IN THE SUPREME COURT OF FLORIDA

NO. 75039

FILED

NOV 18 1988

CLERK, SUPREME COURT
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LLOYD DUEST,

Petitioner,

v.

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

Respondent.

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

LARRY HELM SPALDING
Capital Collateral Representative
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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. Wainwright, 474 So. 2d 1163 (Fla. 1985); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); see also, Johnson (Paul) v. Wainwright, 498 So. 2d 938 (Fla. 1987); cf. Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for petitioner to raise the claims presented in this petition. **See**, e.g., Downs v. Dusser, 514 So. 2d 1069 (Fla. 1987); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); Wilson, supra.

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

The petition pleads claims involving fundamental constitutional error. See Dallas v. Wainwright, 175 So. 2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So. 2d 362 (Fla. 1984). The petition includes claims predicated on significant, fundamental, and retroactive changes in constitutional law. See, e.g., Jackson v. Dugger, 549 So. 2d 1197 (Fla. 1989); Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987); Tafero v. Wainwright, 459 So. 2d 1034, 1035 (Fla. 1984).

The petition also pleads claims of ineffective assistance of counsel on appeal. See Knight v. State, 394 So. 2d 997, 999 (Fla. 1981); Wilson v. Wainwright, supra; Johnson v. Wainwright, supra. These and other reasons demonstrate that the Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action. As the petition shows, habeas corpus relief would be proper on the basis of the claims herein presented.

B. REQUEST FOR STAY OF EXECUTION

Mr. Duest'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., Jennings V. Dugger (No.

74,926 Fla., Oct. 26, 1989); Roberts v. Dugger (No. 74,788, Fla., Oct. 26, 1989).

This is Mr. Duest'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. DUEST'S SENTENCE OF DEATH WAS BASED UPON AN UNCONSTITUTIONALLY OBTAINED PRIOR CONVICTION AND THEREFORE ALSO ON MISINFORMATION OF CONSTITUTIONAL MAGNITUDE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

In United States v. Tucker, 404 U.S. 443, 447-49 (1972), the Supreme Court held that a sentence in a noncapital case must be set aside as a violation of due process if the trial court relied even in part upon "misinformation of constitutional magnitude." As articulated in Zant v. Stephens, 462 U.S. 879 (1983) this rule is absolute and does not depend upon the presence or absence of other aggravating or mitigating factors for its application. Reconsideration of the sentence is required. See Tucker, 404 U.S. at 448-449; Lipscomb v. Clark, 468 F. 2d 132, 1323 (5th Cir. 1972).

The United States Supreme Court in Johnson v. **Mississippi**, 108 S. Ct. 1981, 1986-87 (1988), recently held:

> The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special **"'need** for reliability in the determination that death is the appropriate punishment'" in any capital case. See Gardner v. Florida, 430 U.S. 349, 363-364, 97 S. Ct. 1197, 1207-1208, 51 **L.Ed.2d** 393 (1977) (quoting Woodson v. North Carolina, 428 U.S. 280, 305, 96 S. Ct. 2978, 2991-92, 49 L.Ed.29 944 (1976)) (White, J., concurring in judgment). Although we have acknowledged that "there can be 'no perfect procedure for deciding in which cases governmental authority should be used to impose **death,'"** we have also made it clear that such decisions cannot be predicated on mere **"caprice"** or on "factors that are constitutionally impermissible or totally irrelevant to the sentencing **process."** Zant v. Stephens, 462 U.S. 862, 884-885, 887, n.24, 103 S. Ct. 2733, 2747, 2748, no.24, 77 L.Ed.2d 235 (1983). The question in this case is whether allowing petitioner's death sentence to stand although based in part on a vacated conviction violates this principle.
>
> In its opinion the Mississippi Supreme Court drew no distinction between petitioner's 1963 conviction for assault and the underlying conduct that gave rise to that conviction. In Mississippi's sentencing hearing following petitioner's conviction for murder, however, the prosecutor did not introduce any evidence concerning the alleged assault itself; the only evidence relating to the assault consisted of a document establishing that petitioner had been convicted of that offense in 1963. Since that conviction has been reversed, unless and until petitioner should be retried, he must be presumed innocent of that charge. Indeed, even without such a presumption, the reversal of the conviction deprives the prosecutor's sole piece of documentary evidence of any relevance to Mississippi's sentencing decision.
>
> Contrary to the opinion expressed by the Mississippi Supreme Court, the fact that petitioner served time in prison pursuant to an invalid conviction does not make the conviction itself relevant to the sentencing decision. The possible relevance of the conduct which gave rise to the assault charge is of no significance here because the jury was not presented with any evidence describing that conduct-the document submitted to the jury proved only the facts of conviction and confinement, nothing more. That petitioner was imprisoned is not proof that he was guilty of the offense; indeed it

would be perverse to treat the imposition of punishment pursuant to an invalid conviction as an aggravating circumstance.

It is apparent that the New York conviction provided no legitimate support for the death sentence imposed on petitioner. It is equally apparent that the use of that conviction in the sentencing hearing was prejudicial. The prosecutor repeatedly urged the jury to give it weight in connection with its assigned task of balancing aggravating and mitigating circumstances "one against the other." 13 Record 2270; App. 17; see 13 Record 2282-2287; App. 26-30. Even without that express argument, there would be a possibility that the jury's belief that petitioner had been convicted of a prior felony would be "decisive" in the "choice between a life sentence and a death sentence." Gardner v. Florida, 430 U.S., at 359, 97 S.Ct., at 1205 (plurality opinion).

The Court in Johnson concluded:

. . . the error here extended beyond the mere invalidation of an aggravating circumstance supported by evidence that was otherwise admissible. Here the jury was allowed to consider evidence that has been revealed to be materially inaccurate.

Accordingly, the judgment is reversed, and the case is remanded to the Mississippi Supreme Court for further proceedings not inconsistent with this opinion.

108 S. Ct. at 1989 (footnote omitted).

There can be no dispute that here the judge and jury relied on Mr. Duest's prior Massachusetts convictions to establish the "prior crime of violence" aggravating circumstance upon which his death sentence was based. The sentencing court found that aggravating circumstance saying:

(B) That at the time of the crime for which the defendant is to be sentenced, he had been previously convicted of another capital offense, or of a felony involving the use or threat of violence to some person;

(1) This aggravating circumstance does apply in this case as the Defendant has been convicted of Armed Robbery and Armed Assault with the Intent to Commit Murder.

(R. 1833).

The state's evidence in this regard consisted solely of copies of two convictions; one for Armed Robbery and one for

Armed Assault with the Intent to Murder. As to the latter charge the judge told the jury:

> THE COURT: State's Exhibit No. 2 is a certified copy from the Commonwealth of Massachusetts. Superior Court, Department of the Trial Court. This is a conviction for armed assault to murder. The defendant pled guilty on January 13, 1971, and was sentenced to a term not exceeding ten years, nor less than five years.
>
> I will read this Indictment to you, also. It says, "Commonwealth of Massachusetts. The Superior Court. At the City of Cambridge, within and for the County of Middlesex, on the first Monday of April, in the year of our Lord one thousand nine hundred and seventy, the jurors for the Commonwealth of Massachusetts on their oath present that Lloyd Paul Duest on the 4th day of March in the year of Our Lord one thousand nine hundred and seventy, at Reading, in the County of Middlesex, aforesaid being armed with a dangerous weapon, did assault Herbert McSheehy and Leo Iacopucci," or something like that, I-A-C-O-P-U-C-C-I, "with intent to murder them against the peace of said Commonwealth and contrary to the Statute in such case and provided--"

(R. 1574-75). This indictment in fact indicates that Mr. Duest attempted to murder two people.

After the jury returned to deliberate regarding its sentencing recommendation, proceedings were reconvened in open court when the jury requested an opportunity to view the prior convictions:

> (Thereupon, the following proceedings were resumed within the presence of the jury:)
>
> THE COURT: Ladies and gentlemen, I understand [sic] you wanted to see the criminal records. They were not published to you originally so I will read them to you again. The first one I read to you, armed robbery, Commonwealth versus Lloyd Paul Duest. I will read you the Indictment.

(R. 1631). The Court thereupon read each indictment, notice of guilty plea and sentence, to the jury. Again the jury heard the indictment and guilty plea indicating Mr. Duest had tried to murder two people.

On June 27, 1988, Mr. Duest's conviction of armed assault with intent to murder was vacated. Commonwealth v. Duest, 26 Mass. App. Ct. 137 (1988). The appellate court noted:

> The Commonwealth acknowledges that it cannot meet its burden of establishing the circumstances of the plea to the indictment charging armed assault with intent to murder. Note 1, supra. There is no proof that the defendant harbored a specific intent to murder or kill when shots from a pistol were fired out of the window of the getaway vehicle at the police cruiser chasing that vehicle. The only evidence on that point is to the effect that the shots were fired at the pursuing police officers in the cruiser. The record, therefore, is fatally deficient on the essential mental element of armed assault with intent to murder, as that element has been clarified by Commonwealth v. Henson, 394 Mass. 584 (1985). The Henson decision has retroactive application. See Commonwealth v. Ennis, 398 Mass. 170, 175 (1986). We find the Commonwealth's concession justified and we accept it.

26 Mass. App. Ct. at 138-39 n 2.

On October 20, 1988, the charge was nolle prossed:

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.
SUPERIOR COURT DEPARTMENT

NO. 87764

COMMONWEALTH
V.

LLOYD PAUL DUEST

NOLLE PROSEQUI

Now comes the Commonwealth and files a nolle prosequi on this indictment of armed assault with the intent to murder. The offenses occurred on March 4, 1970, in the town of Reading, Massachusetts. The defendant pled guilty to indictment No. 87762 (armed robbery), indictment No. 87763 (unlawfully carrying a firearm) and indictment No. 87764 (armed assault with intent to murder) and he was sentenced by Justice Hale on January 18, 1971 in Middlesex Superior Court. On September 24, 1987, the defendant filed a motion to withdraw his plea of guilty and for a new trial. Justice Hale, after a hearing, denied the defendant's motion on December 10, 1987. On June 27, 1988, the Appeals Court vacated the guilty

plea on the indictment for armed assault with intent to murder. The Appeals Court affirmed Judge Hale's denial of the defendant's motion to withdraw his guilty pleas on the other indictments.

The Commonwealth is unable to proceed to trial on this indictment, as witnesses, including police officers, are no longer available. Therefore, due to the present state of the evidence, this nolle prosequi is filed in the interest of justice.

Respectfully Submitted
For the Commonwealth,

SCOTT HARSHBARGER
DISTRICT ATTORNEY

by: _____
Elizabeth Kelley
Assistant District Attorney
Middlesex Superior Courthouse
40 Thorndike Street
Cambridge, MA 02141
(617) 494-4673

Dated: October 20, 1988

Johnson v. Mississippi, supra, is a new case law cognizible in a habeas corpus proceeding. See Jackson v. Dugger, 547 S. 2d 1197 (Fla. 1989). As a result, this claim is cognizible as being based on a change in law. Burr v. State, ___ So. 2d ___, 14 F.L.W. 428 (Fla. 1989). Mr. Duest's case is virtually identical to Johnson. The only evidence introduced regarding the prior convictions was the indictment and guilty plea, subsequently vacated and dismissed.

Mr. Duest's jury, after being instructed to weigh the aggravating circumstances against the mitigating and determine if the mitigating outweighed the aggravating, returned a seven to five death recommendation. Only one of the seven jurors needed to have changed sides because of the prior armed assault with intent to murder which the jury specifically asked to have read a second time. It is the **"possibility"** that the reversed prior conviction may have resulted in a death sentence that warranted reversal in Johnson. It is the same possibility that requires a reversal of Mr. Duest's sentence of death.

As noted in Johnson, "[M]ore importantly, the error here extended beyond the mere invalidation of an aggravating circumstance ... Here the jury was allowed to consider evidence that has been revealed to be materially inaccurate." Johnson, 108 S. Ct. at 1989. In Mr. Duest's case, the identical eighth amendment violation occured. Habeas corpus relief is appropriate. Mr. Duest's sentence of death violates the eighth amendment as explained in Johnson v. Mississippi. The death sentence must be vacated.

CLAIM II

MR. DUEST WAS DENIED HIS RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY WHEN THE STATE INTRODUCED EVIDENCE OF FLIGHT AND IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS. MR. DUEST RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WHEN THIS ISSUE WAS NOT RAISED ON DIRECT APPEAL.

A indigent criminal defendant is entitled to the effective assistance of counsel during the direct appeal of his criminal conviction. Evitts v. Lucey, 469 U.S. 387, 394 (1985)(appellate attorney "must play the role of an active advocate" and insure adversarial process works). A habeas corpus petition must demonstrate "specific errors or omissions" and resulting prejudice to be entitled to relief. Wilson v. Wainwright, 474 So. 2d 1162 (Fla. 1985). In Wilson, this Court found both. Mr. Wilson's appellate attorney, R.E. Conner failed to raise a meritorious sufficiency of the evidence issue. This Court found:

> The decision not to raise this issue cannot be excused as mere strategy or allocation of appellate resources. This issue is crucial to the validity of the conviction and goes to the heart of this case. If, in fact, the evidence does not support premeditation, petitioner was improperly convicted of first degree murder and death an illegal sentence. To have failed to raise so fundamental an issue is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome.

474 So. 2d at **474-75.**

Here Mr. Duest was represented by Mr. Wilson's appellate attorney, R.E. Conner. As in Mr. Wilson's case, Mr. Conner neglected issues at the heart to the case.

The reference to flight and/or an alias used by a criminal defendant inserts into the trial impermissible factors for the jury's consideration and deprives the defendant of a fair trial. The reference to this type of evidence suggests that the defendant has something to hide. In fact, it is introduced to argue guilty knowledge. Here, Mr. Duest's trial counsel repeatedly challenged the State's introduction of flight evidence. The issue was preserved for appellate review. The evidence was key to Mr. Duest's conviction. The issue was meritorous, yet appellate counsel failed to raise. This failure could only be premised upon ignorance.

During all stages of a criminal trial the defendant is presumed innocent. It is the state's burden to prove each and every element of the crime. The elements of the crime must be shown by proof of guilt beyond a reasonable doubt. For that reason, in order to be admissible, evidence must be relevant. **"Relevant** evidence is evidence tending to prove or disprove a material fact." Section **90.401** of the Evidence Code. Evidence of flight and use of aliases may be admissible when relevant to establish guilty knowledge. However, even then the evidence must be excluded where the "probative value is substantially outweighed by the danger of unfair **prejudice."** Section **90.403** of the Evidence Code.

Here the prosecution introduced Mr. Duest's use of an alias and evidence of his flight as evidence of his guilt. Yet at the same time evidence that Mr. Duest had another reason for concealing his identity and fleeing was kept from the jury. The jury did not know that Mr. Duest was wanted in Massachusetts for escape. The jury was falsely led to believe that Mr. Duest's

only motive for using an alias on April 18, 1982 was his guilt with regard to the homicide crime on February 15, 1982. The jury was also led to believe that Mr. Duest fled the police station because he knew he had committed the murder and was going to be caught. The introduction of such evidence constituted plain error under Biswell, which impinged upon the fundamental fairness of the trial. It violated the Florida Supreme Court's recent pronouncement in Merritt v. State, 523 So. 2d 573 (Fla. 1988), as well. Cf. Johnson v. Mississippi, 108 S. Ct. 1981 (1988) (consideration of materially inaccurate evidence violated eighth and fourteenth amendments).

During Mr. Duest's trial, the State's repeated references to Mr. Duest's alias -- Robert Brigida -- and his flight from police officers on April 18, 1982, violated due process and the Florida Evidence Code. This evidence was not relevant; it was not probative; it did not tend to prove or disprove a material fact; it was materially inaccurate and misleading. At least to a person who knows that Mr. Duest was wanted for escape in Massachusetts, the evidence of the use of an alias and of flight does not tend to prove guilty knowledge of murder because the conduct is just as likely the result of being wanted for escaping Massachusetts while awaiting trial for robbery, six (6) counts of cocaine possession, and thirty one (31) counts of larceny by check. See Presentence Investigation, R. 1809. Use of aliases and evidence of flight are only admissible when the alias and the flight are relevant to the consciousness of guilt. Merritt v. State, 523 So. 2d 573 (Fla. 1988).

When the defense sought to suppress this evidence before the trial the following occurred:

> [PROSECUTOR]: Then this defendant, after Feltgen had walked out of the room, this defendant ran. I think it is more presumable that he ran when he found out he was a suspect in a homicide as opposed to a misdemeanor, some misdemeanor warrant.

THE COURT: Either that or he was afraid thev were going to find out he had a capias from Massachusetts.

