IN THE SUPREME COURT OF FLORIDA

NO. 75583

JERRY WILLIAM CORRELL,

Petitioner,

v.

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

Respondent.

AMENDED PETITION FOR EXTRAORDINARY RELIEF, FOR A WRIT OF HABEAS CORPUS

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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 Mr. Correll's capital conviction and sentence of death. In February, 1985, Mr. Correll was sentenced to death. Direct appeal was taken to this Court. The trial court's judgment and sentence were affirmed. Correll v. State, 523 So. 2d 562 (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. Wainwrisht, 474 So. 2d 1163 (Fla. 1985); Baggett v. Wainwrisht, 229 So. 2d 239, 243 (Fla. 1969); see also Johnson v. Wainwrisht, 498 So. 2d 938 (Fla. 1987); cf. Brown v. Wainwrisht, 392 So. 2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Correll to raise the claims presented herein. See, e.g., Jackson v. Dugger, 547 So. 2d 1197 (Fla.

1989); Downs v. Duqaer, 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 Mr. Correll's capital conviction and sentence of death, and of this Court's appellate review. Mr. Correll'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. Dusser, 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 Mr. Correll's claims.

With regard to ineffective assistance, the challenged acts and omissions of Mr. Correll's appellate counsel occurred before this Court. This Court therefore has jurisdiction to entertain Mr. Correll'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. Wainwright, supra, 474 So. 2d 1163; McCrae v. Wainwright, 439 So. 2d 768 (Fla. 1983); State v. Wooden, 246 So.

2d 755, 756 (Fla. 1971); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); Ross v. State, 287 So. 2d 372, 374-75 (Fla. 2d DCA 1973); Davis v. State, 276 So. 2d 846, 849 (Fla. 2d DCA 1973), affirmed, 290 So. 2d 30 (Fla. 1974). The proper means of securing a hearing on such issues in this Court is a petition for writ of habeas corpus. Baggett, supra, 287 So. 2d at 374-75; Powell v. State, 216 So. 2d 446, 448 (Fla. 1968). With respect to the ineffective assistance claims, Mr. Correll will demonstrate that the inadequate performance of his appellate counsel was so significant, fundamental, and prejudicial as to require the issuance of the writ.

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

11. GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Correll asserts that his convictions and his sentence of death were obtained and then affirmed during the Court's appellate review process in violation of his rights as guaranteed by the fourth, fifth, sixth, eighth and fourteenth amendments to the United States Constitution, and the corresponding provisions of the Florida Constitution, for each of the reasons set forth herein. In Mr. Correll'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. As shown below, relief is appropriate.

CLAIM I

MR. CORRELL'S RIGHT TO CONFRONT THE WITNESSES AGAINST HIM WAS DENIED WHEN THE COURT LIMITED THE CROSS-EXAMINATION OF THE STATE'S WITNESSES.

The defendant's rights to present a defense and to confront and cross-examine the witnesses against him are fundamental safeguards "essential to a fair trial in a criminal prosecution." Pointer v. Texas, 380 U.S. 403, 404 (1965). Mr. Correll was denied his rights to present a defense and to confront and cross-examine the witnesses against him when trial counsel was precluded from introducing evidence of Susan Correll's drug use and the theory of the defense that this was a "drug deal gone bad" (R. 877, 887).

The defense's theory of the case was that someone else had committed these murders during a drug deal that had gone bad. (See Claim I)(R. 877, 887). In order to put forward that theory, counsel attempted to show Susan Correll's drug dependence and the possibility that others had the motive and opportunity to kill her and her family. The trial court refused to permit defense counsel to go into areas of cross-examination that would implicate Susan in any drug use.

During Donna Valentine's testimony, Mr. Kenny wanted to

inquire of this long time friend of Susan's about drug usage that the two had engaged in on the night of the murders.

> (Whereupon, Counsel approached the bench and the following proceedings were had outside the hearing of the Jury:)
>
> MR. KENNY: In the spirit of the order that you gave earlier in regard to Mr. Perry's motion about evidence of criminal activity in her deposition, Ms. Valentine indicates that when Susan Correll came over to see her on the Sunday evening, the 30th of June, that she had been smoking marijuana.
>
> Mr. Sharp, I think, has opened the door to that in asking whether or not she seemed to be sick or injured or anything like that in any way.
>
> I think this goes to the same kind of thing, and I would like to be able to ask the question, but I'm proffering it beforehand.
>
> THE COURT: Thank you.
>
> MR. PERRY: As to relevancy as to whether or not she had been smoking marijuana, relevance to being sick and injured.
>
> THE COURT: I don't see the connection. The only reason I can see it, the State was asking whether she was sick or injured, about the cause of death, and she didn't have massive physical injuries the last time she was seen.
>
> MR. KENNY: Presumably she wouldn't have had 17 stab wounds when she was over there.
>
> THE COURT: Right. I don't see the relevancy. I don't think he's opened the door by asking that question.

(R. 543-544).

Prior to trial, the lower court had granted the State's motion in limine to keep out any reference to Susan's drug use (R. **2187).** Because of this pretrial ruling, the defense was incapable of properly impeaching the testimony of Richard Henestofel when Henestofel denied purchasing cocaine Sunday evening (R. **1043)** and wanting to share it with Susan Correll that night (R. **1048).**

Obviously, it was critical to the defense to fully explore the State's witness' credibility and to effectively impeach his testimony before the jury. It was also critical to explore Susan Correll's drug involvement through the testimony of Donna Valentine. However, effective cross-examination and impeachment were never permitted. The trial court prohibited development of this crucial evidence thereby precluding effective cross-examination. Since Mr. Correll's trial, new case law has developed which establishes the error here and justifies under Jackson V. Dugger, **547** So. 2d **1197** (Fla. **1989),** presentation of this issue in a habeas petition. **See** Olden v. Kentucky, **109** S. Ct. **480 (1989);** Crane v. Kentuckv, **476** U.S. **683 (1986).**

There can be no doubt that the trial court's decision violated the sixth amendment right of confrontation, which requires that a defendant be allowed to impeach the credibility of prosecution witnesses by showing the witness' possible bias or showing that there may be other reasons to doubt the State's

reliance upon the witness's testimony. Here the defense sought to let the jury actually see the evidence that Susan Correll was heavily involved in drugs and that Richard Henestofel lied about his participation in her drug use. It has been recognized that:

> . . . denial of cross-examination [in such circumstances] would be constitutional error of the first magnitude and no amount of showing of want prejudice would cure it.

Smith v. Illinois, **390** U.S. **129, 131, 88 S.** Ct. **748, 749 (1968).**

The prejudice to Mr. Correll resulting from this limitation of cross-examination and confrontation rights is manifest when the testimony of this witness is analyzed and the evidence that was not admitted is considered.

In Alford v. United States, **282** U.S. **687, 51 S.** Ct. **218 (1931),** the Supreme Court recognized that cross-examination of a witness is a matter of right, stating:

> [P]rejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. (Citations omitted)

Id., **282 U.S.** at **692,** 51 S. Ct. at **219.**

A criminal defendant's right to cross-examination of witnesses is one of the basic guarantees of a fair trial protected by the confrontation clause:

> Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject

> always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner had traditionally been allowed to impeach, i.e., discredit, the witness.

Davis v. Alaska, 415 U.S. 315, 317 (1972).

The scope of cross-examination may not be limited to prohibit inquiry into areas that tend to discredit the witness:

> A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is "always relevant as discrediting the witness and affecting the weight of his testimony." 3A J. Wigmore, Evidence Section 940, p. 775 (Chadbourn rev. 1970). We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. Greene v. McElroy, 360 U.S. 474, 496, 79 S. Ct. 1400, 3 L.Ed.2d 1377 (1959).

Davis, supra at 316-17 (footnote omitted).

