IN THE SUPREME COURT OF FLORIDA

NO. 75213

JUDY A. BUENOANO

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, IF NECESSARY, APPLICATION FOR STAY OF EXECUTION PENDING THE FILING AND DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

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

A. JURISDICTION

This is an original action under Fla. R. App. P. 9.100(a). This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents constitutional issues which directly concern the judgment of this Court during the appellate process, and the legality of Ms. Buenoano's capital conviction and sentence of death. In December, 1985, Ms. Buenoano was sentenced to death. Direct appeal was taken to this Court. The trial court's judgment and sentence were affirmed. Buenoano v. State, 527 So. 2d 194 (Fla. 1988). Jurisdiction in this action lies in this Court, see, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein involved the appellate review process. See Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); see also Johnson v. Wainwright, 498 So. 2d 938 (Fla. 1987); cf. Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Ms. Buenoano to raise the claims presented herein. See, e.g., Jackson v. Dugger, ___ So. 2d ___, 14 F.L.W. 355 (Fla., July 6, 1988); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); Wilson, supra.

This Court has consistently maintained an especially vigilant control over capital cases, exercising a special scope of review, see Elledge v. State, 346 So. 2d 998, 1002 (Fla. 1977); Wilson v. Wainwright, 474 So. 2d at 1165, and has not hesitated in exercising its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital trial and sentencing proceedings. Wilson; Johnson;

Downs; Riley. This petition presents substantial constitutional questions which go to the heart of the fundamental fairness and reliability of Ms. Buenoano's capital conviction and sentence of death, and of this Court's appellate review. Ms. Buenoano'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, supra; Thompson v. Dusaer, 515 So. 2d 173 (Fla. 1987); Tafero **v.** Wainwright, 459 So. 2d 1034, 1035 (Fla. 1984); Edwards v. State, 393 So. 2d 597, 600 n. 4 (Fla. 3d DCA), petition denied, 402 So. 2d 613 (Fla. 1981); cf. Witt v. State, 387 So. 2d 922 (Fla. 1980). The petition also involves claims of ineffective assistance of counsel on appeal. **See** Knight v. State, 394 So. 2d 997, 999 (Fla. 1981); Wilson v. Wainwright, supra; Johnson v. Wainwright, supra. These and other reasons demonstrate that the Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action. As the petition shows, habeas corpus relief would be more than proper on the basis of Ms. Buenoano's claims.

With regard to ineffective assistance, the challenged acts and omissions of Ms. Buenoano's appellate counsel occurred before this Court. This Court therefore has jurisdiction to entertain Ms. Buenoano's claims, Knight v. State, 394 So. 2d at 999, and, as will be shown, to grant habeas corpus relief. Wilson, supra;

Johnson, supra. This and other Florida courts have consistently recognized that the Writ must issue where the constitutional right of appeal is thwarted on crucial and dispositive points due to the omissions or ineffectiveness of appointed counsel. **See**, e.g., Wilson v. Wainwriaht, supra, 474 So. 2d 1163; McCrae v. Wainwriaht, 439 So. 2d 768 (Fla. 1983); State v. Wooden, 246 So. 2d 755, 756 (Fla. 1971); Baggett v. Wainwriaht, 229 So. 2d 239, 243 (Fla. 1969); Ross v. State, 287 So. 2d 372, 374-75 (Fla. 2d DCA 1973); Davis v. State, 276 So. 2d 846, 849 (Fla. 2d DCA 1973), affirmed, 290 So. 2d 30 (Fla. 1974). The proper means of securing a hearing on such issues in this Court is a petition for writ of habeas corpus. Baggett, supra, 287 So. 2d at 374-75; Powell v. State, 216 So. 2d 446, 448 (Fla. 1968). With respect to the ineffective assistance claims, Ms. Buenoano will demonstrate that the inadequate performance of her appellate counsel was so significant, fundamental, and prejudicial as to require the issuance of the Writ.

Ms. Buenoano's claims are presented below. They demonstrate that habeas corpus relief is proper in this case.

B. REQUEST FOR STAY OF EXECUTION

Ms. Buenoano's petition includes a request that the Court stay her currently scheduled execution. As will be shown, the issues presented are substantial and warrant a stay. This Court has not hesitated to stay executions when warranted to ensure judicious consideration of the issues presented by petitioners litigating during the pendency of a death warrant.

This is Ms. Buenoano's first and only petition for a writ of habeas corpus. The claims she presents are no less substantial than those involved in the cases cited above. She therefore respectfully urges that the Court enter an order staying her execution, and, thereafter, that the Court grant habeas corpus relief.

II.

Additionally, counsel notes at the outset that this case involves a conflict of interest involving counsel's representation of Appellant on direct appeal. As reflected in a previously filed petition for disclosure (appended hereto), counsel has been constrained by the Florida Bar's directions from disclosing information. Petitioner urges that the relief sought by that petition be granted, in order to afford her proper review pursuant to Rule 3.850 and in this habeas corpus action.

III. GROUNDS FOR HABEAS CORPUS RELIEF

By her petition for a writ of habeas corpus, Petitioner asserts that her convictions and her sentence of death were obtained and then affirmed during the Court's appellate review process in violation of her rights as guaranteed by the fourth, fifth, sixth, eighth and fourteenth amendments to the United States Constitution, and the corresponding provisions of the Florida Constitution, for each of the reasons set forth herein. In Ms. Buenoano's case, substantial and fundamental errors occurred in both the guilt and penalty phases of trial. These errors were uncorrected by the appellate review process, in large part because of appellate counsel's ineffective assistance. As shown herein, relief is appropriate.

CLAIM I

APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN FAILING TO URGE A PLAIN, MERITORIOUS CLAIM OF ERROR UNDER RICHARDSON V. STATE, IN VIOLATION OF MS. BUENOANO'S RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

A. INTRODUCTION

The State failed to list Dr. Knapp, an entomologist, as a State witness before trial as required by Fla. R. Crim. P. 3.220

(R. 551). On the third day of trial, during the State's case, the State announced it would present three additional expert witnesses from three different disciplines; trial counsel objected (R. **551-552).** Trial counsel telephonically deposed two of these expert witnesses at night after the day's court proceedings (R. **2142-2178).** Trial counsel blindly attempted to determine what knowledge these expert witnesses possessed in the middle of this trial.

Although the trial court expressly ruled that the testimony of these surprise witnesses would prejudice Ms. Buenoano, the trial court ruled that the surprise witnesses would be allowed to testify for the State in rebuttal:

> I will allow the witnesses to testify. But for the late notice to the Defense, those witnesses could have and would have testified in the State's case in chief because, obviously, they are proper witnesses. But for that, they would have testified. I excluded them because of the prejudice to the Defense.
>
> The Defense is still prejudiced, but they have had an opportunity to at least depose the witnesses and they have been made available for deposition. I realize obviously that the Defense has not had time to have an expert to refute the testimony, but because of the unusual nature of this case and I did not allow the State's witnesses to testify in the State's case in chief, the Defense had an opportunity to have the experts testify and to refute their testimony. Therefore, I will allow the witnesses to testify.

(R. 1272-1273). Trial counsel again protested to the judge that he had no time to obtain any potential expert witnesses to assist him (for example in preparing cross-examination, or in testifying to rebut the State's surprise experts), which the trial court acknowledged to be true:

> MR. JOHNSTON: Well, Your Honor, the prejudice goes a lot deeper, and you are catching me off guard, as to any potential experts, because, now, I cannot subpoena the necessary witnesses that were with the deceased Mr. Goodyear in Vietnam to disprove that he was not exposed to any Agent Blue. Here, I am talking about maybe one of his buddies that he was there with in Vietnam.

THE COURT: Right.

(R. **1273**). Dr. Knapp, the entomologist, did testify as a State rebuttal witness.

Although the trial court expressly found that the defense had been prejudicial, it allowed the State to call the expert. The result of this ruling was that Ms. Buenoano's counsel was not given an opportunity to receive the assistance of an expert or otherwise to effectively prepare to evaluate and challenge the scientific conclusions of Dr. Knapp. Ms. Buenoano's counsel, who does not have a Ph.D. in entomology, was given no time to research this highly specialized scientific field; the State had provided no notice that it would call this expert. Ms. Buenoano was not given the opportunity to retain an expert in entomology to refute Dr. Knapp's scientific testimony. Ms. Buenoano's counsel was forced to attempt to prepare for three unannounced experts in different fields in the middle of a trial for his client's life.

The State's surprise testimony from a doctor of entomology was the last evidence heard by the jury before guilt-phase deliberations, deliberations which lasted ten hours. This surprise scientific witness was used to completely undermine the defense. This was a stark violation of the standards enunciated by Richardson v. State and its progeny. Counsel litigated these issues before the trial court (**e.g.**, R. **252**: "Well, Your Honor, the prejudice goes a lot deeper, and you are catching me off guard . . ."). Cf. Johnson v. Wainwright, **498** So. **2d 935** (Fla. **1987**). **On** appeal, inexplicably, counsel wholly failed to present the issue for this Court's review. Wilson, supra.

B. FACTUAL AND **LEGAL** BASIS **FOR** RELIEF

The prosecutor announced he would call three undisclosed, surprise expert witnesses (R. **551**). Defense counsel objected and moved for a Richardson hearing (R. **552**).

The prosecutor stated he had spoken to a witness before trial who said the victim had worked in orange groves (R. **553).** The prosecutor also deposed Dr. Brahman, a defense expert, concerning of different ways a person could come into contact with arsenic in the environment (R. **554, 558).** The prosecutor deposed another defense witness on the orange grove connection (R. **558).** The prosecutor failed to depose defense witness Dr. Loomis (R. **557).**

It is clear everyone understood the defense's theory of the case. The prosecutor questioned defense witnesses on the subject before the trial. The court indicated correctly it was not the defense's job to tell the prosecution what questions to ask or which defense witnesses to take the time and effort to depose (R. **560).** The State could not have legitimately used the excuse that it had been surprised by the defense, as the trial judge found. The defense, however, was completely caught off guard, and **was** prejudiced by the State, as the trial judge also found.

Trial counsel explained to the court the prejudice Ms. Buenoano faced if these surprise witnesses were allowed to testify:

> The point is, Your Honor, that the Rules of Criminal Procedure I don't think are going to be complied with if the Court permits the other witnesses that he's given me today to testify.
>
> I can hardly have any opportunity to go out and try and get some rebuttal witnesses to refute what these witnesses allegedly will say.
>
> I listed all the witnesses for Mr. Perry [the prosecutor] that I plan to call. When I found out that I was going to call Dr. Braman I listed him, and Mr. Perry went to Tampa to take Dr. Braman's testimony, but before that I listed Dr. Loomis or a firm of which Dr. Loomis is associated with. Mr. Perry has not to this day wanted to take this expert's testimony.
>
> Had he chose to take that testimony then, perhaps, he would have been a little more illuminated about what the defense's theory is, than waiting to get it in the

courtroom.

(R. 557).

The burden is on the State to prove the allegations in the indictment. The State must prepare evidence, disclose it to the defense and then present it to the jury. The fact that the State failed to prepare its case does not allow the court to force a defendant to give up her right to confront witnesses against her. Cf. Gardner v. Florida, **430** U.S. **349 (1977).** It is unreasonable to expect a lay person such as trial counsel without expert assistance to be able to intelligently question an expert in entomology during deposition. It is unreasonable to expect trial counsel to do research to determine if the State entomologist's findings and conclusions are valid on the evening after trying a death penalty case during the day. It is unreasonable to expect trial counsel to retain an entomologist, brief him on the intricacies of the case and prepare to refute the surprise entomologist overnight, in the middle of a capital trial. Cf. Valle V. State, **474** So. 2d **796** (Fla. **1985).** It must be remembered that trial counsel was being expected to prepare for expert testimony given by witnesses from three different scholarly disciplines. Neither of the defense's experts were experts in the fields of the State's surprise witnesses.

The prejudice to Ms. Buenoano's case is clear from the record. Indeed, the trial judge made an express finding that Ms. Buenoano was prejudiced. However, the court allowed the State to call the witness. Ms. Buenoano's case was very complex. Defense counsel had to prepare for a myriad of unusual issues involved in the case. The alleged offense occurred fourteen years before the trial. The State's theory required preparation of complex expert testimony. The State attempted to introduce four separate instances of past **"similar"** criminal acts, two of which were admitted under the "Williams Rule." Finally, the State was seeking the death penalty. Defense counsel had to prepare to

challenge all of this, while also attempting to research complex scientific issues and prepare a defense forensic presentation. Counsel was also required to prepare for a possible penalty phase. Forcing counsel to grasp the complexities of new fields of highly technical scientific expertise and attempt to prepare cross-examination and retain and prepare new experts to rebut the State's surprise witnesses in the middle of a capital trial violated the fifth, sixth, and eighth amendments. Cf., United States v. Cronic, 466 U.S. 648, 104 S. Ct. 2039 (1984).

It is important to realize that neither of the experts the defense had disclosed pretrial as possible defense witnesses were doctors of entomology or herbacide physiology. The defense had no experts in these fields to assist in analyzing the surprise State witnesses. Defense counsel's lack of understanding of this surprise testimony is clear from the content of the from-the-hip depositions he was forced to take of Dr. Knapp and Dr. Young, and the from-the-hip cross-examination conducted at the trial. Capital trials should not and cannot be lawfully tried this way. Cf. Valle, supra.[1] Defense counsel was so ill-prepared to depose Dr. Knapp that the last question of the deposition was an effort to attempt to learn what the experts field of expertise even was (R. 2150-51: "What is your Ph.D. in?").

Defense counsel is not an expert in entomology, and had retained no such expert to assist the defense -- he did not know the State was going to spring these witnesses in the midst of this capital trial. It is unreasonable to expect an attorney to be able to depose an expert blindly in the middle of a murder trial and expect the defendant to not suffer substantial prejudice. See Webber v. State, 510 So. 2d 1210 (Fla. App. 2

[1]The State rendered counsel ineffective on these matters. See United States v. Cronic, 466 U.S. 648, 104 S. Ct. 2039 (1984).

Dist. 1987). As the trial judge correctly found, the defense was prejudiced.

During the State's evidence trial counsel was cross-examining the State's expert witnesses as to the possibility that the victim died from arsenic poisoning caused by citrus pesticides or contact with agents orange and blue in Vietnam. The State became concerned that it would not be able to prove what it had alleged. It then brought its surprise witnesses. Defense counsel, overnight, had to attempt to prepare for three surprise scientific experts, an impossibility. Ms. Buenoano was effectively denied an opportunity to properly confront. See McKinzy v. Wainwright, 719 F.2d 1525 (11th Cir. 1982). Her attorney was caught completely off guard. Rule 3.220 was circumvented, and abrogated.

The State violated Ms. Buenoano's rights under Fla. R. Crim. P. 3.220 and the Confrontation Clause. Because of the State's ability to void the Rule and Constitution, Ms. Buenoano was effectively denied her right to a possible acquittal in this wholly circumstantial case.

Under Rule 3.220, the State is required to disclose the names of the witnesses it will call. The State must disclose these names in order to ensure the defense is given a meaningful opportunity to prepare and to confront these witnesses, particularly scientific experts. The trial court understood this, but disregarded Fla. R. Crim. P. 3.220 and the Confrontation Clause in its ruling:

> The issue is a narrow one. Because of the Defense questioning of the witnesses that elicited a possible defense involving the exposure of the victim to Agent Blue or to lead arsenic used as a spray in citrus, should the State be allowed to present rebuttal testimony that would' show, and I read the depositions, that the victim from his own records was not exposed to those items? Would that prejudice the Defense?
>
> Well, obviously it would because it is the position of the Defense in this case that it is mostly circumstantial evidence that the

> defendant is alleged to have killed the deceased by poisoning.
>
> The experts testified that he had a high concentration of arsenic in his body which could have come from three possible sources, through homicide, suicide, or accident.
>
> The State then presents a case to eliminate all possible access to arsenic. That means presenting all possible theories or rebutting them. The best defense in this case is to indicate there were a number of potential sources that the victim could have received the arsenic from, and therefore, this defendant should be found not guilty.
>
> I conducted a Richardson Inquiry, and I am able to determine that there was no collusion of the State to hide witnesses. It appears that both the State and the Defense were aware of the witnesses. The State did not note Doctor Knapp or Colonel Young as witnesses until the trial had started, and as soon as it was determined they might be called, the Defense objected indicating that he had had no proper notice; that he had not had a chance to depose them or to have their expert verify their testimony and perhaps call rebuttal or experts to refute their testimony as they did with other witnesses made known by the State.
>
> This case involves an unusual fact pattern. It is unusual because I have allowed Williams Rule evidence and similar fact evidence to be used. The purpose of trial is not a case involving games, it is to get the information to the jury so they can return a fair and accurate verdict. At this time, I will allow the witness to testify.

(R. **1270-1272).**

The question here is not whether the Rules of Criminal Procedure and Ms. Buenoano's constitutional right to meaningful confrontation of witnesses is a game, it is whether the State of Florida may convict Ms. Buenoano of first degree murder and sentence her to die without affording her basic due process.