MR. BARON: That is the real reason. That is something that is not going to be brought out. I don't see the relevance of him leaving two months after a murder when he is not even arrested for murder, where he has voluntarily at that point, according to all

of the police reports, came in voluntarily and was talking to the detectives.

At that point in time it was not only the arrest that took place but it was on a warrant for the real Robert Brigida.

Of course, my concern is a jury hearing that this man is charged with an escape or he had escaped that evening and what prejudicial impact it will have on the case.

MR. GARFIELD: I don't think I have to bring out any formal charges. All I want to bring out was after Feltgen talked to him he ran out of the interrogation room and was found hiding in somebody's closet which is what happened.

(R. 37-38). Despite the judge's recognition that the flight may have resulted because of the Massachusetts' capias, she ruled the evidence was admissible. This was fundamental error.

In Merritt, the Florida Supreme Court stated:

> John Edward Merritt was convicted of first-degree murder and armed burglary. The trial judge imposed death over the jury's recommended life sentence. We have jurisdiction. Art. V, section 3(b)(1), Fla. Const.
>
> Darrell Davis was murdered and his home burglarized in 1982. In 1985 the state received information leading to Merritt who was serving time on an unrelated conviction in Virginia. In April 1985 the state executed a search warrant for Merritt's body hair and fingerprints. Nine months later, (December 1985) he escaped while being transported to Florida for prosecution of charges unrelated to the Davis incident. In March 1986 Merritt was indicted for Davis's first degree murder and armed burglary.
>
> Merritt argues that the trial court erroneously admitted evidence of the 1985 escape. We agree. Flight evidence is admissible as relevant to the defendant's consciousness of guilt where there is sufficient evidence that the defendant fled to avoid prosecution of the charged offense. See Straiaht v. State, 397 So.2d 903, 908

(Fla.), cert. denied, 454 U.S. 1022, 102 S.Ct. 556, 70 L.Ed.2d 418 (1981); State v. Young, 217 So.2d 567 (Fla.1968), cert. denied, 396 U.S. 853, 90 S.Ct. 112, 24 L.Ed.2d 101 (1969); Daniels v. State, 108 So.2d 755 (Fla.1959); Blackwell v. State, 79 Fla. 709, 86 So. 224 (1920). However, flight alone is no more consistent with guilt than innocence. **See** Whitfield v. State, 452 So.2d 548 (Fla.1984).

Merritt argues that the state failed to establish that he fled to avoid prosecution for the Davis murder as opposed to the other unrelated charges. We addressed a similar argument in Bundy v. State, 471 So.2d 9 (Fla.1985), cert. denied, ___ U.S. ___, 107 S.Ct. 295, 93 L.Ed.2d 269 (1986). Bundy murdered two Tallahassee Chi Omega sorority sisters in January 1978. During Bundy's trial for the Leach murder, the state introduced evidence that he fled twice in the six days following Leach's disappearance. Bundy argued on appeal that the evidence was inadmissible because the state failed to prove that he fled to avoid prosecution for the Leach murder as opposed to the Tallahassee crimes. We found, however, that the jury could reasonably infer Bundy's consciousness of guilt from his flights because they occurred only days after Leach's much publicized disappearance.

Unlike Bundy, there is insufficient evidence in the instant case that Merritt fled to avoid prosecution for the Davis murder and burglary. Merritt escaped three years after the Davis murder. Although he was made aware of the murder investigation when the state executed its search warrant in April 1985, he did not attempt to escape until December 1985 during his return to Florida to stand trial on unrelated charges, including armed kidnapping, aggravated assault, and armed burglary. Merritt was not indicted for the Davis murder until March 1986. A jury could not reasonably infer from these facts that Merritt escaped to avoid prosecution for the Davis murder. Such an inference would be the sheerest of speculation.

Merritt was between a rock and a hard place once the court erroneously admitted the evidence. To rebut the state's improper implication that he escaped to evade prosecution for the Davis murder, defense counsel introduced testimony that he escaped while being returned to Florida on unrelated charges. The court compounded the error by instructing the jury that an attempt to avoid prosecution through flight is a circumstance which may be considered in determining guilt. We cannot say beyond a reasonable doubt that these errors did not affect the jury's

verdict. See DiGuilio v. State, 491 So.2d 1129 (Fla.1986).

523 So. 2d at 573-74.

The facts here are virtually identical with those in Merritt. Here, as in Merritt there is no evidence indicating that flight was in order to avoid prosecution for the murder. At the time he was arrested, he was already using an alias which is very consistent with trying to avoid prosecution in Massachusetts. The flight occurred more than two months after the homicide, unlike "days after" as was the case in Bundy. Mr. Duest was stopped on the street and taken to the police station without making any effort to run, this was even after the police had informed Mr. Duest he was "a possible suspect in a homicide" (R. 844). Mr. Duest voluntarily went with the police. He was not placed under arrest. He was not handcuffed. Id. Mr. Duest was told Massachusetts authorities had been contacted and that "he was, in fact, under arrest for the warrants in Massachusetts, at which time he replied, 'I was afraid you were going to find out about those'" (R. 882). Mr. Duest fled only after he was fingerprinted (Feltgen depo at 18). Certainly the fingerprinting caused Mr. Duest to know that his true identity would soon be discovered. Under the circumstances, it is the "sheerest of speculation" to conclude his flight was premised upon his guilt of the murder and not upon some forty (40) charges pending against him in Massachusetts.

Despite the defense's strenuous objection, the following testimony was elicited from the arresting police officer:

> Q Did you eventually leave the room and leave him still there?
>
> A Yes, I did. I then left the room.
>
> Q Did there come a time when you returned to the room and Mr. Duest or, as you know him, Brigida, was not there?
>
> A That is correct?
>
> Q You didn't give him permission to be not there?

A No, I didn't.

Q Since he was under arrest. Well, what did the room look like when you came back in?

A The wooden chair that I had secured him to, the arm of the chair was broken off from the chair itself. The door was open, and Robert Brigida was gone.

Q Did there come a time later on when you actually found Lloyd Duest, also known as Robert Brigida?

A Yes, I did.

Q And how much time went by before you eventually found him? You can skip all the details.

A It was approximately four to five hours later, approximately six o'clock a.m. the following morning.

(R. **883).**

The prosecutor argued in closing that Mr. Duest was guilty of the murder "that is why he ran out of there" (R. **1448). "All** the man had to do was say I am not Bobby Brigida and then he would be clear." Id. He also asked other witnesses if they had hid in a closet (R. **514).** The prosecutor's statement was a blatant lie. He knew that Mr. Duest could not have just said he was not Robert Brigida and walked away. The prosecutor knew that to accomplish that Mr. Duest would have to prove his true identity which would have led to forty **(40)** outstanding charges in Massachusetts. The prosecutor knew the jury did not know this and knew that defense counsel could not and would not explain his way out of his corner by introducing evidence of such an extensive criminal record. This violated Giglio v. United States, **405** U.S. **150 (1972),** and its progeny. When the State presents false and misleading evidence or argument, the defendant is entitled to relief if there is "any reasonable likelihood" that the testimony or argument "could have" affected the verdict. United States v. Bagley, **105** S. Ct. **3375, 3382 (1985).** The evidence of flight violated due process, the Florida Evidence

Code, and Merritt. The resulting conviction is unreliable. The error is not harmless beyond a reasonable doubt. There is a "reasonable likelihood" it "could have" affected the verdict.

This case represents a classic example of where an objected to trial court's ruling renders counsel unable to insure as adversarial testing. 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. Washington, 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. Ferguson 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.q. 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); Ferguson 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,' Cuvler 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]actual or constructive denial of the assistance of counsel altogether," Strickland v. Washington, 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 Pension 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.

Perrv 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 required 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 rights 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 defense counsel was constrained by the trial court's ruling. As noted in Merritt, counsel was put between a rock and a hard place. There was no adversarial testing. Counsel's performance was rendered ineffective and deficient, against counsel's own wishes. Where there is no adversarial testing prejudice is presumed.

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

The claim is now properly brought pursuant to the Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. This issue involved a classic violation of longstanding principles of Florida law. It virtually "leaped out upon even a casual reading of transcript." Matire V. Wainwright, **811** F.2d **1430, 1438** (11th Cir. **1987).** This clear claim of per se error required no elaborate presentation -- counsel only had to direct this Court to the issue. The court would have done the rest, based on long-settled Florida and federal constitutional standards.

No tactical decision can be ascribed to counsel's failure to urge the claim. **No** procedural bar precluded review of this issue. **See** Johnson V. Wainwright, supra, **498** So. 2d **938.** However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Duest of the appellate reversal to which he was constitutionally entitled.

See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra. Accordingly, habeas relief must be accorded now.

CLAIM III

THE STATE INTRODUCED IRRELEVANT PREJUDICIAL, AND INFLAMMATORY EVIDENCE OF "OTHER CRIMES" AND BAD CHARACTER, VIOLATING DUE PROCESS UNDERMINING THE RELIABILITY OF THE JURY'S DETERMINATION. MR. DUEST WAS DENIED THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WHEN THIS ISSUE WAS NOT RAISED ON DIRECT APPEAL.

Florida evidence law is (and was at the time of trial) precise with regard to the admissibility of evidence of the accused's criminal "character" or commission of bad acts other than those charged:

> **(1) Character Evidence Generally.** Evidence of a person's character or a trait of his character is inadmissible to prove that he acted in conformity with it on a particular occasion, except:
>
> (a) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the trait.
>
> . . . .
>
> **(2) Other Crimes, Wrongs, or Acts.**
>
> (a) Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.
>
> (b) 1. When the state in a criminal action intends to offer evidence of other criminal offenses under paragraph (a), no fewer than 10 days before trial, the state shall furnish to the accused a written statement of the acts or offenses it intends to offer, describing them with the particularity required of an indictment or information. No notice is required for evidence of offenses used for impeachment or on rebuttal.
>
> 2. When the evidence is admitted, the court shall, if requested, charge the jury on the limited purpose for which the evidence is received and is to be considered. After the

> close of the evidence, the jury shall be instructed on the limited purpose for which the evidence was received and that the defendant cannot be convicted for a charge not included in the indictment or information.

Sec. 90.404, Florida Evidence Code. This is a statement of the rule of Williams v. State, 110 So. 2d 654 (Fla. 1959). Before a defendant's extraneous criminal acts may be introduced, the following should occur:

a. There must be a demonstrated connection between the defendant and the collateral occurrences;

b. The probative value of the evidence must be weighed against its prejudicial effect. Section 90.403.

If the evidence is deemed admissible after this analysis, the jury should be given a cautionary instruction at the time the evidence is introduced, and in final jury instructions, if requested.

In Castro v. State, 547 So. 2d 111, 114-15 (Fla. 1989), this Court held:

> We do agree, however, that the court erred in admitting the testimony of William Kohler. William Kohler was an owner of the apartment house where the murder occurred and was permitted to testify that several days after the murder he found a steak knife outside Castro's apartment building. There is no question that the knife found by Kohler was irrelevant. It was undisputed that Castro had broken the murder weapon into pieces and thrown it out the window during the trip to Lake City.
>
> Likewise, the trial erred in admitting McKnight's testimony that Castro had tied him up and threatened to stab him several days prior to killing Scott. This evidence violated the dictates of Williams v. State, 110 So.2d 654 (Fla.), cert. denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959). In State v. Lee, 531 So.2d 133, 135 (Fla.1988), we considered Williams and said that
>
> > [e]vidence of collateral crimes of acts committed by the defendant is inadmissible if its sole relevancy is to establish bad character or propensity of the accused. Williams v. State..... Evidence of other crimes or acts is admissible, however, "if it casts light upon the character of the act under

> investigation by showing motive, intent, absence of mistake, common scheme, identity or a system or general pattern of criminality so that the evidence of the prior offenses would have a relevant or a material bearing on some essential aspect of the offense being tried.: Id. at 662. See section 90.404(2)(a), Fla.Stat. (1983). The test for admissibility of evidence of collateral crimes is relevancy. Heiney v. State, 447 So.2d 210, 213 (Fla.), cert. denied, 469 U.S. 920 [105 S.Ct. 303, 83 L.Ed.2d 237] (1984).

That is to say, similar fact evidence which tends to reveal the commission collateral crimes is admissible if it is relevant to a material fact in issue, except where the sole relevance is the character or propensity of the accused.

The rationale underlying the Williams rule is that such evidence

> "would go far to convince men of ordinary intelligence that the defendant was probably guilty of the crime charged. But, the criminal law departs from the standard of the ordinary in that it requires proof of a particular crime. Where evidence has no relevancy except as to the character and propensity of the defendant to commit the crime charged, it must be excluded."

Jackson v. State, 451 So.2d 458, 461 (Fla. 1984) (quoting Paul v. State, 340 So.2d 1249, 1250 (Fla. 3d DCA 1976), cert. denied, 348 So.2d 953 (Fla.1977)). For this reason, we have held that the erroneous admission of irrelevant collateral crimes evidence "is presumed harmful error because of the danger or propensity to crime thus demonstrated as evidence of guilt of the crime charged." Straight v. State, 397 So.2d 9003, 908 (Fla.), cert. denied, 454 U.S. 1022, 102 S.Ct. 556, 70 L.Ed.2d 418 (1981). Accord Peek v. State, 448 So.2d 52, 56 (Fla. 1986).

In this case McKnight's testimony was inadmissible because it lacked relevance to any material fact in issue. We reject the state's contention that McKnight's testimony was relevant to demonstrate McKnight's state of mind in accompanying Castro to Lake City and in obeying Castro's order to stab Scott. The record discloses that McKnight's state of mind was never in issue. Therefore, testimony to establish his mental state was irrelevant. As the state itself argued in its closing, Castro never implicated McKnight in any statement and in fact specifically exonerated him of any responsibility for the murder. The only discernible purpose for this testimony was to show a bad character

and propensity for violent behavior. Accordingly, we find that this evidence was erroneously admitted.

Because we find error, we must consider whether the state has met its burden of showing the the error here can be deemed harmless beyond a reasonable doubt. State v. DiGuilio, 491 So.2d 1129, 1135 (Fla.1986). As we have noted above, the improper admission of this irrelevant collateral crimes evidence is presumptively harmful. Peek, 488 So.2d at 56; Straight, 397 So.2d at 908. Moreover, we recognize that it is not enough to show that the evidence against a defendant was overwhelming. Error is harmless only "if it can be said beyond a reasonable doubt that the verdict could not have been affected by the error." Ciccarelli v. State, 531 So.2d 129, 132 (Fla. 1988)(emphasis supplied).

At Mr. Duest's trial, defense counsel moved to exclude certain collateral bad acts. At the bench conference the following occurred:

MR. BARON: Judge, the fourth matter is that there was testimony that at the apartment Demizio and Wioncek and all the other people were living at for that weekend that the night of February 14th or the morning house, actually, of February 15th, there was a rather wild scene going on.

THE COURT: I gathered that in the opening statement. With a 15-year-old girl.

MR. GARFIELD: I didn't say that much, Judge.

THE COURT: I gathered, Mr. Garfield.

MR. BARON: One of the things that was testified to by Mr. Demizio and as was as all the other witnesses, which I'm going to be moving - I guess I can move now as to any of the witnesses tha actually observed it - was that the person named Danny supposedly took a razor blade to a girl named LaDonna. LaDonna's not a witness. She's not been listed as a witness. I don't know if anyone knows where she is.

But, anyway, a razor blade, and cut this girl LaDonna's shirt off of her back for whatever reason. And certainly I don't really see any relevance to show anything at that point in time he was acting badly. It has nothing to do with the relevance of a particular murder case that might have happened.

THE COURT: Except that this man was tough.

MR. GARFIELD: I don't even care about that. I was going to say that. But I think that's a relatively secondary argument to the real reason that's admissible.

Other people saw that, too, and there, remembering this isn't a self-defense case or something where the central issue is other than identification.

THE COURT: It's an "I wasn't here" case.

MR. GARFIELD: Heck, yeah. He want to come in here next week with all his witnesses to say, "I remember the pot roast that Lloyd ate and we have such a good memory because it was Valentine's day and birthdays." But he wants to deprive the State's witnesses of being able to show their good memory.

I don't want to make a value judgment or moral judgment, but basically the testimony would be simply that the way he elected to help her disrobe was to take a razor blade and cut down.

He saved her buttons. He didn't rip the buttons. So what? Other people observed that. That's one way they remember the guy, besides his scars, besides whatever the other testimony is going to be. And that I strongly feel.

MR. BARON: Judge, I don't see any way that goes to identify, that they remember him because he took a razor.

They remember the incident.