A limitation on the right to reveal a witness' bias or motivation for testifying impermissibly prevents the jury from properly assessing the witness' testimony and prevents the defendant from developing the facts which would allow the jury to properly weigh the testimony. In Davis v. Alaska, supra, the United States Supreme Court found that a confrontation clause

violation had occurred when the defendant was prevented from asking the witness questions that would reveal possible bias. In holding that the State's interest in protecting juvenile offenders did not override the defendant's right to inquire into bias or interest, the Court stated:

> In the instant case, defense counsel sought to show the existence of possible bias and prejudice of Green, causing him to make a faulty initial identification of petitioner, which in turn could have affected his later in-court identification of petitioner.
>
> We cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it. But we do conclude that the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Green's testimony which provided "a crucial link in the proof . . . of petitioner's act." Douglas v. Alabama, 380 U.S. at 419, 85 S. Ct. at 1077. The accuracy and truthfulness of Green's testimony were key elements in the State's case against petitioner. The claim of bias which the defense sought to develop was admissible to afford a basis for an inference of undue pressure because of Green's vulnerable status as a probationer, cf. Alford v. United States, 282 U.S. 687, 51 S. Ct. 218, 75 L.Ed. 624 (1931), as well as of Green's possible concern that he might be a suspect in the investigation.
>
> We cannot accept the Alaska Supreme Court's conclusion that the cross-examination that was permitted defense counsel was adequate to develop the issue of bias properly to the jury. While counsel was permitted to ask Green whether he was biased, counsel was unable to make a record from which

> to argue why Green might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial. On the basis of the limited cross-examination that was permitted, the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness or, as the prosecutor's objection put it, a "rehash" of prior cross-examination. On these facts it seems clear to us that to make any such inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. Petitioner was thus denied the right of effective cross-examination which "'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.' Brookhart v. Janis, 384 U.S. 1, 3, 86 S. Ct. 1245, 1246, 16 L.Ed.2d 314." Smith v. Illinois, 390 U.S. 129, 131, 88 S. Ct. 748, 750, 19 L.Ed.2d 956 (1968).

Id. at 318-19 (footnote omitted)(emphasis added).

Here, Mr. Correll's cross-examination was limited when the evidence used to conduct the cross-examination was not permitted to go to the jury so that it, the trier of fact, could fully consider how Susan Correll's involvement with the drug world provided a motive for someone other than Mr. Correll for her murder.

State rules of procedure do not override a defendant's right to elicit evidence in his defense. Crane v. Kentucky, 476 U.S. 683, 688; Chambers v. Mississippi, 410 U.S. 284 (1973); Davis, supra. The Crane court explained that, even though state rules

of procedure may allow the trial court the discretion to exclude evidence that is not relevant, rulings that limit the defendant's opportunity to be heard, to present evidence bearing on credibility, or to elicit evidence "central to the defendant's claim of innocence" do not withstand constitution scrutiny:

> Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, Chambers v. Mississippi, supra, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, Washinston v. Texas, **388** U.S. **14, 23, 87** S.Ct. **1920, 1925, 18** L.Ed.2d **1019 (1967);** Davis v. Alaska, **415** U.S. **308, 94** S.Ct. **1105, 39** L.Ed.2d **347 (1974),** the Constitution guarantees criminal defendant's **"a** meaningful opportunity to present a complete defense." California v. Trombetta, **467** U.S., at **485, 104** S.Ct., at **2532;** cf. Strickland v. Washinston, **466** U.S. **668, 684-685, 104** S.Ct. 2052, **2063, 80** L.Ed.2d **674 (1984)**("The Constitution guarantees a fair trial through the Due Process Clause, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment"). We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard. In re Oliver, **333** U.S. **257, 273, 68** S.Ct. **499, 507-508, 92** L.Ed. **682 (1948);** Grannis v. Ordeal, **234** U.S. **385, 394, 34** S.Ct. **779, 783, 58** L.Ed. **1363 (1914).** That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence. In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and "survive the crucible of meaningful adversarial testing." United States v. Cronic, **466** U.S. **648, 656, 104** S.Ct. **2039, 2045, 80** L.Ed.2d **657 (1984).** See

also Washington v. Texas, supra, 388 U.S., at 22-23, 87 S.Ct., at 1924-1925.

Crane, 476 U.S. at 690. Mr. Correll was deprived of his opportunity to effectively challenge these witnesses.

The constitutional error here contributed to Mr. Correll's conviction. The error can by no means be deemed harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967); Satterwhite v. Texas, 108 S. Ct. 1972 (1988). The trial court's ruling limiting the impeachment of this witness allowed the introduction of his account of the events without making that account survive "the crucible of meaningful adversarial testing." United States v. Cronic, 466 U.S. 648, 104 S. Ct. 2039 (1984).

The preclusion of this evidence resulted in the arbitrary imposition of a death sentence in violation of Mr. Correll's eighth amendment rights. A hearing is necessary. New case law establishes Mr. Correll's entitlement to relief. Habeas corpus relief is appropriate.

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

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Correll's death sentence. This Court has not hesitated in the past to

exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings, see Wilson v. Wainwrisht, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error.

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

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

CLAIM II

THE INTENSE SECURITY MEASURES IMPLEMENTED DURING MR. CORRELL'S TRIAL IN THE JURY'S PRESENCE ABROGATED THE PRESUMPTION OF INNOCENCE, DILUTED THE STATE'S BURDEN TO PROVE GUILT BEYOND A REASONABLE DOUBT, AND INJECTED MISLEADING AND UNCONSTITUTIONAL FACTORS INTO THE TRIAL AND SENTENCING PROCEEDINGS, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The extreme security measures employed during Mr. Correll's trial, in particular the imposition of leg shackles on Mr. Correll destroyed any presumption of innocence and perverted the judicial process. The prejudice from these extreme security measures, and the shackling, in the circumstances of this case far outweighed any possible danger and caused an unconstitutional conviction and sentence.

Prior to voir dire Mr. Kenny presented the problem to the trial court:

> MR. KENNY: One other thing, Your Honor, and that is that last time when we started the trial Mr. Correll was in ankle shackles and we were able to basically avoid any problem because of the way the courtroom was set up.
>
> This time, however, because the tables are built differently and the courtroom is differently set up, unless there is some kind of a barrier put in front of our table it's going to be obvious to all the jurors that he's wearing ankle shackles, and I would ask either that the ankle shackles be removed or something be set up in front of our table, or the courtroom be rearranged in some way so

it's not obvious that he's wearing shackles. He's got civilian clothes and it seems to me that it would be prejudicial to him to be clearly in shackles during the trial.

THE COURT: State's position?

MR. SHARPE: Your Honor, I think during the course of the trial it's going to come out that Mr. Correll is in jail and the Court is going to give the instruction on the presumption of innocence and everything that goes with it. I don't think that the shackles are going to be prejudicial one way or another.

I think based on Mr. Correll's behavior in the Orange County jail and this being a jurisdiction that's foreign to all of us, that it's probably in the best interest security-wise the way this courtroom is set up to have him in the ankle shackles because there are two direct doors to the hallway on the side where the defense table sits.

MR. KENNY: We can certainly --

THE COURT: I will hear from the security personnel.

THE COURT DEPUTY: I would like to see him kept in shackles, because of the problem taking the shackles off and putting them on, we have to remove the witnesses from the witness room in order to use that room. We can't do it out in the corridor which is adjacent to the room. That would be the problem.

Is he a security risk as far as the State is concerned? I spoke with the State and they said he was and I spoke with the Public Defender and they said he wasn't. That's the whole problem as far as we are concerned.

THE COURT: He's charged with four

counts of first degree murder and the State is seeking the death penalty if he is convicted as charged. That alone, I think, indicates some security risk. I understand there was also an incident in the Orange County jail where he attempted to arm himself.

MR. SHARPE: There was an incident in the Orange County jail where the guards in the jail found in his possession a comb fashioned into a knife. They removed it from him and put him into isolation as a result of that.

We had information from one of the witnesses in this case that he fashioned that comb first of all to use in an escape attempt and, secondly, to stick another prisoner who he didn't like.

MR. KENNY: Your Honor, I would point out that I talked to the jail people about that and what happened was they found the comb deep inside a mattress. Apparently there was a slit in the mattress that was being used in his cell, which was a single cell.

They apparently did not proceed necessarily to go to any formal hearing about it. I don't think they felt they could show it was actually his. Otherwise they have had no trouble with him at all. I am concerned not so much simply because of the idea that he's in jail but the feeling I think the jurors will get that the authorities believe or know that he's dangerous and thus has to be shackled.

I think that's probably more important, and certainly forms an impression on the jurors' minds that would negate or partly denote, at least, any instruction about reasonable doubt and presumption of innocence.