The State has the burden of proof. It became apparent to the prosecutor that his lack of preparation had endangered the State's ability to prove the offense beyond a reasonable doubt. The fact that mid-way through the State's case-in-chief he realized he would not be able to prove the State's case, and then sprung his expert witnesses on the defense, does not sanction a

violation of Ms. Buenoano's rights. Fla. R. Crim. P. 3.220 has a purpose:

> No rebuttal exception exists within the rule requiring disclosure of names of prospective witnesses upon demand for discovery. Kilpatrick V. State, 376 So.2d 386 (Fla. 1979). However, a violation of Rule 3.220, Florida Rules of Civil Procedure, does not necessarily require reversal of a conviction unless the record discloses that non-compliance with the rule resulted in prejudice to the defendant. The trial court has discretion to determine whether the non-compliance would result in harm or prejudice to the defendant, but the court's discretion can be exercised only after the court has made an adequate inquiry into all of the surrounding circumstances establishing prejudice or non-prejudice to the defendant, and if the court determines that the state's non-compliance has not prejudiced the ability of the defendant to properly prepare for trial, it is essential that the circumstances establishing non-prejudice to the defendant affirmatively appear in the record. Richardson V. State, 246 So.2d 771 (Fla. 1971); Ramirez V. State, 241 So.2d 744 (Fla. 4th DCA 1970).

Poe V. State, 431 So. 2d 266 (Fla. App. 5 Dist. 1983). In this case, the trial court found prejudice. When a trial court conducts a Richardson inquiry, and prejudice has been shown, a new trial is warranted. Richardson v. State, 246 So. 2d 771 (1971). Relief was and is warranted here. Prejudice was found. See Smith v. State, 500 So. 2d 125 (Fla. 1986).

It is worth noting that the only case the prosecution cited to support its position was Britton V. State, 414 So. 2d 638 (Fla. 5th DCA 1982):

> THE COURT: I have reviewed the cases, the case that you gave me. There is only one case I could find in Florida after the Britton case. That is Harich, H-A-R-I-C-H, versus State of Florida. There is no case that contains any other citations to Britton and that doesn't help at all. That case is a 437 Southern Second 1082.
>
> In that case, it notes that the Court committed no error in allowing the testimony of the rebuttal witnesses over the Defense objection. That is all it says. So, it is of little or no help at all.
>
> However, I did review Richardson versus State at 246 Southern Second 771, a

> Supreme Court case of the State of Florida and several other cases that were cited in Richardson.

(R. 1270).

The Britton case has nothing to do with the situation that the State caused during Ms. Buenoano's trial. The State urged, and the trial court relied on, a wholly inapplicable case. The text of this case is quoted in full:

> The appellant, Britton, contends that the court below erred by allowing the state to call a witness in rebuttal. He argues the witness' testimony was both improper rebuttal and cumulative.
>
> Rebuttal evidence explains or contradicts material evidence offered by a defendant. Kirkland v. State, 86 Fla. 64, 97 So. 502 (1923). See also Dornau v. State, 306 So.2d 167 (Fla.2d DCA 1974), cert. denied, 422 U.S. 1011, 95 S.Ct. 2636, 45 L.Ed.2d 675 (1975). The testimony delivered by the state's rebuttal witness neither explained nor contradicted any evidence offered by Britton. Permitting the testimony, however, was not error: the order of presentation of evidence and witnesses is largely a function of the trial court's discretion; this discretion is broad enough to allow the state to introduce, after the defendant's case, evidence not strictly in rebuttal, so long as the evidence was admissible in the main case. Williamson v. State, 92 Fla. 980, 111 So. 124, 53 A.L.R. 250 (1926); Davis v. State, 44 Fla. 32, 32 So. 822 (1902). See also 23 C.J.S. Criminal Law sec. 1045 (1961). Because the trial court properly eliminated a hearsay problem in the proffered testimony, the testimony presented to the jury was admissible in the state's case in chief. Therefore, the court did not err by permitting the "rebuttal" testimony.
>
> As for Britton's argument that the testimony was unnecessarily cumulative, it is not error to permit a state witness to testify after the defense has rested, even if the evidence is merely cumulative, in the absence of the defendant's showing injustice amounting to an abuse of discretion. Williamson, 111 So. at 126-27; Driscoll v. Morris, 114 So.2d 314 (Fla. 3d DCA 1959). Britton has failed to demonstrate such prejudice.

Britton v. State, 414 So. 2d 638 (Fla. 5th DCA 1982).

Amazingly, the trial court relied on Britton, supra, in allowing the surprise testimony:

> I have talked with Judge Diamantis who happens to be a local judge who was the judge on the Britton case, and I discussed it with him. I also reviewed the Britton case. It was not overturned. It is still valid in the State of Florida.
>
> I will allow the witnesses to testify.

(R. 1272). The Britton case has absolutely nothing to do with Fla. **R.** Crim. P. 3.220, and had absolutely nothing to do with this case.

It is clear that Ms. Buenoano's right to meaningful confrontation of witnesses against her was violated by the trial court's allowal of State expert testimony which was virtually impossible for an attorney to analyze and refute, because no notice was given. The last witness the jury heard before its ten-hour deliberation was the surprise witness. Ms. Buenoano's first degree murder conviction and her sentence of death, based on such a procedure, violate the fifth, sixth, eighth and fourteenth amendments.

The trial court committed plain error. Ms. Buenoano was clearly prejudiced. Appellate counsel was patently ineffective in not urging this claim on direct appeal.

Admission of this evidence violated Ms. Buenoano's sixth amendment right to confront adverse witnesses. This right is fundamental and made obligatory on the states by the fourteenth amendment. Smith v. Illinois, **390** U.S. **129 (1968).** The right **of** confrontation embodies the right to cross-examine the witnesses. Pointer v. Texas, **380** U.S. **400 (1965).** That right would be an empty one were a defendant not afforded the opportunity to meaningfully cross-examine.

c. APPELLATE COUNSEL WAS PREJUDICIALLY INEFFECTIVE FOR FAILING TO RAISE THIS CLAIM ON DIRECT APPEAL

This Court is especially vigilant in its policing of counsel's performance on appeal. When this Court learns of unreasonable attorney omissions, it does not hesitate to act:

> It is true that we have imposed upon ourselves the duty to independently examine each death penalty case. However, we will be the first to agree that our judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate. It is the unique role of that advocate to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged derivations from due process.

Wilson v. Wainwright, 474 So. 2d 1162, 1165 (Fla. 1985) (emphasis supplied).

Wilson places this Court in the forefront of appellate court scrutiny of attorney advocacy. Undeniably, the appellate level right to counsel also comprehends the sixth amendment right to effective assistance of counsel. Evitts v. Lucey, 105 S.Ct. 830 (1985). Appellate counsel must function as "an active advocate on behalf of his client," Anders v. California, 386 U.S. 738 (1967), who must receive "expert professional . . . assistance . . . [which is] necessary in a legal system governed by complex rules and procedure. . . ." Lucey, 105 S.Ct. 830, 835 n.6.

These are not merely arcane jurisprudential precepts: "Lawyers in criminal cases are necessities, not luxuries." United States v. Cronic, 80 L.Ed. 657, 664 (1984). Counsel is crucial, not just to spew the legalese unavailable to the layperson, but also to "meet the adversary presentation of the prosecution." Lucey, 105 S.Ct. 830, 835 n.6. Thus, effective counsel does not leave an appellate court with "the cold record which it must review without the help of an advocate." Anders, 386 U.S. at 745. Counsel must "affirmatively promote his client's position before the court ... to induce the court to

pursue all the more vigorously its own review because of the ready references not only to the record', but also to the legal authorities as furnished it by counsel." Anders, 386 U.S. at 745; see also Mylar v. Alabama, 671 F.2d 1299, 1301 (11th Cir. 1982).

Here, the trial court's failure to sustain defense counsel's objection to the State's use of the undisclosed scientific expert testimony, although the trial court found that the defense had been prejudiced, was per se reversible error, and would have entitled Ms. Buenoano to a new trial had it been challenged on direct appeal. Appellate counsel ineffectively, unreasonably, and inexplicably failed to raise the issue, to Ms. Buenoano's demonstrable prejudice. See Johnson v. Wainwrisht, 498 So. 2d 935 (Fla. 1987).

The Eleventh Circuit Court of Appeals has found similar appellate attorney conduct to "fall below the wide range of competence required of attorneys in criminal cases," and thus to violate the appellant's sixth amendment right to the effective assistance of counsel. See Matire v. Wainwrisht, 811 F.2d 1430 (11th Cir. 1987). In Matire, the Eleventh Circuit found counsel's failure to raise a meritorious issue on direct appeal prejudicially deficient, particularly "[i]n light of the then Florida rules of per se reversal," which created a "near certainty that Matire's conviction would have been reversed." 811 F.2d at 1439. This Court made a similar ruling in Johnson v. Wainwrisht, supra. Like those petitioners, Ms. Buenoano is entitled to habeas corpus relief.

CLAIM II

JUDY BUENOANO WAS DENIED THE EFFECTIVE REPRESENTATION OF COUNSEL DURING HER CAPITAL APPEAL BECAUSE DEFENSE COUNSEL WAS ENGAGED IN A CONFLICT BETWEEN REPRESENTING MS. BUENOANO AND REPRESENTING HIS OWN INTERESTS IN A BOOK AND MOVIE RIGHTS CONTRACT.

Counsel states at the outset that he is constrained by direct instructions from the Florida Bar in disclosing facts supporting this claim in this pleading (**see** Petition in this regard filed in this Court)(appended hereto). Because of those constraints, Ms. Buenoano cannot be effectively represented -- her attorney cannot plead relevant facts, because he has been instructed by the Bar that there are things that he cannot disclose. A stay of execution until this matter is resolved, and/or an order from this Court directing the Bar to authorize disclosure so that this claim (along with others which cannot be detailed in this petition or Ms. Buenoano's Rule **3.850** motion because of the Bar's instructions) are accordingly respectfully prayed for at the outset. Counsel herein pleads what he is allowed to disclose, as this information has been learned from sources other than the Florida Bar.

In her capital trial and the subsequent appeal, Ms. Buenoano was represented by Mr. James Johnston and his wife. The trial began on October 21, **1985**. Ms. Buenoano was convicted of first degree murder.

During the course of the proceedings, at sentencing, counsel entered into a contract with his client concerning "any and all books, articles, television movies, other movies or any publication whatsoever . . .," arising from these proceedings. (**See** Contract attached to Petition). The contract continued in effect during direct appeal.

This, of course, was a conflict of interest. It is alleged, however, that a conflict of interest existed in this case, and

that the conflict is sufficient to warrant relief under the applicable standards.

The 1985 Code of Professional Responsibility of the Florida Bar included as misconduct:

> **(B)** Prior to conclusion of all aspects of the matter giving rise to his employment, a lawyer shall not enter into any arrangement or understanding with a client or prospective client by which he acquires an interest in publication rights with respect to the subject matter of his employment or proposed employment.

DR 5-104, Code of Professional Responsibility (1983).

The Supreme Court has held:

> Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. **See** Cuyler V. Sullivan, supra, at 346, 64 L.Ed.2d 333, 100 S.Ct. 1708. From counsel's function as assistant to the defendant derive the overeaching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. **See** Powell V. Alabama, 287 U.S., at 68-69, 77 L.Ed. 158, 53 S.Ct. 55, 84 ALR 527.

Strickland V. Washington, 466 U.S. 668, 688 (1984).

Further, the right to effective assistance of counsel extends to the first appeal as of right:

> Nonetheless, if a State has created appellate courts as "an integral part of the ... system for finally adjudicating the guilt or innocence of a defendant," .... the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution.
>
> . . . .
>
> A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney.

Evitts v. Lucey, 469 U.S. 387, 393, 396 (1985). (Beyond citing the applicable case law, current counsel is constrained from providing much of anything else.)

The High Court has also noted:

> Glasser [v. United States, 315 U.S. 60 (1942),] established that unconstitutional multiple representation is never harmless error. Once the Court concluded that Glasser's lawyer had an actual conflict of interest, it refused "to indulge in nice calculations as to the amount of prejudice" attributable to the conflict. The conflict itself demonstrated a denial of the "right to have the effective assistance of counsel." 315 U.S., at 76, 62 S.Ct., at 467. Thus, a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief. See Holloway, supra, 435 U.S., at 487-491, 98 S.Ct., at 1180-1182. But until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance. See Glasser, supra, 315 U.S., at 72-75, 62 S.Ct., at 465-467.
>
> * * * *
>
> . . . We hold that the possibility of conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance.

Cuyler v. Sullivan, 446 U.S. 335, 349-50 (1980).

The assistance of counsel is a constitutional right so basic that its infraction can never be treated as harmless error. Chapman v. California, 386 U.S. 18, 23 (1967). Thus, when a defendant is deprived of the assistance of counsel in the prosecution of a capital trial, reversal is automatic. Gideon v. Wainwright, 372 U.S. 335 (1963). Also, "[t]he mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate's conflicting obligations have effectively sealed his lips on crucial matters." Holloway v. Arkansas, 435 U.S. 475, 490 (1978).

While Ms. Buenoano does not need to show prejudice, all that counsel understands himself to be permitted to say by the Bar is

that such a showing "may" exist. Undersigned counsel, however, finds himself constrained from pleading it, to Ms. Buenoano's detriment, and in violation of her right to counsel in these proceedings. Trial and appellate counsel operated under a conflict. Matters not pursued were not raised on direct appeal by the same attorney who was operating under a conflict:

> It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with the record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client.

Hollowav v. Arkansas, 435 U.S. at 490-1.

There are numerous examples of appellate counsel's failure in this case to urge issues on appeal. One such is suggested by a footnote in this Court's opinion on direct appeal:

> 2. Although Buenoano also alleges it was error to allow the testimony of the attorney who prosecuted her in Escambia County for the attempted murder of John Gentry, this argument was not developed in her brief, and therefore we do not address it.

Buenoano v. State, 527 So. 2d 194, 198 fn 2 (Fla. 1988). Another example of counsel's ineffectiveness on appeal is his failure to include the Santa Rosa record concerning the death of Michael Goodyear in the direct appeal record for this Court to consider in connection with the issues raised. Id. at 199. Other examples of counsel's ineffectiveness on appeal are set forth in this Petition.

Claims such as this are properly heard in post-conviction proceedings. See Harich V. State, 542 So. 2d 980 (Fla. 1989); Porter v. Wainwright, 805 F.2d 931 (11th Cir. 1986); Burden v. Zant, 871 F.2d 956 (11th Cir. 1989).

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Ms. Buenoano'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 Court could not have known of appellate counsel's conflict of interest on direct appeal, since it involved the same attorney who represented Ms. Buenoano before the trial court. Accordingly, a stay of execution, leave to amend, and an order to the Bar directing disclosure to current counsel are appropriate, and thereafter habeas relief should be accorded.

CLAIM III .

APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN NOT ENSURING THE COMPLETE RECORD ON APPEAL WAS BEFORE THE COURT IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Appellate counsel raised the following claim on direct appeal:

IV. THE TRIAL COURT ERRED IN ALLOWING TESTIMONY DURING THE SENTENCING PHASE OF TWO FORMER PROSECUTORS CONCERNING DETAILS OF TWO OTHER CRIMES AS DEFENDANT DID NOT HAVE A FAIR OPPORTUNITY TO REBUT THEIR HEARSAY TESTIMONY.

This claim could be found at pages 28 to 38 of the appellant's initial brief. Appellate counsel's briefing of this issue was adequate.

This death sentenced petitioner should not be denied an opportunity to have this claim considered because her appellate attorney unreasonably failed to provide this Court with the Santa Rosa County transcript.

This Court addressed Claim IV of petitioner's direct appeal brief as follows:

Buenoano's allegation that the prosecutor's testimony detailing her prior

> felony conviction was inaccurate is mere speculation. This Court has no way of comparing the testimony given by witnesses at the Santa Rosa trial to that given by the prosecutor in the case at bar since the Santa Rosa record was not made part of the record on appeal. Testimony during the sentencing proceeding relating to Buenoano's prior conviction was extraneous and not critical to the finding of aggravation because there was a certified judgment and sentence evidencing the conviction. Although the testimony may have amount to the type of **"overkill"** which this Court has repeatedly met with disapproval, in the context of the entire trial any error which may have occurred in admitting this particular testimony was harmless and did not result in prejudice to the defendant's case requring a new sentencing proceeding.

Buenoano v. State, 527 So. 2d **194** (Fla. **1988).**

Collateral counsel shall provide the Santa Rosa County record on appeal to this Court for its consideration of this claim.

Direct appeal counsel rendered ineffective assistance of counsel in not to ensuring this Court had the entire record on appeal. Appellate counsel's claim has merit. This Court should consider this valid claim at this time.

Habeas relief is appropriate, and the Writ should issue.

CLAIM IV

> MS. BUENOANO'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, AND APPELLATE COUNSEL'S ARGUMENT ON THIS ISSUE ON DIRECT APPEAL CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL.