MR. GARFIELD: I'd remember somebody who took a razor blade to a girl that was laying next to me.

Judge, I just think that's relevant. There's no way it's not relevant. It's not prejudicial at all.

In light of a guy charged with stabbing somebody a dozen times, he's not going to get a fair trial if they think that he took off a girl's blouse that way?

That's ridiculous.

I don't know if you have any other motions in limine. There's something else you should raise, incidentally.

That's it? How about drugs? He's going to say everybody used drugs, including Duest. I don't care.

THE COURT: Obviously, he doesn't care about it.

MR. BARON: Judge, it goes to the person's ability to remember or perceive what they saw.

MR. GARFIELD: That's fine with me.

Mr. Baron is saying it's okay for a witness to say that Mr. Duest popped five quaaludes or whatever else he did? That's no problem?

MR. BARON: I'm not objecting to it.

MR. GARFIELD: As to the razor blade --

THE COURT: As to the razor blade incident, I'll let that in.

(R. **633-36)** (emphasis added).

The State presented evidence that the assailant escaped from custody was guilty of statutory rape, (the girl involved in the razor blade incident was a minor) participated in orgies and with regard to a different victim at a different place, he

> [S]macked her, threw her into the wall; threw her head into the wall; threw her on the bathroom floor. He took a razor blade and cut the back of her shirt right off.

(R **658, 635, 648, 675, 934, 944).**

The State used this **"evidence"** improperly in closing. For example:

> They remember it. It is something that stands out in a normal person's mind because it isn't everybody that goes around up to women or men - it doesn't make any difference - with some sharp device and shssh. That is something that someone would remember.
>
> It is also interesting, and I believe interesting that there was testimony from Mr. Demezio, that this incident involving why a man would do that to a girl, related to the fact that everybody else around there was having sex. If it wasn't said to you explicit, you people aren't deaf, dumb and blind. You knew what kind of party that was. Everybody is paired off. It is like a flesh pile. But who is left out? Who is left out? Lloyd Duest is left out. Danny is left out. He doesn't like it. He tries to get it on with Donna and she resists. . . .

(R 1407).

Appellate counsel did not raise this glaring and meritorious issue on appeal. There can be no tactic for this; only

ignorance. Appellant counsel's performance was deficient. Mr. Duest was prejudiced; the error was not harmless beyond a reasonable doubt. Mr. Duest was denied the reversal to which he was entitled.

This error undermined the reliability of the jury's guilt sentencing determination. For each of the reasons discussed above the Court should vacate Mr. Duest's unconstitutional sentence of death. This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Duest'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. Wainwrisht, **474** So. 2d **1163** (Fla. **1985),** and it should now correct this error.

Moreover, the claim is now properly brought pursuant to the Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. This issue involved a classic violation of longstanding principles of Florida law. It virtually "leaped out upon even a casual reading of transcript." Matire v. Wainwrisht, **811** F.2d **1430, 1438** (11th Cir. **1987).** This clear claim of per se error required no elaborate presentation -- counsel **only** had to direct this Court to the issue. The court would have done the rest, based on long-settled Florida and federal constitutional standards.

No tactical decision can be ascribed to counsel's failure to urge the claim. **No** procedural bar precluded review of this issue. **See** Johnson v. Wainwrisht, supra, **498** So. 2d **938.** However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Duest of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwrisht, supra, **474** So. 2d at **1164-65;** Matire, supra. Accordingly, habeas relief must be accorded now.

PAGE(S) MISSING

CLAIM IV

MR. DUEST'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 Court has recently discussed the "heinous, atrocious and cruel" aggravating circumstance and explained:

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

Rhodes v. State, 547 So. 2d 1201 (Fla. 1989)(emphasis added). In Cochran v. State, 547 So. 2d 928, 931 (Fla., 1989), the Court stated:

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

In Teffeteller v. State, 439 So. 2d 840, **846** (Fla. 1983) the Court stated:

> The criminal act that ultimately caused death was a single sudden shot from a shotgun. The fact that the victim lived for a couple of hours in undoubted pain and knew that he was facing imminent death, horrible as this prospect may have been, does not set this senseless murder apart from the norm of capital felonies.

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

violated Maynard v. Cartwrisht, 108 S. Ct. 1853 (1988) and Hitchcock v. Dusser, 107 S. Ct. 1821 (1987). In addition, the judge employed the same erroneous nonstandard when sentencing Mr. Duest to death.

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

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

(R. 1626). The Tenth Circuit's en banc opinion (unanimously overturning the death sentence) explained that the jury in Cartwrisht received a more detailed but yet inadequate instruction:

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

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

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

to the victim." State v. Dixon, 282 So. 2d 1, 9 (Fla. 1973). The Dixon construction has not been consistently applied, and the jury in this case was never apprised of such a limiting construction. Here, both the judge and the jury applied precisely the construction condemned in Rhodes and Cartwriaht. In fact, Oklahoma's "heinous, atrocious, and cruel" aggravating circumstance was founded on Florida's counterpart, **see** Maynard v. Cartwriaht, 802 F.2d at 1219, and this Court's construction in Dixon was adopted by the Oklahoma courts. There as here, however, the constitutionally required limiting construction was never applied.

Of course, the role of a Florida sentencing jury is critical. The Eleventh Circuit in Mann v. Dugger, 844 F.2d 1446, 1454-55 n. 10 (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:

> Florida could, if it so desired, administer a capital sentencing scheme in which the jury played no role. **See** Spaziano v. Florida, 468 U.S. 447, 465, 104 S.Ct. 3154, 3165, 82 L.Ed.2d 340 **(1984)("[T]here** is no constitutional imperative that a jury have the responsibility of deciding whether the death sentence should be imposed...."). The fact of the matter is, however, that under the existing scheme in Florida the jury does share in capital sentencing responsibility. Because the jury's recommendation is a critical factor in the ultimate sentencing decision, the jury's function, like the function of any capital sentencer, must be evaluated pursuant to eighth amendment standards. This court, in various contexts in federal habeas cases, has treated the Florida jury as if it were a sentencer for constitutional purposes. For example, in Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988), we held that the eighth amendment is violated when a Florida sentencing jury is instructed that, once it finds the victim's murder to have been committed under aggravating circumstances, death is presumed to be the appropriate sentence.

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. Duest's claim.

In Hitchcock v. Duqqer, 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. Duqqer, 863 F.2d 705, 708 (11th Cir. 1989). See also Harqrave v. Duqqer, 832 F.2d 1528 (11th Cir. 1987)(en banc); Stone v. Duqqer, 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 the Florida Supreme Court explained:

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

Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1989). See also Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987)(improper instructions to sentencing jury render death sentence fundamentally unfair); Meeks v. Duqqer, 548 So. 2d 184 (Fla. 1989)(since it could not be said beyond a reasonable doubt that a properly instructed jury would not return a recommendation of life, resentencing was required). 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 since mitigation was contained in the record.

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

This Court when presented with this issue on direct appeal did not have the benefit of Cartwright, nor had it yet declared Hitchcock retroactive change in law which required accurate jury instructions in the penalty phase of a capital case in Florida. In Mr. Duest's case, as in Cartwriaht, the jury's sentencing discretion was not guided or channeled. Here, no adequate "limiting construction" was ever applied to the "heinous, atrocious or cruel" aggravating circumstance. This Court did not apply Cartwright and require a resentencing.

In Mr. Duest's case, the jury was not instructed as to the limiting constructions placed upon of the "heinous, atrocious or cruel" aggravating circumstance. The failure to instruct on the **"elements"** of this aggravating circumstance in this case left the jury free to ignore those **"elements,"** and left no principled way to distinguish Mr. Duest'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. Cartwriaht.

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

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

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

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

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

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

Cartwright is a significant change in law under the test set forth in Jackson v. Dusser, 547 So. 2d 1197 (Fla. 1989).

Recently, a petition for a writ of certiorari was granted in Clemons v. Mississippi, ___ U.S. ____, 45 Cr. L. 4067 (June 19, 1989), in order to resolve the question of when Cartwright error may be harmless. Certainly Mr. Duest'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. Duest's case. See Walton v. Arizona, cert. sranted, 46 Cr. L. 3014 (October 2, 1989); Ricketts v. Jeffers, cert. sranted, 46 Cr. L. 3035 (October 10, 1989). A stay of execution is appropriate and thereafter habeas corpus relief.

CLAIM V

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

This Court rendered its decision in Rosers v. State, 511 So. 2d 526 (Fla. 1987), on July 9, 1987. That decision established that an overbroad application of the cold, calculated and premeditated aggravating circumstance occurred here in Mr. Duest's case. Moreover, the decision in Maynard v. Cartwright, 108 S. Ct 1853 (1988), applies to overbroad applications of aggravating circumstances and holds them to be violative of the eighth amendment. As the record in its totality reflects, the sentencing jury never applied the limiting construction of the cold, calculated aggravating circumstance as required by Rosers and Maynard v. Cartwright.

Aggravating circumstance (5)(i) of Section 921.141, Florida Statutes, is unconstitutionally vague, overbroad, arbitrary, and

capricious on its face, and is in violation of the sixth, eighth, and fourteenth amendments to the United States Constitution and Article I, sections 2, 9 and 16 of the Florida Constitution. This circumstance is to be applied when:

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

921.141(5)(i), Florida Statutes.

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

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

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

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

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

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

> Because of the uniqueness of the death penalty, Furman held that it could not be imposed under sentencing procedures that created a substantial risk that it would be

> inflicted in an arbitrary and capricious manner.

428 U.S. at 189. Capital sentencing discretion must be strictly guided and narrowly limited. 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. Maynard v. Cartwrisht, supra.

The terms **"cold"** and **"calculated"** suffer from the same deficiency as terms held vague in Maynard v. Cartwrisht. 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, and the need to narrowly guide capital sentencing discretion.

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, its definition had remained vague until 1987 as to what this circumstance required. More importantly, however, the jury was not told in Mr. Duest's case what more was required. In fact, the prosecutor told the jury no more was required.

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

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

Roaers 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 [] require[s] a careful plan or prearranged design."); Jackson v. State, 530 So. 2d 269, 273 (Fla. 1988)(application of aggravating circumstance "error under the principles we recently enunciated in Rogers.").

Because Mr. Duest was sentenced to death based on a finding that his crime was "cold, calculated and premeditated," but neither the jury nor trial judge had the benefit of the narrowing definition set forth in Rogers, petitioner's sentence violates the eighth and fourteenth amendments. Moreover, the decision in Rouers was long after the direct appeal in Mr. Duest's case. Prior to Roaers it is clear that "cold, calculated and premeditated" had no guiding principle.

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

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

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

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

> Godfrev v. Georgia [] 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 save the jury no guidance concernins the meaning of any of [the assravatins circumstance's1 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 penaltv was imposed. from the many cases in which it was not." Id., at 433. Compare Proffitt 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). Neither the Rosers limiting construction nor the Cartwrisht discretion-channeling standard was ever applied to petitioner's case, by either the jury or the judge. This aggravating circumstance cannot stand under proper eighth amendment analysis. Under Maynard V. Cartwright, this circumstance must be stricken.

Under Florida law, aggravating circumstances "must be proven beyond a reasonable doubt." Hamilton v. State, 547 So. 2d 630, (Fla. 1989). In fact, Mr. Duest'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. Duest'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 Cartwrisht.

In Mr. Duest'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. For eighth amendment purposes, the jury is a sentencer. Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(in banc), cert. denied, 109 S. Ct. 1353 (1989). The failure to provide Mr. Duest's sentencing jury the proper **"channeling** and limiting" instructions violated the eighth amendment principle discussed in Maynard v. Cartwrisht.

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

The 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. See Clemons v. Mississippi, 109 S. Ct. 3184 (cert. sranted 1989). The error denied Mr. Duest an individualized and reliable capital sentencing determination. Knight v. Dugger, 863 F.2d 705, 710 (11th Cir. 1989).

Under Jackson v. Dusser, 547 So. 2d 1197 (Fla. 1989), Hitchcock, and Cartwrisht represent fundamental changes in law, that in the interests of fairness requires the decisions to be given retroactive application. Florida sentencing juries must be instructed in conformity with the eighth amendment. The errors committed here can not 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.

CLAIM VI

THE EIGHTH AMENDMENT WAS VIOLATED BY THE SENTENCING COURT'S REFUSAL TO FIND THE MITIGATING CIRCUMSTANCES CLEARLY SET OUT IN THE RECORD. MR. DUEST RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WHEN COUNSEL FAILED TO RAISE THIS ERROR ON DIRECT APPEAL.

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

The sentencing judge in Mr. Duest's case found no mitigating circumstances, but did not address nonstatutory mitigation (R. 1697). Finding four aggravating circumstances the court imposed death (R. 1679). The court's conclusion that no mitigating circumstances were present, however, is belied by the record.

Both statutory and nonstatutory mitigating circumstances were set forth in the record. The state conceded that Mr. Duest had a history of drug abuse (R. **1607).** The State conceded that he had helped an inmate:

> What has he done? Well, he has done a couple of things. I stand corrected. The parents, Mr. Duest mentioned to you that he helped an inmate once. Consider that. Consider anything else that was brought out along that line.

(R. 1615). The prosecutor was referring to an incident in Walpole prison where Mr. Duest assisted a guard who was giving aid to an inmate who had been stabbed:

> I don't have much more to say except he has helped people in prison when he was there. He helped a guard with a prisoner that had been stabbed. He went out and him and another person took him to the hospital. The guard couldn't go into the section. He was serving time at that time. He just waited there at the hospital and he didn't escape or anything. He waited for the prisoner to go back with the guard back to prison.

(R. 1578-79). In regard to Lloyd's serious drug abuse history, his father testified:

> Q Has he had a drug problem in the past?
>
> A Yes, he did.
>
> Q What?
>
> A I brought him to a drug clinic. I believe it was in Cambridge, Cambridge, Mass. He had another drug problem a little later and brought him - trying to bring him to another one. He couldn't get into one because they were all filled. He has got a young daughter.

(R. 1578). The State conceded that these were mitigating factors. The State also recognized testimony that Mr. Duest was a good father (R. **1615-16).**

The State conceded that there was evidence upon which the sentencer could find the influence of extreme mental or emotional disturbance in that Mr. Duest had a long-standing drug problem which is also constitutes nonstatutory mitigation **(R. 1607).**

There was also additional evidence in the record which would have supported the impairment factor as well as extreme disturbance in that Mr. Duest detailed a lengthy psychiatric history:

> MR. BARON: There were two other things he brought to my attention.
>
> One was concerning any psychological history. He indicated to me that he told Miss Balazik that while in Walpole and in -- what was the other prison?
>
> THE DEFENDANT: Concord. I transferred from Walpole to Concord.
>
> MR. BARON: -- he had seen a psychiatrist and been in some kind of therapy. One of them is mentioned in the PSI, I believe the Walpole one, but the Concord one is not mentioned, neither one. My understanding, none of the doctors, from what I'm told, still work within the prison or prison system, so whether or not they would have added anything is unknown at this time.
>
> THE COURT: So there is an omission of one, the Concord one. You have the Waltham one in here, right?
>
> MS. BALAZIK: Yes.
>
> MR. BARON: And the one he's been seeing within the Broward County jail is listed in there.
>
> THE DEFENDANT: I saw a psychiatrist for two years, once a week, one on one, from 1971 to 1973, and I guess three years later I was arrested for illegal possession of a firearm. My parole was violated on account of the arrest.
>
> I was sent to Walpole, did 14 months, went to trial and was found not guilty, and during that 14-month span of time, I also saw a psychiatrist.
>
> MR. BARON: In addition, he indicated that he gave Miss Balazik a number of additional places that he had worked for whatever period of time that are not included within the PSI. I don't know if it was because they were not confirmed or what the situation was.

(R. 1662-63).

Numerous additional nonstatutory mitigating factors were present in the record. Mr. Duest's father testified that his son Lloyd had been an excellent son, and that Lloyd got diplomas while in prison for counselling younger drug addicts (R. **1577).**

His sister testified that he had been a good brother (R. **1582).** His mother said her son Lloyd was loveable and compassionate, that he was a quiet boy and never a discipline problem at school (R. **1583-84).** His wife testified that he had been a good husband and father (R. **1587).** Mr. Duest worked on his parent's home, always gave Christmas gifts except for the time when he was on escape status, and loved his family (R. **1671).** During his time in the Broward County Jail, Mr. Duest made a significant contribution to group therapy sessions:

> Mental: Records from Walpole State Prison indicate that the subject was seen in **1971** by a prison psychologist on a one to one basis. However, no clinical diagnosis was ever made. The subject is currently in group therapy sessions in Broward County Jail. According to Psychotherapist Gary B. Lane, Lloyd contributed to the group by assisting other inmates in problem solving, bringing numerous newspapers and magazine articles to be shared by the group and actively participating verbally in group interactions. He states that his participation acted as a role model for others to do the same. As a group therapy member, Mr. Duest made a significant contribution to the effectiveness of the sessions.