It may be possible they can move to

switch tables so that he's not so close to the door, for instance. It may be possible to put something in front of the tables.

All I'm saying it seems to me to be unnecessarily prejudicial at this stage to have him clearly in ankle shackles to start with.

Your Honor, we would like to keep the defense table where it is because I don't want his back to the audience.

THE COURT: And next to the Jury as well. We are all visiting here. I have to rely upon the security personnel here for security recommendations. They have requested that I leave him in shackles.

It's going to come out during the course of the trial, it's obvious that it is, from the witness list, that he has been in custody at least a portion of the time since the incident occurred, if not all of it, because of the witnesses that we are all aware are proposed in jail witnesses. So it's not going to be, I don't think, any secret that he's presently in custody.

The fact that he's shackled, apparently the normal security procedure for a case of this nature in Sarasota. I would prefer, if possible, to have a privacy screen across that table. I don't know if that at this late date is possible or not, but if it's not possible we will go with what we have.

(R. 10-14). The State and the trial judge wrongly concluded that eventually the jury would know that Mr. Correll was incarcerated, therefore there was no prejudice to his being seen in leg irons.

The fourteenth amendment guarantees a state criminal defendant the right to a fair trial. Fundamental to this guarantee are the defendant's right to be presumed innocent and

the State's concomitant duty to prove guilt beyond a reasonable doubt. See In re Winship, 397 U.S. 358 (1970). Therefore, "courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." Estelle v. Williams, 425 U.S. 501, 503 (1976). Procedures or practices which are not "probative evidence" but which create "the probability of deleterious effects" on fundamental rights and the judgment of the jury thus must be carefully scrutinized and guarded against. Id. at 504. Similarly, in a capital case, the eighth amendment mandates heightened scrutiny and requires that the proceedings not dilute the jury's sense of responsibility by the injection of impermissible factors. Caldwell v. Mississippi, 472 U.S. 320 (1985).

During the voir dire, Mr. Kenny again made his concerns known at a bench conference:

> MR. KENNY: They are coming in the other side and they can see his shackles.
>
> THE COURT: Have him hold his feet under the table more.

(R. 62).

The United States Supreme Court analyzed the effect of security measures in Holbrook v. Flynn, 475 U.S. 560 (1986)

> Central to the right to a fair trial, guaranteed by the Sixth and Fourteenth Amendments, is the principle that "one

> accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on the grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." Taylor v. Kentucky, 436 U.S. 478, 485, 98 S. Ct. 1930, 1934, 56 L.Ed.2d 468 (1978).

Holbrook, 475 U.S. at 567.

The United States Supreme Court in Holbrook ultimately found that the defendant had failed to show prejudice from the security. Holbrook, 475 U.S. at 572. However, the security measures in that case consisted merely of four uniformed Highway Patrol Officers at a multi-defendant trial. By contrast, in Mr. Correll's case the security imposed was much more extreme, and the risk of danger was much less.

Nonetheless, Holbrook recognized that "certain practices pose such a threat to the 'fairness of the factfinding process' that they must be subjected to 'close judicial scrutiny.' Holbrook, 475 U.S. 568 (quoting Estelle v. Williams, 425 U.S. 501, 503-04 (1976)); see also Elledge v. Dugger, 823 F.2d 1451 (11th Cir. 1987). The Holbrook court approved Estelle's recognition that where a defendant is forced to wear prison garb before a jury, "the constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment." Holbrook, 475 U.S. 568 (quoting Estelle, 425 U.S. at 504-05). Leg shackles are even more offensive.

In Mr. Correll's case the combination of extraordinary

security measures and other circumstances of the case, under any level of scrutiny, was impermissibly prejudicial. Holbrook, 475 U.S. at 569. The use of shackles is particularly prejudicial and offensive. "Due process requires that shackles be imposed only as a last resort." Spain v. Rushen, 883 F.2d 712, 728 (9th Cir. 1989). In Spain, the Ninth Circuit held that the trial court violated that capital defendant's rights by requiring him to wear shackles at trial. Id. at 713. The court recognized five (5) inherent disadvantages to physical restraint of defendants on the fairness of the trial:

> (1) Physical restraints may cause jury prejudice, reversing the presumption of innocence;
>
> (2) Shackles may impair the defendant's mental faculties;
>
> (3) Physical restraints may impede the communication between the defendant and his lawyer;
>
> (4) Shackles may detract from the dignity and decorum of the judicial proceedings; and
>
> (5) Physical restraints may be painful to the defendant.

Spain, 883 F.2d at 721.

The Eleventh Circuit has similarly found that forcing a defendant to wear shackles at sentencing was unconstitutional, even though the defendant at that point had been adjudged guilty. Elledse v. Dusser, 823 F.2d at 1450. The Court explained that

> Initially, the prejudice perceived when a defendant is seen in shackles by the jury involves the presumption of innocence. The issue has usually arisen in the context of a determination of guilt or innocence. Courts focus upon the prejudicial impact restraints have on the defendant's presumption of innocence. See e.g. Allen v. Montgomery, 728 F.2d 1409, 1413 (11th Cir. 1984); Collins v. State, 297 S.E. 2d 503, 505 (Ga. App. 1982); State v. Tolley, 226 S.E. 2d 353, 367 (N.C. 1976).

Id. That court went on to explain that the danger of prejudice extends even beyond the presumption of innocence. Shackles may have unknown and unpredictable adverse effects on the jury, such as an improper suggestion of future dangerousness. Id.

"[R]eviewing courts require that trial judges pursue less restrictive alternatives before imposing physical restraints." Spain, 883 F.2d at 721. Although shackling may sometimes be appropriate, "[t]he degree of prejudice is a function of the extent of chains applied and their visibility to the jury." Id. at 722. Even if shackles seem reasonably necessary, a trial court should take steps to discover and prevent prejudice to the jury, such as polling the jury about the impact of the restraints and providing a curative instruction. Elledae at 1452. But in Mr. Correll's case no action was taken to discover or alleviate the adverse effects of the shackles. Mr. Correll's trial judge placed the burden on Mr. Correll to hide the chains from the jury. The trial judge failed to consider less restrictive alternatives.

No Court has ever addressed the lack of proper inquiry as to the need for security or the possibility of less restrictive measures. Id. As in Elledse, "[Mr. Correll] was denied the required procedure when the court refused him an adequate opportunity to challenge the untested information that served as a basis for the shackling." Elledse teaches that evidentiary hearings may be necessary to allow the defendant to show that the evidence presented against him on the issue of future dangerousness was insufficient.

This Court has examined this issue in other recent cases, and has altered the standards previously applied in Mr. Correll's case. In Bello v. State, 14 F.L.W. 340 (Fla. July 14, 1989), this Court granted a new sentencing to a capital defendant who was shackled during the penalty phase of his trial. The Court recognized that shackling is an inherently prejudicial restraint and that the constitutional concern centers on possible adverse effects on the presumption of innocence. Id. at 341. In Bello, as here, defense counsel objected to the shackling but the trial judge overruled the objection. There, as here, the trial judge merely relied on law enforcement's opinion. This Court held that the defendant was entitled to a new trial because the trial judge made no appropriate inquiry. Id.

Obviously, this Court did not have the benefit of Spain and Bello, prior to Mr. Correll's direct appeal. Those cases mandate

that relief be given now. Bello has changed the applicable standard for assessing this claim.

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

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

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

federal constitutional standards.

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

CLAIM III

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

This Court has held that, under Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821 (1987), the sentencing jury must be correctly and accurately instructed as to mitigating circumstances. Under Mavnard v. Cartwrisht, 108 S. Ct. 1883 (1988), the jury also must be instructed correctly and accurately regarding the aggravating circumstances to be weighed against the mitigation when the jury decides what sentence to recommend. In Mr. Correll's case, the jury was incorrectly instructed and did not receive instructions in accord with the limiting and

narrowing construction of the prior violent felony aggravating factor adopted by this Court.

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

At the penalty phase, Mr. Correll's jury was instructed that whether "the Defendant has previously been convicted of another capital offense or of a felony involving the use of threat of violence to some person" was an aggravating circumstance (R. 2002). The jury was also instructed that sexual battery was a capital felony and that robbery was a capital felony (Id.). Mr.

