had lived in a foster home and had then lived with his grandmother where there was virtually no supervision. It was clear that Mr. Smith's home life was a travesty. Yet, throughout this and even though he had spent many years in prison (R. **1296),** Ms. Irving testified that Frank Smith was **"a** good nephew" (R. **1316).** He could be trusted as a babysitter because he cared about the kids **(R. 1316).**

The court could also have considered the question of guilt in mitigation. Certainly the court had to know the State's case was extremely weak and the jury deliberated at guilt-innocence for 8 **1/2** hours. Someone obviously had questions and throughout sentencing, Mr. Smith maintained his innocence. That residual doubt could have been considered in mitigation of sentence.

Despite the presence of clearly mitigating circumstances, the court stated there was no mitigation. In its sentencing order, the court stated:

> The Court considered the Defendant's character and record and has reviewed the totality of the circumstance of the offense and the Court finds there is nothing in mitigation.

(R. 1559). This Court has recognized that factors such as poverty, emotional deprivation, lack of parental care, and cultural deprivation, are mitigating. The evidence presented here regarding Mr. Smith's background of poverty, deprivation and lack of parental care went unrebutted. The court cannot simply choose to ignore it. In Lamb v. State, **532** So. 2d **1051** (Fla. 1988), this Court remanded the case for resentencing where it was not clear that the trial court had considered the evidence presented in mitigation. In addition to information about a drug problem,

> Lamb also introduced nonstatutory mitigating evidence that he would adjust well to prison life; that his family and friends feel he is a good prospect for rehabilitation; that before the offense he was friendly, helpful, and good with children and animals;

Lamb, supra, at 1054. The court quoted from its 1987 opinion in Rosers v. State, 511 So. 2d 526, 534 (Fla. 1987), saying:

> 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 finding 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.

Since the court was "not certain whether the trial court properly considered all mitigating evidence," id. at 1054, the case was remanded for a new sentencing.

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

> In the present case, of course, the relevant Oklahoma statute permits the defendant to present evidence of any mitigating circumstances. See Okla. State., Tit. 21, Section 701.10 (1980). Nonetheless, in sentencing the petitioner (which occurred about one month before Lockett was decided), the judge remarked that he could not "in following the law. . . consider the fact of this young man's violent background." App. 189. Although one can reasonably argue that these extemporaneous remarks are of no legal significance, I believe that the reasoning of the plurality opinion in Lockett compels a remand so that we do not "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." 438 U.S., at 605, 98 S.Ct. at 2965.
>
> I disagree with the suggestion in the dissent that remanding this case may serve no useful purpose. Even though the petitioner had an opportunity to present evidence in mitigation of the crime, it appears that the trial judge believed that he could not consider some of

> the mitigating evidence in imposing sentence. In any event, we may not speculate as to whether the trial judge and the Court of Criminal Appeals actually considered all of the mitigating factors and found them insufficient to offset the aggravating circumstances, or whether the difference between this Court's opinion and the trial court's treatment of the petitioner's evidence is "purely a matter of semantics," as suggested by the dissent. Woodson and Lockett require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court.

102 S. Ct. at **879.** Justice O'Connor's opinion makes clear that a capital sentencer may not refuse to consider proffered mitigating circumstances.

Here, the judge refused to recognize mitigating circumstances that were present. Under Penry v. Lynaugh's requirement that a capital sentencer fully consider and give effect to the mitigation, **109** S. Ct. **2934 (1989),** as well as under Eddings, supra, Magwood, supra, and Lamb, supra, the sentencing court's refusal to consider the non-statutory mitigating circumstances which were established was error. This claim also reflects the errors involved in the trial judge's restricted consideration of nonstatutory mitigation. This claim was urged on direct appeal, but rejected. Hitchcock and Penry have changed all that. Reconsideration at this juncture is appropriate.

Mitigating circumstances that are clear from the record must be recognized or else the sentencing is constitutionally suspect. The required balancing cannot occur when the **"ultimate"** sentencer failed to consider obvious mitigating circumstances. The factors should now be recognized. Mr. Smith is entitled to relief on this claim.

This error undermined the reliability of the jury's sentencing determination and prevented the jury from assessing the full panoply of mitigation presented by Mr. Smith. For each

of the reasons discussed above the Court should vacate Mr. Smith's unconstitutional sentence of death.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Smith's death sentence. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings, see Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error. Accordingly, habeas relief must be accorded now.

CLAIM IV

THE TRIAL COURT'S DENIAL OF THE DEFENSE REQUESTED PENALTY PHASE JURY INSTRUCTION INFORMING THE JURY OF ITS ABILITY TO EXERCISE MERCY DEPRIVED MR. SMITH OF A RELIABLE AND INDIVIDUALIZED CAPITAL SENTENCING DETERMINATION, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

In a capital sentencing proceeding, the United States Constitution requires that a sentencer not be precluded from "considering, as a mitigating factor, any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978); see also Hitchcock v. Dusser, 107 S. Ct. 1821, 1824 (1987). Because of the heightened "need for reliability in the determination that death is the appropriate punishment in a specific case," the eighth amendment requires "particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." Woodson v. North Carolina, 428 U.S. 280, 304, 303 (1976).

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

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

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

In Mr. Smith's case, at the penalty phase, defense counsel requested that the following instructions be given to the jury:

> With regard to your decision to recommend life or death, the Court hereby instructs you that there is nothing which would suggest that the decision to afford an individual Defendant mercy violates our Constitution. You are empowered to decline to recommend the penalty of death even if you find one or more aggravating circumstances and no mitigating circumrstance.

(R. 1519). The trial court refused to provide the instruction (Id.).

Not permitting the jury to consider any mercy or sympathy they may have had towards the defendant undermined the jury's ability to reliably weigh and evaluate mitigating evidence. See Parks v. Brown, 860 F.2d 1545 (10th Cir. 1988)(in banc), cert. granted sub nom., Saffle v. Parks, 109 S. Ct. 1930 (1989). The jury's role in the penalty phase is to evaluate the circumstances of the crime and the character of the offender before deciding whether death is an appropriate punishment. Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). An admonition which may be understood as directing the jury to disregard the consideration of sympathy improperly suggests to "the jury that it must ignore the mitigating evidence about the [petitioner's] background and character." California v. Brown, 479 U.S. 538, 107 S. Ct. 837, 842 (1987)(O'Connor, J., concurring).

Jurors simply cannot be foreclosed from considering sympathy and mercy arising in the jury because of the defendant's character during penalty deliberations:

> The capital defendant's constitutional right to present and have the jury consider mitigating evidence during the capital phase of the trial is very broad. The Supreme Court has held that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978) (emphasis in original). See also Woodson v. North Carolina, 428 U.S. 280, 304 (1976).
>
> The sentencer must give "individualized" consideration to the mitigating circumstances surrounding the defendant and the crime, Brown, 479 U.S. at 541; Zant v. Stephens, 462 U.S. 862, 879 (1983); Eddings v. Oklahoma, 455 U.S. 104, 111-12 (1982); Lockett, 438 U.S. at 605, and may not be precluded from considering "any relevant mitigating evidence." Eddings, 455 U.S. at 114. See also Andrews v. Shulsen, 802 F.2d 1256, 1261 (10th Cir. 1986), cert. denied, U.S. ___, 107 S. Ct. 1964, 95 L. Ed. 2d 536 (1987).

Mitigating evidence about a defendant's background or character is not limited to evidence of guilt or innocence, nor does it necessarily go to the circumstances of the offense. Rather, it can include an individualized appeal for compassion, understanding, and mercy as the personality of the defendant is fleshed out and the jury is given an opportunity to understand, and to relate to, the defendant in normal human terms. A long line of Supreme court cases shows that a capital defendant has a constitutional right to make, and have the jury consider, just such an appeal.

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

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

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

individual." Id. at 110.

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

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

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

Without placing an undue technical emphasis on definitions, it seems to us that sympathy is likely to be perceived by a reasonable juror as an essential or important ingredient of, if not a synonym for, "mercy," "humane" treatment, "compassion," and a full

> **"individualized"** consideration of the "humanity" of the defendant and his **"character." . . .** [I]f a juror is precluded from responding with sympathy to the defendant's mitigating evidence of his own unique humanness, then there is an unconstitutional danger that his counsel's plea for mercy and compassion will fall on deaf ears.
>
> Here, the petitioner did offer mitigating evidence about his background and character. Petitioner's father testified that petitioner was a **"happy-go-lucky** guy" who was "friendly with everybody." The father also testified that, unlike other people in the neighborhood, petitioner avoided violence and fighting; that he (the father) was in the penitentiary during the petitioner's early childhood; that petitioner was the product of a broken home; and that petitioner only lived with him from about age **14** to 19. Although the father admitted that petitioner once was involved in an altercation at school, he suggested that it was a result of the difficulties of attending a school with forced bussing. Record, vol. V, at **667-82.**
>
> Petitioner's counsel, in his closing argument, then relied on this testimony to argue that petitioner's youth, race, school experiences, and broken home were mitigating factors that the jury should consider in making its sentencing decision. In so doing, defense counsel appealed directly to the jury's sense of compassion, understanding, and sympathy, and asked the jury to show "kindness" to his client as a result of **his** background. Record, vol. V, at **708-723.**
> **. . .** [There is] an impermissible risk that the jury did not fully consider these mitigating factors in making its sentencing decision.
>
> **. . .**
>
> As we discussed above, sympathy may be an important ingredient in understanding and appreciating mitigating evidence of a defendant's background and character.

Parks v. Brown, **860** F.2d at **1554-57.** The United States Supreme Court has granted a writ of certiorari in order to review the decision in Parks, **see** Saffle v. Parks, **109** S. Ct. **1930** (1989), and thus will soon establish standards for a determination of this claim.

In this case, there exists a substantial possibility that the jury may have understood that it was precluded from

considering sympathy or mercy. Cf. Smith v. Marvland, 108 S. Ct. 1860, 1867 (1988). This prevented Mr. Smith's jury from providing Mr. Smith the "particularized consideration" the eighth amendment requires. Undeniably, the presentation of evidence in mitigation of punishment involves the jury's human, merciful reaction to the defendant. See Peek v. Kemp, 784 F. 2d 1479, 1490 and n.12 (11th Cir. 1986)(en banc)(the role of mitigation is to present "factors which point in the direction of mercy for the defendant"); see also Tucker v. Zant, 724 F.2d 882, 891 (11th Cir.), vacated for reh'g en banc, 724 F.2d 898 (11th Cir. 1984), reinstated in relevant part sub nom. Tucker v. Kemp, 762 F.2d 1480, 1482 (11th Cir. 1985)(in banc). Not allowing the jury to believe that **"mercy"** may enter their deliberations negates any evidence presented in mitigation, for it forecloses the very reaction that evidence is intended to evoke, and therefore precludes the sentencer from considering relevant, admissible (even if nonstatutory) mitigating evidence, in violation of Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); Skipper v. South Carolina, 476 U.S. 1 (1986); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, and the eighth and fourteenth amendments.