(R. 1811). Mr. Duest was not known for violence and to the contrary had a reputation for respect of his family and friends, and helping others:

> Friend, Edward R. Lavache, states, **"I** am a Watertown firefighter and have been a friend of Lloyd Duest for over ten years During this time I have never known Lloyd to do harm to anyone. I do not believe he would ever take the life of another person. I have always known him to be a loving father and husband, he has always shown the greatest respect for his family and friends. He has always helped me whenever possible and I've never seen him turn down a friend.

(R. **1813).** Mr. Duest was characterized as a good worker:

> Friend, James Pallone, states, **"I** would like to write this Recommendation for Lloyd Duest who I have known all my life. He has always been in good standing and shown Character with my family and his community within the last **25** years.
>
> He had worked for my [sic] for 10 years and was prompt at his job. He showed

> responsibility and character in his job, and always got along with his fellow workers.
>
> If there is anything I could do or testify to in his behalf please do not hesitate to contact me."

(R. 1813). The probation officer concluded that Mr. Duest did satisfy mitigating factor (8) in that "he does has a very supportive family, friends and members of the community in Massachusetts" (R. 1816).

Despite the presence of clearly mitigating circumstances, the court concluded that no statutory mitigating circumstances were present; the court failed to even address nonstatutory mitigation. This Court has recognized that factors such as drug addiction, mental disability and a previous history of good character are mitigating. **See**, e.g., Perry v. State, 522 So. 2d 817 (Fla. 1988)(non-violent background is mitigating). The United States Supreme Court has held that good behavior in jail is mitigating as a matter of law. Skipper v. South Carolina, 476 U.S. 1 (1986). It is obvious from the record that the court failed to weigh the mitigation as mandated by Florida statues and precedent: "As to the mitigating circumstances, none may be applied in this case" (R. 1697). It is extremely significant that despite the finding of "any other mitigation" in the PSI and the state's admission of nonstatutory mitigation, the court totally neglected to make any finding whatsoever regarding the eighth mitigating circumstance "any other aspect of the defendant's character or record, and any other circumstances of the offense" (R. 1627).

This Court recently addressed the necessity of a meaningful weighing of mitigating circumstances:

> 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; that he had seen a psychologist and a psychiatrist concerning drug abuse and emotional problems; and that he had consumed

alcohol and smoked cannabis in the hours preceding the capital felony. The trial court concluded that the record did not support the notion that his behavior was affected by alcohol or drugs. In considering the other factors, the court concluded that none rose "to that level of a mitigating circumstances to be weighed in the penalty decision." This statement gives us pause. We have previously recognized the semantic ambiguities which result from reviewing and considering any and all nonstatutory mitigating evidence. Echols v. State, 484 So.2d 568, 576 (Fla.1985), cert. denied, 479 U.S. 871, 107 S.Ct. 241, 93 L.Ed.2d 166 (1986). More recently, we stated:

> There appears to be some confusion over the concept of mitigation as set forth in our death penalty statute, which requires "specific written findings of fact based upon [aggravating and mitigating] circumstances ... and upon the records of the trial and the sentencing proceedings." Section 921.141(3), Fla.Stat. (1985). However, a "finding" that no mitigating factors exist has been construed in several different ways: (1) that the evidence urged in mitigating was not factually supported by the record: (2) that the facts, even if established in the record, had no mitigating value: or (3) that the facts, although supported by the record and also having mitigating value, were deemed insufficient to outweigh the aggravating factors involved.

Roaers v. State, 511 So.2d 526 (Fla.1987), cert. denied, ___ U.S. ___, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). Mindful of the admonition that a trial court not refuse to consider any relevant mitigating evidence, we found that

> 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 of 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 sentencina, the sentencer must determine whether they are of sufficient weight to counterbalance the aggravating factors.

> Id. Under the circumstances here, and mindful that we have rejected one aggravating factor on which the court relied, we are not certain whether the trial court properly considered all the mitigating evidence or whether it found that the aggravation outweighed the mitigation. Accordingly, we reverse the death sentence and remand for reconsideration of the death sentence and resubmission of a new sentencing order, if appropriate. A new penalty phase is not necessary.

Lamb v. State, 532 So. 2d 1051, 1054 (Fla. 1988)(emphasis added).

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

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

455 U.S. at 119-20. Justice O'Connor's opinion makes it clear that the sentencer is entitled to determine the weight due a particular mitigating circumstance; however, the sentencer may not refuse to consider that circumstance as a mitigating factor. Here, that is undeniably what occurred. The judge gave the mitigating circumstances no consideration.

Under Eddings, supra; Magwood, supra; and Lamb, supra, the sentencing court's refusal to accept and find the statutory and nonstatutory mitigating circumstances which were established was error. Mitigating circumstances that are clear from the record must be recognized or else the sentencing is constitutionally suspect. How can the required independent weighing occur when the "ultimate" sentencer has failed to consider obvious mitigating circumstances? The factors should now be recognized and habeas corpus relief must be granted. This error undermined the reliability of the death sentence. Obviously the sentencer failed to from assess the full panoply of mitigation presented by Mr. Duest. For each of the reasons discussed above the Court should vacate Mr. Duest's unconstitutional sentence of death.

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

Moreover, the claim is now properly brought pursuant to the Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. This issue involved a classic violation of longstanding principles of Florida law. See Lockett, Eddings, supra. It virtually "leaped out upon even a casual reading of transcript." Matire V. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). This

clear claim of per se error required no elaborate presentation -- counsel only had to direct this Court to the issue. The court would have done the rest, based on long-settled Florida and federal constitutional standards.

No tactical decision can be ascribed to counsel's failure to urge the claim. No procedural bar precluded review of this issue. See Johnson v. Wainwright, supra, 498 So. 2d 938. However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Duest of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra. Accordingly, habeas relief must be accorded now.

CLAIM VII

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

A capital sentencing jury must be:

> [T]old that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed . . .
>
> [S]uch a sentence could be given 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. Duest's capital proceedings. To the contrary, the burden was shifted to Mr. Duest 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 habeas corpus proceedings. Mr. Duest 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. Duaaer, 107 S. Ct. 1821 (1987); Maynard v. Cartwright, 108 S. Ct. 1853 (1988). Under Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989), Hitchcock was a change in law which required a penalty phase jury to receive accurate instructions. Mr. Duest's jury was unconstitutionally instructed, as the record makes abundantly clear (See R. 1572, 1625-26). This claim is now properly before this Court, and relief would be more than proper.

At the penalty phase of trial, prosecutorial argument and judicial instructions informed Mr. Duest's jury that death was the appropriate sentence unless "mitigating circumstances exist to outweigh any aggravating circumstances" (R. 1572, 1590, 1625-26). At one point the prosecutor stated "So let's look at the mitigating circumstances and let's see if they outweigh the aggravating circumstances" (R. 1606). Such argument and instructions, which shift to the defendant the burden of proving that life is the appropriate sentence, violate the eighth and fourteenth amendments, as the 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. Duest 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 cert granted (October 2, 1989).

The jury instructions here employed a presumption of death which shifted to Mr. Duest the burden of proving that life was the appropriate sentence. As a result, Mr. Duest'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. Duest'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 (R. 1697). The burden of proof was shifted to Mr. Duest 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. Duest'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. Duest proved that the mitigating circumstances existed which outweighed the aggravating circumstances. A reasonable juror could have well understood that mitigating circumstances were factors calling for a life sentence, that aggravating and mitigating circumstances had differing burdens of proof, and that life was a possible penalty, while at the same time understanding, based on the instructions, that Mr. Duest had the ultimate burden to prove that life was appropriate. In fact this is precisely what the prosecutor argued. 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. Duest'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. Duest'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. Duest'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, Bovde 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. Duest'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. Duest's sentencing or to "fully" consider mitigation, Penry v. Lynaugh, supra, particularly in light of the prosecutor's closing argument. There is a "substantial possibility" that this understanding of the jury instructions resulted in a death recommendation despite factors calling for life. Mills, supra. The death sentence in this case is in direct conflict with Adamson, Mills, and Penry, supra. This error "perverted" the jury's deliberations concerning the ultimate question of whether Mr. Duest should live or die. Smith v. Murray, 106 S. Ct. at 2668.

Moreover, the judge applied this presumption of death in her written findings. Sentencing errors apparent on the fact of the record are cognizible and preserved without a "contemporaneous objection." Forehand v. State, 537 So. 2d 103 (Fla. 1989); State v. Whitfield, 487 So. 2d 45 (Fla. 1986). The failure to raise this error on direct appeal was deficient performance which deprived Mr. Duest of a reversal. Habeas corpus relief is thereby appropriate, and Mr. Duest's sentence of death must be vacated.

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

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Duest's death sentence. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital

proceedings, see Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error.

Moreover, the claim is now properly brought pursuant to the Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. This issue involved a classic violation of longstanding principles of law. See Lockett, Eddings, supra. It virtually "leaped out upon even a casual reading of transcript." Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). This clear claim of per se error required no elaborate presentation -- counsel only had to direct this Court to the issue.

No tactical decision can be ascribed to counsel's failure to urge the claim. No procedural bar precluded review of this issue. See Johnson v. Wainwright, supra, 498 So. 2d 938. However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Duest of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra. Accordingly, habeas relief must be accorded now.

CLAIM VIII

MR. DUEST'S JUDGE AND JURY CONSIDERED AND RELIED ON THE VICTIM'S PERSONAL CHARACTERISTICS, THE IMPACT OF THE OFFENSE ON THE VICTIM'S FAMILY, AND THE PROSECUTOR'S AND FAMILY MEMBERS' CHARACTERIZATIONS OF THE OFFENSE OVER DEFENSE COUNSEL'S TIMELY OBJECTION IN VIOLATION OF MR. DUEST'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS, BOOTH V MARYLAND, SOUTH CAROLINA V. GATHERS, AND JACKSON V. DUGGER. APPELLATE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE FAILED TO RAISE A MERITORIOUS BOOTH ISSUE.

The act of murder has a powerful capacity to evoke the human emotion of sympathy for the victim's family while simultaneously engendering the emotional and unprincipled responses of rage, hatred, and revenge against the accused. The State did not

hesitate to provoke such an unprincipled emotional response from Mr. Duest's judge and jury.

In the guilt/innocence phase of the trial, the prosecutor introduced, and the court admitted over strenuous defense objection, a photograph whose only purpose was to depict the victim with his family:

> MR. BARON: I don't know what the probative value of this is. I would object. I don't -- I would object because it depicts a dresser.
>
> THE COURT: What does it have to do with this case?
>
> MR. GARFIELD: I don't know. I offer all the photographs in. What is wrong with showing that he is a human being, Judge, with children? He is going to call the whole defendant's family down. How could that be prejudice? All the other photographs show the room.
>
> MR. BARON: Another photograph shows this dresser from a side angle. It doesn't show -- The photographs haven't been introduced. What is the necessity?
>
> THE COURT: I don't have any problem. What is the probative value?
>
> MR. GARFIELD: Just part of the room, Judge.
>
> THE COURT: We have another one that shows part of the room. Which is the other one?
>
> MR. GARFIELD: What is the question? Is it so important, Judge, that the jury can't see?
>
> THE COURT: It doesn't make any difference to me. Why do you need to put extra things in?
>
> MR. GARFIELD: See the one you have got?
>
> THE COURT: Switching them around. You want this on it?
>
> MR. GARFIELD: It shows -- Look, Judge. You have here State's Exhibit 10 that shows --
>
> THE COURT: Do you know who these people are?
>
> MR. GARFIELD: No.

MR. BARON: Judge, I know he has a daughter and a son and if I am not mistaken Mr. Shifflett's picture.

MR. GARFIELD: It looks like Mr. Shifflett's. I have no idea. It shows how the room is laid out and taking this room into account where the clothes are from.

THE COURT: This is an old 1890's thing. Look at the thing.

MR. GARFIELD: Obviously it is time for Mr. Baron to make an objection. I don't think it is prejudicial.

THE COURT: It is not prejudicial. Probably a relative.

MR. GARFIELD: At best it is cumulative, shows how the room is laid out. I might not have to put this in.

THE COURT: I will allow it in. For the record, I, we are going to take out --

MR. GARFIELD: Take out this one, G.

THE COURT: I is 11?

THE CLERK: Yes.

(Thereupon, State's Exhibits Nos. 4 through 11 were offered and received in evidence.)

(R. 459-61)(emphasis added). The prosecutor's motive could not have been more clearly stated. The only probative value of the photo in question was to present a photograph depicting the victim's family to the jury. Defense counsel made a timely objection on the grounds that the only purpose of the photograph was to depict the victim's family.

The State began developing the theme of sympathy for the victim in voir dire:

MR. DOEBERLING: I am thinking, two weeks is going to kill me, but yet this guy is very important.

MR. GARFIELD: What about the person who is dead?

MR. DOEBERLING: I know. Sure, he is -- I spend most of my career as a respiratory therapist, having these guys come through ER and so forth, trying to help them out.

(R. 122)(emphasis added).

It became only too obvious to the jury as to the identity of the persons pictured in exhibit 11. The victim's family was very much in evidence:

> MR. GARFIELD: He also said the same thing to me outside. I think what is happening, is when he is saying that he is looking at the relatives and the relatives are very adamant about that. Mr. Grillo had indicated that they don't like this homosexual thing being brought out. You notice he is saying Marlin Beach and Lefty's?
>
> THE COURT: I know.

(R. 497)(emphasis added).

> THE COURT: Okay. Ladies and gentlemen, I am going to let you go for lunch. You come back at 1:30 and then we can start again.
>
> (Thereupon, the following proceedings were had out of the presence of the jury:)
>
> MR. BARON: Judge, my client has told me, and I haven't seen anything, I am going by what he told me. It is something I need to bring up to the Court. That three people in Mr. Pope's family and Mr. Harris were sitting right near the jury and have been making comments, that if not to the jury, at least easily within earshot of the jury. I would ask if nothing else that they not sit there anymore.
>
> THE COURT: I have not noticed anything because I cautioned Mr. Harris before.
>
> MR. GARFIELD: I didn't notice because my back -- I will tell them to move over to the next aisle which they were in.
>
> THE COURT: Okay.
>
> MR. GARFIELD: I think the reason was to see the witness better. You can't see from the left side as well as from the right side.
>
> MR. BARON: If they want to sit a few rows back, I don't care.
>
> THE COURT: Okay. Anything else?
>
> MR. BARON: No.
>
> THE COURT: I didn't say anything for the record but my clerk watched and she didn't see anything, either. I watched. Okay.

(R. 1064-64)(emphasis added). Not only were the victim's family the subject of the prosecutor's motion and their photographs

shown to the jury, but they also created at least two disturbances in the courtroom requiring that they be admonished and then moved.

The State's presentation of victim impact evidence before Mr. Duest's jury and judge continued throughout the course of the proceedings. During the state's closing penalty phase argument the prosecutor sought a collective emotional response from Mr. Duest's jury drawing upon the victim impact evidence and testimony adduced during guilt-innocence proceedings:

> The defendant in this case has taken the position that he did not do this. Therefore, he has no remorse in this case. The victim was what I would call, and what he has been called by the witnesses, a young 64. You remember the picture that was in evidence of him, of Mr. Pope. That was a live and well picture, so it is not a gory photograph. I just want you to recall State's Exhibit 16. There he is. Look at the age of the people that he is with. Pretty young for his age. Enjoying his life. Perhaps he was gay. I watched you people too long to believe that that makes any difference to you. He had just as much of a right to be the way he was as anybody else has to be the way they are. Of course, he had a family, too. I am not going to dwell on that but you have heard from the family of Mr. Duest. Let's not forget that the person who is dead has a family, also. They loved him and he loved them. So much for that circumstance. I submit to you that that does apply in this case. Number eight, wicked, evil, atrocious, or cruel.

(R. 1596-97)(emphasis added). The prosecutor's message is clear -- Mr. Duest should die because the victim was a young 64 and enjoying his life. Mr. Duest should die because the victim had friends and family. The prosecutor continued to evoke the jury's sympathy for the victim:

> No remorse. All that time. All that time. So I would submit to you that this was a premeditated killing, that it was done in the cold and calculated and premeditated manner without any pretense of moral or legal justification. Okay. That is all for the aggravating. You want to be as fair to the State and you want to be as fair to Mr. Duest and to the family of Mr. Duest and to the family of Mr. Pope as you possibly can be.