Correll had been convicted of sexual battery involving Susan Carroll, the same victim, and same episode for which he had been convicted of first degree murder. He was convicted of a robbery and first degree murder of Marybeth Jones.

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

this aggravating circumstance. As a result, the penalty phase instruction on this aggravating circumstance "fail[ed] adequately to inform [Mr. Correll's] jur[y] what [it] must find to impose the death penalty." Maynard V. Cartwright, 108 S. Ct. at 1858.

Mr. Correll's death sentence thus violates the eighth and fourteenth amendments. Habeas relief is proper.

CLAIM IV

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

Crimes against children are unparalleled in their capacity to evoke the human emotion of sympathy for the victims while simultaneously engendering the emotional and unprincipled responses of rage, hatred, and revenge against the accused. The temptation to provoke such an unbridled and unprincipled emotional response from Mr. Correll' judge and jury proved irresistible to the State. The Assistant State Attorney's opportunity to unleash these emotions at Mr. Correll's trial came as early as voir dire when the prosecutor tried to make sure the horror was clear to the jury:

> It's a case of multiple homicide by stabbing, and the victims in the case are all female; one of them is a five-year-old child, one is a grandmother and the other two are

young women.

> This is a case of a violent crime, and you are going to see during the course of the trial just how violent it was.

(R. 304).

During opening statement the state made sure the jurors would be aware of the personal characteristics of the victims, characteristics that were unrelated to the crime:

> The State's evidence will show that on the morning of July 1st, 1985, in Orange County, Orlando, Florida, that Mary Lou Hines, a 58-year-old arandmother and the former mother-in-law of the Defendant, Jerry Correll, failed to show up for her job.
>
> The people that she worked with there found that this was rather unusual, Mrs. Hines having been a very responsible and conscientious employee. So they set about trying to locate and trying to contact Mrs. Hines.
>
> They called, they couldn't get any answer at her home. Believing because of her age and the fact that there might be some difficulty or some problem, that it was better to go out to her house. Two of the employees from that business where she worked set out to 3004 Tampico Drive in Orlando, Florida, where Mrs. Hines lived with her daughter, Susan Correll, her daughter, Marybeth Jones, and her granddaughter Tuesday Correll.
>
> These witnesses will testify in this case, and you will hear, that on arriving there they couldn't find anybody to come to the door, no one would answer, the door was locked, the house was all closed up and the car of Mrs. Hines was in the driveway.
>
> They will also testify that something

just was not right. They looked in the window of Tuesday, the little five-year-old daughter of Jerry Correll, and on the venetian blind facing to the outside was a big red smeared stain.

(R. 447-448)(emphasis added)

You have one little victim, a little five-year-old girl, the Defendant's own daughter, who had no wounds, no defensive wounds on her body because she had no reason to fear that daddy would kill her.

But daddy killed her because he couldn't leave her as the only witness to testify and identify himself for the rampage and the homicidal melee that took place in that house that night.

(R. **456).**

The state took every opportunity to remind the jury that one victim was **"a** little child" and one an "elderly lady" even though Mrs. Hines was only fifty-six years old and far from being a "helpless little old lady" as the state attempted to portray her.

Where was it that you found the two bodies, the little child and the elderly lady?

(R. **555).**

Even the medical examiner could not accept this characterization of Mrs. Hines:

Q Another photograph received in evidence as State's Exhibit Number 2, and I will ask you, Doctor, likewise, if you performed an autopsy on that person and whether or not that person was identified to you?

A Yes, she was.

Q Who was she identified to you to be?

A Mary Lou Hines.

Q This would be the elderly lady?

A Yes.

Q Lastly --

A She's only 56.

(R. 750-51).

Then at guilt phase closing:

> You heard in the testimony about the doll, the little girl's doll at the foot of this hallway with blood on it. That little girl who woke up that night and saw daddy, maybe she was standing there clutching her doll if she saw daddy fighting with mommy. And much to her amazement, she saw what daddy did. But being that's daddy, with no defensive wounds, she's not going to be afraid of daddy.
>
> And after Susie is disabled, Correll here, and Mary Lou Hines comes out. And there's the girl, Tuesday Correll, right there by her doll, her rocking chair, and daddy continues. Because we know from Dr. Hegert that the little girl was tossed in there. And after two people are down, there you have a five-year-old girl who can tell everything. And there is no defensive wounds on her.

(R. 1815).

All of this set the stage for the state's closing at penalty:

Are there any mitigating factors? I submit there aren't. These crimes and the evidence that you've seen in two weeks here in the Sarasota County Courthouse evidenced the reason why the State of Florida has a death penalty.

Last July four bodies were driven to a cemetery in Orlando. Three big coffins were dropped into the around and one little one. Dirt covered them up, and that was the end of those four people. And it was four people that died out there, not grisly faces in a slide. It was a loving arandmother and her two dauahters and a little girl who had a whole lot to live for. So let's not forget about them.

I'll agree with Mrs. Cashman, life is sacred. And their lives were sacred, and we should not forget them because we empathize during the course of this procedure with Jerry Correll, and the victims go forgotten.

We call this our system of justice. But in this system, who speaks for these people? Who sees to it that thev receive justice?

This trial and this procedure is not about revenge. It's not about sympathy. It's about the application of the law of the State of Florida and justice for Jerry Correll and justice for Mary Lou Hines and Susan Correll and Marybeth Jones and Tuesday Correll. And in order to do that, to see that those people receive justice, you have to speak for them.

Ladies and gentlemen, justice in this case requires that you speak for those folks and that you tell those folks and that you tell Jerry Correll that for what he did and for the way he did it and for what he is, that he deserves the death penalty.

Thank you.

(R. 1991-92) (emphasis added).

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

Innocence is not a consideration. I

> know what Jerry Correll did. The Jury knows what Jerry Correll did. And Jerry Correll knows what he did. They have found it to be of no reasonable doubt what he did.

(R. 1914). Thus, Mr. Correll's case presents not only the constitutionally unacceptable risk that the sentencer may have relied on victim impact evidence in violation of Booth, Gathers, and Jackson v. Dugger, **547** So. 2d **1197, 14** F.L.W. **355** (Fla. 1989), but actual reliance on victim impact evidence by the trial court. Scull v. State, **533** So. 2d **1137** (Fla. **1988).**

The Booth and Gathers Courts found the consideration of evidence and argument involving matters such as those relied on by the judge and jury here to be constitutionally impermissible, as such matters violated the well established principle that the discretion to impose the death penalty must be "suitably directed and limited so as to minimize the risks of wholly arbitrary and capricious **action."** Gress v. Georgia, **428** U.S. **153, 189** (1976)(joint opinion **of** Stewart, Powell, and Stevens, JJ.); **see** also California v. Ramos, **463** U.S. **992, 999 (1983).** The Booth Court ruled that the sentencer was required to provide, and the defendant had the right to receive, an "individualized determination" based upon the "character of the individual and the circumstances of the crime." Booth v. Maryland, supra; **see** also Zant v. Stephens, **462** U.S. **862, 879 (1983);** Eddings v. Oklahoma, **455** U.S. **104, 112 (1982).** Here, however, the judge and jury justified the death sentence through an individualized

consideration of the victims personal characteristics and impact of the crime on their family.

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

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

Florida law also recognizes the constitutionally unacceptable risk that a jury may impose a sentence of death in an arbitrary and capricious manner when exposed to victim impact evidence. In Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989), this Court held that the principles of Booth are to be given full effect in Florida capital sentencing proceedings. Jackson dictates that relief post-Booth and Gathers is now warranted in Mr. Correll's case. Compare Jackson v. State, 498 So. 2d 406,

411 (Fla. 1986) with Jackson v. Dugger, supra.

The same outcome is dictated by this Court's decision in Scull v. State, 533 So. 2d 1137 (Fla. 1988), where the Court, again relying on Booth, noted that a trial court's consideration of victim impact statements from family members contained within a presentence investigation as evidence of aggravating circumstances constitutes capital sentencing error. Scull, viewed in light of this Court's pronouncement in Jackson that Booth represents a significant change in law, illustrates that habeas relief is fully appropriate.