The United States Supreme Court recently held in a case declared to be retroactive on its face that a capital sentencing jury must make a "reasoned moral response to the defendant's background, character, and crime." Penry v. Lynaugh, 109 S. Ct. 2934, 2947 (1989). It is improper to create "the risk of an unguided emotional response." 109 S. Ct. at 2951. A capital defendant should not be executed where the process runs the "risk that the death penalty will be imposed in spite of factors which may call for a less severe **penalty."** Penry, 109 S. Ct. at 2952. There can be no question that Penry must be applied retroactively. The Court there concluded that, Jurek v. Texas, 428 U.S. 262 (1976), notwithstanding, the Texas death penalty

scheme previously found constitutional, created the "risk that the death [would] be imposed in spite of factors which [] call[ed] for a less severe penalty." 109 S. Ct. at 2952. Thus Mr. Penry's claim was cognizable in post-conviction proceedings. Johnny Penry sought, and was granted relief, in part on the identical claim now pressed by Mr. Smith. Penry alleged that under Texas' functional equivalent of aggravating factors his jury was precluded from considering a discretionary grant of mercy based on the existence of mitigating factors. Id., 109 S. Ct. at 2942. The Court found that, as applied to Penry, the failure to so instruct was not a legitimate attempt by Texas to avoid unbridled discretion, 109 S. Ct. 2951, but rather, an impermissible attempt to restrain the sentencer's discretion to decline to impose a death sentence. 109 S. Ct. 2951. The net result is the same: the unacceptable risk that the jury's recommendation of death was the product of the jury's belief that feelings of compassion, sympathy, and mercy towards the defendant were not to be considered in determining its verdict. The resulting recommendation is therefore unreliable and inappropriate in Mr. Smith's case. This error undermined the reliability of the jury's sentencing verdict. Penry, supra.

Given the court's admonition, reasonable jurors could have believed that the court's original instructions during guilt-innocence to disregard feelings of sympathy remained in full force and effect during penalty phase deliberations, cf. Booth v. Maryland, 107 S. Ct. 2529 (1987); Penry v. Lynaugh, 109 S. Ct. 2934 (1989), similarly removing the sentencing recommendation from the realm of a reasoned and moral response.

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

the Court should vacate Mr. Smith's unconstitutional sentence of death. This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Smith's death sentence.

The retroactive opinion in Penry requires that this issue to be addressed and fully assessed at this juncture. The eighth amendment cannot tolerate the imposition of a sentence of death where there exists a "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Penry, 109 S. Ct. at 2952. Accordingly, habeas corpus relief is warranted.

CLAIM V

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

This issue was urged and rejected on direct appeal. Smith v. State, 515 So. 2d 182, 185 (Fla. 1987). It is presented again herein because the United States Supreme Court's recent decision in Maynard V. Cartwright, 108 S. Ct. 1853 (1988), demonstrates that Mr. Smith was and is entitled to relief.

In State V. Dixon, 283 So. 2d 1, 9 (1973), this Court provided the following limiting construction of the "heinous, atrocious, or cruel" aggravating circumstance:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies--the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

Mr. Smith's jury was not advised of these limitations on the "heinous, atrocious or cruel" aggravating factor. As a result, the instructions failed to limit the jury's discretion and violated Maynard v. Cartwright, 108 S. Ct. 1853 (1988). In addition, the judge employed the same erroneous nonstandard when sentencing Mr. Smith to death, as did this Court when it affirmed this aggravating circumstance on direct appeal. Smith v. State, 515 So. 2d 182, 185 (Fla. 1987)("[t]his is heinous, atrocious, and cruel by any standard").

The eighth amendment error in this case is even more egregious than the eighth amendment error upon which a unanimous United States Supreme Court granted relief in Maynard v. Cartwright, 108 S. Ct. 1853 (1988). The sentencing court here instructed the jury:

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

(R. 1355). The Tenth Circuit's in banc opinion (unanimously overturning the death sentence) explained that the jury in Cartwrisht received a more detailed instruction which was still held inadequate:

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

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

The Dixon construction has not been consistently applied, was not applied here, and the jury in this case was never apprised of such a limiting construction. Here, the jury, the judge, and this Court applied precisely the construction condemned in Cartwright.[3]

Of course, the role of a Florida sentencing jury is critical. The Eleventh Circuit in Mann v. Dusser, 844 F.2d 1446 (11th Cir. 1988)(in banc), cert. denied, 109 S. Ct. 1353 (1989), specifically discussed the fundamental significance of a Florida jury's sentencing role in a capital case:

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

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

2954, 57 L.Ed.2d 973 (1978), to consider nonstatutory mitigating evidence. The jury recommended death and the trial judge imposed the death penalty. In imposing the death sentence, the trial judge expressly stated that he had considered all evidence and testimony presented. On petition for writ of habeas corpus, the supreme court ordered the defendant resentenced. The court held that the jury had been precluded from considering nonstatutory mitigating evidence, and that the trial judge's consideration of that evidence had been "insufficient to cure the original infirm recommendation." Id. at 859 n. 1.

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

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

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

State, 332 So.2d 65, 68 (Fla.1976). In these cases, the supreme court frequently focuses on how the error may have affected the jury's recommendation.

Id. at 1452.[4] As the en banc Eleventh Circuit noted in earlier portions of the Mann opinion:

> A review of the case law shows that the Supreme Court of Florida has interpreted section 921.141 as evincing a legislative intent that the sentencing jury play a significant role in the Florida capital sentencing scheme. See Messer v. State, 330 So.2d 137, 142 (Fla. 1976)("[T]he legislative intent that can be gleaned from Section 921.141 [indicates that the legislature] sought to devise a scheme of checks and balances in which the input of the jury serves as an integral part."); see also Riley V. Wainwright, 517 So.2d 656, 657 (Fla.1987)("This Court has long held that a Florida capital sentencing jury's recommendation is an integral part of the death sentencing process."); Lamadline v. State, 303 So.2d 17, 20 (Fla.1974)(right to sentencing jury is "an essential right of the defendant under our death penalty legislation'!). In the supreme court's view,

Id. at 1452 n.7.

> The legislature created a role in the capital sentencing process for a jury because the jury is "the one institution in the system of Anglo-American jurisprudence most honored for fair determinations of questions decided by balancing opposing factors." Cooper v. State, 336 So.2d 1133, 1140 (Fla.1976), cert. denied, 431U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977); see also McCampbell v. State, 421 So.2d 1072, 1075 (Fla.1982)(the jury's recommendation "represent[s] the judgment of the community as to whether the death sentence is appropriate"); Chambers v. State, 339 So.2d 204, 209 (Fla.1976)(England,

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

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

> J., concurring)(the sentencing jury "has been assigned by history and statute the responsibility to discern truth and mete out justice").
>
> To give effect to the legislature's intent that the sentencing jury play a significant role, the Supreme Court of Florida has severely limited the trial judge's authority to override a jury recommendation of life imprisonment. In Tedder v. State, 322 So.2d 908, 910 (Fla.1975), the court held that a trial judge can override a life recommendation only when "the facts [are] so clear and convincing that virtually no reasonable person could differ." That the court meant what it said in Tedder is amply demonstrated by the dozens of cases in which it has applied the Tedder standard to reverse a trial judge's attempt to override a jury recommendation of life. See, e.g., Wasko v. State, 505 So.2d 1314, 1318 (Fla.1987); Brookings v. State, 421 So.2d 1072, 1075-76 (Fla.1982); Goodwin v. State, 405 So.2d 170, 172 (Fla.1981); Odom v. State, 403 So.2d 936, 942-43 (Fla.1981), cert. denied, 456 U.S. 925, 102 S.Ct. 1970, 72 L.Ed.2d 440 (1982); Nearv v. State, 384 So.2d 881, 885-88 (Fla. 1980); Mallov v. State, 283 So.2d 1190, 1193 (Fla.1979); Shue v. State, 366 So.2d 387, 390-91 (Fla.1978); McCaskill v. State, 344 So.2d 1276, 1280 (Fla.1977); Thompson v. State, 328 So.2d 1, 5 (Fla.1976).

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

In Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), the Supreme Court reversed a Florida sentence of death because the jury had been erroneously instructed not to consider nonstatutory mitigation. "In Hitchcock, the Supreme Court reversed [the Eleventh Circuit's] en banc decision in Hitchcock v. Wainwright, 770 F.2d 1514 (1985), and held that, on the record of the case, it appeared clear that the jury had been restricted in its consideration of nonstatutory mitigating circumstances. . . ." Knight v. Dugger, 863 F.2d 705, 708 (11th Cir. 1989). See also Harsrave v. Duaaer, 832 F.2d 1528 (11th Cir. 1987)(en banc); Stone v. Dugger, 837 F.2d 1477 (11th Cir. 1988). The Supreme Court treated the jury as sentencer for purposes of eighth amendment instructional error review, as have the Eleventh

Circuit and this Court. See Mann, supra; Riley v. Wainwright, 517 So. 2d 565 (Fla. 1987). In fact, this Court, recognizing the significance of this change in law, held Hitchcock was to be applied retroactively.

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

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

Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1989). See also Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987)(improper instructions to sentencing jury render death sentence fundamentally unfair); Meeks v. Duaaer, 14 F.L.W. 313 (Fla. June 22, 1989)(since it could not be said beyond a reasonable doubt that a properly instructed jury would not return a recommendation of life, resentencing was required). Thus, it is clear that, after Hitchcock, for purposes of reviewing the adequacy of jury instructions in Florida the jury is the sentencer. Instructional error is reversible where it may have affected the jury's sentencing verdict. Meeks, supra; Riley, supra. The bottom line here is that this jury was unconstitutionally instructed, Maynard v. Cartwright, supra, and that the State cannot prove the error harmless beyond a reasonable doubt.

Mr. Smith is entitled to relief under the standards of Maynard v. Cartwrisht, and the holding in Hitchcock that jury instructions must meet eighth amendment standards. The jury was not instructed as to the limiting construction applicable to "heinous, atrocious or cruel." The jury did not know that the murder had to be "unnecessarily torturous to the victim." What cannot be disputed is that here, as in Cartwriaht, the jury instructions provided no guidance regarding the "heinous, atrocious or cruel" aggravating circumstance. The judge also

misapplied the law. As a result, the eighth amendment error here is plain.

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

When presented with this issue on direct appeal, this Court did not have the benefit of Cartwrisht. The court itself applied no adequate "limiting construction" to the "heinous, atrocious or cruel" aggravating circumstance.