> Not a single one of you started this trial, sitting there as prospective jurors, thinking you were going to be unfair. So it is too late now to become unfair.

(R. 1605-06)(emphasis added). The gist of the prosecutor's argument was that it would be "unfair" not to consider the victim's family and that it was "too late to become unfair."

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

> Daughter of the victim, Lillian P. Ferren, stated, "It is very difficult to summarize my feelings about my Dad's tragic murder without wondering why such a good man had to die in such a horrible manner, or for that manner, anyone else. My Dad was a good father to my brother and I. He was a kind and gentle man who always put his family first. He was retired from a company he had worked for for twenty-five years and had moved to Fort Lauderdale just five short months before he was murdered. I could write pages on the pain and grief this murder has caused our family. About the loss we feel on a daily basis. About all the big and little things he did that made him such a special Dad and made his tragic death such a terrible loss, but that is not the purpose of this letter. My Dad was brutally murdered and one of the worst ways imaginable to me. He lay bleeding to death after being literally ripped apart by an escaped convict who was awaiting trial for another crime. Do I feel Lloyd Duest deserves to be able to return to society in twenty-five years to prey on more innocent victims? The jury did not want to give Duest the opportunity and neither do I. The repeated escapes and subsequent crimes indicates to me that this man has no intention of either rehabilitating himself of allowing the penal system to rehabilitate him. With all of this in mind, I must agree with the jury's recommendation of the death sentence for Lloyd Duest for the atrocities he has committed against my father and others and if given the opportunity, I feel he will do it again."
>
> Victim's son, David D. Pope, stated, "I would like first to address the prospect of the minimum sentence of life in prison with the provision for Parole in twenty-five years: I find the idea of Parole unacceptable, not just in this case but in any case which involves someone accused of Murder In The First Degree. I do not believe anyone should be placed back in society after being convicted of this type of crime. Quite frankly, I believe it would be difficult to keep the defendant in prison for even twenty-five. In my opinion his prior record

> indicates not only a consistent history of criminal convictions, but also a consistent history of prison escapes. Because of this trend, I am concerned that the defendant might escape again and in the process or aftermath take someone's life. On a more personal basis I believe the fact that this man did take my father's life in an intentional as well as cruel manner justifies the maximum sentence. I do not accept the reasoning presented by others that someone has to commit multiple murders before Capital Punishment is warranted. For these reasons I reaffirm the recommendation of the majority of the jury to impose the maximum sentence."

(R. 1811-12)(emphasis added). In addition, the presentence investigator offered her own characterization of the offense for the court's consideration:

> In view of the fact that The Aggravating Circumstances that do apply sufficiently outweigh The Mitigating Circumstances, it can be said that Lloyd Duest presents a threat to society. It is the opinion of this officer that he acted knowingly, with and in a premeditated design and that he did so knowing his actions created a great likelihood of death for John Pope, Jr. This offense was a brutal Homicide in which victim was stabbed eight times and then left to die.
>
> Lloyd Duest is of a criminal nature with a total lack of regard for the law or the rights of others, including their right to live. His entire adult life has been one criminal act after another. It is felt that life imprisonment is not sufficient punishment. Chances for rehabilitation are minimal, due to the fact that attempts have been made in the past and have failed.
>
> Lloyd Duest has a history of Escape from confinement at least four times in Massachusetts and Florida, and should he escape again, the results could be disastrous. This officer feels that Lloyd Duest has the capacity as well as the propensity to murder again.
>
> Having considered the subject's prior criminal record, his absolute lack of remorse and the seriousness of the offense, The Aggravating and Mitigating Factors, and the advise of the jury, this officer respectfully recommends that Lloyd Duest be sentenced to death.

(R. 1817).

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 "create[ing] a constitutionally unacceptable risk that the [sentencer] may [have] impose[d] the death penalty in a arbitrary and capricious manner." Id. at 2533 (emphasis added). Similarly, in South Carolina v. Gathers, 109 S. Ct. 2207 (1989), the court vacated the death sentence there based on admissible evidence introduced during the guilt-innocence phase of the trial from which the prosecutor fashioned a victim impact statement during closing penalty phase argument. Booth and Gathers mandate reversal where the sentencer is contaminated by victim impact evidence or argument. Mr. Duest's trial contains not only victim impact evidence and argument but, in addition, characterizations and opinions of the crimes condemned in Booth. Both the jury and judge relied on the victim impact evidence and argument in recommending a sentence of death. The court not only condoned but considered the victim impact evidence presented. At the time of sentencing the prosecutor complimented the probation officer for doing "an excellent job in compiling her investigation" (R. 1682). Furthermore, the judge made it clear that she had the presentence investigation before her and was relying on it at the time of sentencing:

> THE COURT: Do you want me to correct the PSI and initial it, Mr. Garfield?
>
> MR. GARFIELD: If there is no objection to that procedure.
>
> THE COURT: Any objection to that procedure? Four-eighteen, '82, he's put down armed escape. That is not the armed escape.
>
> MR. BARON: They were both filed, but under the facts, the first one, there was no weapon used at all.
>
> MR. GARFIELD: I agree with that statement.

THE COURT: Do you have a problem with my crossing out "armed" here?

MR. BARON: No, Judge.

(R. 1683). Mr. Duest's case presents the constitutionally unacceptable risk that the sentencer may have relied on victim impact evidence in violation of Booth, Gathers, and Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989).

The prosecutor augmented his appeal to the court that Mr. Duest should die because of the suffering of the victim's family and friends with a specific argument at the time of sentencing:

> I will be brief also, as far as the proper sentence. Aside from leaal consideration, that jury was not allowed to consider the tears that would have, without a doubt, flowed from the family of the victim and some of the victim's friends. Some of the family and friends of the deceased did not want to testify. In the interest of a clean presentation, I did not allow them to testify. I'm not sure that would have been proper, but it's amazing how we can have a defendant standing here today worried about how many convictions you're going to count when, as far as I'm concerned, it's almost trivial in regard and in comparison to the human misery this man has basically spent his life inflicting upon people.

(R. 1685-86)(emphasis added).

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. Maryland, 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 his family.

Here, the proceedings violated Booth and Gathers, thus calling into question the reliability of Mr. Duest'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. Lynaush, 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. Dusser, 547 So. 2d 1197 (Fla. 1989), the court held that the principles of Booth are to be given full effect in Florida capital sentencing proceedings. As in Jackson, defense counsel for Mr. Duest vigorously objected during the State's introduction of victim impact evidence (R. 459-461). Jackson dictates that relief post-Booth and Gathers is now warranted in Mr. Duest's case. Further, Gathers makes clear that error occurs when the victim's characteristics are paraded before the sentencer and those characteristics were not known to the assailant. There is simply no evidence that Mr. Duest was aware of the "circumstance" that the victim had children or liked to enjoy himself. As in Gathers, these personal characteristics were purely fortuitous and did not provide any information relevant to Mr. Duest's culpability. Gathers, supra at 2211. See Zersuera v. State, ___ So. 2d ___, 14 F.L.W. 463, 464 (Fla. Sept. 28, 1989)

This record is replete with Booth error. Mr. Duest 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. Duest'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. The jury vote for death was 7 to 5. Only one person had to change their mind for there to be a life recommendation. 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 argument "could [have] resulted" in the imposition of death because of impermissible considerations, Booth, 107 S. Ct. at 505, 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. Duest. For each of the reasons discussed above the Court should vacate Mr. Duest's unconstitutional sentence of death.

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

Moreover, the claim is now properly brought pursuant to the Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. This issue involved a classic violation of longstanding principles of law. It virtually "leaped out upon even a casual reading of transcript." Matire v. Wainwrisht, 811 F.2d 1430, 1438 (11th Cir. 1987). This clear claim of per se error required no elaborate presentation -- counsel only had to direct this Court to the issue. The court would have done the rest, based on long-settled Florida and federal constitutional standards.

No tactical decision can be ascribed to counsel's failure to urge the claim. No procedural bar precluded review of this issue. See Johnson v. Wainwrisht, supra, 498 So. 2d 938. However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Duest of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwrisht, supra, 474 So. 2d at 1164-65; Matire, supra. Accordingly, habeas relief must be accorded now.

CLAIM IX

DURING THE COURSE OF MR. DUEST'S TRIAL THE COURT IMPROPERLY ASSERTED THAT SYMPATHY AND MERCY TOWARDS MR. DUEST WERE IMPROPER CONSIDERATIONS, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

This claim arises under new case law and is properly pled now. Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); Penry v. Lynaugh, 109 S. Ct. 2934 (1989).

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

> One of the instructions that the Judge is going to give you is that if you feel sympathy in this case, whether it be for the victim who is dead or whether it be for the defendant, whatever sympathy you might feel you have got to cast that aside while you deliberate and reach a verdict.

(R. 80).

> [THE PROSECUTOR]: Now, you may feel sympathy for either a victim in a case - and again it would be natural perhaps for you to feel sympathy for someone who is killed - then again maybe you don't. Maybe it would depend on the victim in a case or you may in this case feel sympathy for the defendant. I don't know. Just because he is on trial in this case. You know that is an unpleasant position to be in on trial.
>
> The Courts have taken into account that people do have emotions during the trial. You can't help but have some kind of an emotional reaction to people that you listen to in a trial, to the facts as you hear them. The law doesn't say to you don't have any emotions. But the law does say that fine, you have this emotion, please put it aside and be objective in your verdict, don't base it upon sympathy or lack of sympathy or the lawyers on the case, if you hate one lawyer or whatever, you like Mr. Baron. He is really nice.

(R. 119). While examining Mr. Duest's father, the prosecutor made the following comment with the resulting exchange:

Q. I don't know if cancer has anything to do with John Edward Pope being stabbed eight times in the back and the chest and three times in the back, Mr. Duest.

MR. GARFIELD: I have no other questions.

MR. BARON: Your Honor, I object to that.

MR. GARFIELD: That was a non-responsive answer.

MR. BARON: That was an unresponsive question and if nothing else probably closing argument.

MR. GARFIELD: Your witness, Mr. Baron.

THE COURT: Do you have any questions, Mr. Baron?

MR. BARON: Yes, I have one question if Mr. Garfield will give me the opportunity.

(R. **1258-59**). During closing the prosecutor returned to his comment:

> Okay. A few more things. The father goes into -- Here is a couple of things about Mr. Duest. There is where I am going to have to remind you that sympathy plays no part in this case. Obviously a man -- He has got cancer. I don't want to get on that. Let's be objective in this case.

Prior to the jury's guilt-innocence deliberations the court concurred with the prosecutor's position that sympathy and mercy were to play no part in Mr. Duest's trial by expressly instructing them that such considerations were precluded by law and would result in "a miscarriage of justice" (R. **1525**). Significantly, the following instructions were the only ones provided by the court with respect to the role that mercy or sympathy could play in deliberations:

> Two, this case must be decided only upon the evidence that you have heard from the answers of the witnesses and have seen in the form of exhibits in evidence and these instructions. Three, <u>This case must not be decided for or against anyone because you feel sorry for anyone, or are angry at anyone</u>.

(R. **1525**) (emphasis added).

* * *

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

(R. 1526)(emphasis added). The jury was never informed that a different standard, one allowing for consideration of mercy or sympathy, was applicable at the penalty phase.

In fact in his closing argument the prosecutor reminded the jury it should remain dispassionate:

> I would like to -- I am grateful for the fact that you had the courage to return what I would submit to you and believe is the only logical verdict in this case. I appreciate that.
>
> I am not going to make any type of compassionate plea for anything. I would like to ask you to remain as calm and dispassionate, not only during my argument or statement and Mr. Baron's, but also during the time that you deliberate.

(R. 1589).

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

Requesting the sentencers to dispel any sympathy they may have had towards the defendant undermined the sentencers' ability to reliably weigh and evaluate mitigating evidence. The sentencers' role in the penalty phase is to evaluate the circumstances of the crime and the character of the offender before deciding whether death is an appropriate punishment. Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). An admonition to disregard the consideration of sympathy improperly suggests to the sentencer "that it must ignore the mitigating evidence about the [petitioner's] background and character." California v. Brown, 479 U.S. 538, 107 S. Ct. 837, 842 (1987)(O'Connor, J., concurring). The sympathy arising from the

mitigation, after all, is an aspect of the defendant's character that must be considered.

Parks v. Brown, 860 F.2d at 1554-57. On April 25, 1989, the United States Supreme Court granted a writ of certiorari in order to review the decision in Parks. See Saffle v. Parks, 109 S. Ct. 1930 (1989). A stay of execution in Mr. Duest's case would be more than appropriate pending the United States Supreme Court's establishing of standards for a determination of this claim.

The United States Supreme Court recently held in a case declared to be retroactive on its face that a capital sentencer jury must make a "reasoned moral response to the defendant's background, character, and crime." Penry v. Lynaugh, 109 S. Ct. 2934, 2947 (1989). It is improper to create "the risk of an unguided emotional response." 109 S. Ct. at 2951. However, a jury must be allowed to grant mercy. Id. 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. Duest. Penry alleged that under Texas' functional equivalent of aggravating factors his jury was precluded from considering a discretionary grant of mercy based on the existence of mitigating factors. Id., 109 S. Ct. at 2942. The Court found that, as applied to Penry, the failure to so instruct was not a legitimate attempt by Texas to avoid unbridled discretion, 109 S. Ct. 2951, but rather, an

impermissible attempt to restrain the sentencer's discretion to decline to impose a death sentence. 109 S. Ct. 2951. In Mr. Duest's case, the sentencer was expressly told that Florida law precluded considerations of sympathy and mercy. The net result is the same: the unacceptable risk that the jury's recommendation of death was the product of the jury's belief that feelings of compassion, sympathy, and mercy towards the defendant were not to be considered in determining its verdict. The resulting recommendation is therefore unreliable and inappropriate in Mr. Duest'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 remained in full force and effect during penalty phase deliberations. 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. Duest's unconstitutional sentence of death. This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Duest's death sentence.

The retroactive opinion in Penry requires that this issue to be addressed and fully assessed at this juncture. Similarly the retroactive decision in Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), which first established the Florida sentencing juries must receive accurate penalty phase instructions, requires this issue to be addressed at this juncture. The eighth amendment cannot tolerate the imposition of a sentence of death where there exists a "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Penry, 109 S. Ct. at 2952. This error undermined the reliability of the jury's

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

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Duest'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. Wainwrisht, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error.

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

CLAIM X

THE PROSECUTOR AND TRIAL JUDGE UNDER FLORIDA BIFURCATED TRIAL PROCEDURE MISINFORMED THE JURY AND IMPERMISSIBLY DIMINISHED THE JURORS' UNDERSTANDING OF THE IMPORTANCE OF THEIR ROLE AND RESPONSIBILITY IN THE SENTENCING PHASE IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The prosecutor and court misinformed Mr. Duest's jury as to its true responsibility in the capital sentencing process under Florida law. These comments derogated the jury's sentencing role, contrary to the law, and diminished their "awesome sense of responsibility."

In Florida, the jury's sentencing recommendation is entitled to great weight in the judge's sentencing decision. A judge may override a jury recommendation of life imprisonment only if "the facts suggesting a sentence of death [are] so clear that virtually no reasonable person could differ." Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). The trial judge and the prosecutor improperly and inaccurately characterized the role, responsibility and critical function of the jury with regard to sentence, in violation of the sixth, eighth and fourteenth amendments.

The prosecutor and judge repeatedly told the jury during voir dire that the sentencing decision rested solely within the province of the court. The prosecutor made similar comments. The record is replete with such inaccurate references; only the most startling will be repeated. The Court, in the presence of the entire assembled venire, inquired of a prospective juror:

> THE COURT: Are you saying that knowing the consequences -- Do you understand -- and I think all of the jurors understand -- that the jurors never impose any kind of penalty in the case, the Court does?
>
> MRS. ROTHKOWITZ: I understand.
>
> THE COURT: That is my job, to do the sentencing.

* * * * * * * * * * *

> THE COURT: I think what we want to know, are you so concerned about the penalty? Now, according to the statutes and the law I have to tell you what the penalty is and then in the next breath I have to tell you to disregard the consequences of your verdict because you do not impose any penalty. No juror does. The judge does. The Court does.

(R. 197-198) (emphasis added).

The Judge, in unconstitutionally informing the jury that the court, not the jury, is exclusively endowed with the sentencing function, echoed similar error committed earlier in voir dire by the prosecutor, who told Juror Thomas, in front of the entire venire:

> Now, your recommendation, if that - if your verdict is guilty of murder in the first degree, your recommendation on sentence is not binding on the Court. It is just a recommendation. A jury never imposes a sentence on any defendant. It is always up to the judge. Nobody else.