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

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

Ms. Buenoano'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 his 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). In addition, the judge employed the same erroneous standard when sentencing Ms. Buenoano to death, and a limiting construction was not applied on direct appeal. Cf. Maynard v. Cartwrisht, supra.

The jury instructions given in Cartwrisht were virtually identical to the instructions given to Ms. Buenoano's sentencing jury. The eighth amendment error in this case is identical to the eighth amendment error upon which a unanimous United States Supreme Court granted relief in Maynard v. 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. 1726). The Tenth Circuit's in 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.

Cartwriuht v. Mavnard, 822 F.2d 1477, 1488 (10th Cir. 1987)(in banc), affirmed, 108 S. Ct. 1853 (1988). In Cartwriuht, 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 Cartwrisht clearly conflicts with what was employed in sentencing Ms. Buenoano to death. See also Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(in banc)(finding that Cartwriuht 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 consciousless 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 Cartwrisht.[2] Of course, the role of a Florida sentencing jury is critical. The Eleventh Circuit in Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(in banc), cert. denied, 109 S. Ct. 1353 (1989), specifically discussed the fundamental significance of a Florida jury's sentencing role in a capital case:

> In analyzing the role of the sentencing jury, the Supreme Court of Florida has apparently been influenced by a normative judgment that a jury recommendation of death carries great force in the mind of the trial judge. This judgment is most clearly

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

reflected in cases where an error has occurred before the jury, but the trial judge indicates that his own sentencing decision is unaffected by the error. As a general matter, reviewing courts presume that trial judges exposed to error are capable of putting aside the error in reaching a given decision. The Supreme Court of Florida, however, has on occasion declined to apply this presumption in challenges to death sentences. For example, in Messer v. State, 330 So.2d 137 (1976), the trial court erroneously prevented the defendant from putting before the sentencing jury certain psychiatric reports as mitigating evidence. The jury recommended death and the trial judge imposed the death penalty. The supreme court vacated the sentence, even though the sentence judge had stated that he had himself considered the reports before entering sentence. The supreme court took a similar approach in Riley v. Wainwright, 517 So.2d 565 (Fla.1987). There, the defendant presented at his sentencing hearing certain nonstatutory mitigating evidence. The trial court instructed the jury that it could consider statutory mitigating evidence, but said nothing about the jury's obligation under Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), to consider nonstatutory mitigating evidence. The jury recommended death and the trial judge imposed the death penalty. In imposing the death sentence, the trial judge expressly stated that he had considered all evidence and testimony presented. On petition for writ of habeas corpus, the supreme court ordered the defendant resentenced. The court held that the jury had been precluded from considering nonstatutory mitigating evidence, and that the trial judge's consideration of that evidence had been "insufficient to cure the original infirm recommendation." Id. at 859 n. 1.

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

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

The [Florida] supreme court's understanding of the jury's sentencing role is illustrated by the way it treats

> sentencing error. In cases where the trial court follows a jury recommendation of death, the supreme court will vacate the senten e and order resentencing before a new jury' if it concludes that the proceedings before the original jury were tainted by error. Thus, the supreme court has vacated death sentences where the jury was presented with improper evidence, see Dougan v. State, 470 So.2d 697, 701 (Fla.1985), cert. denied, 475 U.S. 1098, 106 S.Ct. 1499, 89 L.Ed.2d 900 (1986), or was subject to improper argument by the prosecutor, see Teffeteller v. State, 439 So.2d 840, 845 (Fla.1983), cert. denied, 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 754 (1984). The supreme court has also vacated death sentences where the trial court gave the jury erroneous instructions on mitigating circumstances or improperly limited the defendant in his presentation of evidence of mitigating circumstances. See Thompson v. Dusser, 515 So.2d 173, 175 (Fla.1987); Downs v. Dusser, 514 So.2d 1069, 10.72 (Fla.1987); Riley v. Wainwright, 517 So.2d 656, 659-60 (Fla.1987); Valle v. State, 502 So.2d 1225, 1226 (Fla.1987); Floyd v. State, 497 So.2d 1211, 1215-16 (Fla.1986); Lucas v. State, 490 So.2d 943, 946 (Fla.1986); Simmons v. State, 419 So.2d 316, 320 (Fla.1982); Miller v. State, 332 So.2d 65, 68 (Fla.1976). In these cases, the supreme court frequently focuses on how the error may have affected the jury's recommendation.

Id. at 1452.[3] As the in banc Eleventh Circuit noted in earlier portions of the Mann opinion:

> A review of the case law shows that the Supreme Court of Florida has interpreted section 921.141 as evincing a legislative intent that the sentencing jury play a significant role in the Florida capital

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

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

sentencing scheme. See Messer v. State, 330 So.2d 137, 142 (Fla. 1976)("[T]he legislative intent that can be gleaned from Section 921.141 [indicates that the legislature] sought to devise a scheme of checks and balances in which the input of the jury serves as an integral part."); see also Riley v. Wainwright, 517 So.2d 656, 657 (Fla.1987)("This Court has long held that a Florida capital sentencing jury's recommendation is an integral part of the death sentencing process."); Lamadline v. State, 303 So.2d 17, 20 (Fla.1974)(right to sentencing jury is "an essential right of the defendant under our death penalty legislation"). In the supreme court's view, the legislature created a role in the capital sentencing process for a jury because the jury is "the one institution in the system of Anglo-American jurisprudence most honored for fair determinations of questions decided by balancing opposing factors." Cooper v. State, 336 So.2d 1133, 1140 (Fla.1976), cert. denied, 431U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977); see also McCampbell v. State, 421 So.2d 1072, 1075 (Fla.1982)(the jury's recommendation "represent[s] the judgment of the community as to whether the death sentence is appropriate"); Chambers v. State, 339 So.2d 204, 209 (Fla.1976)(England, J., concurring)(the sentencing jury "has been assigned by history and statute the responsibility to discern truth and mete out justice").

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

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

In Hitchcock v. Duaaer, 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] in banc decision in Hitchcock v. Wainwrisht, 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. Duaaer, 863 F.2d 705, 708 (11th Cir. 1989). See also Harsrave v. Duaaer, 832 F.2d 1528 (11th Cir. 1987)(in banc); Stone v. Dusaer, 837 F.2d 1477 (11th Cir. 1988). The United States Supreme Court treated the jury as sentencer for purposes of eighth amendment instructional error review, as have the Eleventh Circuit Court of Appeals and this Court. See Mann, supra; Riley v. Wainwrisht, 517 So. 2d 565 (Fla. 1987). In fact, this Court, recognizing the significance of this change in law, held Hitchcock was to be applied retroactively.

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

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

Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1989). See also Riley v. Wainwrisht, 517 So. 2d 656 (Fla. 1987)(improper instructions to sentencing jury render death sentence fundamentally unfair). 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. Riley, supra. However,

the jury here was unconstitutionally instructed, Maynard V. Cartwright, supra, and the error affected Ms. Buenoano's death sentence.

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

What cannot be disputed is that here, as in Cartwriaht, the jury instructions provided no guidance regarding the "heinous, atrocious or cruel" aggravating circumstance. The jury was simply told:

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

(R. 1726). This did not embody the limiting constructions necessary to channel and limit the sentencer's discretion.

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

In Ms. Buenoano'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. Without

the benefit of Cartwrisht, this Court did not apply it, and the required resentencing was never ordered.

Trial counsel objected to the instruction given for the same reason the Oklahoma instruction was ruled unconstitutional in Cartwrisht -- that the instruction did not sufficiently limit the overbroad construction attendant to this aggravator(R. 1698). However, the issue raised on direct appeal was that there was insufficient evidence of suffering or of torture to justify the aggravating factor of heinous, atrocious or cruel. Appellate counsel failed to argue the instruction error evidence on the record, failed to draw this Court's attention to Cartwrisht, and thus rendered ineffective assistance of counsel.

This Court has held that, under Hitchcock, the sentencing jury must be correctly and accurately instructed as to the mitigating circumstances to be weighed against aggravating circumstances. Under Maynard V. Cartwrisht, 108 S. Ct. 1883 (1988), the jury must also be correctly and accurately instructed regarding the aggravating circumstances to be weighed by it against the mitigation when it decides what sentence to recommend. In Mikenas V. Dugger, 519 So. 2d 601 (Fla. 1988), a new jury sentencing was ordered because the jury was instructed without objection that mitigating circumstances were limited by statute. A subsequent resentencing by trial judge alone did not cure the instructional error, although at the resentencing, the trial judge considered nonstatutory mitigation. The jury's recommendation was not reliable because the jury did not know what to balance in making its recommendation. In Ms. Buenoano's case, the jury did not receive instructions narrowing aggravating circumstances in accord with the limiting and narrowing constructions adopted by the Supreme Court. Thus, the jury here also did not know the parameters of the factors it was weighing.

Florida has adopted a statutory scheme in which the "jury is specifically instructed to weigh statutory aggravating and

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

Under Florida law, aggravating circumstances "must be proven beyond a reasonable doubt." Hamilton v. State, 547 So. 2d 630, 633 (Fla. 1989). Ms. Buenoano'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, Ms. Buenoano's jury received no instructions regarding the elements of the "heinous, atrocious and cruel" aggravating circumstances submitted for the jury's consideration. Its discretion was not channeled and limited in conformity with Cartwriaht. Neither was the sentencing judge's.

Florida law requires the jury to weigh the aggravating circumstances against mitigating evidence. Ms. Buenoano's jury was so instructed. This Court has produced considerable case law regarding the import of instructional error to a jury regarding the mitigation it may consider and balance against the aggravating circumstances. In Mikenas v. Dugger, the court ordered a new sentencing because the jury had not received an instruction explaining that mitigation was not limited to the

statutory mitigating factors. The error was cognizable in post-conviction proceedings even though there had been no objection at trial, the issue had not been raised on direct appeal, and at a resentencing to the judge alone, the judge had known that mitigation was not limited to the statutory mitigating factors. It was cognizable because this Court determined that Hitchcock required the sentencing jury in Florida to receive accurate information which channeled and limited its sentencing discretion but allowed the jury to give full consideration to the defendant's character and background. Because of the weight attached to the jury's sentencing recommendation in Florida, instructional error is not harmless unless the reviewing court can "conclude beyond a reasonable doubt that an override would have been authorized." Mikenas, 519 So. 2d at 601. In other words, it is not harmless if there was sufficient mitigation in the record for the jury to have a reasonable basis for recommending life and thus to preclude an override. There was sufficient mitigation in the record below.

Similar conclusions have been reached in other cases where the jury was erroneously instructed. Meeks v. Dugger, So. 2d ___, 14 F.L.W. 313, 314 (Fla. June 22, 1989)("Had the jury recommended a life sentence, the trial court may have been required to conform its sentencing decision to Tedder v. State, 322 So. 2d 908 (Fla. 1975), which requires that, if there is a reasonable basis for the recommendation', the trial court is bound by it."); Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1989)("It is of no significance that the trial judge stated that he would have imposed the death penalty in any event. The proper standard is whether a jury recommending life imprisonment would have a reasonable basis for the recommendation."); Floyd v. State, 497 So. 2d 1211, 1216 (Fla. 1986)("In view of the inadequate and confusing jury instructions, we believe Floyd was denied his right to an advisory opinion. We cannot sanction a practice

which gives no guidance to the jury for considering circumstances which might mitigate against death."). In Ms. Buenoano's case, the jury received no guidance as to the **"elements"** of the aggravating circumstances against which the evidence in mitigation was balanced. In Florida, the jury's pivotal role in the capital sentencing process requires its sentencing discretion to be channeled and limited. The failure to provide Ms. Buenoano's sentencing jury the proper "channeling and limiting" instructions violated the eighth amendment principle discussed in Mavnard v. Cartwrisht.

In Mavnard v. Cartwrisht, the Court held that **"the** channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." **108** S. Ct. at **1858.** There must be a "principled way to distinguish [the] case, in which the death penalty was imposed, from the many cases in which it was not." Id. at **1859,** quoting, Godfrey **v.** Georsia, **446** U.S. **420, 433 (1980).** In **Ms.** Buenoano'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 Ms. Buenoano'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. Georsia, **408 U.S. 238 (1972),** and Maynard **v.** Cartwrisht.

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

juries of this State should and must be specifically instructed about the elements which may satisfy the aggravating circumstance of 'especially heinous, atrocious or cruel.'" Id.

The Tennessee Supreme Court concluded that under Maynard v. Cartwrisht, juries must receive complete instructions regarding aggravating circumstances. State v. Hines, 758 S.W.2d 515 (Tenn. 1988). The court did not read Cartwrisht as applying only to the heinous, atrocious, and cruel aggravating circumstance. The court there also found that ambiguity in the instructions regarding any limiting constructions of an aggravating circumstance violated 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 Mavnard 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, Ms. Buenoano's jury received inadequate instructions and her sentence of death violates the eighth amendment.

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

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

The error cannot be found harmless beyond a reasonable doubt. In Florida, the Supreme Court normally remands for resentencing when aggravating circumstances are invalidated. See, e.g., Schafer v. State, 537 So. 2d 988 (Fla. 1989)(remanded

for resentencing where three of five aggravating circumstances stricken and no mitigating circumstances identified); Nibert v. State, 508 So. 2d 1 (Fla. 1987)(remanded for resentencing where one of two aggravating circumstances stricken and no mitigating circumstances found); cf. Rernbert v. State, 445 So. 2d 337 (Fla. 1984)(directing imposition of life sentence where one of two aggravating circumstances stricken and no mitigating circumstances found). The striking of this additional aggravating factor requires resentencing. Schafer, supra. Id. The "harm" before the jury is plain -- a jury's capital sentencing decision, after all, is not a mechanical counting of aggravators and involves a great deal more than that. The error denied Ms. Buenoano an individualized and reliable capital sentencing determination. Knight v. Dugger, 863 F.2d 705, 710 (11th Cir. 1989). Under Witt v. State, 387 So. 2d 922 (Fla.) cert. denied, 449 U.S. 1067 (1980), Cartwrisht represents a fundamental change in law, that in the interests of fairness requires the decision to be given retroactive application. The errors committed here cannot be found to be harmless beyond a reasonable doubt. There was a wealth of mitigating evidence before the jury which could have caused a different balance to be struck had this aggravating circumstances not been found and weighed against the mitigation. Habeas relief is warranted under Hitchcock, Cartwrisht and the eighth amendment. A new jury sentencing proceeding must be ordered.

Recently, a petition for a writ of certiorari was granted in Clemons v. Mississippi, U.S. ____, 45 Cr. L. 4067 (June 19, 1989), in order to resolve the question of when Cartwrisht error may be harmless. Certainly Ms. Buenoano'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 Ms. Buenoano's case. See Walton v. Arizona, cert. granted, 46 Cr. L. 3014 (October 2, 1989); Ricketts v. Jeffers, cert. granted, 46 Cr. L. 3035 (October 10, 1989). A stay of execution and Rule 3.850 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 Ms. Buenoano. For each of the reasons discussed above the Court should vacate Ms. Buenoano's unconstitutional sentence of death.

This 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).

No tactical decision can be ascribed to counsel's failure to properly urge the claim. No procedural bar precluded review of this issue. See Johnson v. Wainwright, supra, 498 So. 2d 938. However, counsel's failure, deprived Ms. Buenoano of the appellate reversal to which she was constitutionally entitled. See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra. Accordingly, habeas relief must be accorded now.

CLAIM V

MS. BUENOANO'S RIGHT TO A RELIABLE CAPITAL SENTENCING PROCEEDING WAS VIOLATED WHEN THE STATE PRESENTED UNREBUTABLE HEARSAY TESTIMONY IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The death penalty is different than any other punishment imposed in this country. Gregg v. Georgia, 428 U.S. 153, 181-88 (1976).

> From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the soverign in taking the life

> of one of it citizens also differs dramatically from any other legitimate state action. It is of vital important to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.

Id.

The penalty phase of Ms. Buenoano's capital trial was not a reliable proceeding in which the sentence could be determined on the basis of reason. Rather, it was a combination of unconstitutional victim impact information, in violation of Booth v. Maryland, 482 U.S. 496, 107 S. Ct. 2529 (1987), unrebuttable hearsay testimony in violation of Gardner v. Florida, supra, and unreliable testimony in violation of Gardner and Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982). On direct appeal, this Court noted that this was "the type of 'overkill' which [the Florida Supreme] Court has repeatedly met with disapproval." Buenoano, 527 So. 2d at 199.

Two prosecutors were called by the state in the penalty phase to summarize the evidence they had presented in previous trials against Ms. Buenoano. These prosecutions both resulted in convictions, and involved the drowning death of Ms. Buenoano's son, Michael Goodyear, and the bombing of John Gentry's car. Each prosecutor's testimony basically consisted of a summary closing argument of the state's evidence in their respective trials. (Mr. Patterson, R. 1518 et seq; Mr. Edgar, R. 1551 et. sea.) Also introduced were the judgments and sentences of each case (R. 1519; 1553).