Mr. Smith's trial counsel timely filed a proposed jury instruction which would have provided the jury with some guidance:

> DEFENDANT'S PROPOSED PENALTY PHASE JURY INSTRUCTION NO. 7
>
> In order that you might better understand and be guided concerning the meaning of aggravating circumstance (h), the Court hereby instructs you that
>
> What is intended to be included in the category of heinous, atrocious and cruel are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily torturous to the victim.
>
> State V. Dixon, 293 So.2d 1 (Fla. 1973)
>
> Godfrev v. Georgia, 100 S. Ct. 1759

(R. 1517). The court refused to provide the instruction (Id.).

Clearly, this Court has held that, under Hitchcock, the sentencing jury must be correctly and accurately instructed as to the mitigating circumstances to be weighed against aggravating circumstances. Under Maynard v. Cartwrisht, 108 S. Ct. 1883

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

Florida has adopted a statutory scheme in which the "jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose the death penalty," Zant V. Stephens, 462 U.S. 862, 890 (1983), unlike the scheme at issue in Stephens, which did not require a weighing process. Maynard V. Cartwright, 108 S. Ct. 1853 (1988), first held that the principle of Godfrey V. Georgia, 446 U.S. 420 (1980), applied to a state where the jury weighs the aggravating and mitigating circumstance found to exist, and required the jury to receive instructions adequately channeling and narrowing its discretion. In Cartwright, the United States Supreme Court determined that error had occurred where the sentencing jury received no instructions regarding the limiting constructions of an aggravating circumstance.

Under Florida law, aggravating circumstances "must be proven beyond a reasonable doubt." Hamilton V. State, 547 So. 2d 630, 633 (Fla. 1989). In fact, Mr. Smith's jury was so instructed. Florida law also establishes that limiting constructions of the

aggravating circumstances are "elements" of the particular aggravating circumstance. "[T]he State must prove [the] element[s] beyond a reasonable doubt." Banda v. State, 536 So. 2d 221, 224 (Fla. 1988). Unfortunately, Mr. Smith's jury received no instructions regarding the elements of the "heinous, atrocious and cruel" aggravating circumstances submitted for the jury's consideration. Its discretion was not channeled and limited in conformity with Cartwriaht.

Florida law requires the jury to weigh the aggravating circumstances against mitigating evidence. In fact, Mr. Smith's jury was so instructed. This Court has produced considerable case law regarding the import of instructional error to a jury regarding the mitigation it may consider and balance against the aggravating circumstances. See, e.g., Mikenas v. Dugger, supra. Because of the weight attached to the jury's sentencing recommendation in Florida, instructional error is not harmless unless the reviewing court can "conclude beyond a reasonable doubt that an override would have been authorized." Mikenas, 519 So. 2d at 601. In other words, it is not harmless if there was sufficient mitigation in the record for the jury to have a reasonable basis for recommending life and thus preclude a jury override.

Similar conclusions have been reached in other cases where the jury was erroneously instructed. Meeks V. Duaaer, ___ So. 2d ___, 14 F.L.W. 313, 314 (Fla. June 22, 1989)("Had the jury recommended a life sentence, the trial court may have been required to conform its sentencing decision to Tedder v. State, 322 So. 2d 908 (Fla. 1975), which requires that, if there is a reasonable basis for the recommendation, the trial court is bound by it."); Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1989)("It is of no significance that the trial judge stated that he would have imposed the death penalty in any event. The proper standard is whether a jury recommending life imprisonment would have a

reasonable basis for the recommendation."); Floyd v. State, 497 So. 2d 1211, 1216 (Fla. 1986)("In view of the inadequate and confusing jury instructions, we believe Floyd was denied his right to an advisory opinion. We cannot sanction a practice which gives no guidance to the jury for considering circumstances which might mitigate against death."). In Mr. Smith's case, the jury received no guidance as to the **"elements"** of the aggravating circumstances against which the evidence in mitigation was balanced. In Florida, the jury's pivotal role in the capital sentencing process requires its sentencing discretion to be channeled and limited. The failure to provide Mr. Smith's sentencing jury the proper "channeling and limiting" instructions violated the eighth amendment principle discussed in Maynard v. Cartwright.

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

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

The Tennessee Supreme Court concluded that under Maynard v. Cartwrisht, juries must receive complete instructions regarding aggravating circumstances. State v. Hines, 758 S.W.2d 515 (Tenn. 1988). The court did not read Cartwriaht as applying only to the heinous, atrocious, and cruel aggravating circumstance. The court there also found that ambiguity in the instructions regarding any limiting constructions of an aggravating circumstance violated Smith v. Maryland, 108 S. Ct. 1860 (1988). The court ruled that error under Maynard v. Cartwright and Smith could not be found to be harmless beyond a reasonable doubt.

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

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

> Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically asserted that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was

held invalid in Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L.Ed.2d (1972).

Cartwright is a significant change in law under the test set forth in Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1987).

The error cannot be found harmless beyond a reasonable doubt. In Florida, the Supreme Court normally remands for resentencing when aggravating circumstances are invalidated. See, e.g., Alvin v. State, 14 F.L.W. 457 (Fla. Sept. 14, 1989)(remanded for resentencing when one of two aggravating circumstances stricken and no mitigating circumstances found); Schafer v. State, 537 So. 2d 988 (Fla. 1989)(remanded for resentencing where three of five aggravating circumstances stricken and no mitigating circumstances identified); Nibert V. State, 508 So. 2d 1 (Fla. 1987)(remanded for resentencing where one of two aggravating circumstances stricken and no mitigating circumstances found): cf. Rembert v. State, 445 So. 2d 337 (Fla. 1984)(directing imposition of life sentence where one of two aggravating circumstances stricken and no mitigating circumstances found). The striking of this additional aggravating factor requires resentencing. Schafer, supra. Id. The "harm" before the jury is plain -- a jury's capital sentencing decision, after all, is not a mechanical counting of aggravators and involves a great deal more than that. The error denied Mr. Smith an individualized and reliable capital sentencing determination. Knight V. Dugger, 863 F.2d 705, 710 (11th Cir. 1989). Under Witt v. State, 387 So. 2d 922 (Fla.) cert. denied, 449 U.S. 1067 (1980), Cartwright represents a fundamental change in law, that in the interests of fairness requires the decision to be given retroactive application. The errors committed here cannot be found to be harmless beyond a reasonable doubt. There was a wealth of mitigating evidence before the jury which could have caused a different balance to be struck had this aggravating circumstances not been found and weighed against the mitigation. Habeas corpus relief is

warranted under Hitchcock, Cartwright and the eighth amendment. A new jury sentencing proceeding must be ordered.

Recently, a petition for a writ of certiorari was granted in Clemons v. Mississippi, ___ U.S. ____, 45 Cr. L. 4067 (June 19, 1989), in order to resolve the question of when Cartwriaht error may be harmless. Certainly Mr. Smith's execution must be stayed pending resolution of that case. The United States Supreme Court has also granted writs of certiorari to consider the failure of the Arizona courts to properly qualify "especially heinous, cruel or depraved." These cases may also have import for Mr. Smith's case. See Walton v. Arizona, cert. granted, 46 Cr. L. 3014 (October 2, 1989); Ricketts v. Jeffers, cert. granted, 46 Cr. L. 3035 (October 10, 1989). A stay of execution and habeas corpus relief are appropriate.

This error undermined the reliability of the jury's sentencing determination and prevented the jury from assessing the full panoply of mitigation presented by Mr. Smith. For each of the reasons discussed above the Court should vacate Mr. Smith's unconstitutional sentence of death. This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Smith's death sentence. Accordingly, habeas relief must be accorded now.

CLAIM VI

THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING CIRCUMSTANCE WAS APPLIED TO MR. SMITH'S CASE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

On direct appeal in Mr. Smith's case, the Florida Supreme Court invalidated the application of the "cold, calculated and premeditated" aggravating circumstance because "[t]he evidence does not rise to the level of heightened premeditation . . . which is necessary to support this aggravating circumstance." Smith v. State, 515 So. 2d 182, 185 (Fla. 1987). Thus, this

aggravating circumstance was overbroadly applied by Mr. Smith's jury and judge. Under Mavnard v. Cartwrisht, 108 S. Ct 1853 (1988), the overbroad application of aggravating circumstances violates the eighth amendment. As the record in its totality reflects, the sentencing jury never applied the "heightened premeditation" limiting construction of the cold, calculated aggravating circumstance, as required by Mavnard v. Cartwrisht, and thus jury resentencing is required.

Aggravating circumstance (5)(i) of Section 921.141, Florida Statutes, is unconstitutionally vague, overbroad, arbitrary, and capricious on its face, and is in violation of the sixth, eighth, and fourteenth amendments to the United States Constitution and Article I, sections 2, 9 and 16 of the Florida Constitution. This circumstance is to be applied when:

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

921.141(5)(i), Florida Statutes.

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

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

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

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

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

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

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

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

It is well established that, although a state's death penalty statute may pass constitutional muster, a particular aggravating circumstance may be so vague, arbitrary, or overbroad as to be unconstitutional. People v. Superior Court (Engert), 647 P.2d 76 (Cal. 1982); Arnold v. State, 224 S.E.2d 386 (Ga. 1976). In People v. Superior Court (Engert), supra, the California Supreme Court struck down an aggravating circumstance that a homicide was "especially heinous, atrocious, and cruel, manifesting exceptional depravity" as unconstitutionally vague and violative of due process, on its face, under the California and United States Constitutions. In Arnold, supra, the Georgia Supreme Court struck down as unconstitutionally vague, under the United States Constitution, an aggravating circumstance that applied when the homicide "was committed by a person who has a substantial history of serious assaultive criminal convictions." 224 S.E.2d at 391-92. The Court held this aggravating circumstance to be unconstitutional under traditional "void for vagueness" standards. 224 S.E.2d at 391. The Court went on to note the special scrutiny (for possible vagueness) required under a death penalty statute:

> This doctrine [vagueness] has particular application to death penalty statutes after

> Furman v. Georgia, supra, where, if anything is made clear, it is that a wide latitude of discretion in a jury as whether or not to impose the death penalty is unconstitutional.

224 S.E.2d at 391-92. Aggravating circumstances must be subjected to special scrutiny for unconstitutional vagueness.

Section 921.141(5)(i), on its face fails in a number of respects to "genuinely narrow the class of persons eligible for the death penalty." The circumstance has been applied by this Court to virtually every type of first degree murder. This aggravating circumstance has become a global or "catch-all" aggravating circumstance. Even where this Court has developed principles for applying the (5)(i) circumstance, those principles have not been applied with any consistency whatsoever.

Section 921.141(5)(i), is unconstitutionally vague, on its face. Even the words of the aggravating circumstance provide no true indication as to when it should be applied. This is precisely the flaw which led to the striking of aggravating circumstances in People v. Supreme Court (Engert), supra, and Arnold v. State, supra.