(R. 82) (emphasis added). Juror Thomas in fact served on Mr. Duest's jury, along with eleven other jurors who listened to the prosecutor's trivialization of their sentencing function.

In addition to deprecating the jury's integral function in Florida's capital sentencing scheme, the prosecutor at Mr. Duest's trial went so far as to belittle this capital jury's basic sense of responsibility, a responsibility deemed by the United States Supreme Court as no less than **"awesome."** Caldwell v. Mississippi, **105** S. Ct. **2633, 2646 (1985).**

> You can't ask questions. You can't take notes. You just kind of sit there and watch passively. You have no real input. The only time you get to talk is when you come back and say what your verdict is. Do you understand that? That is what your role is. Essentially going to be rather a passive one... .
>
> I am not singling you out. That is the limitation you have of this low paying nondesirable job that you have. That is another parameter of it. You are stuck with our input. You have no control of it. You sit and listen. You go back in the room.

> Somehow you come back and tell us what the verdict is. It is no doubt an easy job. It is not a hard one. It is done every day.
>
> It is something you are not geared for, trained for, in your previous background. Does anybody have a problem with that aspect of the job?

(R. 259-260) (emphasis added).

Later, he again diminished the role of the jury in sentencing:

> MR. GRILLO: Do you understand the way the case will develop, the jury selection, the State's case, the verdict, if it is a verdict, of murder in the first degree and then it will go to a sentencing and you get to vote a non-binding vote to the Judge?

(R. 276).

In charging the jury at the conclusion of the guilt/innocence phase of Mr. Duest's trial, the court stated:

> It is the Judge's job to determine what a proper sentence would be if the defendant is guilty.

(R. 1525). The Court added **". . .** The penalty is for the court to decide" (R **1528).** See also **R. 1526: "The** penalty is for the Court to decide. You are not responsible for the penalty in any way because of your verdict."

Later in introducing the penalty phase, the Court told the jury:

> Final decision as to what punishment shall be imposed rests solely with the Judge of this court; however, the law requires that you, the jury, render to the court, advisory sentence, as to what punishment should be imposed upon the Defendant.

(R. 1571-72).

At the conclusion of the sentencing hearing, in his instructions to the jury before they retired for sentencing deliberation, the court once again minimized the great import of the jury's responsibility:

> **As** you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge.

(R. 1624).

At no point did the judge ameliorate the effect of the court's or the prosecutor's derogation and mischaracterization of the jury's critical role by informing them that their advisory sentence would be accorded "great **weight,"** Tedder, or would be of any particular importance in the ultimate sentencing decision.

Because the jury was led to believe that it had little or no effect on sentencing when in fact their function at capital sentencing is critical, and because this created a reduced sense of responsibility incompatible with Florida sentencing procedure and with the eighth amendment, the recommendation of Mr. Duest's jury is constitutionally unreliable, and a new sentencing hearing is required. The claim is cognizable for several reasons. First, Caldwell v. Mississippi, 105 S. Ct. 2633 (1985), prohibits incorrect comments and instructions which cannot be said to have had no effect on sentencing, and which could diminish the sentencers' sense of moral responsibility for its decision. The jury is a **"sentencer"** in Florida, because the recommendation is entitled to great weight. Hitchcock v. Dusser, 107 S. Ct. 1821 (1987); Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(in banc) cert. denied 109 s. Ct. 1353 (1989). Second, it was an unreasonable omission by defense counsel to have allowed the jury to be so misinformed, an omission not possibly attributable to reasonable tactic or strategy. The error is prejudicial, especially in light of the other misinformation upon which the jury was instructed, and violates Mr. Duest's right to effective assistance of counsel under the sixth, eighth and fourteenth amendments. Finally, misinforming and thereby misleading a jury about the ultimate penalty, and their effect on its imposition, is fundamental error under the eighth and fourteenth amendments, since reliability in capital sentencing is thereby foreclosed, allowing death sentences that strike like lightning, and which are arbitrarily, discriminatorily and capriciously imposed. .cp4

Statements by the prosecutor or court that diminish the jury's sentencing responsibility violate the eighth amendment to the United States Constitution.

> This Court has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its *@trulyawesome responsibility.@* In this case, the State sought to minimize the jury's sense of responsibility for determining the appropriateness of death. Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires. The sentence of death must therefore be vacated.

Caldwell at 2646.

The Eleventh Circuit held in Adams v. Wainwright, 804 F.2d 1526, (11th Cir. 1986) modified, Adam v. Duaaer, 816 F. 2d 1493 (11th Cir. 1987) reversed on other arounds Dusaer V. Adams, 109 S. Ct. 1211 (1989) where the judge's statements ... created an @@intolerabledanger that the jury's sense of responsibility for its advisory sentence was diminished, thereby rendering Adams's death sentence unreliable in violation of the Eighth Amendment." Adams at 1529. Of supreme relevance to Mr. Duest's claim is the Eleventh Circuit's holding that "the district court's reliance on the judge's status as the 'sole sentencer' was misplaced.@* Adams, id. This constitutionally impermissible characterization of the judge's role is precisely the characterization made by Mr. Duest's prosecutor:

> [A] jury never imposes a sentence on any defendant. It is always up to the judge. Nobody else.

(R. 82), and echoed by the judge:

> You do not impose any penalty. No juror does. The Judge does. The Court does.

(R. 198).

The Eleventh Circuit cited Caldwell for the additional proposition that:

> [T]he prejudicial effect of the prosecutor's argument was increased by the fact jurors

> would be likely to find minimization of their otherwise difficult role of determining whether another should die attractive, particularly when they were told that the alternative decision makers were leaal authorities that they might view as having more of a right to make such an important decision.

Adams at 1532. Again, this is precisely the harm done by the prosecutor when he told Mr. Duest's jury, of their function,

> It is something you are not geared for, trained for, in your previous background.

(R. 260).

Notably, in Adams and Mr. Duest's case, unlike Caldwell, the Caldwell error was multiplied by the fact that the source of the erroneous information as to the jury's proper responsibility was the trial court itself.

> Indeed, because it was the trial judge who made the misleading statements in this case, representing them to be an accurate description of the jury's responsibility, the jury was even more likely to have believed that its recommended sentence would have no effect and to have minimized its role than the jury in Caldwell. Cf. id. at **2645** (noting importance of fact trial judge agreed with prosecutor's remarks).

Adams at 1532.

While it is true that in Florida, the jury sentence is an advisory recommendation and not the final sentencing determination, it is nonetheless improper to minimize the "great weight" to be accorded a jury recommendation under Tedder. Indeed, while the Florida Supreme Court has approved instructions that inform the jury that its sentence is **"advisory"** subject to a **"final"** or **"ultimate"** decision by the court, such instructions are acceptable only **"as** long as the significance of its rthe jury's] recommendation is adequately **stressed."** Pope v. Wainwright, **496** So. 2d **798** (Fla. **1986).** In Pope, **"[i]n** his final instructions to the jury, the trial judge stressed the significance of the jury's recommendation and the seriousness of the decision they were being asked to make." Pope, slip op. at 11. This crucial stressing of the jury's integral responsibility

was totally absent in Mr. Duest's case. Here, the prosecutor and court irreparably trivialized the jury's function, stressing not that the jury sentencing recommendation was important but that "That is my job, to do the sentencing" (R 197), and "it is just a recommendation. A jury never imposes sentence on any defendant. It is always up to the judge. Nobody else" (R 82).

This instruction is erroneous and represents precisely the diminution condemned in Caldwell and the imprimatur absent in Tucker. (See also Teffeteller v. State, 439 So. 2d 840, 845 fn. 2 (Fla. 1983) ("Although a jury's sentencing recommendation is only advisory, it is an integral part of the death sentencing process and cannot properly be ignored.") The comments and instructions to Mr. Duest's jury were wrong and it most certainly cannot be said that they "had no effect on the sentencing decision." Caldwell.

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

Caldwell v. Mississippi, 472 U.S. 320 (1985), involved prosecutorial/judicial diminution of a capital jury's sense of responsibility which is far surpassed by the jury-diminishing statements made during Mr. Duest's trial. The en banc Eleventh Circuit in Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988), and Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988), determined that

Caldwell assuredly does apply to a Florida capital sentencing proceeding and that when either judicial instructions or prosecutorial comments minimize the jury's role relief is warranted. See Mann, supra. Caldwell involves the most essential eighth amendment requirements to the validity of any death sentence: that such a sentence be individualized (i.e., not based on factors having nothing to do with the character of the offender or circumstances of the offense), and that such a sentence be reliable. Id., 105 S. Ct. at 2645-46.

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

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

Mann v. Dugger makes clear that proceedings such as those resulting in Mr. Duest's sentence of death violate Caldwell and the eighth amendment. In Mann, as in Mr. Duest's case, the prosecutor sought to lessen the jurors' sense of responsibility during voir dire and repeated his effort to minimize their sense of responsibility during his closing argument. In Mann, the en

banc Eleventh Circuit held that "the Florida [sentencing] jury plays an important role in the Florida sentencing scheme," 844 F.2d at 1454, and thus:

> Because the jury's recommendation is significant . . . the concerns voiced in Caldwell are triggered when a Florida sentencing jury is misled into believing that its role is unimportant. Under such circumstances, a real danger exists that a resulting death sentence will be based at least in part on the determination of a decisionmaker that has been misled as to the nature of its responsibility. Such a sentence, because it results from a formula involving a factor that is tainted by an impermissible bias in favor of death, necessarily violates the eighth amendment requirement of reliability in capital sentencing.

Id. at 1454-55. The comments and arguments provided to Mr. Duest's jurors were as egregious as those in Mann and went far beyond those condemned in Caldwell.

Again and again, the jury was told it is the judge who "pronounces" sentence. The jury, as if their sentencing determination were but a political straw poll, were told that they were simply making a recommendation, providing a view which could be taken for whatever it was worth by the true sentencing authority who carried the entire responsibility on his shoulders -- the judge. The jury were time and again instructed that their role was merely advisory and only a recommendation which could be accepted or rejected as the sentencing judge saw fit.

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

In a capital case, the jurors are placed "in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice . . . Given such a situation, the

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

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

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

Under Florida's capital statute, the jury has the primary responsibility for sentencing. In Hitchcock v. Dusser, 107 S. Ct. 1821 (1987), the United States Supreme Court for the first time held that instructions for the sentencing jury in Florida was governed by the eighth amendment. This was a retroactive change in law. See Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987), which excuses counsel's failure to object the adequacy of the jury's instructions and the impropriety of prosecutor's comments. Thus, the intimation that a capital sentencing judge has the sole responsibility for the imposition of sentence, or is in any way free to impose whatever sentence he or she sees fit, irrespective of the sentencing jury's own decision, is inaccurate, and is a misstatement of the law. See Mann v. Dusser, 844 F.2d at 1450-55 (discussing critical role of jury in Florida capital sentencing scheme). The judge's role, after all, is not that of the "sole" or "ultimate" sentencer. Rather, it is to serve as a "buffer where the jury allows emotion to override the duty of a deliberate determination" of the appropriate sentence. Cooper v. State, 336 So. 2d 1133, 1140 (Fla. 1976). While Florida requires the sentencing judge to independently weigh the aggravating and mitigating circumstances and render sentence, the jury's recommendation, which represents the judgment of the community, is entitled to great weight. Mann, supra; McCampbell v. State, 421 So. 2d 1072, 1075 (Fla. 1982). The jury's sentencing verdict may be overturned by the judge only if the facts are "so clear and convincing that virtually no reasonable person could differ." Tedder, 322 So. 2d at 910. Mr. Duest's jury, however, was led to believe that its determination meant very little, as the judge was free to impose whatever sentence he wished. Cf. Mann v. Dusser.

In Caldwell, 105 S. Ct. 2633, the Court held "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe

that the responsibility for determining the appropriateness of the defendant's death lies elsewhere," id., 105 S. Ct. at 2639, and that therefore prosecutorial arguments which tended to diminish the role and responsibility of a capital sentencing jury violated the eighth amendment. Because the "view of its role in the capital sentencing procedure" imparted to the jury by the improper and misleading argument was "fundamentally incompatible with the eighth amendment's heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case,'" the Court vacated Caldwell's death sentence. Caldwell, 105 S. Ct. at 2645. The same vice is apparent in Mr. Duest's case, and Mr. Duest is entitled to the same relief.

The comments and instructions here went a step further -- they were not isolated, as were those in Caldwell, but as in Mann were heard by the jurors at each stage of the proceedings. These cases teach that, given comments such as those provided to Mr. Duest's capital jury, the State must demonstrate that the statements at issue had "no effect" on the jury's sentencing verdict. Id. at 2646. This the State cannot do. Here the significance of the jury's role was minimized, and the comments at issue created a danger of bias in favor of the death penalty. Had the jury not been misled and misinformed as to their proper role, had their sense of responsibility not been minimized, and had they consequently voted for life, such a verdict, for a number of reasons, could not have been overridden -- for example, the evidence of non-statutory mitigation was more than a "reasonable basis" which would have precluded an override. See Hall v. State, 541 So. 2d 1125 (Fla. 1989); Brookings v. State, supra, 495 So. 2d 135; McCampbell v. State, supra, 421 So. 2d at 1075. The Caldwell violations here assuredly had an effect on the ultimate sentence. This case, therefore, presents the very danger discussed in Caldwell: that the jury may have voted for death because of the misinformation it had received. This case

also presents a classic example of a case where no Caldwell error can be deemed to have had "no effect" on the verdict.

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

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Duest'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. Wainwriaht, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error.

Moreover, the claim is now properly brought pursuant to the Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. This issue involved a classic violation of longstanding principles of Florida law. It virtually "leaped out upon even a casual reading of transcript." Matire V. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). This clear claim of per se error required no elaborate presentation -- counsel only had to direct this Court to the issue. The court would have done the rest, based on long-settled Florida and federal constitutional standards.

No tactical decision can be ascribed to counsel's failure to urge the claim. No procedural bar precluded review of this issue. See Johnson v. Wainwright, supra, 498 So. 2d 938. However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Duest of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra. Accordingly, habeas relief must be accorded now.

CLAIM XI

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

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

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

Furman v. Georgia, 408 U.S. 238, 274, (1972)(Justice Brennan concurring)(footnote omitted).

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

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

> circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed.

Proffitt v. Florida, 428 U.S. 258 (1976).

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

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

Miller v. State, supra. See also Riley v. State, 366 So. 2d 19 (Fla. 1979), and Robinson v. State, 520 So. 2d 1 (Fla. 1988). The limitation of the sentencer's ability to consider aggravating circumstances specifically and narrowly defined by statute is required by the eighth amendment.

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

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

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

jury to consider guilt phase evidence during the penalty phase **(R. 1625).**

As a result of the court's direction to consider guilt phase evidence when assessing the proper penalty, the jury and the court considered numerous improper and nonstatutory aggravating factors. The prosecutor characterized Mr. Duest as a **"fag";** he ridiculed the family nickname of **"Lloydy"** and sarcastically referred to Mr. Duest as "the loving Lloydy"; and finally called him a **"jerk"** and stated that the state witnesses "did not like him" (R. **1431, 1437, 1451).** During voir dire the prosecutor stated: **"He** looks innocent to you? Well, he is not" (R. **284).**

In the penalty phase, the prosecutor constantly urged the jury to impose the death sentence based on nonstatutory aggravation. He continued his attempts to inflame the jury by his personal denigration of Mr. Duest with comments such as **"He** probably would have graduated had he wanted to or applied himself" (R. **1612).** In his final summation to the jury, the prosecutor highlighted nonstatutory aggravating factors:

> He was never in the military. I mean, sometimes a person went to war and had been decorated a veteran or something. Well, at least he served his country. He was never in the military. I have seen or heard nothing. You have heard nothing. You heard nothing to indicate that he particularly supported his children. You heard he was -- Every time he made an appearance it was to borrow money. He borrowed money from his sister, Debbie. He borrowed money from his father. Here is his father. You can tell he is a gutsy guy. I respect Richard Duest. I don't like being up here and cross examining him and giving him a tough time. I respect the man. He has got guts.
>
> Here is the kid. What does he do for his old man? Give me $500 bucks, Dad. That is wonderful. So it looks to me, and you decide for yourself, it looks to me like this defendant is a taker, not a giver. I don't see anything he save. I just don't see anything he save. No efforts at a useful life. What has he done? Well, he has done a couple of things. I stand corrected. The parents, Mr. Duest mentioned to you that he helped an inmate once. Consider that.

> Consider anything else that was brought out along that line.
>
> No Christmas Presents. Doreen says he is a wonderful father. No known occupation. No real prospects for rehabilitation. Not a first offender. He has been throush the system time and time again. Well, I didn't think I would take this long. I really didn't. I don't get to speak to you again.