This record is replete with Booth error. Mr. Correll was sentenced to death on the basis of the very constitutionally impermissible "victim impact" evidence and argument which the United States Supreme Court condemned in Booth and Gathers. The Booth Court concluded that "the presence or absence of emotional distress of the victim's family, or the victim's personal characteristics are not proper sentencing considerations in a capital case." Id. at 2535. These are the very same impermissible considerations urged on (and urged to a far more extensive degree) and relied upon by the jury and judge in Mr. Correll's case. Here, as in Booth, the victim impact information "serve[d] no other purpose than to inflame the jury [and judge] and divert it from deciding the case on the relevant evidence concerning the crime and the defendant." Id. Since a decision

to impose the death penalty must "be, and appear to be, based on reason rather than caprice or emotion," Gardner v. Florida, 430 U.S. 349, 358 (1977)(opinion of Stevens, J.), such efforts to fan the flames are "inconsistent with the reasoned decision making" required in a capital case. Booth, supra at 2536. The decision to impose death must be a "reasoned moral response." Penry, 109 S. Ct. at 2952. The sentencer must be properly guided and must be presented with evidence which would justify a sentence of less than death.

In Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633 (1985), the United States Supreme Court discussed when eighth amendment error required reversal: "Because we cannot say that this effort had no effect on the sentence decision, that decision does not meet the standard of reliability that the Eighth Amendment requires." Id., 105 S. Ct. at 2646. Thus, the question is whether the Booth errors in this case may have affected the sentencing decision. As in Booth and Gathers, contamination occurred, and the eighth amendment will not permit a death sentence to stand where there is the risk of unreliability. Since the prosecutor's argument "could [have] resulted" in the imposition of death because of impermissible considerations, Booth, 107 S. Ct. at 505, a stay of execution and, thereafter, habeas relief are appropriate.

This error undermined the reliability of the jury's sentencing

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

CLAIM V

MR. CORRELL'S RIGHT TO A RELIABLE CAPITAL SENTENCE WAS VIOLATED WHERE HIS SENTENCING JURY DID NOT RECEIVE INSTRUCTIONS EXPLAINING THE LIMITING CONSTRUCTION OF THE "COMMITTED DURING THE COMMISSION OF A FELONY" AGGRAVATING CIRCUMSTANCE.

This Court has held that, under Hitchcock v. Dusser, 107 S. Ct. 1821 (1987), the sentencing jury must be correctly and accurately instructed as to mitigating circumstances. Under Mavnard v. Cartwright, 108 S. Ct. 1883 (1988), the jury also must be instructed correctly and accurately regarding the aggravating circumstances to be weighed against the mitigation when the jury decides what sentence to recommend. In Mr. Correll's case, the jury was incorrectly instructed and did not receive instructions in accord with the limiting and narrowing construction of the committed during the course of a felony aggravating factor adopted by this Court.

Florida has adopted a statutory scheme in which the "jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to

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

At the penalty phase, Mr. Correll's jury was instructed whether "the crime for which the Defendant is to be sentenced was committed while he was engaged in the commission of, or the attempt to commit, or the flight after committing or attempting to commit the crime of robbery or sexual battery" was an aggravating circumstance (R. 2002). Although the jury was given the standard instruction that "each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision," they were not specifically instructed that they must find that Mr. Correll committed the underlying felony "beyond a reasonable doubt."

Hardwick v. State, 521 So. 2d **1071, 1076** (Fla. **1988).** The trial court failed to provide this limiting instruction further instructions concerning the offense of sexual battery to Mr. Correll's jury.

Prior to giving the instructions, defense counsel argued that the evidence presented at best established that the sexual battery of Susan Correll occurred after she was dead. Based on the evidence presented during the trial of this cause there is a reasonable hypothesis that the Defendant did not have sexual intercourse with Susan Correll until after she had died. This Court in the case of Eutzy v. State, **458** So. 2d 755 (Fla. 1984), indicated that although every aggravating factor must be proved beyond a reasonable doubt, this did not proscribe the use of circumstantial evidence to meet this burden of proof, **so long as** that circumstantial evidence is inconsistent with any reasonable hypothesis which negates the aggravating factor. The jury was not properly instructed so that they could resolve this issue, an issue that the court admitted was for the jury to decide:

> My point is: If she is alive but unconscious and then dragged in and put on the bed and is raped, that's sexual battery. You're arguing that she's already dead, not that she's unconscious. So I think it's a question of fact. I think it's been presented to the Jury, so I wouldn't strike it.
>
> What's your next one? I'll let you argue it, if you want to.

(R. 816).

The jury should have been instructed that to find the aggravating circumstance of committed during the commission of a sexual battery on Susan Correll that they must find beyond a reasonable doubt the sexual battery. Additionally, given the obvious factual issues presented and acknowledged by the court, they should have been instructed that the State needed to prove that the sexual battery occurred while the victim was alive. See McCall v. State, 503 So. 2d **1306** (Fla. 5th DCA **1987).**

In Mr. Correll's case, the jury did not receive an instruction regarding the limiting construction of this aggravating circumstance. Hardwick v. State, ~~supra~~. As a result, the penalty phase instruction on this aggravating circumstance **"fail[ed]** adequately to inform [Mr. Correll's] jur[y] what [it] must find to impose the death **penalty."** Maynard v. Cartwright, **108 S.** Ct. at **1858.**

Mr. Correll's death sentence thus violates the eighth and fourteenth amendments. Habeas relief is proper.

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

This claim involves fundamental constitutional error which

goes to the heart of the fundamental fairness of Mr. Correll'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 VI

THE TRIAL COURT ERRED IN REFUSING TO PERMIT MITIGATING EVIDENCE TO BE PRESENTED BY THE DEFENSE EXCEPT THROUGH TESTIMONY OF THE DEFENDANT, THEREBY FORCING HIM TO TESTIFY.

During penalty, defense counsel attempted to bring in mitigating evidence that Mr. Correll had developed a close spiritual relationship with his God, evidence clearly mitigating. Ms. Cashman, defense counsel, attempted to elicit this evidence from Mr. Correll's sister-in-law by way of a letter she'd received from Mr. Correl while he was in jail (R. **1898)**

After the State's objection, the following bench conference was held:

> THE COURT: I can't see any reason for entering this other than for the hearsay comments.
>
> MS. CASHMAN: Your Honor, we're primarily offering it into evidence to show the state of mind of Mr. Correll.
>
> THE COURT: His present state of mind?
>
> MS. CASHMAN: I believe it's dated

January the 16th, Your Honor. I believe that's not too remote in time. It's within the last several weeks.

THE COURT: Well, the best evidence is for him to tell what his state of mind is.

MR. PERRY: I have no way of cross-examining him about his reference to the Scriptures, to determine if those are in fact genuine. I know the rules are somewhat relaxed. But the rules say as long as you don't take away a person's opportunity to confront a piece of evidence. And there's no way that I can confront that piece of evidence.

MR. KENNY: Your Honor, in the sort of situation where we're dealing with many possible mitigating factors, obviously, one of them is remorse, but a man's change in character is also a factor. And this very specifically goes to his religious feelings at the time.

And, first of all, it shows that it's not something that he's developed since the verdict. And, secondly, it shows his religious feelings at this time. I think all of them are relevant. And this is a letter not written for any particular purpose, because it's prior to the verdicts. And I think it goes to show his state of mind.

And Mrs. Correll would testify further about several conversations she's had with him with regard to the Scriptures.

MR. PERRY: Again, I'm going to object. I have no way to cross-examine him, to find out when he had his religious conversion, the strength or weakness of that conversion.

THE COURT: I agree. This letter is simple a way of attempting to allow Mr. Correll to speak to the Jury without being cross-examined. Sustain the objection.

(R. 1900-02). The defense then put Mr. Correll on the stand to testify to the content of the letter (R. **1943-44).**

The trial court was wrong in concluding that hearsay was not permitted at the penalty phase. The law in Florida provides that hearsay is admissible at a penalty phase proceeding:

> While hearsay evidence may be admissible in penalty phase proceedings, such evidence is admissible only if the defendant is accorded a fair opportunity to rebut any hearsay statements. Section **921.141(1),** Fla. Stat. **(1985).**

Rhodes v. State, **547** So. 2d **1201, 14** F.L.W. **343, 344** (Fla. **1989).**

Section **921.141(1),** Fla. Stat. **(1985),** provided:

> If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsection (5) and (6). Any such evidence which the court deems to have probative value may be received, resardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements.