The terms "cold" and "calculated" suffer from the same deficiency as terms held vague in People v. Superior Court of Santa Clara County (Engert), supra. Thus, here also:

> The terms address the emotions and subjective, idiosyncratic values. While they stimulate feelings of repugnance, they have no direct content.

647 P.2d at 78. Here, as in Arnold v. State, supra, the terms are "highly subjective." 224 S.E.2d at 392. The finding of this aggravating circumstance depends on a finding that the homicide is "cold, calculated, and premeditated." The terms cold and calculated are unduly vague and subjective. This is especially true when considered in the context of the special need for reliability in capital sentencing.

This Court has discussed this aggravating factor. See Jent v. State, 408 So. 2d 1024, 1032 (Fla. 1982); McCray v. State, 416

So. 2d 804, 807 (Fla. 1982); Combs v. State, 403 So. 2d 418 (Fla. 1981). In Jent, supra, the court stated:

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

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

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

416 So. 2d at 807. Although this Court has attempted to require more in this aggravating circumstance than simply premeditation, the jury was not told in Mr. Smith's case what more was required.

In part because of the concerns discussed above, this Court has further defined "cold, calculated, and premeditated":

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

Rosers v. State, 511 So. 2d 526, 533 (Fla. 1987). This Court's subsequent decisions have plainly recognized that cold, calculated and premeditated requires proof beyond a reasonable doubt of a "careful plan or prearranged **design."** See Mitchell v.

State, 527 So. 2d 179, 182 (Fla. 1988)("the cold, calculated and premeditated factor [] requir[es] a careful plan or prearranged design."); Jackson v. State, 530 So. 2d 269, 273 (Fla. 1988) (application of aggravating circumstance "error under the principles we recently enunciated in Rogers.").

Because niether Mr. Smith's jury nor trial judge had the benefit of the narrowing definition set forth in Roaers, his sentence violates the eighth and fourteenth amendments. Moreover, the decision in Roaers preceded the direct appeal in Mr. Smith's case by several months. Mr. Smith is entitled to the benefit of the Roaers rule. The judge did not require any "heightened" premeditation as required by McCray, supra, and certainly he did not properly instruct the jury on this limiting construction.

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

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

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

The Court there discussed its earlier decision in Godfrev v. Georsia, 446 U.S. 420 (1980):

> Godfrev v. Georsia [] which is very relevant here, applied this central tenet of Eighth Amendment law. The aggravating circumstance at issue there permitted a person to be sentenced to death if the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Id., at 422. The jury had been instructed in the words of the statute, but its verdict recited only that

the murder was "outrageously or wantonly vile, horrible or inhuman." The Supreme Court of Georgia, in affirming the death sentence, held only that the language used by the jury was "not objectionable" and that the evidence supported the finding of the presence of the aggravating circumstance, thus failing to rule whether, on the facts, the offense involved torture or an aggravated battery to the victim. Id., at 426-427. Although the Georgia Supreme Court in other cases had spoken in terms of the presence or absence of these factors, it did not do so in the decision under review, and this Court held that such an application of the aggravating circumstance was unconstitutional, saying:

> "In the case before us, the Georgia Supreme Court has affirmed a sentence of death based upon no more than a finding that the offense was 'outrageously or wantonly vile, horrible and inhuman.' There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterized almost every murder as 'outrageously or wantonly vile, horrible and inhuman.' Such a view may, in fact, have been one to which the members of the jury in this case subscribed. If so, their preconceptions were not dispelled by the trial judge's sentencing instructions. These gave the jury no guidance concerning the meaning of any of [the aggravating circumstance's] terms. In fact, the jury's interpretation of [that circumstance] can only be the subject of sheer speculation." Id., at 428-429 (footnote omitted).

The affirmance of the death sentence by the Georgia Supreme Court was held to be insufficient to cure the jury's unchanneled discretion because that court failed to apply its previously recognized limiting construction of the aggravating circumstance. Id., at 429, 432. This Court concluded that, as a result of the vague construction applied, there was "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." Id., at 433. Compare Proffit v. Florida, 428 U.S. 242, 254-256, 96 S.Ct. 2960, 2967-2968, 49 L.Ed.2d 913 (1976). It plainly rejected the submission that a particular set of facts surrounding a murder, however shocking they might be, were enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty.

Cartwright, supra, 108 S. Ct. at 1858-59 (emphasis added).

In Florida, a resentencing is required when aggravating circumstances are invalidated. See, e.g., Schafer v. State, 537 So. 2d 988 (Fla. 1989)(remanded for resentencing where three of five aggravating circumstances stricken and no mitigating circumstances identified); Nibert v. State, 508 So. 2d 1 (Fla. 1987)(remanded for resentencing where one of two aggravating circumstances stricken and no mitigating circumstances found); cf. Rembert v. State, 445 So. 2d 337 (Fla. 1984)(directing imposition of life sentence where one of two aggravating circumstances stricken and no mitigating circumstances found). The striking of this aggravating factor on direct appeal certainly requires resentencing under Florida law. Under eighth amendment law it is the sentencer who must make the "reasoned moral response." Penry v. Lynaugh, 109 S. Ct. 2934, (1989). The United States Supreme Court has granted certiorari in a case to determine whether an appellate court has the power to usurp the sentencer's discretion and declare improper consideration of an aggravating circumstance harmless. Clemons v. Mississippi, 45 Cr. L. 4082.

Under Florida law, aggravating circumstances "must be proven beyond a reasonable doubt." Hamilton v. State, 547 So. 2d 630, (Fla. 1989). In fact, Mr. Smith's jury was so instructed. Florida law also establishes that limiting constructions of the aggravating circumstances are "elements" of the particular aggravating circumstance. "[T]he State must prove [the] element[s] beyond a reasonable doubt." Banda v. State, 536 So. 2d 221, 224 (Fla. 1988). Unfortunately, Mr. Smith's jury received no instructions regarding the elements of the "cold, calculated and premeditated" aggravating circumstance submitted for the jury's consideration. Its discretion was not channeled and limited in conformity with Cartwright.

Florida law requires the jury to weigh the aggravating circumstances against mitigating evidence. In fact, Mr. Smith's jury was so instructed. This Court has produced considerable case law regarding the import of instructional error to a jury regarding the mitigation it may consider and balance against the aggravating circumstances. In Mikenas v. Dugger, the court ordered a new sentencing because the jury had not received an instruction explaining that mitigation was not limited to the statutory mitigating factors. The error was cognizable in post-conviction proceedings even though there had been no objection at trial, the issue had not been raised on direct appeal, and at a resentencing to the judge alone, the judge had known that mitigation was not limited to the statutory mitigating factors. It was cognizable because this Court determined that Hitchcock required the sentencing jury in Florida to receive accurate information which channeled and limited its sentencing discretion, but allowed the jury to give full consideration to the defendant's character and background. Because of the weight attached to the jury's sentencing recommendation in Florida, instructional error is not harmless unless the reviewing court can "conclude beyond a reasonable doubt that an override would have been authorized." Mikenas, 519 So. 2d at 601. In other words, there was sufficient mitigation in the record for the jury to have a reasonable basis for recommending life and thus preclude a jury override.

Similar conclusions have been reached in other cases where the jury was erroneously instructed. Meeks v. Dusser, ___ So. 2d ___, 14 F.L.W. 313, 314 (Fla. June 22, 1989)("Had the jury recommended a life sentence, the trial court may have been required to conform its sentencing decision to Tedder v. State, 322 So. 2d 908 (Fla. 1975), which requires that, if there is a reasonable basis for the recommendation, the trial court is bound by it."); Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1989)("It is

of no significance that the trial judge stated that he would have imposed the death penalty in any event. The proper standard is whether a jury recommending life imprisonment would have a reasonable basis for the recommendation."); Floyd v. State, 497 SO. 2d 1211, 1216 (Fla. 1986)("In view of the inadequate and confusing jury instructions, we believe Floyd was denied his right to an advisory opinion. We cannot sanction a practice which gives no guidance to the jury for considering circumstances which might mitigate against death."). In Mr. Smith's case the jury received no guidance as to the **"elements"** of the aggravating circumstances against which the evidence in mitigation was balanced. In Florida, the jury's pivotal role in the capital process requires its sentencing discretion to be channeled and limited. The failure to provide Mr. Smith's sentencing jury the proper "channeling and limiting" instructions violated the eighth amendment principle discussed in Mavnard v. Cartwriaht.

In Mavnard v. Cartwriaht, the Court held that **"the** channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." 108 S. Ct. at 1858. There must be a "principled way to distinguish [the] case, in which the death penalty was imposed, from the many cases in which it was not." Id. at 1859, quoting, Godfrev v. Georgia, 446 U.S. 420, 433 (1980). In Mr. Smith's case, the jury was not instructed as to the limiting constructions placed upon of the "cold, calculated and premeditated" aggravating circumstance. The failure to instruct on the **"elements"** of this aggravating circumstance in this case left the jury free to ignore those **"elements,"** and left no principled way to distinguish Mr. Smith's case from a case in which the state-approved and required **"elements"** were applied and death, as a result, was not imposed. The jury was left with

open-ended discretion found to be invalid in Furman v. Georgia, 408 U.S. 238 (1972), and Maynard v. Cartwrisht.

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

The Tennessee Supreme Court concluded that under Maynard v. Cartwrisht, juries must receive complete instructions regarding aggravating circumstances. State v. Hines, 758 S.W.2d 515 (Tenn. 1988). The court did not read Cartwrisht as applying only to the heinous, atrocious, and cruel aggravating circumstance. The court there also found that ambiguity in the instructions regarding any limiting constructions of an aggravating circumstance violated Smith v. Maryland, 108 S. Ct. 1860 (1988). The court ruled that error under Maynard v. Cartwrisht and Smith could not be found to be harmless beyond a reasonable doubt.

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

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

> Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically asserted that the challenged provision fails adequately to inform juries what they must

> find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman V. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L.Ed.2d (1972).

The striking of this aggravating factor requires resentencing. Schafer, supra. Id. The **"harm"** before the jury is plain -- a jury's capital sentencing decision, after all, is not a mechanical counting of aggravators and involves a great deal more than that. The error denied Mr. Smith an individualized and reliable capital sentencing determination. Knight V. Dusser, 863 F.2d 705, 710 (11th Cir. 1989).

Under Witt v. State, 387 So. 2d 922 (Fla.), cert. denied, 449 U.S. 1067 (1980), Cartwrisht represents a fundamental change in law, that in the interests of fairness requires the decision to be given retroactive application. The errors committed here cannot be found to be harmless beyond a reasonable doubt. There was mitigating evidence before the jury which could have caused a different balance to be struck had this aggravating circumstances not been found and weighed against the mitigation. Habeas corpus relief is warranted under Hitchcock, Cartwrisht and the eighth amendment. A new jury sentencing proceeding must be ordered.