Defense attorney Johnston objected to this testimony, and explained that it was hearsay, and that there would be no fair opportunity to rebut the testimony (R. 1522; 1555). The trial court allowed the testimony, ruling that the defense "appears" to have an opportunity to rebut the testimony, and that there had been an opportunity to cross-examine the witness at the previous trials (R. 1523; 1555).

The penalty phase of a capital trial must "satisfy the requirements of the Due Process Clause." Gardner v. Florida, 430 U.S. 349, 358; 97 S. Ct. 1197, 1204 (1977). In Gardner, the United States Supreme Court held that the defendant was denied due process when the death sentence was based on information which he had no opportunity to deny or explain. 430 U.S. at 362. The right to cross-examine adverse witnesses has specifically been applied to capital sentencing hearings. Proffitt v. Wainwright, 685 F.2d 1227, 1254 (11th Cir. 1982). While the "abridgment of fundamental constitutional rights at capital sentencing may be justified in some instances where the state demonstrates a compelling interest," Proffitt, 685 F.2d at 1255, there is no compelling state interest here. The state merely needed to prove the existence of prior felonies. There was absolutely no reason to retry those cases in Ms. Buenoano's capital penalty phase. There was absolutely no reason to present the jurors with precisely the type of matters condemned in Booth v. Maryland, and South Carolina v. Gathers.

A. THE INFORMATION WAS UNRELIABLE

The state asked both previous prosecutors, Edgar and Patterson, to relay to the jury the evidence the state had presented in the prior trials. They were not even asked to summarize all the evidence that went to the prior juries. Thus, any evidence conflicting with the state's evidence that may have caused a jury some doubt as to Ms. Buenoano's guilt was not presented to the jury in the present case. In fact, in the case of the drowning of Michael Goodyear, the penalty phase jury that had heard **all** of the evidence in that case recommended life. The circumstances of that case, as presented by both the state **and** the defense, convinced that jury to recommend life.

The Supreme Court's cases have focused on the **"quality"** of information before the sentencer." Gardner; Proffitt. The

importance of the information presented at Ms. Buenoano's penalty phase was the fact of prior convictions. The additional facts presented focused on **"quantity"** over "quality," and an unreliable quantity at that. "Reliability in the factfinding aspect of sentencing has been the cornerstone" of the United States Supreme Court in recent capital decisions. Gardner v. Florida, **430** U.S. at **359-60, 362.** This penalty proceeding was not reliable.

B. THE PROSECUTORS WHO TESTIFIED PRESENTED MISLEADING TESTIMONY

Deliberate deception of a court and jurors by the presentation of false evidence is in conflict with the demands of justice. Giglio v. United States, **405** U.S. **150, 153, 92 S.** Ct. **763, 766 (1972).** In this case, the prosecutors who testified presented misleading testimony. The first prosecutor/witness, Patterson, was asked to summarize the facts presented through live testimony at the attempted murder trial (R. **1522).** This was misleading in that it implied the witness would be presenting **all** the testimony, when in reality he only presented the testimony which supported the state's case in that trial.

The second prosecutor/witness, Edgar, was similarly asked to relate the "evidence that [he] presented in that particular proceeding involving the death of Michael Goodyear **..."** (R. **1554).** This is also misleading or deceptive to the jury because they could not be expected to know that they were not hearing a full summary of the previous trial, but rather a closing argument that highlighted the evidence most favorable to the prosecution.

Further, neither prosecutor remembered exactly what evidence had been ruled admissible in the previous trials. For instance, Edgar testified that a doctor had noticed signs of arsenic poisoning in Michael prior to his death (R. **1564).** This was evidence that **was** not admitted in the previous trial (Id.)

C. THE DEFENSE HAD NO FAIR OPPORTUNITY TO REBUT OR CROSS EXAMINE THE TESTIMONY PRESENTED BY THE WITNESS/PROSECUTORS.

This court's ruling that the witnesses/prosecutors could testify as they did was premised on the knowledge that defense attorney Johnston had represented Ms. Buenoano in both of the previous trials. However, Mr. Johnston cannot be expected to remember every detail of two lengthy trials held months and years previously, especially in the midst of a complex, technical murder trial which itself involved "Williams" Rule evidence from still two other cases which never went to trial. The fact that Mr. Johnson remembered enough to conduct some cross-examination does not cure the harm. He had no transcripts at that time with which to rebut the "summaries," and it is inconceivable within the bounds of due process to require him to conduct such cross examination from memory. Cf., United States v. Cronic, 466 U.S. 648, 104 S. Ct. 2039 (1984).

Further, without transcripts, Mr. Johnston was at a loss to rebut the testimony even when the witnesses admitted they might be mistaken, but could not remember:

> BY *M.R.* JOHNSTON:
>
> Q Mr. Patterson, did you go to the clerk's office in Pensacola and get a list of witnesses that testified in your case that you've just described?
>
> A No, sir, I did not.
>
> Q Could it be that you have confused some of the witnesses testimony, and I specifically ask you about John Gentry, and not John, but Albert Gentry, and Johnny Rowel testifying in the case of the State of Florida versus Judy Goodyear, as opposed to the State of Florida versus James Goodyear?
>
> A I'm not sure that John Rowel testified in Judy Goodyear's..
>
> Q What about Albert Gentry?
>
> A I believe he did, I'm not certain.
>
> Q But yet, you were able to tell the jury some of the - tell this jury some of the things which you say John Gentry testified to

in the trial involving Judy, and you are not sure whether or not Ms. Rowel even testified?

A. I'm not sure that I indicated to the jury that John Rowel testified to anything. I was trying to relate to the jury what I felt like the facts at the trial revealed.

* * * *

Q Mr. Patterson, aren't you confusing the witnesses in the case of James Goodyear that testified in that case as opposed to the witnesses that testified in the case of Judy Goodyear?

A No, sir, I believe Ray Odom (Phonetic) did testify in Judy's case. I believe he testified as to Ms. Rowel obtaining the dynamite.

Q Okay.

MR. JOHNSTON: Your Honor, I still renew my objection.

The result was that Ms. Buenoano was retried, with only the evidence favoring the prosecution, in the penalty phase of her capital trial. This hardly comports with due process. A capital defendant has a "legitimate interest in the character of the procedure which leads to the imposition of [her] sentence," Gardner, **430** U.S. at **358,** 97 S. Ct. at 1205, and thus such sentencing process must comport with due process. Id. The sentencing phase of Ms. Buenoano's capital trial abrogated these due process principles, and resulted in an unreliable death sentence. The sixth, eighth, and fourteenth amendments were violated. Habeas relief is proper.

In raising this claim on direct appeal, appellate counsel failed to refer the court relevant and controlling United States Supreme Court precedent. This precedent, including Booth v. Marvland, supra, Gardner v. Florida, supra, Proffitt v. Wainwright, supra and Giglio v. United States, supra, is directly on point, and critical to the correct disposition of this claim. In this regard, appellate counsel rendered ineffective assistance and this claim should be entertained at this juncture. Habeas relief should be accorded now.

CLAIM VI

MS. BUENOANO'S RIGHTS TO A FUNDAMENTALLY FAIR AND RELIABLE CAPITAL TRIAL AND SENTENCING DETERMINATION WERE VIOLATED WHEN THE STATE URGED THAT SHE BE CONVICTED AND SENTENCED TO DEATH ON THE BASIS OF VICTIM IMPACT AND OTHER IMPERMISSIBLE FACTORS, IN VIOLATION OF BOOTH V. MARYLAND, SOUTH CAROLINA V. GATHERS, AND THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND APPELLATE COUNSEL'S FAILURE TO URGE THIS CLAIM ON DIRECT APPEAL CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL.

This Court recently acknowledged that Booth v. Maryland, 482 U.S. 496, 107 S. Ct. 2529 (1987), was an unanticipated retroactive change in law:

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

Jackson v. Dusser, 547 So. 2d 1197, 14 F.L.W. 355 (Fla. 1989). On direct appeal this Court noted the possibility of prosecutorial "overkill" infecting Ms. Buenoano's capital sentencing proceedings. Buenoano, supra. Review pursuant to Booth and South Carolina v. Gathers, is appropriate, as is resentencing in light of these errors.

Ms. Buenoano's capital trial and sentencing proceedings were permeated with impermissible victim impact information. Booth v. Maryland, 107 S. Ct. 2529 (1987) and South Carolina v. Gathers, 45 Cr. L. 3076 (June 12, 1989), forbid the introduction of victim impact evidence and argument during a capital proceeding.

The impermissible victim impact statements at Ms. Buenoano's case were introduced both during the sentencing and guilt-innocence phases of the trial, and they were relied upon in argument. During the guilt phase of the proceedings approximately one half of the evidence presented did not even involve the capital offense on which Ms. Buenoano was facing

trial. The State presented extensive "Williams" Rule evidence concerning Bobby Joe Morris, with whose death Ms. Buenoano has never been charged, and John Gentry, based on an attempted poisoning, a charge which had been nolle prossed by the State.

Also presented at trial was the testimony of John Gentry. He testified about his suffering:

> Approximately the first part of December I started getting extremely nausea and vomiting, and I couldn't hold anything on my stomach, and it was just miserable.

(R. **955**). He went on to testify about how sick he became, until he eventually went to the hospital (R. **956**).

During the penalty phase, the State again presented the testimony of John Gentry, this time concerning the injuries he had sustained as a result of a bomb blast in his car, a crime for which Ms. Buenoano had been convicted. Mr. Gentry explained at length how the explosion and resulting injuries had affected his life adversely (R. **1497**):

> **A.** I've lost part of both intestines, part of my stomach, part of a kidney, part of my liver.

(R. **1501**).

> A. I had to go back [to the hospital] twice; once to remove a cyst about the size of a grapefruit off of my kidney.

(R. **1503**).

The remainder of the testimony presented by the State at the penalty phase consisted of two prosecutors who testified about the cases they had prosecuted against Ms. Buenoano.

The victims in the various "Williams" Rule cases became the focus of the penalty phase. Concerning the death of Ms. Buenoano's son, Mr. Edgar constantly referred to Michael as "her crippled son" (R. **1555, 1558**):

> BY THE WITNESS: The defendant took her son to that bridge with her other two children, James Buenoano, or Kimberly Goodyear/Buenoano, and Michael. Michael was **19** years old then.

Michael was taken to the bridge where they parked their vehicle. They launched a canoe, which was approximately a **15,** 16 foot canoe. Kimberly was placed ashore, told to remain there. The defendant and James took Michael up the river. Michael was placed in a folding type aluminum lawn chair and seated in approximately the middle section of the canoe, according to the testimony.

Q Did the testimony indicate how many people that canoe was designed to hold?

A Well, as best we could determine from the testimony, the canoe was designed to hold two or three people. It could hold three people, however, again, I'd like to point out the testimony was very clear that the victim was placed in a lawn chair, sitting in a canoe. He, of course, is 6'3", weighed **125** pounds, was paralized from the elbows to the fingertips on both arms, from the knees to the toes on both feet. He was wearing fifteen Pounds of braces. Not only could he not walk, he certainly could not swim. He basically could not attend to himself. The only ability he had to pick up or grasp or hold anything, was a special device that was fitted to him, called a Robins Hook which is strapped around the shoulders,area and when a person, in this case, the deceased, would flex his shoulders, he could lose and open that hook and grasp such as a door handle or glass of water. No way was he capable of fishing or walking, or any of those things.

He was seated in the lawn chair. Took him up the river and drowned him.

*** * * ***

Divers, later that afternoon, early that evening, found the boy. He was not wearing a life jacket or any lifesaving apparatus. He had these braces on that acted as a weight or anchor. He was found in the middle of the river and the river was described as about fifty yards across and the bottom of it was contoured, such as dropped off and a flattened out level bottom river and fairly clean bottom.

They found his glasses twenty-five feet upstream. They also were in the middle of the river. Michael was known to wear glasses. Since there were glasses twenty five feet upstream from the body, it was presumed that the, and from the testimony at trial, these are the boy's glasses. They recovered the body and took him to the hospital.

(R. 1556-9) (emphasis added).

Mr. Edgar then went on to explain to the jury additional characteristics about "the crippled son" and his childhood:

> Q What did that reveal, sir?
>
> A It revealed, first of all, Michael was an illegitimate child, number one. He was different from the other two children, not treated the same way. He spent a good bit of his growing up years in institutions, shut away and kept away from family. He was sent out of town, or he was sent up to camp, sent away from the home.
>
> He was, emotionally and intellectually, a borderline retarded child, but he was not a psychiatric problem or a violent child. He was different.
>
> He was a fearful child. He wore thick glasses. He slobbered. He wet the bed, even in his teen years. He had an emotional and had judgment problems. He was different and awkward. He wasn't as nice looking as James and he wasn't as athletic as James. He wasn't as pretty as the other children. He was treated differently.
>
> We interviewed the neighbors across the street from where the defendant had lived at the time of this drowning. They indicated this boy when he was in high school would spend an awful lot of time with some of the adult neighbors, just hanging around, nobody playing with him practically. They didn't want to be cruel or rude to the boy. They listened to him a lot, but he did make some sort of a nuisance by wanting somebody to be friends with.
>
> We presented the testimony of some of the high school coaches and counselors personnel. They indicated that he wasn't a behavior problem in school. He did attend normal high school, didn't make good grades. He tried and tried to participate in such things as helping with the girls basketball team as an equipment assistant, but he was awkward, uncoordinated. He didn't like to participate in group sports so much because he wasn't gifted that way.

(R. 1561-2).

None of these victim impact matters are relevant to a fair and reliable capital sentencing determination. They were impermissible victim impact. This information is certainly not relevant to any of the statutory aggravating factors. Ms. Buenoano had admitted that she had been convicted of prior felonies, and a stipulation to that effect was read to the jury

(R. 1343). Further, the prosecutor had the judgments and sentences (R. 1520; 1553). There was no need to present such detailed victim impact testimony, especially in light of an admission of conviction. In fact, as noted, this Court even referred to this evidence as "the type of **'overkill'** which [this] Court has repeatedly met with disapproval." Buenoano v. State, 527 So. 2d 194, 199 (Fla. 1988).

The evidence presented to the sentencing court and jury in Ms. Buenoano's case was that which the United States Supreme Court in Booth and Gathers determined to be impermissible considerations at the penalty phase of a capital trial. The eighth amendment was violated here, as it was in Booth and Gathers.

This record is replete with Booth error. Ms. Buenoano 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. These are the very same impermissible considerations urged (and urged to a far more extensive degree) and relied upon by the jury and judge in Ms. Buenoano's case. Here, as in Booth, the victim impact information **"serve[d]** no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant." Id. Since a decision to impose the death penalty'must "be, and appear to be, based on reason rather than caprice or **emotion,"** Gardner v. Florida, 430 U.S. 349, 358 (1977)(opinion of Stevens, J.), such efforts to fan the flames are "inconsistent with the reasoned decision making" required in a capital case. Booth, supra, 107 S. Ct. at 2536. ~~See also~~ Penry v. Lynaugh, 109 S. Ct. at 2952, (1989)(death sentence can not be premised on "an unguided emotional response"); Rhodes v. State, So. 2d ___, 14 F.L.W. 343, 345 (Fla., July 6, 1989)(suffering of victims after the homicide is

not relevant to heinous, atrocious, or cruel aggravating circumstance).

Trial counsel did challenge the use of unreliable hearsay at the trial. However, he failed to urge Booth as grounds for reversal on direct appeal.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Ms. Buenoano'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 was readily ascertainable from a casual reading of the transcript. Matire v. Wainwrisht, 811 F.2d 1430, 1438 (11th Cir. 1987). This claim of error required no elaborate presentation -- counsel should have directed this Court to the error.

No tactical decision can be ascribed to counsel's failure to urge the claim. He urged it below, and urged aspects of it on appeal. Counsel's failure to urge this claim deprived Ms. Buenoano of the appellate reversal to which she was constitutionally entitled. See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra. Accordingly, habeas relief should be afforded.

CLAIM VII

THE DEATH PENALTY STATUTE, ENACTED AFTER THE CHARGED OFFENSE WAS COMMITTED, WAS IMPROPERLY APPLIED RETROACTIVELY IN VIOLATION OF ARTICLE I, SECTION 10 OF THE UNITED STATES CONSTITUTION, THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

The offense in this case occurred on September 16, 1971. At the time of the offense, the Florida capital sentencing statute provided for the imposition of a death sentence after conviction of a capital felony, but the jury was allowed in its verdict to include a recommendation of mercy. Fla. Stat. Ann. section 775.082 (1971). The statutory aggravating circumstances in the present death penalty statute did not exist at that time. The present death penalty statute was not enacted until 1973. Ms. Buenoano contends that the application of the 1973 statute to an offense which she was alleged to have committed in 1971 constitutes an ex post facto violation of Article I, Section 10 of the United States Constitution, of the fifth, sixth, eighth, and fourteenth amendments, of due process and equal protection of law, and of the corresponding provisions of the Florida Constitution.

The death penalty statute in effect in 1971, at the time of the offense, was struck down as violative of the Eighth and Fourteenth Amendments. Donaldson v. Sack, 265 So. 2d 499 (Fla. 1972); see also Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726 (1972). The application of a statute not enacted at the time of the offense constitutes a violation of the prohibition against enactment of ex post facto laws by the states as provided by Article I, Section 10 of the United States Constitution.