(emphasis added). Thus, hearsay is admissible in the penalty phase of a Florida capital trial so long as it is relevant and so long as the defendant's constitutional right of confrontation is not violated by its introduction. Perri v. State, **441** So. 2d 606, 608 (Fla. **1983).** Even the State concedes: "[H]earsay is

admissible in the penalty phase of a capital case. 921.141(1) Fla. Stat. (1983)." (State's Response to Duest v. Dugger, No. 75,039, January 1990, at page 44). Under Florida law, Mr. Correll's letter was admissible if relevant

Evidence offered by a capital defendant during the penalty phase is relevant if it either rebuts an aggravating circumstance or if it constitutes a mitigating factor. Skipper v. South Carolina, 476 U.S. 1 (1986). A mitigating fact is "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." Eddings v. Oklahoma, 455 U.S. 104, 110 (1982), quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978).

> Underlying Lockett and Eddings is the principle that punishment should be directly related to the personal culpability of the criminal defendant. If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." California v. Brown, 479 U.S. 538, 545, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987) (concurring opinion).

Penry v. Lynaush, 109 S. Ct. 2934, 2947 (1989). Clearly this evidence was mitigating and, contrary to the judge's ruling, admissible.

The trial court's ruling virtually forced Mr. Correll into choosing between testifying in his own behalf or not having the evidence come before the jury at all. Mr. Correll had to choose to exercise one constitutional right at the expense of another. This Hobson's choice violated Mr. Correll's constitutional rights. The United States Supreme Court has explained that the exercise of constitutional rights cannot be penalized. To do so is a violation of the right, the right being burdened by a costly sanction. For example, no inference of guilt can attach to the exercise of the right of silence under the fifth amendment. In Griffin v. California, 380 U.S. 609 (1965), the State violated the fifth amendment by arguing the defendant's failure to testify was evidence of guilt. The Court found that the comment was a penalty upon the exercise of a constitutional right:

> It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly.

380. U.S. at 614. In North Carolina v. Pearce, 395 U.S. 711 (1969), the defendant was punished for exercising his right to appeal:

> It can hardly be doubted that it would be a flagrant violation of the Fourteenth Amendment for a state trial court to follow an announced practice of imposing a heavier sentence upon every reconvicted defendant for the explicit purpose of punishing the defendant for his having succeeded in getting his original conviction set aside. Where, as in each of the cases before us, the original

> conviction has been set aside because of constitutional error, the imposition of such a punishment, "penalizing those who choose to exercise" constitutional rights, "would be patently unconstitutional." United States v. Jackson, 390 U.S. 570, 581, 88 S.Ct. 1209, 1216, 20 L.Ed.2d 138. And the very threat inherent in the existence of such a punitive policy would, with respect to those still in prison, serve to "chill the exercise of basic constitutional rights." Id., at 582, 88 S.Ct., at 1216. See also Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106; cf. Johnson v. Avery, 393 U.S. 483, 89 S.Ct. 747, 21 L.Ed.2d 718.

395 U.S. 723-24. See also Brooks v. Tennessee, 406 U.S. 605, 610-11 (1972)(where State precluded a defendant from testifying unless he testified first, defendant's constitutional rights violated because the State action burdened "otherwise unconditional right not to take the stand").

A situation very similar to Mr. Correll's occurred in the mid-1960's. Congress passed a death penalty "applicable only to those defendants who assert the right to contest their guilt before a jury." United States v. Jackson, 390 U.S. 1209, 1216 (1968). The United States Supreme Court overturned the statute, saying: "Whatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights." Id. Here, Mr. Correll was virtually told, you may not introduce mitigating evidence pursuant to your eighth amendment right, unless you abrogate your fifth amendment right and testify. Under Jackson, Brooks,

Griffin, and Pearce, Mr. Correll's eighth amendment right was violated.

The right to trial by jury is a fundamental right, Duncan v. Louisiana, 391 U.S. 145, 158 (1968), and criminal defendants may not be penalized for the exercise of that constitutional right. United States v. Jackson, 390 U.S. 570, 581 (1968); Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort"). See also Blackledse v. Perry, 417 U.S. 21, 28-29 (1974). From these principles follows the command that "the Construction forbids the exaction of a penalty for a defendant's unsuccessful choice to stand trial." Smith v. Wainwright, 664 F.2d 1194, 1196 (11th Cir. 1981). Such actions would "chill" -- if not freeze altogether -- a defendant's right, preserved by the Constitution, to seek a jury trial. "The chilling effect of such a practice upon standing trial would be as real as the chilling effect upon taking an appeal that arises when a defendant appeals, is reconvicted on remand and receives a greater punishment." United States v. Stockwell, 472, F.2d 1186, 1187 (9th Cir. 1973). See also Hess v. United States, 496 F.2d 936 (8th Cir. 1974); United States v. Derrick, 519 F.2d 1 (6th Cir. 1975); Poteet v. Fauver, 517 F.2d 393 (2d cir. 1975); Baker v. United States, 412 F.2d 1069 (5th cir. 1969).

Here, Mr. Correll's eighth amendment right to present mitigation was violated by the trial court's ruling that, in order to exercise his eighth amendment privilege, he would lose his fifth amendment right to remain silent. Proffitt v. Wainwriqht, 685 F.2d 1227, 1254 (11th 1982), modified on rehearinq, 706 F.2d 311 (11th 1983), ~~cert~~. denied, 464 U.S. 1002 (capital defendant has confrontation right at penalty phase of Florida capital trial).

The trial court also confused the issue of who owned the right of confrontation. The ruling was premised on the State's inability to cross-examine Mr. Correll about the content of the letter (R. 1900) yet the right of confrontation is a sixth amendment right that belongs to the criminal defendant. ~~Proffitt~~ v. Wainwright, supra.

> If the defendant is given a fair opportunity to rebut it, hearsay is admissible in penalty proceedings.

Perri v. State, 441 So. 2d 606, 608 (Fla. 1983)

Here, the judge and the State misinterpreted who owned the right of confrontation and forced Mr. Correll to elect one constitutional guarantee at the expense of another. This was clearly erroneous and must be corrected. Mr. Correll is entitled to relief.

This error undermined the reliability of the jury's sentencing determination and prevented the jury from assessing

the full panoply of mitigation presented by Mr. Correll. For each of the reasons discussed above the Court should vacate Mr. Correll's unconstitutional sentence of death.

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

Moreover, the claim is now properly brought pursuant to the Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. This issue involved a classic violation of longstanding principles of Florida law. See Lockett, Eddings, supra. It virtually "leaped out upon even a casual reading of transcript." Matire v. 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. Wainwright, supra, 498 So. 2d 938.

However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Correll 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 VII

THE PROSECUTOR'S ARGUMENTS TO THE JURY CONCERNING IMPERMISSIBLE NONSTATUTORY AGGRAVATION PERVADED MR. CORRELL'S TRIAL SUCH THAT IT RESULTED IN THE TOTALLY ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

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

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

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

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

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

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

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

> This court, in Elledse v. State, 346 So.2d 998, 1003 (Fla. 1977) stated:
>
> We must guard against any unauthorized aggravating factor going into the equation which might tip the

> scales of the weighing process in favor of death.
>
> Strict application of the sentencing statute is necessary because the sentencing authority's discretion must be "guided and channeled" by requiring an examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.

Proffitt v. Florida, 428 U.S. 242, 258, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

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

The prosecutor in his closing argument on penalty referred to Mr. Correll's lack of remorse, a factor that cannot be considered as an aggravating factor. He emphasized Mr. Correll's lack of remorse by asking the jurors to recall the testimony of Detective Diane Payne. During the State's case, Detective Payne was asked about Mr. Correll's condition at the time of his interview which occurred on the day after the murders.

> Q Let me ask you, Detective Payne, about Mr. Correll's condition during the course of the time that he was with you and interviewed by you. Can you tell us how he acted?
>
> A He was cooperative.
>
> Q What about his emotional condition?
>
> A I did not see that he was that upset, no.
>
> Q Was he crying?

A No. I don't remember seeing any tears.

Q All right, during the first part of the nontaped interview?

A Correct, both.

Q Did he cry during the taped interview?