This error undermined the reliability of the jury's sentencing determination and prevented the jury from assessing the full panoply of mitigation presented by Mr. Smith. For each of the reasons discussed above the Court should vacate Mr. Smith's unconstitutional sentence of death. This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Smith's death sentence. Accordingly, habeas relief must be accorded now.

CLAIM VII

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

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

Florida has adopted a statutory scheme in which the "jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose the death penalty," Zant v. Stephens, 462 U.S. 862, 890 (1983), unlike the scheme at issue in Stephens, which did not require a weighing process. Thus, Stephens on its face is not controlling as to the significance of consideration of an improper aggravating circumstance by sentencers who do weigh aggravating against mitigating circumstances. Maynard v. Cartwrisht, 108 S. Ct. 1853 (1988), first held that the principle of Godfrey v. Georgia, 446 U.S. 420 (1980), applied to a state where the jury weighs the aggravating and mitigating circumstances found to exist. In Cartwrisht, the Supreme Court determined that error had occurred where the sentencing jury received no instructions regarding the limiting constructions of an aggravating circumstance.

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

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

(R. 1354-55).

The prosecutor argued that this aggravating circumstance applied because "[h]e was taking that TV set . . . for financial gain" (R. **1346).** This argument, however, was not in accord with the limiting construction of this aggravating circumstance.

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

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

fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Smith's death sentence. Accordingly, habeas relief must be accorded now.

CLAIM VIII

MR. SMITH'S RIGHT TO A RELIABLE CAPITAL SENTENCE WAS VIOLATED WHERE HIS SENTENCING JURY WAS IMPROPERLY INSTRUCTED AND DID NOT RECEIVE INSTRUCTIONS EXPLAINING THE LIMITING CONSTRUCTION OF THE PRIOR VIOLENT FELONY AGGRAVATING CIRCUMSTANCE.

This Court has held that, under Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), the sentencing jury must be correctly and accurately instructed as to mitigating circumstances. Under Maynard v. Cartwrisht, 108 S. Ct. 1883 (1988), the jury also must be instructed correctly and accurately regarding the aggravating circumstances to be weighed against the mitigation when the jury decides what sentence to recommend. In Mr. Smith's case, the jury was incorrectly instructed and did not receive instructions in accord with the limiting and narrowing construction of the prior violent felony aggravating factor adopted by the Florida Supreme Court.

Florida has adopted a statutory scheme in which the "jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose the death penalty," Zant v. Stephens, 462 U.S. 862, 890 (1983), unlike the scheme at issue in Stephens, which did not require a weighing process. Thus, Stephens on its face is not controlling as to the significance of consideration of an improper aggravating circumstance by sentencers who do weigh aggravating against mitigating circumstances. Mavnard v. Cartwrisht, 108 S. Ct. 1853 (1988), first held that the principle of Godfrev v. Georgia, 446 U.S. 420 (1980), applied to a state where the jury weighs the aggravating and mitigating circumstances found to exist. In Cartwrisht, the Supreme Court

determined that error had occurred where the sentencing jury received no instructions regarding the limiting constructions of an aggravating circumstance.

At the penalty phase, Mr. Smith's jury was instructed that whether "the Defendant has been previously convicted of another capital offense or of a felony involving the use of threat of violence to some person" was an aggravating circumstance (R. 1354). The jury was also instructed that sexual battery on a child was a capital felony (Id.). Mr. Smith had been convicted of sexual battery involving the same victim and same episode for which he had been convicted of first degree murder.

The prosecutor argued that Mr. Smith's contemporaneous conviction of sexual battery involving the same victim he had been convicted of murdering established the presence of this aggravating circumstance (R. 1345). However, in Wasko v. State, 505 So. 2d 1314 (Fla. 1987), this Court noted that "[c]ontemporaneous convictions prior to sentencing can qualify as previous convictions of violent felony and may be used as aggravating factors," only when the contemporaneous conviction involved either a different victim, or a different incident or transaction. 505 So. 2d at 1317. In Lamb v. State, 532 So. 2d 1051, 1053 (Fla. 1988), this Court reiterated this limitation on the prior-crime-of-violence aggravating circumstance: "[I]t is 'improper to aggravate for a prior conviction of a violent felony when the underlying felony is part of the single criminal episode against the single victim of the murder for which the defendant is being sentenced.'" Under this limitation, the prosecutor's argument that the jury should weigh this aggravating circumstance against the mitigating evidence was wrong and not corrected by the instructions. In Mr. Smith's case, the jury did not receive an instruction regarding this limiting construction of this aggravating circumstance. As a result, the penalty phase instruction on this aggravating circumstance "fail[ed] adequately

to inform [Mr. Smith's] jur[y] what [it] must find to impose the death penalty." Maynard v. Cartwright, 108 S. Ct. at 1858.

Mr. Smith's death sentence thus violates the eighth and fourteenth amendments. This error undermined the reliability of the jury's sentencing determination and prevented the jury from assessing the full panoply of mitigation presented by Mr. Smith. For each of the reasons discussed above the Court should vacate Mr. Smith's unconstitutional sentence of death. This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Smith's death sentence. Accordingly, habeas relief must be accorded now.

CLAIM IX

THE FLORIDA SUPREME COURT'S FAILURE TO REMAND FOR RESENTENCING AFTER STRIKING AN AGGRAVATING CIRCUMSTANCE ON DIRECT APPEAL DENIED MR. SMITH THE PROTECTIONS AFFORDED UNDER FLORIDA'S CAPITAL SENTENCING STATUTE, IN VIOLATION OF DUE PROCESS, EQUAL PROTECTION, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

A capital sentencing scheme is constitutional only to the extent that it is applied consistently to all capital defendants and eliminates any risk that death will be imposed in an arbitrary, capricious, or unreliable manner. See, e.g., Proffitt v. Florida, 428 U.S. 242 (1976). Mr. Smith was not afforded those protections, and thus was denied his due process, equal protection, and eighth and fourteenth amendment rights.

The trial court sentenced Mr. Smith to death on the basis of five aggravating circumstances (R. 1552-56). The court's order imposing the death sentence concludes: "sufficient Aggravating Circumstances exist" (R. 1560). Clearly, the trial court believed that the five aggravating circumstances the court found were "sufficient" to justify a death sentence.

However, on direct appeal, this Court invalidated the cold, calculated and premeditated aggravating circumstance because "[t]he evidence does not rise to the level of heightened

premeditation." Smith v. State, 515 So. 2d 182, 185 (Fla. 1987). This Court approved the trial court's other findings of aggravation and affirmed the death sentence. Id.

This Court's failure to reverse and remand for resentencing is in direct conflict with the court's own well-established standards. In Elledge v. State, 346 So. 2d 998, 1003 (Fla. 1977), the Court held that if improper aggravating circumstances are found, "then regardless of the existence of other unauthorized 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, Elledge, supra, or even when mitigation is not found and an aggravating factor is struck. Alvin v. State, 14 F.L.W. 457 (Fla. Sept. 14, 1989); Schafer v. State, 537 So. 2d 988 (Fla. 1989); Nibert v. State, 508 So. 2d 1 (Fla. 1987).

In Alvin, supra, the trial court found no mitigating circumstances and two aggravating circumstances. After invalidating one aggravating circumstance, this Court remanded for resentencing because "we are not convinced that the judge would have imposed the same sentence had he known of the invalidity of one of the two aggravating circumstances." 14 F.L.W. at 458.

The same is true in Mr. Smith's case, and the result should have been the same. In Mr. Smith's case, the trial court determined that five aggravating circumstances were "sufficient" to justify the sentence of death (R. 1560). Further, the trial court imposed death only after "weighing" the aggravating and mitigating circumstances and determining that mitigation did not "outweigh" aggravation (Id.). The court's order thus indicated that the court relied upon the five aggravating circumstances, weighed those factors against unspecified mitigating

circumstances, and found that mitigation did not outweigh aggravation. As in Alvin, supra, there is no way to know if the trial judge would have imposed death had he known of the invalidity of one of the five aggravating circumstances. As in Alvin, Schafer, Nibert, and Elledge, this Court should have remanded for resentencing so that the trial court could have reweighed aggravation and mitigation. This Court's failure to remand for resentencing deprived Mr. Smith 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).

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.

Adamson v. Ricketts, 865 F.2d 1011, 1036 (9th Cir. 1988)(in banc).[5]

In Florida, the trial court (jury and judge) is the only body authorized to weigh aggravating circumstances against

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[5]The United States Supreme Court has granted certiorari in Clemons v. Mississippi, 109 S. Ct. 3184 (1989), to consider the very questions at issue here: 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.

mitigating circumstances. In Mr. Smith's case, this Court unconstitutionally took over that function, contrary to its own precedent, which requires a trial judge to engage in a meaningful weighing of aggravating and mitigating circumstances before imposing a death sentence. **See**, e.g., Nibert v. State, 508 So. 2d 1 (Fla. 1987); Muehleman v. State, 503 So. 2d 310 (Fla. 1987); Van Roval v. State, 497 So. 2d 625 (Fla. 1986). For example, the court sets aside death sentences where findings of fact are issued long after the death sentence was imposed because in such circumstances, the court cannot know that "the trial court's imposition of the death sentence was based on a 'reasoned judgment' after weighing the aggravating and mitigating circumstances." Van Royal, 497 So. 2d at 629-30 (Ehrlich, J., concurring). In Patterson v. State, 513 So. 2d 1257 (Fla. 1987), the court observed that Nibert 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 emphasized that sentencing responsibility rests at the trial court level and 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." Rhodes v. State, 547 So. 2d 1201, (Fla. 1989).

Florida Supreme Court precedent thus clearly established that the trial court is the capital sentencer and that the trial court must reach a "reasoned judgment" based upon the trial court's weighing of aggravation and mitigation. In Mr. Smith's case, this Court undertook sentencing responsibility and thus denied Mr. Smith the protections afforded him under the Florida capital sentencing statute.

Moreover, this Court also usurped the jury's role in Florida capital sentencing. 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 v. Dugger, 844 F.2d 1446, 1452-54 (11th Cir. 1988)(in banc), representing the judgment of the community. Id. Thus, when error occurs before a Florida sentencing jury, resentencing before a new jury is required. Riley; Mann. Mr. Smith's jury was permitted to consider an aggravating circumstance which this Court later held was not properly considered. Thus, this Court should have remanded for resentencing before a new jury, rather than assuming (as it implicitly must have) that Mr. Smith's jury would still recommend death without the invalidated aggravating factors.

Under Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), a Florida capital jury is treated as a sentencer for eighth amendment purposes. Under Maynard v. Cartwrisht, 108 S. Ct. 1853 (1988), a sentencing jury must be properly instructed regarding the aggravation it may consider. Hitchcock and Cartwrisht are new law establishing that this claim is properly presented in these proceedings and establishing that Mr. Smith is entitled to relief.