While Dobbert v. Florida, 432 U.S. 282 (1977) addressed this issue, later caselaw raises questions about the viability of Dobbert's holding. Under the Supreme Court's post-Dobbert jurisprudence, the Dobbert holding no longer holds up. In Miller v. Florida, 107 S. Ct. 2446 (1987), the Supreme Court set out the

test for determining whether a statute is ex post facto. See also Weaver v. Graham, 450 U.S. 24 (1981). Under the resulting new analysis, it is now clear that sec. 921.141 operated as an ex post facto law in Ms. Buenoano's case, and thus was flatly improper and unconstitutional. For example, the substantive rights and protections afforded to a capital defendant under the 1971 capital sentencing statute's broad discretion to reach a verdict of mercy were denied to Ms. Buenoano. But the harm did not stop there.

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

In a similar case concerning the retroactive application of the "cold, calculated, premeditated" aggravator, which was added to sec. 921.141 in 1979, to a defendant whose offense occurred before that circumstance was enacted, a federal district court in Florida has expressly held:

> The United States Constitution contains two ex post facto clauses, one applicable to the states, article 1, section 10, clause 1, and one to the federal government, article 1, section 9, clause 3. In this case, the Court is called upon to address the ex post facto clause applicable to the states: "No state shall . . . pass any . . . ex post facto law."
>
> The Supreme Court has held that three critical elements must be present to establish an ex post facto clause violation.

First, the statute must be a penal or criminal law. Second, the statute must apply retrospectively. Finally, the statute must be disadvantageous to the offender because it may impose greater punishment. Weaver v. Graham, 450 U.S. 24 (1981); see also Miller v. Florida, ___ U.S. ____, 107 S. Ct. 2446, 2451 (1987). A law may violate the ex post facto prohibition even if it "merely alters penal provisions accorded by the grace of the legislature." Id. at 30-31. The challenged statute need not impair a "vested right" in order to be found violative of the ex post facto clause. Id. A law which is merely procedural and does not add to the quantum of punishment, however, cannot violate the ex post facto clause even if it is applied retrospectively. Id. at 32-33 & n. 17. See Dobbert v. Florida, 432 U.S. 282, 293 (1977) ("even though it may work to the disadvantage of a defendant, a procedural change is not ex post facto."). With these principles in mind, the Court will consider whether Mr. Stano has stated an ex post facto claim.

In the instant case, Florida Statute sec. 921.141(5)(i) (1979) is clearly a penal or criminal statute since it deals with the quantum of punishment that may be imposed upon a person convicted of a capital felony. Section 921.141(5)(i) also operates retrospectively because it changes the legal consequences of acts completed before the effective date of July 1, 1979. That is, the change in the sentence statute allowed the trial judge to consider an additional aggravating factor which could increase the quantum of punishment from life imprisonment to death under Florida's sentencing scheme of weighing and balancing aggravating and mitigating factors. Finally, there is no doubt that the addition of a new aggravating factor could disadvantage a criminal defendant on trial for his or her life. Under Florida's capital sentencing scheme the trial judge and sentencing jury are charged with the duty of weighing and balancing all factors in aggravation and mitigation. Under such a delicate scheme, the presence or absence of an aggravating factor could be outcome determinative. Accordingly, this Court finds that Florida Statute sec. 921.141(5)(i) (1979), adding an additional aggravating factor to Florida's capital sentencing scheme, is unconstitutional as applied to Gerald Stano, whose crimes occurred before the statute's effective date.

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

The change in the death penalty law prior to Ms. Buenoano's trial also changes the legal consequences at sentencing.

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

When the Legislature enacted the new death penalty law, it expressly intended to create statutory aggravating factors, and it expressly intended to curtail the jury's broad authority to reach a verdict of mercy. Moreover, the legislature intended to curtail the defendant's protections under the prior statute through its use of judicial sentencing. Aggravating factors were intended, in a sense, to provide notice of the type of conduct which will result in a sentence of death. Ms. Buenoano was given no such notice: the aggravators did not exist.

The change which the new law brought to the capital sentencing scheme operates to the disadvantage of the capital defendant. It provided for aggravating factors instead of broad mercy. Further, the jury here was instructed that it could not consider mercy in recommending a life sentence. (See Claim XIV). Under the law in effect at the time of the offense in this case, the jury would have been able to impose an unreviewable sentence of life solely on the basis of mercy. Under Miller, this Court's application of the new death penalty statute is plain constitutional error. Under Jackson v. Dugger, ___ So. 2d ___,

14 F.L.W. 355 (Fla. 1989), Miller is a significant change in law because it is inconsistent with this Court's prior rulings.

In Miller, 107 S. Ct. at 2452, the Supreme Court altered the prior standard and held that the defendant need not "definitively [show] that he would have gotten a lesser sentence." Moreover,

> In assessing whether a provision is disadvantageous [to the defendant], courts must look to the challenged provision itself and ignore any extrinsic circumstances that may have mitigated its effect on the particular individual. ... Ex post facto analysis "is concerned solely with whether a statute assigns more disadvantageous criminal or penal consequences to an act than did the law in place when the act occurred." In other words, the legislature must provide punishment for past conduct.

Stano, supra slip op. at 39 n.18 (citations omitted). This is what happened here.

Similar to the Miller defendant, Ms. Buenoano was subjected to the probability of a more enhanced sentence because of the new law, and was deprived of the jury's inherent power to show mercy under the old statute. In this instance the more severe sentence was death instead of life. Ms. Buenoano was therefore "substantially disadvantaged" by a retrospective law.

The third part of the Miller analysis requires examination of the sec. 921.141(5)(i) to determine whether it alters a substantial right. Miller v. Florida, 107 S. Ct. at 2452. It did, for example, by creating aggravators which did not exist before, and by altering th right to mercy.

For the foregoing reasons, the law as applied to Ms. Buenoano is ex post facto, and her sentence of death is therefore invalid. Miller v. Florida, 107 S. Ct. 2446 (1987). The application of the new statute to Ms. Buenoano's case violates due process and equal protection of law, and violates the fifth and sixth amendments and the eighth amendment's mandate of heightened scrutiny, fundamental fairness, and reliability in capital sentencing.

Under the analysis of Witt v. State, 387 So. 2d 922 (Fla.), cert denied 449 U.S. 1067 (1980), Miller represents a fundamental change in the constitutional law of capital sentencing that, in the interests of fairness, requires the decision to be given retroactive application.

Ms. Buenoano's jury should have been instructed under the old law. The State should not have been allowed to argue that aggravating factors enacted after the offense applied to Ms. Buenoano.

Defense counsel did argue this issue at trial. However, even though Miller v. Florida, supra, was decided before Ms. Buenoano's case was decided on direct appeal, defense counsel did not direct it to this Court's attention. This was ineffective assistance. At the very least it was error to instruct the jury on the aggravating factor of "cold, calculated, premeditated," under section 921.141(5)(i), Fla. Stat., as this aggravator has already been found to violate the ex post facto clause when retrospectively applied to an offense taking place before its enactment. See Stano v. Dugger, supra. This aggravating factor was added to the list of aggravators by the Legislature on July 1, 1979, by Chapter 79-353, Laws of Florida.

When the Legislature enacted Chapter 79-353, the legislators expressly intended to add to Florida's capital sentencing statute an additional statutory aggravating factor. They expressly intended for the new provision to enhance the probability of imposing death on a capital defendant by adding an aggravating factor which could be found by a jury and judge.

Prior to enactment of this legislation, facts of heightened premeditation, standing alone, did not justify the finding of any of the original aggravating factors. Thus, the purpose of the new legislation was expressly aimed at enhancing the probability of a death sentence and thereby disadvantaging the capital defendant.

This change in the sentencing statute operates to the disadvantage of the capital defendant. Neither under the old statute in effect at the time of the offense in this case, nor under the statute enacted in 1972 was cold, calculated and premeditated a permissible aggravating factor. Under Miller, this Court's application of this aggravator is plain constitutional error. Under ~~Jackson v. Dugger~~, ___ So. 2d 14 F.L.W. 355 (Fla. 1989), Miller is a significant change in law because it is inconsistent with this Court's prior rulings.

Ms. Buenoano's sentence violates the prohibition against ex post facto application of criminal laws. A stay of execution and habeas relief are warranted. This court should order a new penalty phase before a constitutionally instructed jury.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Ms. Buenoano'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.

This 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 claim required no elaborate presentation -- counsel only had to direct this Court to Miller.

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. Wainwriaht, supra, 498 So. 2d 938. However, counsel's failure deprived Ms. Buenoano of the appellate reversal to which she was constitutionally entitled. See Wilson v. Wainwriaht, supra, 474 So. 2d at 1164-65; Matire, supra. Habeas relief is proper.

CLAIM VIII

MS. BUENOANO WAS DENIED HER FUNDAMENTAL FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS BY THE TRIAL COURT'S FAILURE TO INSTRUCT ON THE LESSER INCLUDED OFFENSES OF PREMEDITATED MURDER AFTER FAILING TO GIVE MS. BUENOANO A CHOICE BETWEEN WAIVING THE EXPIRED STATUTE OF LIMITATIONS AND HAVING THE BENEFIT OF THE LESSER INCLUDED OFFENSE INSTRUCTIONS OR ASSERTING THE STATUTE OF LIMITATIONS ON THE LESSER INCLUDED OFFENSES.

The jury in this case was never instructed on the lesser included offenses of premeditated murder. Ms. Buenoano did not personally waive the statute of limitations on the lesser included offenses. Neither the trial court nor defense counsel gave Ms. Buenoano the personal choice between waiving the statute of limitations and receiving the benefit of the lesser included offenses or asserting the statute of limitations. In this regard, counsel's performance was prejudicially deficient.

A capital defendant is constitutionally entitled to lesser included offense instructions. See Beck v. Alabama, infra; Keeble v. United States, 412 U.S. 205 (1973).

In Beck v. Alabama, 447 U.S. 625 (1980), the U.S. Supreme Court held that a death sentence may not constitutionally be imposed after a jury verdict of guilt of a capital offense if the jury was not permitted to consider a verdict of guilt on a lesser included offense:

> While we have never held that a defendant is entitled to a lesser included offense instruction as a matter of due process, the nearly universal acceptance of the rule in both state and federal courts establishes the value to the defendant of this procedural safeguard. That safeguard would seem to be especially important in a case such as this. For when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense -- but leaves some doubt with respect to an element that would justify conviction of a capital offense -- the failure to give the jury the "third option" of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction.
>
> Such a risk cannot be tolerated in a case in which the defendant's life is at stake. As

we have often stated, there is a significant constitutional difference between the death penalty and lesser punishments:

"[D]eath is a different kind of punishment from any other which may be imposed in this country.... From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, **430** U.S. **349, 357-358, 97** S.Ct. **1197, 1204, 51** L.Ed.2d **393** (opinion of Stevens, J.).

To insure that the death penalty is indeed imposed on the basis of "reason rather than caprice or **emotion,"** we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination. Thus, if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, Alabama is constitutionally prohibited from withdrawing that option from the jury in a capital case.

In Spaziano v. Florida, **468** U.S. **447** (1984), the United States Supreme Court held that a defendant must be given the choice whether to waive a statute of limitations and receive the benefit of lesser included offense instructions or assert the statute of limitations:

> The Court in Beck recognized that the jury's role in the criminal process is essentially unreviewable and not always rational. The absence of a lesser included offense instruction increases the risk that the jury will convict, but because it is persuaded that the defendant is guilty of capital murder, but simply to avoid setting the defendant free. In Beck, the Court found that risk unacceptable and inconsistent with the reliability this Court has demanded in capital proceedings. Id., at **643, 100** S.Ct., at **2392.** The goal of the Beck rule, in other words, is to eliminate the distortion of the factfinding process that is created when the jury is forced into an all-or-nothing choice between capital murder and innocence. Id., at **638-643, 100** S.Ct., at **2390-2392.** Requiring that the jury be instructed on lesser included offenses for which the defendant may not be convicted, however,

would simply introduce another type of distortion into the factfinding process.

We reaffirm our commitment to the demands of reliability in decisions involving death and to the defendant's right to the benefit of a lesser included offense instruction that may reduce the risk of unwarranted capital convictions. But we are unwilling to close our eyes to the social cost of petitioner's proposed rule. Beck does not require that the jury be tricked into believing that it has a choice of crimes for which to find the defendant guilty, if in reality there is no choice. Such a rule not only would undermine the public's confidence in the criminal justice system, but it also would do a serious disservice to the goal of rationality on which the Beck rule is based.

If the jury is not to be tricked into thinking that there is a range of offenses for which the defendant may be held accountable, then the question is whether Beck requires that a lesser included offense instruction be given, with the defendant being forced to waive the expired statute of limitations on those offenses, or whether the defendant should be given a choice between having the benefit of the lesser included offense instruction or asserting the statute of limitations on the lesser included offenses. We think the better option is that the defendant be given the choice.

As the Court in Beck recognized, the rule regarding a lesser included offense instruction originally developed as an aid to the prosecution. If the State failed to produce sufficient evidence to prove the crime charged, it might still persuade the jury that the defendant was guilty of something. Id., at 633, 100 S.Ct., at 2387. See also 3 C. Wright, Federal Practice and Procedure sec. 515, p. 20, n. 2 (2d ed. 1982). Although the Beck rule rests on the premise that a lesser included offense instruction in a capital case is of benefit to the defendant, there may well be cases in which the defendant will be confident enough that the State has not proved capital murder that he will want to take his chances with the jury. If so, we see little reason to require him not only to waive his statute of limitations defense, but also to give the State what he perceives as an advantage--an opportunity to convict him of a lesser offense if it fails to persuade the jury that he is guilty of capital murder. In this case, petitioner was given a choice whether to waive the statute of limitations on the lesser offenses included in capital murder. He knowingly chose not to do so.[6] Under those circumstances, it was not error for the trial judge to refuse to instruct the jury on the lesser included offenses.

In footnote 6 the Supreme Court wrote:

> There is no doubt about petitioner's understanding of the implications of his refusal to waive the statute of limitations. The following colloquy occurred in open court:
>
> "THE COURT: Do you understand that while the statute of limitations has run on the Court submitting to the jury lesser included verdicts representing the charges of second-degree murder and third-degree murder, manslaughter, that you who has the benefit of the statute of limitations can waive that benefit and, of course--and then have the Court submit the case to the jury on the first-degree, second-degree, third-degree and manslaughter.
>
> "If you don't waive the statute of limitations, then the Court would submit to the jury only on the one charge, the main charge, which is murder in the first degree, and the sentencing alternatives are as [defense counsel] stated them. Do you understand that?
>
> "MR. SPAZIANO: Yes, your Honor.
>
> "THE COURT: Are you sure?
>
> "MR. SPAZIANO: I understand what I'm waiving. I was brought here on first-degree murder, and I figure if I'm guilty of this, I should be killed." Tr. 753-754.

In Harris v. State, 438 So.2d 787 (Fla. 1983), this Court held that the right to waive or not waive is personal to the defendant. The record is devoid of any evidence that Ms. Buenoano was given these constitutionally mandated options. The failure to give Ms. Buenoano this option renders her conviction and sentence of death unreliable.

This Court, in Harris, supra, set forth the standard pursuant to which the right to jury instructions on lesser included offenses can be waived or not waived by a capital defendant. However, the Court held that the waiver must be expressly made by the capital defendant himself or herself -- it is a personal right of the defendant, one which cannot be ascribed to counsel:

> But, for an effective waiver, there must be more than just a request from counsel that

> these instructions not be given. We conclude that there must be an express waiver of the right to these instructions by the defendant, and the record must reflect that it was knowingly and intelligently made.

Id. at 797 (emphasized in original). Here, the record reflects absolutely no waiver.

The record does not reflect that Ms. Buenoano knowingly and intelligently waived the expired statute of limitations or the lesser included offense instructions. It should be noted that the United States Supreme Court held that the capital defendant must make a knowing waiver of the statute of limitations, and relied on the defendant's on-the-record waiver. Spaziano v. Florida, supra.

It is clear that Ms. Buenoano was entitled to have the jury instructed on the lesser included offenses of premeditated murder. The record includes evidence which would support a jury conviction on a lesser included offense. There is no direct evidence that Ms. Buenoano premeditated the murder. The State produced no witness or evidence that the premeditation was formed before the killing. The record is devoid of any confession that the murder was premeditated. The State did produce two witnesses who alleged that Ms. Buenoano told them she had killed her husband. Neither of these two witnesses testified that Judy had planned the murder, only that the victim died. The jury very well could have found this evidence sufficient to find her guilty of second degree murder or manslaughter as opposed to premeditated murder. The jury could have found that this evidence fit squarely under the second degree murder instruction:

> MURDER - SECOND DEGREE
> F.S. 782.04(2)
>
> Before you can find the defendant guilty of Second Degree Murder, the State must prove the following three elements beyond a reasonable doubt:

Elements 1. (Victim) is dead.