A As far as I know, there were no tears.

(R. 1083-84). In an attempt to get the jury to make **"an** unguided emotional response," the prosecutor argued:

> Diane Payne, when questioned by Mr. Sharpe, indicated that Jerry William Correll never cried during this interview. She never saw one tear.

(R. 1813-14)(emphasis added). The prosecutor inappropriately stressed Mr. Correll's lack of remorse in an attempt to elicit an emotional response from the sentencer.

The State's presentation of and the consideration of nonstatutory aggravating circumstances prevented the constitutionally required narrowing of the sentencer's discretion. See Maynard v. Cartwright, **108 S.** Ct. **1853, 1858 (1988),** and Lowenfield v. Phelps, **108** S. Ct. **546 (1988).** Instead, this impermissible aggravating factor evoked a sentence that was **"an** unguided emotional response," a clear violation of Mr. Correll's constitutional rights. Penry v. Lynaugh, **109** S. Ct. **2934 (1989).**

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

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

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

No tactical decision can be ascribed to counsel's failure to

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

CLAIM VIII

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

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

Mr. Correll's sentencing judge found five aggravating factors and no mitigation. This oral sentencing and the written

finding of no mitigation are improper. The record reveals that substantial and significant mitigation was before the court and the court failed to fully consider this mitigation.

Defense counsel presented much in mitigation for the Judge and Jury's consideration. Jerry's mother, Dora Correll, testified that her son was a "happy go luck kid" who loved to fish and swim and play ball (R. **1893**). Jerry and his father always enjoyed a good relationship and when the senior Correll died in **1982**, Jerry was devastated at the loss (R. **1894**). Mrs. Correll had a good relationship with her son and while he lived with her they got along well and Jerry was very helpful. He had never been abusive toward her (R. **1894**). She believed Jerry was a good, loving parent to Tuesday. She had never seen him abusive toward Tuesday (R. **1894**).

Jerry's older brother, Charles, testified that he didn't see much of Jerry growing up (R. **1895**). Since Charles was fifteen years older than Jerry he had pretty much left the home by the time Jerry was of school age. He had gotten closer to Jerry in the last few years, however, since they lived fairly close to each other. He had observed Jerry with Tuesday on occasion and had felt they had a good relationship. Charles recalled his birthday when Jerry had taken Tuesday to the drugstore to buy a card for her Uncle Charles' birthday. Jerry and Tuesday then came to Charles to help him celebrate the day (R. **1896**). Jerry

had been helping Charles build a privacy fence at Charles' house and Charles felt that Jerry was a helpful brother (R. **1897**). Charles had never seen Jerry violent (R. **1897**).

Charles' wife, Shirley, testified that she had known Jerry for eight years. He had visited them a lot over the past few years and almost always brought Tuesday when he came (R. **1898**). Jerry did a lot with Tuesday -- he liked to take her swimming and picnicking and visiting. Shirley and Jerry had been corresponding since he'd been in jail. She knew that Jerry had been taking Bible study courses and their correspondence revolved primarily around religion. She believed that Jerry's attitude had changed for the better (R. **1902-04**).

Dr. Michael Radelet, professor of sociology at Florida State University, offered expert testimony concerning the probability of any further dangerous acts of Jerry Correll. Dr. Radelet stated that it was highly unlikely that Jerry Correll would ever commit a violent act again (R. **1927**).

Jerry Correll testified about his family background and that he'd had a good relationship with his parents (R. **1935**). He hadn't graduated from high school but had started work early to support himself (R. **1935**). He started drinking and using drugs at age seventeen and his drug usage had consisted of alcohol, marijuana, cocaine, crystal meth and others. He was still using drugs at the time of his arrest (R. **1940**). He didn't do well in

school and hadn't attended church on a very regular basis but after his arrest, he'd begun a Bible study course and was getting back into his religion **(R. 1941).**

Jerry was twenty-two when he met the sixteen-year-old Susan (R. **1945).** Tuesday was born about ten months after he and Susan married **(R. 1947).** They were happy about the pregnancy and attended Lamaze classes together and Jerry was there for Tuesday's birth. Jerry told of how their problems started when he was working long hours and Susan thought he was dating someone else **(R. 1947).** She started drinking a lot and doing cocaine and she often left the baby alone while Jerry was working. He'd come home to find the baby alone (R. **1948).** Eventually Jerry and Susan divorced and then got back together only to separate again.

All of this was presented in mitigation but in addition, Jerry Correll had claimed a defense of innocence. The sentencing court could also have considered the question of guilt in mitigation. The jury deliberated at guilt-innocence for over *8* hours. Someone obviously had questions and throughout sentencing, Mr. Correll maintained his innocence. That residual doubt could have been considered in mitigation of sentence.

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

> The Court has carefully considered all

> statutory mitigating factors and finds that no mitigating circumstance exists in the evidence of this case. The Court has also carefully examined and considered the record for any other factor or circumstance involving the case and the character of JERRY CORRELL. No mitigating circumstances can be found.

(R. 1409). This Court has recognized that factors such as poverty, emotional deprivation, lack of parental care, and cultural deprivation, are mitigating. The evidence presented here regarding Mr. Correll's background of hard work, good family and relationships, and a history of drug abuse went unrebutted. The court cannot simply choose to ignore it. In Lamb v. State, 532 So. 2d 1051 (Fla. 1988), this Court remanded the case for resentencing where it was not clear that the trial court had considered the evidence presented in mitigation. In addition to information about a drug problem,

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

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

> the trial court's first task in reaching its conclusions is to consider whether the facts alleged in mitigation are supported by the evidence. After the factual finding has been made, the court then must determine whether the established facts are of a kind capable of mitigating the defendant's punishment,

> i.e., factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed. If such factors exist in the record at the time of sentencing, the sentencer must determine whether they are of sufficient weight to counterbalance the aggravating factors.

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

In Eddings v. Oklahoma, 455 U.S. 104 (1982), the 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 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 changed all that. Reconsideration at this juncture is appropriate.

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

failed to consider obvious mitigating circumstances. The factors should now be recognized. Mr. Correll is entitled to relief on this claim.

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

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

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

would have done the rest, based on long-settled Florida and federal constitutional standards.

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

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

In a capital sentencing proceeding, the United States constitution requires that a sentencer not be precluded from "considering, as a mitigating factor, any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978); see also Hitchcock v. Dugger, 107 S. Ct. 1821, 1824 (1987). Because of the heightened need for reliability in the determination that death is the appropriate punishment in a

specific case," the eighth amendment requires "particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." Woodson v. North Carolina, 428 U.S. 280, 304, 303 (1976).

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

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

> Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978)(striking down Ohio's death penalty statute, which allowed consideration only of certain mitigating circumstances, on the grounds that the sentencer may not "be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death")(emphasis in original). The Supreme Court, in requiring individual consideration by capital juries and in requiring full play for mitigating circumstances, has demonstrated that mercy has its proper place in capital sentencing. The [prosecutor's closing] in strongly suggesting otherwise, misrepresents this important legal principle.

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

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

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

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

Not permitting the jury to consider any mercy or sympathy they may have had towards the defendant undermined the jury's ability to reliably weigh and evaluate mitigating evidence. See Parks v. Brown, 860 F.2d 1545 (10th Cir. 1988)(in banc), cert.

sranted sub nom., Saffle v. Parks, 109 S. Ct. 1930 (1989). The jury's role in the penalty phase is to evaluate the circumstances of the crime and the character of the offender before deciding whether death is an appropriate punishment. Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). An admonition which may be understood as directing the jury to disregard the consideration of sympathy improperly suggests to "the jury that it must ignore the mitigating evidence about the [petitioner's] background and character." California v. Brown, 479 U.S. 538, 107 S. Ct. 837, 842 (1987)(O'Connor, J., concurring).

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

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

U.S. 862, 879 (1983); Eddings v. Oklahoma, 455 U.S. 104, 111-12 (1982); Lockett, 438 U.S. at 605, and may not be precluded from considering "any relevant mitigating evidence." Eddinss, 455 U.S. at 114. See also Andrews v. Shulsen, 802 F.2d 1256, 1261 (10th Cir. 1986), cert. denied, ___ U.S. ___, 107 S. Ct. 1964, 95 L. Ed. 2d 536 (1987).