This Court's failure to follow its own case law and remand for resentencing deprived Mr. Smith of his rights to due process and equal protection and violated the eighth and fourteenth amendments. This error undermined the reliability of the jury's sentencing determination and prevented the jury from assessing the full panoply of mitigation presented by Mr. Smith. For each of the reasons discussed above the Court should vacate Mr. Smith's unconstitutional sentence of death. This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Smith's death sentence. Accordingly, habeas relief must be accorded now.

CLAIM X

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

A capital sentencing jury must be:

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

State v. Dixon, 283 So. 2d 1 (Fla. 1973)(emphasis added). This straightforward standard was never applied at the penalty phase of Mr. Smith's capital proceedings. To the contrary, the burden was shifted to Mr. Smith on the question of whether he should live or die. In Hamblen v. Dugger, 546 So. 2d 1039 (Fla. 1989), a capital post-conviction action, this Court addressed the question of whether the standard employed shifted to the defendant the burden on the question of whether he should live or die. The Hamblen opinion reflects that claims such as the instant should be addressed on a case-by-case basis in capital post-conviction actions. Mr. Smith herein urges that the Court assess this significant issue in his case and, for the reasons set forth below, that the Court grant him the relief to which he can show his entitlement.

Shifting the burden to the defendant to establish that mitigating circumstances outweigh aggravating circumstances conflicts with the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), and Dixon, for such instructions unconstitutionally shift to the defendant the burden with regard to the ultimate question of whether he should live or die. In so instructing a capital sentencing jury, a court injects misleading and irrelevant

factors into the sentencing determination, thus violating Caldwell v. Mississippi, 472 U.S. 320 (1985), Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), and Maynard v. Cartwright, 108 S. Ct. 1853 (1988). Mr. Smith's jury was unconstitutionally instructed, as the record makes abundantly clear (See R. 1354). The court then employed this unconstitutional standard in imposing death (R. 1439).

At the penalty phase of trial, judicial instructions informed Mr. Smith's jury that death was the appropriate sentence unless "mitigating circumstances exist that outweigh the aggravating circumstances" (R. 1554). The trial judge then imposed death because "there are insufficient mitigating circumstances . . . to outweigh the aggravating circumstances" (R. 1439). Such a standard, which shifts to the defendant the burden of proving that life is the appropriate sentence, 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 jury's deliberations concerning the ultimate question of whether Mr. Smith should live or die. See Smith v. Murray, 106 S. Ct. 2661, 2668 (1986). No bars apply under such circumstances. Id. A writ of certiorari has been granted to resolve the split of authority between Adamson and the Arizona Supreme Court. Walton v. Arizona, 46 Cr.L. 3014 (October 2, 1989).

The jury instructions and the standard relied upon by the judge here employed a presumption of death which shifted to Mr. Smith the burden of proving that life was the appropriate sentence. As a result, Mr. Smith's capital sentencing proceeding was rendered fundamentally unfair and unreliable.

In Adamson, 865 F.2d at 1041-44, the Ninth Circuit held that because the Arizona death penalty statute "imposes a presumption of death on the defendant," the statute deprives a capital

defendant of his eighth amendment rights to an individualized and reliable sentencing determination. What occurred in Adamson is precisely what occurred in Mr. Smith's case. See also Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988). The instructions, and the standard upon which the sentencing court based its own determination, violated the eighth and fourteenth amendments. The burden of proof was shifted to Mr. Smith 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. Smith's rights to a fundamentally fair and reliable capital sentencing determination, i.e., one which is not infected by arbitrary, misleading and/or capricious factors. See Adamson, supra; Jackson, supra. The unconstitutional presumption inhibited the jury's ability to "fully" assess mitigation, in violation of Penry v. Lynaugh, 109 S. Ct. 2935 (1989), a decision which was declared, on its face, to apply retroactively to cases on collateral review.

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

This error cannot be deemed harmless. In Mills v. Maryland, 108 S. Ct. 1860 (1988), the court concluded that, in the capital

sentencing context, the Constitution requires resentencing unless a reviewing court can rule out the possibility that the jury's verdict rested on an improper ground. Id. 108 S. Ct. at 1866-67. Under Hitchcock, Florida juries must be instructed in accord with the eighth amendment principles. Hitchcock constituted a change in law in this regard. The constitutionally mandated standard demonstrates that relief is warranted in Mr. Smith's case.

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

Under the instructions and standard employed in Mr. Smith's case, once one of the statutory aggravating circumstances was found, by definition sufficient aggravation existed to impose death. The jury was then directed to consider whether mitigation had been presented which outweighed the aggravation. Thus, under the standard employed in Mr. Smith's case, the finding of an aggravating circumstance operated to impose upon the defendant the burden of production and the burden of persuasion of the existence of mitigation, and the burden of persuasion as to whether the mitigation outweighs the aggravation. Where as here, the prosecution contends that the jury finding of guilt

establishes the "in the course of a felony" aggravating circumstance, a presumption of death automatically arises. Certainly, the standard employed here was more restrictive of the jury's ability to conduct an individualized sentencing than the Pennsylvania statute at issue in Blystone. See also, Boyde v. California, 109 S. Ct. 2447 (Cert. granted June 5, 1989).

The effects feared in Adamson and Mills are precisely the effects resulting from the burden-shifting instruction given in Mr. Smith's case. In being instructed that mitigating circumstances must outweigh aggravating circumstances before it could recommend life, the jury was effectively told that once aggravating circumstances were established, it need not consider mitigating circumstances unless those mitigating circumstances outweighed the aggravating circumstances. This jury was thus constrained in its consideration of mitigating evidence, Hitchcock, 107 S. Ct. 1821 (1987), and from evaluating the "totality of the circumstances," Dixon v. State, 283 So. 2d 1, 10 (Fla. 1973), in determining the appropriate penalty. The jury was not allowed to make a "reasoned moral response" to the issues at Mr. Smith's sentencing or to "fully" consider mitigation, Penry v. Lynaugh, 109 S. Ct. 2934, 2951 (1989). There is a "substantial possibility" that this understanding of the jury instructions resulted in a death recommendation despite factors calling for life. Mills, supra. The death sentence in this case is in direct conflict with Adamson, Mills, and Penry, supra. This error "perverted" the jury's deliberations concerning the ultimate question of whether Mr. Smith should live or die. Smith v. Murray, 106 S. Ct. at 2668.

Under Hitchcock and its progeny, no bars apply, because Hitchcock, decided after Mr. Smith's trial, worked a change in law. This error undermined the reliability of the jury's sentencing determination and prevented the jury from assessing the full panoply of mitigation presented by Mr. Smith. For each

of the reasons discussed above the Court should vacate Mr. Smith's unconstitutional sentence of death. This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Smith's death sentence. Accordingly, habeas relief must be accorded now.

CLAIM XI

MR. SMITH'S DEATH SENTENCE RESTS UPON AN UNCONSTITUTIONAL AUTOMATIC AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF MAYNARD V. CARTWRIGHT, LOWENFIELD V. PHELPS, HITCHCOCK V. DUGGER, AND THE EIGHTH AMENDMENT.

In Florida, the "usual form" of indictment for first degree murder under sec. 783.04, Fla. Stat. (1987), is to "charge[e] murder . . . committed with a premeditated design to effect the death of the victim." Barton v. State, 193 So. 2d 618, 624 (Fla. 2d DCA 1968).

Mr. Smith was charged with first-degree murder in the "usual form": murder "from a premeditated design to effect the death of" the victim in violation of Florida Statute 782.04. An indictment such as this which "tracked the statute" charges felony murder: section 782.04 is the felony murder statute in Florida. Lightbourne v. State, 438 So. 2d 380, 384 (Fla. 1983).

In this case, it is likely that Mr. Smith was convicted on the basis of felony murder. The State argued for a conviction based on the felonies charged, and argued that the victim was killed in the course of a felony. The jury received instructions on premeditated and felony murder. It returned a general verdict of guilt on first-degree murder.

If felony murder was the basis of Mr. Smith's conviction, then the subsequent death sentence is unlawful. Cf. Strombera v. California, 283 U.S. 359 (1931). This is because the death penalty in this case was predicated upon an unreliable automatic finding of a statutory aggravating circumstance -- the felony murder finding that formed the basis for conviction. Automatic

death penalties upon conviction of first-degree murder violate the eighth and fourteenth amendments, as was recently stated by the United States Supreme Court in Sumner v. Shuman, 107 S. Ct. 2716 (1987). In this case, felony murder was found as a statutory aggravating circumstance. The murder was committed while the defendant was engaged, or was an accomplice in the commission of a sexual battery and kidnapping (R. 1792). The sentencing jury was instructed that it was entitled automatically to return a death sentence upon its finding of guilt of first degree (felony) murder because the underlying felony justified a death sentence. Every felony-murder would involve, by necessity, the finding of a statutory aggravating circumstance, a fact which, under the particulars of Florida's statute, violates the eighth amendment: an automatic aggravating circumstance is created which does not narrow ("[A]n aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty . . . ." Zant v. Stephens, 462 U.S. 862, 876 (1983)). "[L]limiting [] the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." Maynard v. Cartwrisht, 108 S. Ct. 1853, 1858 (1988). In short, if Mr. Smith was convicted for felony murder, he then faced statutory aggravation for felony murder. This is too circular a system to meaningfully differentiate between who should live and who should die, and it violates the eighth and fourteenth amendments.