(R. 1614-16)(emphasis added). The prosecutor argued that Lloyd Duest should die because the victim was a "young 64" and was "enjoying his life"; and because the victim had a family and "they loved him and he loved them" (R. 1596-97).

At the sentencing hearing, the prosecutor argued that Mr. Duest should die because he was a "rabid dog":

> You know, we've seen what happens when a rabid dog runs around and the destruction that ~~a rabid dog~~ can inflict upon people. This man has a rabid dog beaten by quite a bit. Doss cannot make moral judgments, but people can, and Lloyd Duest made a moral judgment back on February 15, 1982 and, in fact, Lloyd Duest believes in the death penalty, Judge. I say he does because he rendered it upon John Edward Pope, Jr.

(R. 1687)(emphasis added). The prosecutor told the court that Mr. Duest should die because a life sentence would mean that the court opposed the death penalty:

> To not sentence Mr. Duest to death would be to make a statement that the death penalty should not apply in Florida, and thus unless the Court is prepared to go that far, I would submit to the Court that is the only proper sentence in this case for this defendant.

(R. 1688-89). Clearly the age of the victim does not constitute a statutory aggravating factor promulgated by the legislature. The fact that Mr. Duest did not finish high school, was gay, and did not give Christmas gifts are not statutory aggravating factors promulgated by the legislature. See Booth v. Maryland, supra.

The prosecutor also featured the allegation that Mr. Duest should die because by maintaining his innocence demonstrated he had no remorse:

> The defendant in this case has taken the position that he did not do this. Therefore, he has no remorse in this case.

(R. 1596).

> No remorse. At that time. At that time. So I would submit to you that this was a premeditated killing, that it was done in the cold and calculated and premeditated manner without any pretense of moral or legal justification.

(R. 1605).

> And I agree with Detective Carney there is a total lack of remorse. I don't care what this man wants to contend. He can stand here and say whatever he wants. It is his perfect right to do so. But as far as the State is concerned, this man has been a one man destructive force throughout his life.

(R. 1687).

The State relied heavily upon nonstatutory aggravating circumstances to justify the imposition of a death sentence. Mr. Duest's jury returned a death recommendation and the Court imposed death. It is clear that consideration of these nonstatutory aggravating circumstances resulted in that recommendation. This violated Mr. Duest's constitutional guarantee under the eighth and fourteenth amendments. This error cannot be harmless in light of the substantial and unrefuted mitigation presented to the jury. If only one juror had been persuaded, the result would have been a life recommendation.

At the sentencing hearing and in the sentencing order, the court placed great emphasis on Mr. Duest's prior record including pending charges. The court's disclaimer that the court does not consider the pending charges as convictions and **"is** not swayed by them," leaves the clear implication that the court is indeed swayed by prior convictions for nonviolent crimes such as larceny and possession of cocaine, and even traffic and misdeameanor offenses get honorable mention (R. **1694-95).**

The prosecutor's introduction and use of, and the sentencers' reliance on, these wholly improper and unconstitutional non-statutory aggravating factors starkly

violated the eighth amendment. It violates the principles ennunciated in Maynard v. Cartwright. Moreover the jury was mislead in violation of Hitchcock v. Dugger, 107 S. Ct. 1821 (1987). Mr. Duest's sentence of death therefore stands in violation of the sixth, eighth and fourteenth amendments, **see** Elledse v. State, 346 So. 2d 998, 1002-03 (Fla. 1977), and should not be allowed to stand.

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

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Duest'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. Wainwrisht, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error.

Moreover, the claim is now properly brought pursuant to the Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. This issue involved a classic violation of longstanding principles of law. It virtually "leaped out upon even a casual reading of transcript." Matire V. Wainwrisht, 811 F.2d 1430, 1438 (11th Cir. 1987). This clear claim of per se error required no elaborate presentation -- counsel only had to direct this Court to the issue. The court would have done the rest, based on long-settled Florida and federal constitutional standards.

No tactical decision can be ascribed to counsel's failure to urge the claim. **No** procedural bar precluded review of this issue. **See** Johnson V. Wainwrisht, supra, 498 So. 2d 938. However, counsel's failure, a failure which could not but have

been based upon ignorance of the law, deprived Mr. Duest of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra. Accordingly, habeas relief must be accorded now.

CLAIM XII

MR. DUEST'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. Duest 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. Duest was convicted on the basis of felony murder. The State argued for a conviction based on the felonies charged, and argued that the victim was killed in the course of a felony. The jury received instructions on premeditation and felony murder. It returned a verdict of first degree murder.

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

the eighth and fourteenth amendments, as was recently stated by the United States Supreme Court in Sumner v. Shuman, 107 S. Ct. 2716 (1987). In this case, felony murder was found as a statutory aggravating circumstance. The murder was committed while the defendant was engaged, or was an accomplice in the commission of a robbery (R. 1511). The sentencing jury was instructed that it was entitled automatically to return a death sentence upon its finding of guilt of first degree (felony) murder because the underlying felony justified a death sentence. The state argued to the jury that the jury should find Mr. Duest guilty of robbery/felony murder and that if so the aggravation is automatic (R. 1593). According to the State's closing argument, every felony-murder would involve, by necessity, the finding of a statutory aggravating circumstance, a fact which, under the particulars of Florida's statute, violates the eighth amendment: an automatic aggravating circumstance is created which does not narrow ("[A]n aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty . . . ." Zant v. Stephens, 462 U.S. 862, 876 (1983)). "[L]limiting [] the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." Maynard v. Cartwright, 108 S. Ct. 1853, 1858 (1988). In short, if Mr. Duest 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. Duest'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. Gress 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 may ever be imposed serves much the same purpose . . . . In fact, each of the five classes of murders made capital by the Texas statute is encompassed in Georgia and Florida by one or more of their statutory aggravating circumstances . . . . Thus, in essence, the Texas statute requires that the jury find the existence of a statutory aggravating circumstance before the death penalty may be imposed. So far as consideration of aggravating circumstances is concerned, therefore, the principal difference between Texas and the other two States is that the death penalty is an available sentencing option--even potentially--for a smaller class of murders in Texas." 428 U.S., at 270-271 (citations omitted).

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

Id. at 554-55 (emphasis added).

Thus, if narrowing occurs either in the conviction stage (as in Louisiana and Texas) or at the sentencing phase (as in Florida and Georgia), then the statute may satisfy the eighth amendment 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. Duest'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 Proffitt, 428 U.S. 242 (1976)(burglary felony murder insufficient for death penalty) and other Florida cases have made clear. With felony-murder as the narrower in this case, neither the conviction nor the statutory aggravating circumstance meet constitutional requirements. There is no constitutionally valid criteria for distinguishing Mr. Duest sentence from those who have committed felony (or, more importantly, premeditated) murder and not received death.

According to the Florida Supreme 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. Cartwriuht, 108 S. Ct. at 1858, the Supreme Court held that the jury instructions must "adequately inform juries what they must find to impose the death penalty." Hitchcock v. Dugger, 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 the Florida Supreme 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). There is neither an adequate nor an independent procedural bar.

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. Duest. For each of the reasons discussed above the Court should vacate Mr. Duest's unconstitutional sentence of death. This claim involves fundamental constitutional error which goes to the heart of the fairness of Mr. Duest's death sentence. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings, see Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error.

Moreover, the claim is now properly brought pursuant to the Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. This issue involved a classic violation of longstanding principles of law. It virtually "leaped out upon even a casual reading of transcript." Matire v. Wainwrisht, 811 F.2d 1430, 1438 (11th Cir. 1987). This clear claim of per se error required no elaborate presentation -- counsel only had to direct this Court to the issue. The court would have done the rest, based on long-settled Florida and federal constitutional standards.

No tactical decision can be ascribed to counsel's failure to urge the claim. No procedural bar precluded review of this issue. See Johnson v. Wainwright, supra, 498 So. 2d 938. However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Duest of the appellate reversal to which he was constitutionally entitled.

See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra. Accordingly, habeas relief must be accorded now.

CLAIM XIII

THE INTRODUCTION AND USE OF MR. DUEST'S POST-MIRANDA SILENCE AS EVIDENCE THAT A DEATH SENTENCE SHOULD BE IMPOSED BECAUSE OF MR. DUEST'S PURPORTED LACK OF REMORSE VIOLATED THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS. APPELLATE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE WHEN HE FAILED TO RAISE THIS ERROR ON DIRECT APPEAL.

During the state's case evidence was presented that Mr. Duest "refused to make a statement" (R. 893). Such **"evidence,"** however, was comment upon Mr. Duest's exercise of his constitutional right to silence. The introduction of Mr. Duest's silence as evidence was fundamentally unfair and a violation of due process. Doyle v. Ohio, 426 U.S. 610 (1976). Despite the fact that Mr. Duest had been advised of his right to silence, the State used that invocation of silence to urge that Mr. Duest be convicted and sentenced to death.

The presentation and use of evidence of post-Miranda silence is forbidden by the United States Constitution. Doyle v. Ohio, 426 U.S. 610 (1976). Dovle reversed a criminal conviction where the prosecution attempted to impeach a defendant's exculpatory trial testimony by eliciting testimony that the defendant remained silent following Miranda warnings. The Court reasoned that the promise of a right to remain silent carries with it the implicit promise that silence will not be penalized. Doyle, 426 U.S. 610, 619, quoting United States v. Hale, 422 U.S. 171, 182-83 (1975)(White, J., concurring). Thus, use of a defendant's post-Miranda silence is fundamentally unfair, in violation of the due process clause of the fourteenth amendment. Doyle, 426 U.S. 610, 619.

Similarly, post-Miranda silence may not be used to rebut an insanity defense. Wainwright v. Greenfield, 106 S. Ct. 634

(1986). Using post-Miranda silence as affirmative proof is indistinguishable from using such silence for impeachment:

> The point of the Doyle holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony. It is equally unfair to breach that promise by using silence to overcome a defendant's plea of insanity. In both situations, the state gives warnings to protect constitutional rights and implicitly promises that any exercise of those rights will not be penalized. In both situations, the State then seeks to make use of the defendant's exercise of those rights in obtaining his conviction. The implicit promise, the breach, and the consequent penalty are identical in both situations.

Greenfield, 106 S.Ct. 634, 639. The Court concluded that just like Doyle, "Greenfield received 'the sort of implicit promise to forego use of evidence that would unfairly "trick" [him] if the evidence were later offered against him at trial.'" Id. at 640, quoting South Dakota v. Neville, 459 U.S. 533, 566 (1983).

The considerations highlighted in Doyle and Greenfield are especially important at a capital sentencing phase. The Constitution requires heightened reliability at a penalty proceeding where a defendant's life is at stake. Gardner v. Florida, 430 U.S. 349 (1977). Therefore, just as a defendant's exercise of constitutional rights may not be used to obtain his conviction, even more so may the exercise of those rights not be used to take his life. See, e.g., Estelle v. Smith, 451 U.S. 454, 462-63 (1981)("Just as the Fifth Amendment prevents a criminal defendant from being made 'the deluded instrument' of his own conviction, . . . it protects him as well from being made the 'deluded instrument' of his own execution. . . . We can discern no basis to distinguish between the guilt and penalty phase . . . so far as the protection of the Fifth Amendment is concerned.").

The invocation of the right to silence following Miranda warnings may not be used in any fashion against an accused.

Here, that principle was violated. The state clearly was directing the jury's attention to pretrial and sentencing silence. This was fundamental error.

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

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Duest'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. Wainwrisht, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error.

Moreover, the claim is now properly brought pursuant to the Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. This issue involved a classic violation of longstanding principles of Florida law. **See** Lockett, Eddings, supra. It virtually "leaped out upon even a casual reading of transcript." Matire V. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). This clear claim of per se error required no elaborate presentation -- counsel onlv had to direct this Court to the issue. The court would have done the rest, based on long-settled Florida and federal constitutional standards.

No tactical decision can be ascribed to counsel's failure to urge the claim. **No** procedural bar precluded review of this issue. **See** Johnson v. Wainwrisht, supra, 498 So. 2d 938. However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Duest of the appellate reversal to which he was constitutionally entitled.

See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra. Accordingly, habeas relief must be accorded now.

CLAIM XIV

MR. DUEST'S SENTENCE OF DEATH WAS BASED ON IMPERMISSABLE HEARSAY EVIDENCE CONTRARY TO THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. APPELLATE COUNSEL WAS INEFFECTIVE IN NOT PRESENTING THIS CLAIM ON DIRECT APPEAL.

The presentence investigation report was rife with hearsay evidence much of which was contrary to the trial testimony. Conclusions of both fact and law based upon hearsay were reached by the probation officer and presented to the court without any opportunity for cross-examination by Mr. Duest.

One of the hearsay facts recited in the P.S.I. was that Danny advised Mike DeMizo [sic] that "he made a big score for approximately $15,500 worth of jewelry and showed him a black box with a red felt lining" (R. 1806). This hearsay statement was contrary to the testimony at trial. Another hearsay fact recited in the P.S.I. was the following description of the events of Mr. Duest's initial detention:

> On April 18, 1982, Lloyd Duest was taken into custody and charged with the following outstanding Capiases from Arlington, Massachusetts:
>
> (1) Idle and Disorderly
>
> (2) Operating After Suspension of License
>
> (3) Operating to Endanger
>
> (4) Refusing to Stop for A Police Officer
>
> (5) Registration Not Operating
>
> (6) Operating Without Inspection Sticker
>
> While Officers were preparing a Probable Cause Affidavit and after advising the defendant that he was under arrest of the above Capiases, Detective Feltgen put on a handcuff on a defendant's right wrist, attaching the other cuff to a wooden chair. The subject was then placed in an interview room and the door closed. Upon returning to the room a short time later, the officer discovered the wooden chair arm broken, the door open and the defendant missing.

(R. 1810). In fact, trial testimony indicated that at the time of his leaving, Mr. Duest had been detained for almost four and a half hours and not a "short time." Further, police spokesman informed the press that Mr. Duest could not have been detained for out of state traffic offenses. This is in fact the law and Mr. Duest was being unlawfully detained. The P.S.I also states:

> "According to The Medical Examiner, John Pope could have lived anywhere up to two minutes which indicates that the victim suffered a great deal prior to his death."

(R. 1815). This hearsay statement was contrary to the medical examiner's conclusions that there were no defensive wounds and absolutely no signs of a struggle. The probation officer made a conclusion of law and fact that the offense was cold and calculated based on this hearsay evidence:

> "According to evidence and testimony he went into the closet where Mike DeMizo kept a dagger and then left the residence with John Pope. He then drove approximately thirteen miles to Mr. Pope's residence. This clearly indicated premeditation on the part of Mr. Duest."

(R. 1816). Cross-examination would have revealed that Mr. Duest informed the witness at the time that he went to the closet to get money. This indicated that he was going to the victim's house for some purpose other than to rob him and thus would negate premeditation and corroborate Priao's statement that the killing was the unanticipated result of an argument.

All of these factual statements and the resultant conclusions of law rendered by Miss Balazik were based on impermissable hearsay not subject to cross-examination. A recent opinion by this Court has held that a death sentence cannot be based on hearsay evidence:

> As part of his testimony Captain Rolette identified a tape recording of an interview he conducted with the sixty-year-old victim. The tape recording was subsequently admitted into evidence and played for the jury. Rhodes argues that Captain Rolette's testimony and the tape recording were highly prejudicial to his defense. Moreover, Rhodes

contends that by allowing the jury to listen, the tape recording of Rolette's interview tithe the Nevada victim, the trial court denied Rhodes his sixth amendment right to confront and cross-examine witnesses.

This Court had held that it is appropriate in the penalty phase of a capital trial to introduce testimony concerning the details of any prior felony conviction involving the use or threat of violence to the person rather than the bard admission of the conviction. See Tompkins v. State, 502 So.2d 415 (Fla. 1986), cert. denied, 107 S.Ct. 3277 (1987); Stano v. State, 473 So.2d 1282 (Fla. 1985), cert. denied, 474 U.S. 1093 (1986). Testimony concerning the events which resulted in the conviction assists the jury in evaluating the character of the defendant and the circumstances of the crime so that the jury can make an informed recommendation as to the appropriate sentence. If is not error for the trial court to amidst Captain Rolette's testimony.