2. The death was caused by the criminal act or agency of (defendant).

3. There was an unlawful killing of (victim) by an act imminently dangerous to another and evincing a depraved mind regardless of human life.

Definition An act is one "imminently dangerous to another and evincing a depraved mind regardless of human life" if it is an act or series of facts that:

1. a person of ordinary judgment would know is reasonably certain to kill or do serious bodily injury to another, and

2. is done from ill will, hatred, spite or an evil intent, and

3. is of such a nature that the act itself indicates an indifference to human life.

In order to convict of Second Degree Murder, it is not necessary for the State to prove the defendant had a premeditated intent to cause death.

(Pattern Jury Instructions)

The jury could have reasonably found that Ms. Buenoano was unhappy with her marriage and administered the poison only with the intent to make Goodyear sick, but not die. Five experts testified to the level of arsenic found in the body of James Goodyear and how much arsenic was required to cause death. The testimony was clearly in conflict. The jury very well could have believed that Goodyear was not given enough poison to cause death. The jury was instructed that they could believe or disbelieve all or any part of an expert's testimony (R. 1459). This Court noted that no expert stated with reasonable certainty that Goodyear's death was caused by arsenic poisoning. Buenoano v. State, 527 So. 2d 194 (Fla. 1988). The jury could have found that the poisoning only contributed to his death but was not the cause.

The State in its briefs to this Court did not state or argue that the similar fact evidence presented at trial was

appropriately admitted to prove intent. The State argues the similar fact evidence was used to prove motive.

Motive is not equivalent to intent:

> Motive. Cause or reason that moves the will and induces action. An inducement, or that which leads or tempts the mind to indulge a criminal act. People V. Lewis, 275 N.Y. 33, 9 N.E.2d 765, 768.
>
> In common usage intent and "motive" are not infrequently regarded as one and the same thing. In law there is a distinction between them. "Motive" is the moving power which impels to action for a definite result. Intent is the purpose to use a particular means to effect such result. "Motive" is that which incites or stimulates a person to do an act. People v. Weiss, 252 App.Div. 463, 300 N.Y.S. 249, 255.

Black's Law Dictionary, 5th edition, p. 914 (1979).

During closing argument the State felt compelled to argue the credibility of its "intent" witnesses. Defense counsel attacked the credibility of the State's "intent" witnesses.

This is not an "open and shut" case. The State relied heavily on "Williams Rule" evidence. The majority of the evidence was circumstantial in nature, and the expert testimony was conflicting. The witnesses' ability to recall events of fourteen years past was clearly in question. There was no evidence that Ms. Buenoano purchased or possessed arsenic in 1971. There was no evidence that Ms. Buenoano took out insurance policies on Mr. Goodyear.

It is obvious the jury did not find this to be a closed case. The jury deliberated for more than ten hours before rendering a verdict. It cannot be said beyond a reasonable doubt that the jury could not have found Ms. Buenoano guilty of a lesser included offense. For instance, the State presented evidence that Ms. Buenoano and Mr. Goodyear were not a happily married couple. There is no evidence that Ms. Buenoano attempted to take out insurance on Mr. Goodyear. Ms. Buenoano could have convinced the jury through evidence and argument that even if the

jury believed she administered poison to Mr. Goodyear that she only wanted to hurt him as revenge for their marital problems.

It is common practice in this state for attorneys in capital cases to prepare and argue cases with the goal of obtaining a conviction on a lesser included offense as opposed to attempting to obtain an acquittal on everything. Indeed, in this case, counsel himself noted -- both on and off the record -- the difficulty of a full acquittal once the court rendered its ruling on the **"Williams"** Rule" evidence.

Ms. Buenoano was forced to litigate her case in hopes solely of an acquittal. This is the exact situation the United States Supreme Court held unconstitutional in Beck v. Alabama, **447** U.S. 625 **(1980)**. Ms. Buenoano was not given the choice of whether to waive the expired statute of limitations or not, as mandated by Spaziano v. Florida and Harris v. State. The record is devoid of any personal intelligent and knowing waiver by Ms. Buenoano of the lesser included offense instructions, as mandated by Harris v. State, **438** So. 2d **787** (Fla. **1983)**.

The record contains evidence upon 'which a conviction of a lesser included offense could have been based. The denial of Ms. Buenoano's constitutional right to have the jury instructed on lesser included offenses is prejudice.

Had Ms. Buenoano not been effectively precluded from the lesser included offense instructions, her trial attorney may have conducted the trial much differently. Alternative theories of defense could have been pursued. Ms. Buenoano could have attempted to show that if in fact she did poison Mr. Goodyear, her motivation was only to hurt him. Ms. Buenoano could have attempted to show that if she did administer poison to Mr. Goodyear, it was a mistake or accident. Ms. Buenoano could have attempted to show that if in fact she did poison Mr. Goodyear, it was because he was an abusive husband or because her mental state was diminished.

Ms. Buenoano's conviction for first degree murder was unconstitutionally obtained. The trial court should have given her the choice of intelligently and knowingly waiving the statute of limitations on the record and thus receiving her constitutional right to the lesser included offense instructions.

Appellate counsel, who was also trial counsel, ineffectively failed to raise this issue on direct appeal. This failure cannot but have been based upon ignorance of the law, and/or the conflict of interest.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Ms. Buenoano'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.

CLAIM IX

THE STATE INTRODUCED IRRELEVANT, PREJUDICIAL, AND INFLAMMATORY EVIDENCE OF "OTHER CRIMES" AND BAD CHARACTER, AND THE JURY WAS IMPROPERLY INSTRUCTED, IN VIOLATION OF DUE PROCESS OF LAW, AND THIS ERROR UNDERMINED THE RELIABILITY OF THE JURY'S DETERMINATION AS TO GUILT-INNOCENCE AND SENTENCE, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND THE FAILURE TO PROPERLY RAISE THIS ISSUE ON DIRECT APPEAL CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL.

The state admitted evidence of two collateral bad acts under the guise that it was similar facts evidence sanctioned by Williams v. State, 110 So. 2d 654 (Fla. 1959). It is clear that the state did not show by clear and convincing evidence that Ms. Buenoano was connected in any way to the death of Bobby Joe Morris. The state did not prove by clear and convincing evidence that Ms. Buenoano ever administered any poison to her ex boyfriend, Mr. Gentry. Ms. Buenoano was never tried for these alleged offenses. The court is required to find that the

collateral crimes were committed by the defendant before admitting any evidence concerning those incidents. Long V. State, 407 So. 2d 1018 (Fla. 2nd DCA 1981).

There were no incriminating statements by Ms. Buenoano regarding the death of Bobby Joe Morris, no evidence she purchased or possessed arsenic, no evidence she desired him dead. The only thing the state proved was that Ms. Buenoano knew Mr. Morris. Ms. Buenoano never was brought to trial for murdering Mr. Morris; she was not even charged. The state showed that Mr. Gentry and Ms. Buenoano knew each other and that at one time during their relationship Mr. Gentry became ill. Evidence of collateral crimes is inadmissible unless accompanied by evidence connecting the defendant therewith. Chapman v. State, 417 So. 2d 1028 (Fla. 3rd DCA 1982); Dibble v. State, 347 So. 2d 1096 (Fla. 1977) and Norris v. State, 158 So. 2d 803 (Fla. 1st DCA 1964).

The state is required to prove the defendant's connection with a "similar act" by clear and convincing evidence. United State v. Terebeck, 692 F.2d 1345, 1359 (11th Cir. 1982); Parnell v. State, 218 So. 2d 535, 538 (Fla. DCA 1969). The trial could not and did not make a specific finding that the state proved by clear and convincing evidence that Ms. Buenoano poisoned either Mr. Morris or Mr. Gentry.

Beyond the clear and convincing test required by Parnell, supra, this Court has said an additional test must be met:

> Even when the evidence of separate criminal activity has relevance, it is possible for such evidence, as it is presented, to have an improper prejudicial impact that outweighs its probative value.

Straight v. State, 397 So. 2d 903, 909 (Fla. 1981), cert. denied, 454 U.S. 1022 (1982). The prosecution's presentation of the "Williams Rule" evidence went beyond the proper scope.

The trial court never gave the due consideration required to the "timeliness" of the evidence. The time between the incidents with Gentry and Goodyear was over eleven years. Relevancy is not

the sole criterian for admissibility of a prior crime; "timeliness" is a central issue. But that issue was never assessed in this case. Cf. McGough v. State, 302 So. 2d 751 (Fla. 1974). In McGough, supra, it was held that "similar act" evidence four to six years prior to the current offense was too remote. Eleven years is much longer. Here, the state made the similar fact evidence a feature of the trial rather than an incident. The volume of the similar facts evidence presented to the jury effectively made the actual issues in the case or side show. The extraordinary amount of evidence presented resulted in an assault on the character of Ms. Buenoano. See Davis v. State, 276 So. 2d 846 (Fla. 2nd DCA 1973) aff'd State v. Davis, 290 So. 2d 30 (Fla. 1974).

It is clear that the state should not be allowed to feature the collateral evidence as was done in Ms. Buenoano's case. Ziealer v. State, 404 So. 2d 861 (Fla. 1st DCA 1981). The admission of this inflammatory evidence could easily have been misinterpreted by the jury. Trial counsel rendered ineffective assistance of counsel in failing to request the "Williams Rule" instruction Ms. Buenoano was entitled to. No was given at the time the similar fact evidence was admitted, as the applicable rules concerning such evidence require.

The jury had no idea how to evaluate this evidence. The jury received this evidence in a vacuum. The state only offered the similar fact evidence to show "plan" and "lack of mistake":

> THE COURT: What would the relevancy be that you are seeking to establish?
>
> MR. PERRY: The relevancy would be, one, to show a pattern or plan, that is, insurance, illness with the same symptoms with the men that she's involved with, their deaths, and then she collects life insurance.
>
> It would also go to show proof of lack of mistake or inadvertence. Those are the basic reasons for the admissibility.

(R. 606). The state did not offer the evidence to prove intent, opportunity, motive, preparation, knowledge and identity.

Ms. Buenoano was entitled to the following instruction before the "Williams Rule" evidence was presented:

> The evidence you are about to receive concerning evidence of other crimes allegedly committed by the defendant will be considered by you for the limited purpose of proving opportunity and [plan] the absence of mistake or accident on the part of the defendant and you shall consider it only as it relates to those issues.
>
> However, the defendant is not on trial for a crime that is not included in the indictment.

(Pattern Jury Instructions). The jury was never given this instruction. Consequently, the jury was never instructed that Ms. Buenoano was not on trial for offenses not included in the indictment. An instruction at the conclusion of the trial is not sufficient to cure the harm. Indeed, "Williams Rule" instruction given at the close of evidence did not include the critical language:

> However, the defendant is not on trial for a crime that is not included in the indictment.

(Pattern Jury Instructions). The fact that the jury was not properly instructed violated the sixth and fourteenth, as well as the eighth amendment: this error spilled-over into Ms. Buenoano's sentencing proceeding.

This Court failed to properly consider the ramifications of the sentencing error on direct appeal. The jury was instructed that it could consider the evidence presented in the guilt phase when it determined whether to recommend whether Ms. Buenoano should live or die. This "Williams Rule" error could not but have influenced penalty phase deliberations. It has been held that "Williams Rule" error receives a different analysis with regard to its effects in a capital the penalty phase:

> While the guilt phase asks the jury to determine whether the defendant committed the crime charged, the penalty phase asks the jury to recommend whether that defendant should be put to death or spend life in prison. This recommendation must be based

> upon a weighing of aggravating and mitigating factors that may properly be inferred from any of the evidence, including that which has been introduced during the penalty phase.
>
> * * *
>
> . . . . Substantially different issues arise during the penalty phase of a capital trial that require analysis qualitatively different than that applicable to the guilt phase. What is harmless as to one is not necessarily harmless as to the other, particularly in light of the fact that a Williams rule error is presumed to infect the entire proceeding with unfair prejudice. Peek, 488 So.2d at 56; Straight, 397 So.2d at 908.

Castro v. State, 547 So. 2d 111 (Fla. 1989).

When the jury was finally instructed as to the meaning of the extensive similar fact evidence, the instruction was incorrect. The trial court instructed the jury as follows:

> The evidence which had been admitted to show similar crimes, wrongs, or acts alleged committed by the defendant will be considered by you only as that evidence relates to proof of motive, opportunity, intent, preparation, plan, knowledge, identity, the absence of mistaken, or accident on the part of the defendant.

(R. 1457).

Not only was the jury not instructed that Ms. Buenoano was not on trial for the collateral acts evidence, but the court instructed the jury it could consider the "Williams rule' evidence to prove; 1) motive, 2) intent, 3) preparation, 4) knowledge, and 5) identity. But "Williams Rule;" evidence was not offered or admitted to prove these items. Consequently, the jury was not allowed to consider this extensive evidence carte blanche in their deliberations.

The court committed prejudicial error in admitting the "Williams Rule" evidence. The court committed prejudicial error in not properly instructing the jury on the "Williams Rule" evidence.

Appellate counsel failed to raise, in his "collateral crime evidence" issue the ineffective assistance of trial counsel, who

was the same as appellate counsel, in not requesting a "Williams rule" instruction during the trial, prior to the actual introduction of the collateral crimes evidence, and in not objecting to the "Williams rule" instruction that was finally given at the close of the evidence. Further, appellate counsel ineffectively failed to raise the trial court's failure to, sua sponte, correctly instruct the capital jury on the use of "Williams rule" evidence, and failed to fully litigate the sentencing error.

Ms. Buenoano's conviction and sentence of death should be vacated and a new trial proceedings ordered.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Ms. Buenoano's conviction and 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.

CLAIM X

THE SENTENCING COURT'S FAILURE TO FIND THE MITIGATING CIRCUMSTANCES CLEARLY SET OUT IN THE RECORD VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS, AND APPELLATE COUNSEL'S FAILURE TO URGE THIS CLAIM ON DIRECT APPEAL CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL.

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

erroneous the defendant "is entitled to resentencing." Id. at 1450.

Ms. Buenoano's sentencing judge found four aggravating factors and no mitigation. This finding of no mitigation is improper. The record reveals that substantial and significant mitigation was before the court and the court failed to fully consider this mitigation.

In his sentencing order, the judge referred to Ms. Buenoano's prison ministry and yet refused to consider it as mitigation. There had been a great deal of testimony regarding her conversion to Christianity while in jail and her subsequent assistance to other inmates during incarceration. Several people testified to this but Roxanne Nordquist, a counselor at Orange County Jail, knew Ms. Buenoano best and had this to say:

> A Yes, sir, I do. I think there's been a tremendous change. She's an encouragement to me and I know an encouragement to many people around her within the system, the other inmates. She's worked with them and she's helped them. She's grown so much in the period of time that I've known her. In visiting with her and talking with her, she feels like she has a call in her life, to get in the ministry herself. She has a desire to be - indicating to me, she has a desire to be a woman chaplain and she's worked on her education, as a matter of fact, in that capacity.

(R. 1679-1680).

The court, however, did not fully and properly consider this testimony even though it is clearly mitigating. See Skipper v. South Carolina, 476 U.S. 1, 106 S. Ct. 1669 (1986). The Court then failed to consider other matters in mitigation such as the love Ms. Buenoano had from her two children, James and Kimberly (R. 1089, 1670).

Significantly, the prosecutor urged a construction to the jury which limited these factors by urging the jurors to note them as one mitigating factor, if at all. This construction, uncorrected, violated Hitchcock v. Dusser, 107 S. Ct. 1821 (1987), and Mills v. Maryland, supra, as well.

Kimberly Goodyear, Ms. Buenoano's daughter, testified about her mother's relationship with Michael, Kim's brother, and their grief over Michael's death (R. **1667-1669).** When asked about what kind of mother Ms. Buenoano was, Kim replied:

> A Very good. She's the best mother in the world. If I ever had any kind of problems, she was right there for me. That's my hardest problem, I don't have her there to help me out. It's nice to have someone pick you up when you fall.

(R. 1670).

The sentencing court could also have considered the question of guilt in mitigation. In fact, the defense argued that evidence of this should go to the jury **(R. 1631-1636)** but the court denied that request and then refused to consider it in mitigation (R. **1646).** Ms. Buenoano maintained her innocence throughout and as her attorney argued:

> The United States Supreme Court, in the case of Lockett vs. Ohio, **438** U.S. **586,** and Eddings vs. Oklahoma, **455** U.S. **104,** cited as a non-statutory mitigating standard for the death penalty the question of reasonable doubt versus absolute certainty. And the Model Penal Code that was drafted also adopts this position. Says this position is an accommodation to the irrevocability of the capital sanction where doubt of guilt remains the opportunity to reverse a conviction on the basis of new evidence must be preserved. A sentence of death is obviously inconsistent with that goal.
>
> The Fifth Circuit, in the case of Smith vs. Balkcom, **660** Fed 2d **573,** also held as follows. The fact that jurors have determined guilt beyond a reasonable doubt does not necessarily mean that no juror entertained any doubt whatsoever. There may be no reasonable doubt, doubt based upon reason, and yet some genuine doubt exists. It may reflect a mere possibility, it may be but the whimsy of one juror or several. Yet this whimsical doubt, this absence of absolute certainty can be real. The capital defendant whose guilt seems abundantly demonstrated may be neither obstructing justice nor engaged in an exercise in futility when his counsel mounts a vigorous defense on the merits.
>
> The Court authorized the very thing that we're seeking here. The Eleventh Circuit also, Your Honor, has approved the question

> of reasonable doubt versus absolute certainty, and somewhere down the line, the Supreme Court is going to answer this question, which I don't think it has yet, but my point is, the statute authorizes the Court to admit this evidence and it would be enlightening to the jury.