The United States Supreme Court recently addressed a similar challenge in Lowenfield v. Phelps, 108 S. Ct. 546 (1988), and the discussion in Lowenfield illustrates the constitutional shortcoming in Mr. Smith's capital sentencing proceeding. In Lowenfield, petitioner was convicted of first degree murder under Louisiana law, which required a finding that he had "a specific intent to kill to inflict great bodily harm upon more than one

person," which was the exact aggravating circumstance used to sentence him to death. The United States Supreme Court found that the definition of first degree murder under Louisiana law provided the narrowing necessary for eighth amendment reliability:

> To pass constitutional muster, a capital-sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1983); cf. Gregg v. Georgia, 428 U.S. 153 (1976). Under the capital sentencing laws of most States, the jury is required during the sentencing phase to find at least one aggravating circumstance before it may impose death. Id., at 162-164 (reviewing Georgia sentencing scheme); Proffitt v. Florida, 428 U.S. 242, 247-250 (1976) (reviewing Florida sentencing scheme). By doing so, the jury narrows the class of persons eligible for the death penalty accordins to an objective legislative definition. Zant, supra, at 878 ("[S]statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty").
>
> * * *
>
> The use of "aggravating circumstances," is not an end in itself, but a means of genuinely narrowing the class of death eligible persons and thereby channeling the jury's discretion. We see no reason why this narrowins function may not be performed by jury findings at either the sentencing phase of the trial or the guilt phase. Our opinion in Jurek v. Texas, 428 U.S. 262 (1976), establishes this point. The Jurek Court upheld the Texas death penalty statute, which, like the Louisiana statute, narrowly defined the categories of murders for which a death sentence could be imposed. If the jury found the defendant guilty of such a murder, it was required to impose death so long as it found beyond a reasonable doubt that the defendant's acts were deliberate, the defendant would probably constitute a continuing threat to society, and, if raised by the evidence, the defendant's acts were an unreasonable response to the victim's provocation. Id., at 269. We concluded that the latter three elements allowed the jury to consider the mitigating aspects of the crime and the unique characteristics of the perpetrator, and therefore sufficiently provided for jury discretion. Id., at 271-

274. But the Court noted the difference between the Texas scheme, on the one hand, and the Georgia and Florida schemes discussed in the cases of Gresq, supra, and Proffitt, supra:

> "While Texas has not adopted a list of statutory aggravating circumstances the existence of which can justify the imposition of the death penalty as have Georgia and Florida, its action in narrowins the categories of murders for which a death sentence mav 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 bv one or more of their statutory aggravating circumstances . . . . Thus, in essence, the Texas statute requires that the jury find the existence of a statutory aggravating circumstance before the death penalty may be imposed. So far as consideration of aggravating circumstances is concerned, therefore, the principal difference between Texas and the other two States is that the death penalty is an available sentencing option--even potentially--for a smaller class of murders in Texas." **428** U.S., at **270-271** (citations omitted).
>
> It seems clear to us from this discussion that the narrowing function required for a regime of capital punishment may be provided in either of these two ways: The legislature may itself narrow the definition of capital offenses, as Texas and Louisiana have done, so that the jury finding of guilt responds to this concern, or the legislature mav more broadly define capital offenses and provide for narrowins bv jury findings of aggravating circumstances at the penalty phase. See also Zant, supra, at **876,** n. **13,** discussing Jurek and concluding, **"in** Texas, aggravating and mitigating circumstances were not considered at the same stage of the criminal prosecution."

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

Thus, if narrowing occurs either in the conviction stage (as in Louisiana and Texas) **or** at the sentencing phase (as in Florida and Georgia), then the statute may satisfy the eighth amendment as written. However, as applied, the operation of Florida law in this case did not provide constitutionally adequate narrowing at either phase, because conviction **and** aggravation were predicated upon a non-legitimate narrower -- felony-murder.

The conviction-narrower state schemes require something more than felony-murder at guilt/innocence. Louisiana requires intent to kill. Texas requires intentional and knowing murders. This narrows. Here, however, Florida allows a first-degree murder conviction based upon a finding that does not legitimately narrow -- felony murder. Mr. Smith's conviction and sentence required only a finding that he committed a felony during which a killing occurred, and no finding of intent was necessary.

Clearly, "the possibility of bloodshed is inherent in the commission of any violent felony, and . . . is **foreseen,"** Tison v. Arizona, 107 S. Ct. 1676, 1684 (1987), but armed robbery, for example, is nevertheless an offense "for which the death penalty is plainly excessive." Id. at 1683. The same is true of burglary, as Florida cases have made clear. With felony-murder as the narrower in this case, neither the conviction nor the statutory aggravating circumstance meet constitutional requirements. There is no constitutionally valid criteria for distinguishing Mr. Smith's sentence from those who have committed felony (or, more importantly, premeditated) murder and not received death.

According to this Court the aggravating circumstance of **"in** the course of a felony" is not sufficient by itself to justify a death sentence in a felony-murder case. Rembert v. State, 445 So. 2d 337, 340 (Fla. 1984)(no way of distinguishing other felony murder cases in which defendants "receive a less severe sentence"); Proffitt v. State, 510 So. 2d 896, 898 (Fla. 1987)("To hold, as argued by the State, that these circumstances justify the death penalty would mean that every murder during the course of a burglary justifies the imposition of the death penalty"). However, here, the jury was instructed on this aggravating circumstance and told that it was sufficient for a recommendation of death unless the mitigating circumstances outweigh the aggravating circumstance. The jury did not receive

an instruction explaining the limitation contained in Rembert and Proffitt. There is no way at this juncture to know whether the jury relied on this aggravating circumstance in returning its death recommendation. In Maynard v. Cartwright, 108 S. Ct. at 1858, the Supreme Court held that the jury instructions must "adequately inform juries what they must find to impose the death penalty." Hitchcock v. Dusser, 107 S. Ct. 1821 (1987), and its progeny require Florida sentencing juries to be accurately and correctly instructed in compliance with the eighth amendment. Under Mills v. Maryland, 108 S. Ct. 1860, 1870 (1988), "[t]he possibility that a single juror" read the instructions in an unconstitutional fashion requires a resentencing.

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

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

Presnell, 439 U.S. at 18.

Moreover, Hitchcock and its progeny, according to this Court, was a change in law which excuses procedural default of

penalty phase jury instructional error. Mikenas v. Dugger, 519 So. 2d 601 (Fla. 1988).

Surely the jury should have been informed that the automatic aggravating circumstance alone would render a death sentence violative of the eighth amendment. Maynard v. Cartwright, 108 S. Ct. 1853, 1858 (1988); Zant v. Stephens, 462 U.S. 862, 876 (1983); Rembert v. State, 445 So. 2d 337, 340 (Fla. 1984). This error undermined the reliability of the jury's sentencing determination and prevented the jury from assessing the full panoply of mitigation presented by Mr. Smith. For each of the reasons discussed above the Court should vacate Mr. Smith's unconstitutional sentence of death. This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Smith's death sentence. Accordingly, habeas relief must be accorded now.

CLAIM XII

GOVERNMENT INTERFERENCE DEPRIVED MR. SMITH OF THE EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

After the State requested and obtained a continuance of trial, Mr. Smith invoked his right to demand a speedy trial (R. 108). On the day trial was to begin, defense counsel announced that he had just received a new witness list from the State listing four or five witnesses defense counsel had not known about before (R. 115, 131).

Defense counsel requested a hearing on the State's discovery violation. See Richardson v. State, 437 So. 2d 1091 (Fla. 1983). The State objected, noting that the defense had demanded a speedy trial (R. 133). Defense counsel responded that when he had made the speedy trial demand (over a month earlier), he was ready to go to trial based on the State's evidence then, but that the State was now producing new evidence (R. 135). The court ruled that the only question was whether defense counsel needed to

depose the witnesses during trial (R. 137).

Later, the State also relied upon the defense speedy trial demand to discourage defense counsel from requesting a competency hearing. During voir dire, defense counsel pointed out that Mr. Smith was acting irrationally and that defense counsel could not understand Mr. Smith (R. 365). The prosecutor responded, "If we have to address [competency] again, . . . that is clearly going to put a hold on any speedy trial" (Id.). The proceedings continued without an inquiry into Mr. Smith's competency.

The State's actions and trial court's rulings deprived Mr. Smith of the effective assistance of counsel. The sixth and fourteenth amendment right to the effective assistance of counsel is violated when the government "interferes . . . with the ability of counsel to make independent decisions about how to conduct the defense." Strickland v. Washinston, 466 U.S. 668, 686 (1984); see also United States v. Cronic, 466 U.S. 648 (1984); Brown v. Allen, 344 U.S. 443, 486 (1953)(state interference with criminal defendant's efforts to vindicate federal constitutional rights), cited in Murray v. Carrier, 106 S. Ct. 2639, 2646 (1986). Thus, a defendant is deprived of the right to the effective assistance of counsel by a court order barring attorney-client consultation during an overnight trial recess, Geders v. United States, 425 U.S. 80 (1976); by court-ordered representation of multiple defendants, Holloway v. Arkansas, 435 U.S. 474 (1979); by a court's refusal to allow summation at a bench trial, Herring v. New York, 422 U.S. 853 (1975); by a state statute requiring a criminal defendant who wishes to testify on his own behalf to do so prior to the presentation of any and all other defense testimony, Brooks v. Tennessee, 406 U.S. 605 (1972); and by a state statute restricting a criminal defendant's right to testify on his own behalf. Fersuson v. Georgia, 365 U.S. 570 (1961).

The Supreme Court recently explained this rule of law in some detail:

> In passing on such claims of "'actual ineffectiveness,' id., at 686, 104 S.Ct. at 2064, the "benchmark . . . must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.'* Ibid. More specifically, a defendant must show "that counsel's performance was deficient" and that "the deficient performance prejudiced the defense." Id., at 687, 104 S.Ct., at 2064. Prior to our consideration of the standard for measuring the quality of the lawyer's work, however, we had expressly noted that direct aovernmental interference with the right to counsel is a different matter. Thus, we wrote:
>
> > Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense. See e.g. Geders v. United States, 425 U.S. 80 [96 S.Ct. 1330, 47 L.Ed.2d 592](1976)(bar on attorney-client consultation during the overnight recess); Herring v. New York, 422 U.S. 853 [95 S.Ct.2550, 45 L.Ed.2d 593](1975)(bar on summation at bench trial); Brooks v. Tennessee, 406 U.S. 605, 612,613 [92 S.Ct. 1891, 1895, 32 L.Ed.2d 358](1972)(requirement that defendant be first defense witness); Fersuson v. Georgia, 365 U.S. 570, 593-596 [81 S.Ct. 756, 768-770, 5 L.Ed.2d 783](1961)(bar on direct examination of defendant). Counsel, however, can also deprive a defendant of the right to effective assistance, simply by failing to render 'adequate legal assistance,' Cuyler v. Sullivan, 446 U.S. [335] at 344 [100 S.Ct. 1708, at 1716, 64 L.Ed.2d 333 (1980)]. Id., at 345-50 [100 S.Ct., at 1716-1719](actual conflict of interest adversely affecting lawyer's performance renders assistance ineffective)." Id., at 686, 104 S.Ct., at 2063-2064.

Our citation of Geders in this context was intended to make clear that "[a]ctual or constructive denial of the assistance of counsel altogether," Strickland v. Washinston, supra, at 692, 104 S.Ct., at 1063-2064, is not subject to the kind of prejudice analysis that is appropriate in determining whether the quality of a lawyer's performance itself has been constitutionally ineffective. See Penson v. Ohio, 488 U.S. ___, ___, 109 S.Ct. 346, ___, ___ L.Ed.2d ___ (1988); United States v. Cronic, supra, 466

U.S., at 659, and n.25, 104 S.Ct., at 2047, and n.25.

Perry v. Leeke, 109 S. Ct. 594, 599-600 (1989)(emphasis added).

In United States v. Cronic, 466 U.S. 648 (1984), the United States Supreme Court explained that the purpose of the right to counsel was to assure a fair adversarial testing.