However, we do find error in the introduction of the tape record statement of the Nevada victim. While hearsay evidence is admissible only if the defendant is accorded a fair opportunity to rebut any hearsay statements. Section 921.141(l), Fla. Stat. (1985). The statements made by the Nevada victim came from a tape recording, not from a witness present in the courtroom. In Engle v. State, 438 So.2d 803, 814 (Fla. 1983), cert. denied, 465 U.S. 1074 (1984), we stated:

> The sixth amendment right of an accused to confront the witnesses against him is a fundamental right which is made obligatory on the states by the due process of law clause of the fourteenth amendment to the United States Constitution. Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). THe primary interest secured by, and the major reason underlying the confrontation clause, is the right of cross-examination. Pointer v. Texas. This right of confrontation protected by cross-examination is a right that has been applied to the sentencing process. Speech v. Patterson, [386 U.S. 605 (1976)].

Obviously, Rhodes did not have the opportunity to confront and cross-examine this witness. By allowing the jury to hear the taped statement of the Nevada victim describing how the defendant tried to cut her throat with a knife and the emotional trauma suffered because of it, the trial court effectly denied Rhodes this fundamental right of confronting and cross-examining a witness against him. Under these circumstances if Rhodes wished to deny or explain this

> testimony, he was left with no chose but to take the witness stand himself.

Rhodes v. State, 14 F.L.W. 343, 346 (Fla. 1989).

Mr. Duest was faced with the same inability to confront and cross-examine witnesses. 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. Duest. For each of the reasons discussed above the Court should vacate Mr. Duest's unconstitutional sentence of death.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Duest'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. Wainwrisht, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error.

Moreover, the claim is now properly brought pursuant to the Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. This issue involved a classic violation of longstanding principles of Florida law. It virtually "leaped out upon even a casual reading of transcript." Matire V. Wainwrisht, 811 F.2d 1430, 1438 (11th Cir. 1987). This clear claim of per se error required no elaborate presentation -- counsel only had to direct this Court to the issue. The court would have done the rest, based on long-settled Florida and federal constitutional standards.

No tactical decision can be ascribed to counsel's failure to urge the claim. No procedural bar precluded review of this issue. See Johnson v. Wainwrisht, supra, 498 So. 2d 938. However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Duest of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwrisht, supra, 474 So. 2d at 1164-65; Matire,

supra. Accordingly, habeas relief must be accorded now. Violation of this fundamental constitutional right requires relief.

CLAIM XV

THE JURY INSTRUCTION THAT A VERDICT OF LIFE MUST BE MADE BY A MAJORITY OF THE JURY WAS ERRONEOUS AND MATERIALLY MISLED THE JURY AS TO ITS ROLE AT SENTENCING AND CREATED THE RISK THAT DEATH WAS IMPOSED DESPITE FACTORS CALLING FOR LIFE, CONTRARY TO THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS. APPELLATE COUNSEL WAS INEFFECTIVE IN NOT RAISING THIS ISSUE ON DIRECT APPEAL.

Mr. Duest's jury was consistently misinformed as to the required vote for a recommendation of life imprisonment. Although they were correctly instructed that a majority is required to recommend a sentence of death, this same majority instruction was erroneously applied to a valid life recommendation as well -- as instructed, Mr. Duest's jury could not return a recommendation of life imprisonment unless a majority of their number so voted, an illegal restriction of their function under Florida law, and misinformation about the functioning of the jury. After the conclusion of the evidence and arguments presented at sentencing and immediately prior to the jury retiring to deliberate on their sentencing decision, the jury was instructed by the judge as to the purported requirements and procedure of a valid sentencing recommendation: From the outset, the jury was incorrectly told that majority vote was necessary for either death or life:

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

> Before you ballot you should carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake, and bring to bear your best judgment in reaching your advisory sentence.

(R **1628 - 1629)** (emphasis added).

After planting the erroneous "majority requirement" for both life and death, the judge a correctly stated that the State is required under Florida law to persuade a majority of the jury that the death sentence is appropriate in a given case. The next instruction given the jury, however, was a manifestly incorrect statement of the law in that it informed them that the defendant, too, was required to persuade a majority that life was the appropriate punishment:

> On the other hand, if a majority of the jury determine that Mr. Lloyd Duest. also known as Robert Brigida, should not be sentenced to death, your advisory sentence will be: A majority of the jury advise and recommend to the Court that it impose a sentence of life imprisonment upon Lloyd Duest, also known as Robert Brigida, without possibility of parole for **25** Years.

(R 1628 - 1630) (emphasis added).

Unlike the State, the defendant is manifestly not required to persuade the jury of anything, and consequently a majority is **not** necessary for a recommendation of life -- if the State fails to meet its burden, i.e., fails to convince seven or more jurors that death is appropriate, the recommendation is a life sentence. Thus, a jury of six members which are in favor of life and six of death has returned a recommendation of life. Nevertheless, the very last instruction to the jury, the last thing they heard before retiring to deliberate, restated the misinformation that a majority was required to return a verdict of life:

> You will now retire to consider your recommendation. When seven or more are in agreement as to what sentence should be recommended to the Court, that form of recommendation should be signed by your foreman and returned to the Court.

(R 1630) (emphasis added).

Immediately following this improper and, as will be shown, highly prejudicial jury instruction, the assistant state attorney asked to approach the bench, whereupon defense counsel objected to the error:

> MR. GARFIELD: I have a certificate. May we approach the bench?
>
> (Thereupon, the following proceedings were had at the bench, between Court and counsel, out of the hearing of the jury:)
>
> MR. BARON: Judge, insofar as seven or more agreement, it is clear that the law is that, you know, if there are six they can --
>
> MR. GARFIELD: You have to read that real carefully, Evan. It makes sense.
>
> THE COURT: That is what it says in the standards.
>
> MR. GARFIELD: It makes sense. It is too complicated to explain it.
>
> THE COURT: Obviously that has not been a problem in the past.
>
> (Thereupon, the following proceedings were resumed within the hearing of the jury:)
>
> THE COURT: You may now retire.
>
> (Thereupon, the jury retired to the jury room to deliberate.)

(R 1630-31). In fact, obviously such an instruction had been a problem in the past. See Rose V. State, **425** So. 2d **521 (1982).**

The process of misinstruction and misinformation as to the jury's role at sentencing, and the Court's failure to correct it, started at the beginning of Petitioner's trial early in jury selection. The fatal instruction referred to above was merely the culmination of a long process. The first group of potential jurors, nonrequested and in full hearing of the entire venue, were mistakenly informed of the majority-for-life requirement that would later infect their entire sentencing determination:

> THE COURT: Can I explain one thing to the jurors at this point? Ladies and gentlemen, whatever verdict a juror reaches, the guilt or innocence of the defendant, it has got to be a unanimous verdict, it has got to be a verdict of each juror and as the jury as a whole.

> Now, in that second part of the trial, we only have those in capital cases, what we call it is a bifurcated trial. The first part of the trial you decide the guilt or innocence. If you decide the defendant is guilty then we go on to the second phase.
>
> If the defendant is not found guilty of murder in the first degree, we do not go on to the second phase of the trial. In the second phase, the penalty phase, you will hear aggravating and mitigating circumstances and then you make a recommendation to the Court. That recommendation does not have to unanimous. It has to be a majority recommendation. Okay. I am sorry.
>
> MR. GARFIELD: I appreciate that. Thanks.

(R **84-85)** (emphasis added).

Moments later, the prosecutor seized on the court's erroneous instruction and reinforced the erroneous majority requirement:

> MR. GARFIELD: And as the Judge pointed out, in every trial every verdict must be unanimous, the verdict of each juror and the jury as a whole. If we get to the second phase, the penalty phase, obviously it doesn't have to be the recommendation just has to be **by** majority.

(R **86-87)** (emphasis added).

Thus, it is evident, beyond dispute, that the jury retired for its sentencing deliberation under the grievous misapprehension that they could not return until a majority concurred on a sentencing recommendation **--** whether for death or life. Indeed, the very last words from the judge to the jury, before **"You** may retire" (R. **1631),** were:

> When seven or more are in agreement as to what sentence should be recommended to the Court, that form of recommendation should be signed by your foreman and returned to the court.

(R. 1630). The jury then retired, improperly charged, and sat with two jury forms to consider, one stating that a majority recommends death, the other a majority recommending life **(R 1802).** The jury had a difficult time reaching a majority verdict. At one point, they requested that the court reread Mr.

Duest's prior convictions of robbery and assault with attempt to murder:

> THE COURT: You may now retire.
>
> (Thereupon, the jury retired to the jury room to deliberate.)
>
> (Thereupon, the following proceedings were had in the absence of the jury:)
>
> THE COURT: Are you ready, Mr. Baron, I don't have any objection. I understand that it is very difficult. You have to understand that it disrupts the entire proceedings as well. Okay. Bring them out.
>
> (Thereupon, the following proceedings were resumed within the presence of the jury:)
>
> THE COURT: Ladies and gentlemen, I understand you wanted to see the criminal records. They were not published to you originally so I will read them to you again.

(R. 1631). After hearing the convictions reread, only did the jury reach their **7-5** recommendation. It is obvious that the jury had reached a **6-6** decision and asked to have the convictions reread to break the deadlock. Had they been properly instructed, Mr. Duest would have had a life recommendation. Due to the instruction that they must come to a majority consensus, one juror was persuaded to vote for death often the prior convictions were reread.

The jury returned with a vote of **7-5** for death, the very barest **"majority"** possible. Never informed or instructed as they should have been (see below), Mr. Duest's jury did not know that a **6-6** split on sentencing was perfectly acceptable under the law. Mr. Duest was deprived of a life recommendation as a result of the incorrect instruction. Had the jury been properly instructed as to the effect of a **6-6** vote, and indeed had returned a **6-6** life recommendation, there is every reason to believe Mr. Duest would not now be under sentence of death. See Tedder v. State, **322** So. 2d **908, 910** (Fla. **1975)** (override of jury permissible

only where facts suggesting death sentence are so clear that no reasonable person could differ).

This Court held that a majority is not required for a life recommendation in Rose v. State, 425 So. 2d 521 (1982). In Rose, decided more than three months before Mr. Duest's trial, the Supreme Court reversed the death sentence, holding that it was not necessary to have a majority reach a life sentence recommendation, because "if seven jurors do not vote to recommend death, then the recommendation is life imprisonment." Id. at 525. In Patten v. State, 467 So. 2d 975 (1985), the jury interrupted their sentencing deliberations to inform the trial judge that they were deadlocked six-six. Rather than giving a full blown "Allen" charge, demanding a majority for either recommendation and excluding as an acceptable alternative a six-six life recommendation, the trial judge merely encouraged the jury to deliberate further, instructing them:

> If you can agree on a majority to either life or death, without trying to pressure you, by talking it over one more time and agreeing one way or another, and I'm not suggesting any result, but if after trying one more time you can't agree and it's still six/six, I will instruct you to go ahead and sign that verdict form that includes life imprisonment.
> . . .

Id. at 977. The jury shortly thereafter returned with a seven-five recommendation of death. This Court reversed and remanded on the authority of Rose.

Mr. Duest's jury effectively did not have the option of requesting further instructions had they found themselves split six to six: the instructions they had received were crystal clear--a life recommendation required the vote of seven or more of their number, and a six to six split was consequently a nullity.

In Harich v. State, 437 So. 2d 1082 (Fla. 1983), the jury had been similarly but less extensively misintructed than Mr. Duest's jury, but had also received a correct instruction--

that only six of their number were required to return a verdict of life. Recognizing the inconsistency in the instructions, and again condemning that part of the instructions which incorrectly indicated that a majority was required to recommend life, the Court nevertheless affirmed the death sentence. Because the **"body"** of the challenged instruction was a correct statement of the law, and because the jury returned a nine to three recommendation of death, with no indication they had any difficulty achieving a majority consensus, the Harich Court found that there was nothing in the record to indicate that the jury was confused by the inconsistent instruction or that the appellant was prejudiced thereby.

Like Mr. Harich's jury, Petitioner's jury was clearly not **"confused"** by the instructions they received: their instructions left absolutely no doubt as to the majority required to return a verdict of life. Quite unlike the Harich jury, however, Petitioner's jury had considerable difficulty reaching a majority, and, had they been **"confused"** by inconsistent instructions of the type given at Harich's trial, would in all likelihood have returned a verdict of life. The prejudice here is undeniable: Mr. Duest was deprived of a life recommendation by the fundamentally erroneous instructions.

Significantly, the **"no** prejudice" rationale applied to the 9-3 vote in Harich is clearly inapplicable to Mr. Duest, whose jury voted 7-5 after being told they had to assemble a majority before returning with a recommendation. It is clear beyond cavil that a capital sentencing jury in Florida is not required to reach a majority in order to return a recommendation of life. However, this fundamental proposition of law was not made clear to Mr. Duest's jury, and the result is that Mr. Duest was actually deprived of his right to a jury verdict of life, of his very right to life, by the fundamentally incorrect and misleading instructions given his sentencing jury, in violation of the

eighth and fourteenth amendments. Mr. Duest's sentence of death can therefore not stand.

Since the misinformed jury voted 7-5, Mr. Duest would very possibly not be on death row, had the proper instruction been given. Furthermore, because the jury voted 7-5 and believed it had to make some recommendation, an "effect on sentencing" is probable:

> Indeed, one can easily imagine that in a case in which the jury is divided on the proper sentence, the presence of appellate review could effectively be used as an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless give in.

Caldwell, 105 S. Ct. at 2642. The jurors here were repeatedly informed that the judge would ultimately sentence. The presence of this "judge review" could cause deadlocked 6-6 jurors to "nevertheless give in." The death penalty cannot be subject to such dice rolling. Mr. Duest's death sentence should not be allowed to stand.

Of course, the role of a Florida sentencing jury is critical. The Eleventh Circuit in Mann v. Dusser, 844 F.2d 1446, 1454-55 n. 10 (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:

> Florida could, if it so desired, administer a capital sentencing scheme in which the jury played no role. See Spaziano v. Florida, 468 U.S. 447, 465, 104 S.Ct. 3154, 3165, 82 L.Ed.2d 340 (1984)("[T]here is no constitutional imperative that a jury have the responsibility of deciding whether the death sentence should be imposed...."). The fact of the matter is, however, that under the existing scheme in Florida the jury does share in capital sentencing responsibility. Because the jury's recommendation is a critical factor in the ultimate sentencing decision, the jury's function, like the function of any capital sentencer, must be evaluated pursuant to eighth amendment standards. This court, in various contexts in federal habeas cases, has treated the Florida jury as if it were a sentencer for constitutional purposes. For example, in Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988), we held that the eighth amendment is

> violated when a Florida sentencing jury is instructed that, once it finds the victim's murder to have been committed under aggravating circumstances, death is presumed to be the appropriate sentence.

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. Duest'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 Hargrave v. Dugger, 832 F.2d 1528 (11th Cir. 1987)(en banc); Stone v. Dugger, 837 F.2d 1477 (11th Cir. 1988). The Supreme Court treated the jury as sentencer for purposes of eighth amendment instructional error review, as have the Eleventh Circuit and the Florida Supreme Court. See Mann, supra; Riley v. Wainwright, 517 So. 2d 565 (Fla. 1987). In fact, the Florida Supreme Court, recognizing the significance of this change in law, held Hitchcock was to be applied retroactively.

In reversing death sentences because of Hitchcock error the Florida Supreme Court explained:

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

Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1989). See also Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987)(improper instructions to sentencing jury render death sentence fundamentally unfair); Meeks v. Dugger, 548 So. 2d 184 (Fla. 1989)(since it could not be said beyond a reasonable doubt that a properly instructed jury

would not return a recommendation of life, resentencing was required). 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, and that the State cannot prove the error harmless beyond a reasonable doubt since mitigation was contained in the record.

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

Moreover, the claim is now properly brought pursuant to the Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. This issue involved a classic violation of principles of Florida law. It virtually "leaped out upon even a casual reading of transcript." Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). This clear claim of per se error required no elaborate presentation -- counsel only had to direct this Court to the issue. The court would have done the rest, based on long-settled Florida and federal constitutional standards.

No tactical decision can be ascribed to counsel's failure to urge the claim. No procedural bar precluded review of this issue. See Johnson v. Wainwright, supra, 498 So. 2d 938. However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Duest of the appellate reversal to which he was constitutionally entitled.

See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra. Accordingly, habeas relief must be accorded now.

CONCLUSION AND RELIEF SOUGHT

The claims presented herein involve ineffective assistance of counsel, fundamental error and significant changes in the law. Because the foregoing claims present substantial constitutional questions which go to the heart of the fundamental fairness and reliability of Mr. Duest's capital conviction and sentence of death, and of this Court's appellate review, they should be determined on their merits. At this time, a stay of execution, and a remand to an appropriate trial level tribunal for the requisite findings on contested evidentiary issues of fact -- including inter alia appellate counsel's deficient performance -- should be ordered. The relief sought herein should be granted.

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

Mr. Duest 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