(R. 1634-1636). That residual doubt could have been considered in mitigation of sentence. However, the trial court would not even allow defense counsel to present testimony going to residual doubt and which would have stressed the seriousness of the jury's role, in the form of a study done by a University of Florida professor. (R. 1647; Appendix 5), in violation of Hitchcock v. Dugger, 107 S. Ct. 1821 (1987).

Despite the presence of clearly mitigating circumstances, the sentencing court stated there was no mitigation. In its initial sentencing, that court made no reference to either mitigating or aggravating circumstances (R. 2331-2333). It was not until two months after sentencing Ms. Buenoano that the court prepared its findings in support of the record (R. 2342-2348). In those findings, the sentencing court referred to Ms. Buenoano's Christian work but then simply said:

> The Court finds that there are no non-statutory mitigating factors present in this case.

(R. 2348). The sentencing court did so erroneously. This Court has recognized that factors such as poverty, emotional deprivation, lack of parental care, and cultural deprivation, are mitigating. A court cannot simply choose to ignore it nor can it choose to ignore evidence of Ms. Buenoano's adjustment to prison life, her conversion to Christianity and her good work while in prison. Skipper, supra. In fact, in Lamb v. State, 532 So. 2d 1051 (Fla. 1988), this Court remanded the case for resentencing for an almost identical issue where it was not clear that the trial court had considered the evidence presented in mitigation. In addition to information about a drug problem,

> Lamb also introduced nonstatutory mitigating evidence that he would adjust well

> to prison life; that his family and friends feel he is a good prospect for rehabilitation; that before the offense he was friendly, helpful, and good with children and animals;

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

> the trial court's first task in reaching its conclusions is to consider whether the facts alleged in mitigation are supported by the evidence. After the factual finding has been made, the court then must determine whether the established facts are of a kind capable of mitigating the defendant's punishment, i.e., factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed. If such factors exist in the record at the time of sentencing, the sentencer must determine whether they are of sufficient weight to counterbalance the aggravating factors.

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

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

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

> whether the trial judge and the Court of Criminal Appeals actually considered all of the mitigating factors and found them insufficient to offset the aggravating circumstances, or whether the difference between this Court's opinion and the trial court's treatment of the petitioner's evidence is "purely a matter of **semantics,"** as suggested by the dissent. Woodson and Lockett require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court.

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

Here, the judge refused to recognize mitigating circumstances that were present. Under Penry v. Lynaugh's, **109** S. Ct. **2934 (1989),** requirement that a capital sentencer fully consider and give effect to the mitigation, 109 S. Ct. **2934 (1989),** as well as under Eddings, supra, Magwood, supra, and Lamb, supra, the sentencing court's refusal to consider the non-statutory mitigating circumstances which were established was error. This claim also reflects the errors involved in the trial judge's restricted consideration of nonstatutory mitigation. Hitchcock and Penry have made it clear that at this was error, which can be corrected through the ordering of a resentencing at this juncture.

Mitigating circumstances that are clear from the record must be recognized or else the sentencing is constitutionally suspect. The required balancing cannot occur when the **"ultimate"** sentencer failed to consider obvious mitigating circumstances. Resentencing is proper.

Because the jury was urged by the State to treat all non-statutory mitigation as one mitigating factor, this error also undermined the reliability of the jury's sentencing determination and prevented the jury from assessing the full panoply of mitigation presented by Ms. Buenoano. For each of the reasons

discussed above the Court should vacate Ms. Buenoano's unconstitutional sentence of death.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Ms. Buenoano'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. **See** Lockett; Eddings, suora. 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. Wainwriaht, supra, **498** So. 2d **938.** However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Ms. Buenoano of the appellate reversal to which she was constitutionally entitled. **See** Wilson v. Wainwright, supra, **474** So. 2d at 1164-65; Matire, suora. Accordingly, habeas relief must be accorded now.

CLAIM XI

THE SENTENCING COURT ERRED BY FAILING TO PROPERLY AND TIMELY WEIGH AGGRAVATING AND MITIGATING CIRCUMSTANCES, CONTRARY TO MS. BUENOANO'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

At sentencing the court stated:

> You, Judy A. Buenoano, also known as Judy Ann Goodyear, having been previously adjudicated guilty of murder in the first degree on November lst, 1985, for the killing of James E. Goodyear, as charged in Indictment Number CR84-4741, now:
>
> It is the sentence of the law and judgment of this Court that you, Judy A. Buenoano, also known as Judy Ann Goodyear, for the murder of James E. Goodyear, be committed to the custody of the Department of Corrections, and at a time to be fixed by the Governor of the State of Florida, you shall be put to death by means of electrocution as provided by Florida Statute 922.10.
>
> May God have mercy on your immortal soul.
>
> You shall be remanded to the custody of the Sheriff of Orange County, Florida. You shall be delivered by the Sheriff of Orange County, Florida, to the Division of Corrections, and there to be held in safekeeping until such time as the Governor issues a death warrant, attaches it to the certified copy of the record of conviction and sentence, and transmits it to the warden, directing him to execute the sentence at the time designated in the warrant. The warden shall set the date for execution within the week designated by the Governor in the death warrant, and shall designate the executioner, and on the day designated, the death warrant authorizing the execution shall be read to you immediately before execution, and you shall then be electrocuted until you are dead.
>
> A qualified physician shall be present and announce when death has been inflicted.
>
> The Sheriff of Orange County, Florida, shall deliver you to the Department of Corrections at a place provided for your reception. The sheriff shall also deliver a copy of this judgment and sentence to the Department of Corrections.
>
> I now advise you that it is your right to appeal this judgment and sentence and you have thirty days from today within which to file your appeal with the Supreme Court of Florida. Failure on your part to appeal

within thirty days from today shall constitute a waiver of your right to appeal.

You are entitled to assistance of counsel in taking your appeal, and upon your request, a showing that you are unable to afford a lawyer, one will be provided at the expense of the State of Florida upon appointment by this Court.

Do you understand your rights to appeal?

THE DEFENDANT: Yes, sir, I do.

(R. 1744-46).

Sentencing was conducted on November 26, 1985 and the order entered on that date (R. 2231-2233) was precisely what the judge read into the record (R. 1744-46).

Not until January 29, 1986, did the court enter an Order of Factual Finding Supporting the Imposition of the Death Penalty (R. 2342-2348). This was clearly not a contemporaneous independent weighing that the applicable statutory and constitutional standards require.

Written findings of fact in support of a death sentence are required. Fla. Stat. section 921.141; see also Van Royal v. State, 497 So. 2d 625 (Fla. 1986). Florida law requires the sentencing court to orally state specific reasons for the imposition of the death penalty on the record. This Court failed to properly state its specific reasons justifying the death sentence on the record. Grossman V. State, 525 So. 2d 833 (1988); Patterson v. State, 513 So. 22d 1257 (Fla. 1987); Van Roval v. State, 497 So. 2d 625 (Fla. 1986); State V. Dixon, 283 So. 2d 1 (Fla. 1973).

The fundamental precept of this Court's and the United States Supreme Court's modern capital punishment jurisprudence is that the sentencer must afford the capital defendant an individualized capital sentencing determination. To this end, this Court has mandated that capital sentencing judges conduct a reasoned and independent sentencing determination. The court has therefore consistently held that the trial judge must engage in

an independent and reasoned process of weighing aggravating and mitigating factors in determining the appropriateness of the death penalty in a given case:

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

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

In this case the trial court did not prepare his own findings until well after the trial. The sentencing had occurred less than three hours after the jury had been excused from the penalty phase (R. 1735) and presumably the judge's original sentencing order was prepared during that recess. In fact, the record here reflects that no contemporaneous independent weighing of aggravating and mitigating circumstances whatsoever was afforded by the sentencing judge. The court made no mention of any aggravating or mitigating factors until some two months later when fact findings to support the death sentence were prepared. This was clearly not a "meaningful weighing" as required by Florida law and is precisely the type of error often addressed by this Court.

This Court has addressed the ramifications of a trial judge's failure to engage in a meaningful weighing of aggravating and mitigating circumstances before imposing a death sentence. In a number of cases, the issue has been presented where findings of fact were issued long after the death sentence was actually imposed. Nibert v. State, 508 So. 2d 1 (Fla. 1987); Muehleman v. State, 503 So. 2d 310 (Fla. 1987); Van Royal v. State, 497 So. 2d 625 (Fla. 1986). In Van Royal, the Court set aside the death sentence because the record did not support a finding that the imposition of that sentence was based on a reasoned judgment. Chief Justice Ehrlich's concurring opinion explained:

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

497 So. 2d at 629-30. The Van Royal judge prepared his sentencing order months after sentencing, just as did the Court in Ms. Buenoano's case.

In Patterson v. State, 513 So. 2d 1257 (Fla. 1987), the Court was presented a similar issue. The Court ordered a

resentencing, emphasizing the importance of the trial judge's independent weighing of aggravating and mitigating circumstances. In Patterson, the trial judge failed to engage in any independent weighing process, and in fact delegated the responsibility to the state attorney:

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

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

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

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

The specific written findings allow the sentencing body to demonstrate that the sentence has been imposed based on an individualized determination that death is appropriate. Cf.

State v. Dixon, 283 So. 2d 1 (1973). As this Court recently stated:

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

Rhodes v. State, ___ So. 2d ___, 14 F.L.W. 343 (Fla., July 6, 1989). This is consistent with the United States Supreme Court's recent holding that the sentencer must make a "reasoned moral response" to the evidence when deciding to impose death. Penry v. Lynaugh, 109 S. Ct. 2934 (1989). The court in Penry also declared that its decision in that case applies retroactively.

This Court has strictly enforced the written findings requirement mandated by the legislature, Rhodes, supra, and has held that a death sentence may not stand when "the judge did not recite the findings on which the death sentences were based into the record." Van Royal, 497 So. 2d at 628. The imposition of such a sentence is contrary to the "mandatory statutory requirement that death sentences be supported by specific findings of fact." Id. The written findings serve to "assure [] that the trial judge based the [] sentence on a well-reasoned application of the factors set out in section 921.141(5) and (6)." The

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

Here, the trial court did precisely that: made findings merely to "memorialize its decision." No findings were ever an integral part of the court's initial decision. The trial court denied Ms. Buenoano's right to an individualized and reliable sentencing determination by failing to conduct the contemporaneous independent weighing which the law requires. It never made findings of fact to support the sentence at all until months later when it "memorialized" its decision through a writing that was not "timely filed" so as to show the "sentence was based on a well-reasoned application of the aggravating and mitigating factors" (see Rhodes, supra). This Court has made it clear in Dixon, supra, Van Royal, supra, and Patterson, supra, that the trial court must (a) engage in a reasoned weighing process of aggravating and mitigating circumstances, (b) not delegate the responsibility for that weighing process to another entity, and (c) provide the reviewing court with a meaningful review of the record. Van Royal prohibits a written finding that is so far removed from the sentence itself that the reviewing court has no way of determining whether the sentencing court properly considered aggravating and mitigating factors.

A trial court cannot impose a death sentence in an arbitrary or capricious manner:

> In order to satisfy the requirements of the eighth and fourteenth amendments, a capital sentencing scheme must provide the sentencing authority with appropriate standards that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition." Proffitt v. Florida, 428 U.S. 2542, 258, 96 S.Ct. 2960, 2969, 49 L.Ed.2d 913, 926 (1976). After reviewing the psychiatric evidence that was before the state court, we must conclude that the state court's rejection of the two mental condition mitigating factors is not fairly supported by the record and that, as such, Magwood was sentenced to death without proper attention to the capital sentencing standards required by the Constitution.

Maawood v. Smith, 791 F.2d 1438, 1449 (11th Cir. 1986). In Maawood the court found that it was error for the trial court to totally disregard evidence of mitigation. Similarly, the court here acted in an arbitrary and capricious manner in failing to provide any independent consideration to the mitigation in the record.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Ms. Buenoano'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. Habeas relief is more than proper.

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. Wainwriaht, 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. Wainwriaht, supra, 498 So. 2d 938. However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Ms. Buenoano 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 XII

THE STATE'S ARGUMENTS AT GUILT-INNOCENCE AND SENTENCING WERE CONSTITUTIONALLY IMPROPER, UNDERMINED THE JURY'S ROLE, MISLED THE JURORS, AND RESTRICTED CONSIDERATION OF MITIGATION, AND LED TO A FUNDAMENTALLY UNFAIR AND UNRELIABLE SENTENCE OF DEATH, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Time constraints make it impossible for counsel to properly discuss this claim. The court is referred to the arguments themselves. It is submitted, however, that the State's arguments at trial and sentencing, and particularly in the latter regard, were classically unconstitutional and rendered Ms. Buenoano's capital conviction and death sentence fundamentally unfair and unreliable. The use of the Bible as a statement demanding Ms. Buenoano's death (notwithstanding the trial court's cautions to counsel) was flatly improper. **See**, e.g., Caldwell V. Mississippi, 105 S. Ct. 2633 (1985); Wilson v. Kemp, 777 F.2d 621 (11th Cir. 1985). The prosecutor also limited the jury's ability to fully and reliably assess nonstatutory mitigating evidence, by arguing that those factors were **"one"** mitigating circumstance. This uncorrected argument violated Penry v. Lynaush, 109 S. Ct. 2934 (1989) and Hitchcock v. Dusser, 107 S. Ct. 1821 (1987).

The prosecutor's closing arguments involve fundamental constitutional error which to the heart of the fundamental fairness of Ms. Buenoano'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. Appellate counsel presented aspects of this claim, but failed to fully and properly litigate the sixth, eighth, and fourteenth amendment errors. In this regard, appellate counsel rendered ineffective assistance, and habeas corpus relief is warranted.

CLAIM XIII

MS. BUENOANO'S SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS AND THE SENTENCING COURT'S OWN CONSTRUCTION SHIFTED THE BURDEN TO MS. BUENOANO TO PROVE THAT DEATH WAS INAPPROPRIATE.

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 aasravatinq circumstances outweished 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 Ms. Buenoano's capital proceedings. To the contrary, the burden was shifted to Ms. Buenoano on the question of whether she should live or die. In Hamblen V. Dusaer, 546 So. 2d 1039, 14 F.L.W. 347 (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. Ms. Buenoano herein urges that the Court assess this significant issue in her case and, for the reasons set forth below, that the Court grant her the relief to which she can show her 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 she should live or die. In so instructing a capital sentencing jury, a court injects misleading and irrelevant factors into the sentencing determination, thus violating Caldwell V. Mississippi, 472 U.S. 320 (1985), Hitchcock V.

Dugger, 107 S. Ct. 1821 (1987), and Maynard V. Cartwright, 108 S. Ct. 1853 (1988). Ms. Buenoano's jury was unconstitutionally instructed, as the record makes abundantly clear (**See** R. 1698-99, 1700).

At the penalty phase of trial, prosecutorial argument and judicial instructions informed Ms. Buenoano's jury that death was the appropriate sentence unless "mitigating circumstances exist to outweigh any aggravating circumstances" (R. 1495, 1711-1712, 1726). 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 Ms. Buenoano should live or die. See Smith v. Murray, 106 S. Ct. 2661, 2668 (1986). No bars apply under such circumstances. **Id.** Writs of Certiorari have been granted to resolve very similar issues. **See** Walton V. Arizona, 46 Cr.L. 3014 (October 2, 1989); Blvstone **v.** Pennsylvania, infra; Bovde v. California, infra. A stay of execution is appropriate here pending resolution of those questions.

The jury instructions here employed a presumption of death which shifted to Ms. Buenoano the burden of proving that life was the appropriate sentence. As a result, Ms. Buenoano's capital sentencing proceeding was rendered fundamentally unfair and unreliable. The jury's ability to fully assess the mitigation was restrained by this construction, and Ms. Buenoano's death sentence thus violates Penrv v. Lvnauah, 109 S. Ct. 2935 (1989), and Mills v. Maryland, 108 S. Ct. 1860 (1988).

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 Ms. Buenoano's case. See also Jackson v. Dugger, 837 F.2d 1469 (11th cir. 1988). The instructions, and the standard upon which the sentencing court based its own determination, violated the eighth and fourteenth amendments. The burden of proof was shifted to Ms. Buenoano on the central sentencing issue of whether she should live or die. Moreover, the application of this unconstitutional standard at the sentencing phase violated Ms. Buenoano'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 Ms. Buenoano 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 Ms. Buenoano had the ultimate burden to prove that life was appropriate. This violates the eighth amendment.