> Thus, the adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an advocate." Anders v. California, 386 U.S. 738, 743, 87 S.Ct. 1396, 1399, 18 L.Ed.2d 493 (1967). The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted--even if defense counsel may have made demonstrable errors--the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated. As Judge Wyzanski has written: "While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators." United State ex. re. Williams v. Twomey, 510 F.2d 634, 640 (CA7), cert. denied sub nom. Sielaff v. Williams, 423 U.S. 876, 96 S.Ct. 148, 46 L.Ed.2d 109 (1975).

466 U.S. at 656-57 (footnotes omitted)(emphasis added).

The Court noted that, despite counsel's best efforts, there may be circumstances where counsel could not insure a fair adversarial testing, and thus where counsel's performance is rendered ineffective:

> Most obvious, of course, is the complete denial of counsel. The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical state of his trial. Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment riahts that makes the adversary process itself presumptively unreliable. No specific showing of prejudice was required in Davis v. Alaska, 415 U.S. 308, 94 S.Ct 1105, 39 L.Ed.2d 347 (1974), because the petitioner had been "denied the right of effective cross-examination" which "'would be constitutional error of the first magnitude

> and no amount of showing of want of prejudice would cure it.'" Id., at 318, 94 S.Ct., at 1111 (citing Smith v. Illinois, 390 U.S. 129, 131, 88 S.Ct. 748, 749, 19 L.Ed L.Ed.2d 956 (1968), and Brookhart v. Janis, 384 U.S. 1, 3, 86 S.Ct. 1245, 1246, 16 L.Ed.2d 314 (1966).
>
> Circumstances of that magnitude may be present on some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.

446 U.S. at 659-60 (footnotes omitted)(emphasis added).

Here also, defense counsel was rendered ineffective by the trial court's rulings. There was no adversarial testing. Counsel's performance was rendered ineffective and deficient, against counsel's own wishes. Trial counsel was thus rendered per se ineffective, Cronic, supra, when the "government", i.e. the prosecutor and judge, fundamentally interfered with counsel's ability to prepare and make independent decisions.

In situations such as the instant, where the "surrounding circumstances made it so unlikely that any lawyer could provide effective assistance," prejudice is presumed. See Cronic, 104 S. Ct. at 662, citing Powell v. Alabama, 287 U.S. 45 (1932); see also Strickland, 466 U.S. at 692; Cuyler v. Sullivan, 446 U.S. at 350. Here, the "surrounding circumstances," i.e., the court's erroneous and unconstitutional rulings, prevented trial counsel from preparing and making independent decisions. Counsel was forced to choose between Mr. Smith's speedy trial rights and his right to effective assistance.

Mr. Smith, however, can demonstrate substantial prejudice: one of the State witnesses announced the day trial began was Jack Lampley, who identified Mr. Smith as the man who tried to sell a television set four days after the offense. This was certainly crucial evidence, for identifications and circumstantial evidence were the entire State's case. Because of the trial court's

ruling, defense counsel was unable to prepare for this witness' testimony. Mr. Smith was deprived of his sixth and fourteenth amendment rights to the effective assistance of counsel by the trial court's unconstitutional actions, to his substantial and demonstrable prejudice, and he is thus entitled to the relief he seeks. As a result of the trial court's actions, Mr. Smith's sentence of death is unreliable, and thus the eighth amendment was violated as well. Relief is proper.

CLAIM XIII

THE PROSECUTOR'S CLOSING ARGUMENT AT THE GUILT PHASE SHIFTED THE BURDEN OF PROOF TO MR. SMITH, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

The State's case against Mr. Smith was entirely circumstantial. No physical evidence whatsoever linked Mr. Smith to the scene or the victim's death -- no fingerprints, no fiber evidence, no serology evidence.

Perhaps because of this dearth of evidence, the State put on extensive testimony and entered innumerable exhibits which established nothing. The State put on fingerprint technicians, although no fingerprints were connected to Mr. Smith; the State put on a forensic serologist, although no serology evidence was connected to Mr. Smith.

In closing argument at the guilt phase, the prosecutor argued:

> Serological; Mr. Washor argues that the absence of blood typing back to the Defendant is significant and that should be a doubt in the case. That is a wash, too. That is the Defendant doesn't get the windfall from that.
>
> * * *
>
> So I submit to you, ladies and gentlemen, the State puts that on so you have the benefit of the whole investigation, **but** it surely doesn't go to show anything about the Defendant's innocence.

(R. 1146-47)(emphasis added).

The State's argument effectively shifted the burden to Mr. Smith to establish his innocence, indicating that even if the evidence did not connect Mr. Smith to the crime, it was somehow meaningful evidence because it did not prove Mr. Smith's innocence.

The prosecutor's argument thus relieved the State of its burden of proof and shifted that burden to Mr. Smith. This violates the Constitution. See In re Winship, 397 U.S. 358 (1970); Mullaney v. Wilbur, 421 U.S. 794 (1975). This argument also deprived Mr. Smith of his right to a reliable guilt-innocence verdict in a capital trial. Beck v. Alabama, 447 U.S. 625 (1980).

This error undermined the reliability of the jury's guilt-innocence and sentencing determination. For each of the reasons discussed above the Court should vacate Mr. Smith's unconstitutional conviction and sentence of death. This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Smith's conviction and death sentence. Accordingly, habeas relief must be accorded now.

CLAIM XIV

THE STATE'S PRESENTATION OF TOTALLY IRRELEVANT EVIDENCE AT GUILT-INNOCENCE DEPRIVED MR. SMITH OF HIS RIGHT TO DUE PROCESS AND VIOLATED THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

The State's case was entirely circumstantial. No physical evidence connected Mr. Smith to the offense. In spite of this lack of evidence -- or because of it -- the State put on extensive testimony and entered innumerable exhibits which established nothing.

Relevant evidence is admissible. Fla. Stat. sec. 90.402. Relevant evidence is "evidence tending to prove or disprove a material fact." Fla. Stat. sec. 90.401. See also Fed. R. Ev. 041.

The evidence which formed a large part of the State's presentation in Mr. Smith's case was not "relevant". The evidence did not prove or disprove any material facts. Compare Johnson v. Mississippi, 108 S. Ct. 1981, 1989 (1988)(White, J., concurring).

The State's presentation thus deprived Mr. Smith of a fair trial, in violation of the Due Process Clause, and of a reliable guilt-innocence determination in a capital trial. Beck v. Alabama, 447 U.S. 625 (1980). Habeas corpus relief is proper.

This error undermined the reliability of the jury's guilt-innocence and sentencing determination and prevented the jury from assessing the full panoply of mitigation presented by Mr. Smith. For each of the reasons discussed above the Court should vacate Mr. Smith's unconstitutional conviction and sentence of death. This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Smith's conviction and death sentence. Accordingly, habeas relief must be accorded now.

CLAIM XV

MR. SMITH'S CONVICTION VIOLATES DUE PROCESS OF LAW BECAUSE THE EVIDENCE WAS INSUFFICIENT TO CONVINCE ANY RATIONAL TRIER OF FACT OF HIS GUILT BEYOND REASONABLE DOUBT.

This claim was vigorously urged on direct appeal, but the Court declined to reverse. Smith v. State, 515 So. 2d 182, 184 (Fla. 1987). It is presented herein again because the evidence indeed was insufficient, and fundamental fairness and the interests of justice require relief.

The State had no physical evidence connecting Mr. Smith to the offense. The State's case was based entirely on the very shaky, unreliable identification testimony of three witnesses. These witnesses had all only seen the suspect in the dark, provided conflicting and uncertain descriptions, and made identifications under circumstances creating a strong likelihood

of misidentification. The bulk of the rest of the State's evidence was irrelevant, establishing nothing regarding Mr. Smith's culpability. Under these circumstances, the State's entirely circumstantial case was not inconsistent with a reasonable hypothesis of innocence.

It violates due process of law to convict an individual when no rational finder of fact could find him or her to be guilty beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979). If no rational finder of fact could have found Mr. Smith guilty of first-degree murder beyond a reasonable doubt, then his first-degree murder conviction must be reversed. The standard for weighing the constitutional sufficiency of the evidence is set forth in Jackson v. Virginia, 433 U.S. 307, 324 (1979):

> [T]he applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt.

This Court must view the evidence in the light most favorable to the prosecution. "If the reviewing court is convinced by the evidence only that the defendant is more likely than not guilty, then the evidence is not sufficient for conviction." Cosby v. Jones, 682 F.2d 1373, 1379 (11th Cir. 1982). See also County Court of Ulster County v. Allen, 442 U.S. 140 (1979). "[I]f the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime chargged, then a reasonable jury must necessarily entertain reasonable doubt." Cosby, 682 F.2d at 1383.

Mr. Smith's jury deliberated for 8 1/2 hours, indicating that there were strong doubts about the State's case. The evidence was insufficient to support conviction, and Mr. Smith's conviction thus violates due process. Relief is proper.

CONCLUSION AND RELIEF SOUGHT

The claims discussed above raise matters of fundamental error and/or are predicated upon significant changes in the law. Because the forgoing claims present substantial constitional questions which go to the heart of the fundamental fairness and reliability of Mr. Smith's capital conviction and sentence of death, and of this Court's appellate review, they should be determined on their merits. The relief sought herein should be granted.

Many of the claims set out above involve, inter alia, ineffective assistance of appellate counsel, as well as fundamental error (Claims I, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV). The appellate level right to counsel also comprehends the sixth amendment right to effective assistance of counsel. Evitts v. Lucey, 105 S. Ct. 830 (1985). Appellate counsel must function as "an active **advocate,"** Anders v. California, 386 U.S. 738, 744, 745 (1967), providing his client the expert professional . . . assistance . . . necessary in a system governed by complex laws and rules and procedures. . . ." Lucey, 105 S. Ct. at 835 n.6.

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

Moreover, as this Court has explained, the Court's "independent review" of the record in capital cases neither can cure nor undo the harm caused by an appellate attorney's deficiencies. Wilson v. Wainwrisht, 474 So. 2d 1162, 1165 (Fla.

1985). "The basic requirement of due process," therefore, "is that a defendant be represented in court, at every level, by an advocate who represents his client zealously within the bounds of the law." Id. at 1164 (emphasis supplied).

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

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

WHEREFORE, Frank Lee Smith through counsel, respectfully urges that the Court issue its writ of habeas corpus and vacate his unconstitutional conviction and sentence of death. Since this action also presents question of fact, Mr. Smith urges that the Court relinquish jurisdiction to the trial court, or assign the case to an appropriate authority, for the resolution of the evidentiary factual question attendant to his claims, including, inter alia, questions regarding counsel's deficient performance and prejudice.

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail, first class, postage prepaid to Ceceila Terenzio, Assistant Attorney General, Department of Legal Affairs, Palm Beach County Regional Service Center, 111 Georgia Avenue, Room **204**, West Palm Beach, FL **33401**, this 17th day of November, **1989**.


Attorney