This error cannot be deemed harmless. In Mills v. Maryland, 108 S. Ct. 1860 (1988), the United States Supreme 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 eighth amendment principles. Hitchcock constituted a change in law in this regard. The constitutionally mandated standard demonstrates that relief is warranted in Ms. Buenoano'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 Ms. Buenoano'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'presentedwhich outweighed the aggravation. Thus under the standard employed in Ms. Buenoano'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. Certainly, the standard employed here was more

restrictive of the jury's ability to conduct an individualized sentencing than the Pennsylvania statute at issue in Blystone. See also, Boyde v. California, 109 S. Ct. 2447 (cert. granted June 5, 1989).

The effects feared in Adamson and Mills are precisely the effects which result from the burden-shifting instruction given in Ms. Buenoano'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 Ms. Buenoano'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 Ms. Buenoano should live or die. Smith v. Murray, 106 S. Ct. at 2668.

Under Hitchcock and its progeny, an objection, in fact, was not necessary to preserve this issue for review because Hitchcock, decided after Ms. Buenoano's trial, worked a change in law.

Defense counsel failed, however, to raise this issue on direct appeal, and thus rendered ineffective assistance.

Moreover, this claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Ms. Buenoano'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. Habeas relief should be granted.

CLAIM XIV

DURING THE COURSE OF MS. BUENOANO'S TRIAL AND SENTENCING PROCEEDINGS THE PROSECUTOR AND COURT IMPROPERLY ASSERTED THAT SYMPATHY AND MERCY TOWARDS MS. BUENOANO WERE IMPROPER CONSIDERATIONS, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

The jury in Judy Buenoano'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 Ms. Buenoano'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 things that the Judge will instruct you on is that sympathy should play no role in whatever decision that you render in this particular case.
>
> Would the fact that the defendant in this case is a woman cause any of you to feel sympathetic to the extent that it might affect your deliberations? If so, please speak up now.
>
> If as we go along and something jives your memory or something stirs inside of you that would cause you to feel that way, feel free to speak up.
>
> Is there anyone here that would feel sympathetic just because the defendant is a woman? Anyone here?

(R. **66-67).**

The court then emphasized this notion by stating:

> Feelings of prejudice, bias or sympathy are not legally reasonable doubts, and they

> should not be discussed by any of you in any way.

(R. 214). Other such comments were made at trial and sentencing. 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, just prior to the guilt phase determination the court instructed:

> Eight, feelings of prejudice, bias, or sympathy are not legally reasonable doubts. 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. 1453).

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

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

> offense that the defendant proffers as a basis for a sentence less than death") (emphasis in original). The Supreme Court, in requiring individual consideration by capital juries and in requiring full play for mitigating circumstances, has demonstrated that mercy has its proper place in capital sentencing. The [prosecutor's closing] in strongly suggesting otherwise, misrepresents this important legal principle.

Wilson v. Kemp, **777 F.2d** at **624.** Requesting the sentencers to dispel any sympathy they may have had towards the defendant undermined the sentencers' ability to reliably weigh and evaluate mitigating evidence. The sentencers' role in the penalty phase is to evaluate the circumstances of the crime and the character of the offender before deciding whether death is an appropriate punishment. Eddings v. Oklahoma, **455** U.S. **104 (1982);** ~~Lockett v. Ohio,~~ **438** U.S. **586 (1978).** An admonition to disregard the consideration of sympathy improperly suggests to the sentencer "that it must ignore the mitigating evidence about the [petitioner's] background and character." California v. Brown, **479 U.S. 538, 107 S.** Ct. **837, 842** (1987)(O'Connor, **J.,** concurring). The sympathy arising from the mitigation, after all, is an aspect of the defendant's character that must be considered:

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

also Andrews v. Shulsen, 802 F.2d 1256, 1261 (10th Cir. 1986), cert. denied, ___ U.S. ___, 107 S. Ct. 1964, 95 L. Ed. 2d 536 (1987).

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

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

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

In Eddings v. Oklahoma, 455 U.S. 104 (1982), the Court reviewed a sentencing judge's refusal to consider evidence of a defendant's troubled family background and emotional problems. In reversing the imposition of the death penalty, the Court held that "[j]just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence." Id. at 113-14 (emphasis in

original). The Court stated that although the system of capital punishment should be "consistent and principled," it must also be "humane and sensible to the uniqueness of the individual." Id. at 110.

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

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

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

Without placing an undue technical emphasis on definitions, it seems to us that

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

Parks v. Brown, **860 F.2d** at **1554-57.** 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 Ms. Buenoano's case would be

more than appropriate pending the United States Supreme Court's establishment of standards determining this claim.

The United States Supreme Court recently held in a case declared to be retroactive on its face that a capital sentencing jury must make a "reasoned moral response to the defendant's background, character, and crime." Penry v. Lynaugh, 109 S. Ct. 2934, 2947 (1989). It is improper to create "the risk of an unguided emotional response." 109 S. Ct. at 2951. A capital defendant should not be executed where the process runs the "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Penry, 109 S. Ct. at 2952. There can be no question that Penry must be applied retroactively. The Court there concluded that, Jurek v. Texas, 428 U.S. 262 (1976), notwithstanding, the Texas death penalty scheme previously found constitutional, created the "risk that the death [would] be imposed in spite of factors which [] call[ed] for a less severe penalty." 109 S. Ct. at 2952. Thus Mr. Penry's claim was cognizable in post-conviction proceedings. Johnny Penry sought, and was granted relief, in part on the identical claim now pressed by Ms. Buenoano. 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 Ms. Buenoano'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 Ms. Buenoano's case. This error undermined the reliability of the jury's sentencing verdict. Penry, supra.

This situation is even more egregious when it is clear that the state of the law in Florida at the time of the offense specifically provided a mechanism by which the jury was instructed to consider mercy.

Given the court's admonition, reasonable jurors could have believed that the court's original instructions during guilt-innocence (R. **921; 922)** remained in full force and effect during penalty phase deliberations, cf. Booth v. Maryland, **107 S.** Ct. **2529 (1987);** Penry v. Lynaugh, **109** S. **Ct. 2934 (1989),** similarly removing the sentencing recommendation from the realm of a reasoned and moral response.

The error here undermined the reliability of the sentencing determination and prevented the jury from assessing mitigation. The court's instructions impeded a "reasoned moral response" which by definition includes sympathy. Penry v. Lynaugh, **109 S.** Ct. **2934, 2949 (1989).** For each **of** the reasons discussed above the Court should vacate Ms. Buenoano's unconstitutional sentence of death. This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Ms. Buenoano's death sentence.

The retroactive opinion in Penry requires this issue be addressed and fully assessed at this juncture. The eighth amendment cannot tolerate the imposition of a sentence of death where there exists a "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Penry, **109 S.** Ct. at 2952. Accordingly, relief is warranted. Moreover, under the capital statute applicable at the time Ms. Buenoano was alleged to have committed the offense **(1971)** the jury would have known that it could expressly recommend mercy.

Removing this protection through the application of the new statute deprived Ms. Buenoano of substantive rights, and thus this issue also raises significant ex post facto concerns. See Claim VII, supra.

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

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Ms. Buenoano'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. Appellate counsel rendered ineffective assistance in failing to properly urge this claim. Habeas relief should be granted.

CLAIM XV

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

The decision in Maynard v. Cartwriaht, 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 Maynard v. Cartwright -- it was improperly instructed. The sentencing court also failed to apply the constitutionally mandated limiting construction. Under these circumstances, it is respectfully submitted that proper review at this juncture is warranted.

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. Gress v. Georsia, 428 U.S. 153, 188-89 (1976); Furman v. Georsia, 408 U.S. 238 (1972). The Court in Gresq interpreted the mandate of Furman as one requiring that severe limits be imposed due to the uniqueness of the death penalty:

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

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

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

> This doctrine [vagueness] has particular application to death penalty statutes after Furman v. Georgia, supra, where, if anything is made clear, it is that a wide latitude of discretion in a jury as whether or not to impose the death penalty is unconstitutional.

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

Section 921.141(5)(i), on its face fails in a number of respects to "genuinely narrow the class of persons eligible for

the death penalty." The circumstance has been applied by this Court to virtually every type of first degree murder. This aggravating circumstance has become a global or **"catch-all"** aggravating circumstance. Even where this Court has developed principles for applying the (5)(i) circumstance, those principles have not been applied with any consistency whatsoever.

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

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

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

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

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

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

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

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

416 So. 2d at 807. Although this Court has attempted to require more in this aggravating circumstance than simply premeditation, its definition had remained vague until 1987 as to what this circumstance required. More importantly, however, the jury was not told in Ms. Buenoano's case what more was required. In fact, the prosecutor told the jury no more was required.

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

Because Ms. Buenoano was sentenced to death based on a finding that her crime was "cold, calculated and premeditated," but neither the jury nor trial judge had the benefit of the narrowing definition set forth by this Court, petitioner's sentence violates the eighth and fourteenth amendments. The record in this case fails to disclose a shred of evidence which could support a finding of "careful plan" or "prearranged design." In fact, the record establishes precisely the opposite. The judge did not require any **"heightened"** premeditation as required by McCray, supra.

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

was mandated in Cartwright. The result here should be the same as in Cartwrisht:

> Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of 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 Godfrev v. Georsia, 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 characterize 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's] terms. In fact, the jury's interpretation of [that circumstance] can only be the subject of sheer speculation." Id., at 428-429 (footnote omitted).

The affirmance of the death sentence by the Georgia Supreme Court was held to be insufficient to cure the jury's unchanneled discretion because that court failed to apply its previously recognized limiting construction of the aggravating circumstance. Id., at 429, 432. This Court concluded that, as a result of the vaque construction applied, there was "no principled way to distinquish this case, in which the death penalty 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.

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

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

In Florida, a resentencing is required when aggravating circumstances are invalidated. See, e.g., Schafer v. State, 537 So. 2d 988 (Fla. 1989)(remanded for resentencing where three of five aggravating circumstances stricken and no mitigating circumstances identified); Nibert v. State, 508 So. 2d 1 (Fla. 1987)(remanded for resentencing where one of two aggravating circumstances stricken and no mitigating circumstances found); cf. Rembert v. State, 445 So. 2d 337 (Fla. 1984)(directing imposition of life sentence where one of two aggravating circumstances stricken and no mitigating circumstances found).

The striking of this aggravating factor certainly requires resentencing under Florida law. Moreover, under eighth amendment law it is the sentencer who must make the "reasoned moral response." Penry v. Lynaugh, 109 S. Ct. 2934, (1989). Moreover, the United States Supreme Court has granted certiorari in a case to determine whether an appellate court has the power to usurp the sentencer's discretion and declare improper consideration of an aggravating circumstance harmless. Clemons v. Mississippi, 45 Cr. L. 4082.

Under Florida law, aggravating circumstances "must be proven beyond a reasonable doubt." Hamilton v. State, 547 So. 2d 630, (Fla. 1989). In fact, Ms. Buenoano'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, Ms. Buenoano's jury received no instructions regarding the elements of the "cold, calculated and premeditated" aggravating circumstance submitted for the jury's consideration. Its discretion was not channeled and limited in conformity with Cartwright.

Florida law requires the jury to weigh the aggravating circumstances against mitigating evidence; Ms. Buenoano's jury was so instructed. This Court has produced considerable case law regarding the import of instructional error to a jury regarding the mitigation it may consider and balance against the aggravating circumstances. In Mikenas v. Dugger, the court ordered a new sentencing because the jury had not received an instruction explaining that mitigation was not limited to the statutory mitigating factors. The error was cognizable in post-conviction proceedings even though there had been no objection at trial, the issue had not been raised on direct appeal, and at a resentencing to the judge alone, the judge had known that

mitigation was not limited to the statutory mitigating factors. It was cognizable because this Court determined that Hitchcock required the sentencing jury in Florida to receive accurate information which channeled and limited its sentencing discretion, but allowed the jury to give full consideration to the defendant's character and background. Because of the weight attached to the jury's sentencing recommendation in Florida, instructional error is not harmless unless the reviewing court can "conclude beyond a reasonable doubt that an override would have been authorized." Mikenas, 519 So. 2d at 601. In other words, there was sufficient mitigation in the record for the jury to have a reasonable basis for recommending life and thus preclude a jury override.

Similar conclusions have been reached in other cases where the jury was erroneously instructed. See Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1989)("It is of no significance that the trial judge stated that he would have imposed the death penalty in any event. The proper standard is whether a jury recommending life imprisonment would have a reasonable basis for the recommendation."); Floyd v. State, 497 So. 2d 1211, 1216 (Fla. 1986)("In view of the inadequate and confusing jury instructions, we believe Floyd was denied his right to an advisory opinion. We cannot sanction a practice which gives no guidance to the jury for considering circumstances which might mitigate against death."). In Ms. Buenoano's case the jury received no guidance as to the "elements" of the aggravating circumstances against which the evidence in mitigation was balanced. In Florida, the jury's pivotal role in the capital process requires its sentencing discretion to be channeled and limited. The failure to provide Ms. Buenoano's sentencing jury the proper "channeling and limiting" instructions violated the eighth amendment principle discussed in Maynard v. Cartwright.

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

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

The Tennessee Supreme Court concluded that under Maynard v. Cartwrisht, juries must receive complete instructions regarding aggravating circumstances. State v. Hines, 758 S.W.2d 515 (Tenn. 1988). The court did not read Cartwrisht as applying only to the heinous, atrocious, and cruel aggravating circumstance. The court there also found that ambiguity in the instructions

regarding any limiting constructions of an aggravating circumstance violated Mills v. Maryland, 108 S. Ct. 1860 (1988). The court ruled that error under Mavnard v. Cartwright and Mills could not be found to be harmless beyond a reasonable doubt. The court in Broqie v. State, 760 P.2d 1316 (Okla. Crim. 1988), also found error under Maynard v. Cartwriaht. The court found eighth amendment error where jury instructions failed to include any qualifying or limiting constructions placed upon an aggravating circumstance.

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

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

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

Appellate counsel's failure to challenge this aggravator, the instructions on it, and its application below was prejudicially ineffective assistance.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Ms. Buenoano'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.

CONCLUSION AND RELIEF SOUGHT

Various claims set out above all involve, inter alia, ineffective assistance of appellate counsel, and/or fundamental error. The appellate level right to counsel also comprehends the sixth amendment right to effective assistance of counsel. Evitts v. Lucey, 105 S. Ct. 830 (1985). Appellate counsel must function as "an active advocate," Anders v. California, 386 U.S. 738, 744, 745 (1967), providing her client the expert professional . . . assistance . . . necessary in a system governed by complex laws and rules and procedures. . . ." Lucey, 105 S. Ct. at 835 n.6.

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

Moreover, as this Court has explained, the Court's "independent review" of the record in capital cases neither can cure nor undo the harm caused by an appellate attorney's deficiencies:

> It is true that we have imposed upon ourselves the duty to independently examine each death penalty case. However, we will be the first to agree that our judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate. It is the unique role that advocate to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deviations from due process. Advocacy is an

> art, not a science. We cannot, in hindsight, precisely measure the impact of counsel's failure to urge his client's best claims. Nor can we predict the outcome of a new appeal at which petitioner will receive adequate representation. We are convinced, as a final result of examination of the original record and appeal and of petitioner's present prayer for relief that our confidence in the correctness and fairness of the result has been undermined.

Wilson v. Wainwright, 474 So. 2d 1162, 1165 (Fla. 1985). "The basic requirement of due process," therefore, 'is that a defendant be represented in court, at every level, by an advocate who represents his client zealously within the bounds of the law." Id. at 1164 (emphasis supplied).

Appellate counsel here failed to effectively advocate for his client, and operated under a conflict of interest. There simply is no reason here for counsel to fail to urge meritorious claims for relief. Matire v. Wainwrisht, 811 F.2d 1430, 1438 (11th Cir. 1987). Counsel ineffectively and through ignorance of the facts and law simply failed to urge them on direct appeal. As in Matire, Ms. Buenoano is entitled to relief. See also, Wilson v. Wainwrisht, supra; Johnson v. Wainwrisht, supra. The "adversarial testing process" failed during Ms. Buenoano's direct appeal -- because counsel failed. Matire at 1438, citing Strickland v. Washinston, 466 U.S. 668, 690 (1984).

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

In addition, appellate counsel's conflict of interest rendered him ineffective, and prejudiced Ms. Buenoano's rights of due process in her direct appeal. Further, as noted supra, because of the conflict of interest, Ms. Buenoano need not show prejudice. An evidentiary hearing is urged on this claim.

There are also presented as independent claims raising matters of fundamental error and/or are predicated upon significant changes in the law. Because the forgoing claims present substantial constitutional questions which go to the heart of the fundamental fairness and reliability of Ms. Buenoano'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. In addition, post conviction counsel should be granted access to the Florida Bar's file on Mr. Johnston.

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

Ms. Buenoano urges that the Court grant her 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, Margene Roper, Assistant Attorney General, Department of Legal Affairs, **125** North Ridgewood, Fourth Floor, Daytona Beach, Florida **32014** this 21st day of December, 1989.

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