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

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

In Woodson v. North Carolina, 428 U.S. 280, 304 (1976), the Court struck down mandatory death sentences as incompatible with the required individualized treatment of defendants. A plurality of the Court stated that mandatory death penalties treated defendants "not as uniquely individual human beings but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the death penalty." Id. at 304. The Court held that "the fundamental respect for humanity underlying the Eight Amendment . . . requires consideration of the character and record of the individual

offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." Id. The Court explained that mitigating evidence is allowed during the sentencing phase of capital trial in order to provide for the consideration of "compassionate or mitigating factors stemming from the diverse frailties of humankind." Id.

In Eddings v. Oklahoma, 455 U.S. 104 (1982), the Court reviewed a sentencing judge's refusal to consider evidence of a defendant's troubled family background and emotional problems. In reversing the imposition of the death penalty, the Court held that "[j]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence." Id. at 113-14 (emphasis in original). The Court stated that although the system of capital punishment should be "consistent and principled," it must also be "humane and sensible to the uniqueness of the individual." Id. at 110.

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

In Skipper v. South Carolina, 476 U.S. 1 (1986), the trial court had precluded the defendant from introducing evidence of his good behavior while in prison awaiting trial. The Court held that the petitioner had a

constitutional right to introduce the evidence, even though the evidence did not relate to his culpability for the crime. Id. at 4-5. The Court found that excluding the evidence "impeded the sentencing jury's ability to carry out its task of considering all relevant facets of the character and record of the individual offender." Id. at 8.

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

Without placing an undue technical emphasis on definitions, it seems to us that sympathy is likely to be perceived by a reasonable juror as an essential or important ingredient of, if not a synonym for, "mercy," "humane" treatment, "compassion," and a full "individualized" consideration of the "humanity" of the defendant and his "character." . . . [I]f a juror is precluded

from responding with sympathy to the defendant's mitigating evidence of his own unique humanness, then there is an unconstitutional danger that his counsel's plea for mercy and compassion will fall on deaf ears.

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

Petitioner's counsel, in his closing argument, then relied on this testimony to argue that petitioner's youth, race, school experiences, and broken home were mitigating factors that the jury should consider in making its sentencing decision. In so doing, defense counsel appealed directly to the jury's sense of compassion, understanding, and sympathy, and asked the jury to show "kindness" to his client as a result of his background. Record, vol. V, at 708-723.

. . . [There is] an impermissible risk that the jury did not fully consider these mitigating factors in-making its sentencing decision.

. . .

As we discussed above, sympathy may be an important ingredient in understanding and appreciating mitigating evidence of a defendant's background and character.

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

In this case, there exists a substantial possibility that the jury may have understood that it was precluded from considering sympathy or mercy. Cf. Mills v. Maryland, 108 S. Ct. 1860, 1867 (1988). This prevented Mr. Correll's jury from providing Mr. Correll the "particularized consideration" the eighth amendment requires. Undeniably, the presentation of evidence in mitigation of punishment involves the jury's human, merciful reaction to the defendant. See Peek v. Kemp, 784 F. 2d 1479, 1490 and n.12 (11th Cir. 1986)(en banc)(the role of mitigation is to present "factors which point in the direction of mercy for the defendant"); see also Tucker v. Zant, 724 F.2d 882, 891 (11th Cir.), vacated for reh'g en banc, 724 F.2d 898 (11th Cir. 1984), reinstated in relevant Dart sub nom. Tucker v. Kemp, 762 F.2d 1480, 1482 (11th Cir. 1985)(in banc). Not allowing the jury to believe that "mercy" may enter their deliberations negates any evidence presented in mitigation, for it forecloses the very reaction that evidence is intended to evoke, and therefore precludes the sentencer from considering relevant, admissible (even if nonstatutory) mitigating evidence, in

violation of Hitchcock v. Dusaer, 107 S. Ct. 1821 (1987); Skipper v. South Carolina, 476 U.S. 1 (1986); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, and the eighth and fourteenth amendments.

The United States Supreme Court recently held in a case declared to be retroactive on its face that a capital sentencing jury must make a "reasoned moral response to the defendant's background, character, and crime." Penry v. Lynaugh, 109 S. Ct. 2934, 2947 (1989). It is improper to create "the risk of an unguided emotional response." 109 S. Ct. at 2951. A capital defendant should not be executed where the process runs the "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Penry, 109 S. Ct. at 2952. There can be no question that Penry must be applied retroactively. The Court there concluded that, Jurek v. Texas, 428 U.S. 262 (1976), notwithstanding, the Texas death penalty scheme previously found constitutional, created the "risk that the death [would] be imposed in spite of factors which [] call[ed] for a less severe penalty." 109 S. Ct. at 2952. Thus Mr. Penry's claim was cognizable in post-conviction proceedings. Johnny Penry sought, and was granted relief, in part on the identical claim now pressed by Mr. Correll. 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 United States Supreme Court found that, as applied to Penry, the failure to so instruct was not a legitimate attempt by Texas to avoid unbridled discretion, 109 S. Ct. 2951, but rather, an impermissible attempt to restrain the sentencer's discretion to decline to impose a death sentence. 109 S. Ct. 2951. The net result is the same: the unacceptable risk that the jury's recommendation of death was the product of the jury's belief that feelings of compassion, sympathy, and mercy towards the defendant were not to be considered in determining its verdict. The resulting recommendation is therefore unreliable and inappropriate in Mr. Correll's case. This error undermined the reliability of the jury's sentencing verdict. Penry, supra.

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

The error here undermined the reliability of the sentencing determination and prevented the jury from assessing mitigation. The court's instructions impeded a "reasoned moral response" which by definition includes sympathy. Penry v. Lynaugh, 109 S.

Ct. 2934, 2949 (1989). For each of the reasons discussed above this Court should vacate Mr. Correll's unconstitutional sentence of death. This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Correll's death sentence.

The retroactive opinion in ~~Penry~~ requires that 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, habeas relief is warranted.

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

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

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

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

CLAIM X

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

A capital sentencing jury must be:

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

State v. Dixon, 283 So. 2d 1 (Fla. 1973)(emphasis added). This straightforward standard was never applied at the penalty phase of Mr. Correll's capital proceedings even though counsel argued for a special instruction defining it (R. 1956-1959). The trial judge, however, may have made the error worse by his "correction":

> Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that counter-act or outweigh the aggravating circumstances.

(R. 2003). The instruction simply shifted the burden to Mr. Correll on the question of whether he should live or die. In Hamblen v. Dugger, 546 So. 2d 1039 (Fla. 1989), a capital post-

conviction action, this Court addressed the question of whether the standard employed shifted to the defendant the burden on the question of whether he should live or die. The Hamblen opinion reflects that claims such as the instant should be addressed on a case-by-case basis in capital post-conviction actions. Mr. Correll herein urges that the Court assess this significant issue in his case and, for the reasons set forth below, that the Court grant him the relief to which he can show his entitlement.

Shifting the burden to the defendant to establish that mitigating circumstances outweigh aggravating circumstances conflicts with the principles of Mullaney v. Wilbur, **421** U.S. **684** (1975), and Dixon, for such instructions unconstitutionally shift to the defendant the burden with regard to the ultimate question of whether he should live or die. In so instructing a capital sentencing jury, a court injects misleading and irrelevant factors into the sentencing determination, thus violating Caldwell v. Mississippi, **472** U.S. **320 (1985),** Hitchcock v. Dugger, 107 S. Ct. **1821 (1987),** and Maynard v. Cartwrisht, **108** S. Ct. **1853 (1988).** Mr. Correll's jury was unconstitutionally instructed, as the record makes abundantly clear (See R. **1354).** The trial court then employed this unconstitutional standard in imposing death (R. **1439).** This claim is now properly before this Court, and Rule **3.850** relief would be more than proper.

At the penalty phase of trial, judicial instructions

informed Mr. Correll's jury that death was the appropriate sentence unless "mitigating circumstances exist that counter-act or outweigh the aggravating circumstances" (R. 2003). The trial judge then imposed death because no mitigating circumstances existed . . . (R. 2027). Such a standard, which shifts to the defendant the burden of proving that life is the appropriate sentence, violates the eighth and fourteenth amendments, as the Court of Appeals for the Ninth Circuit recently held in Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(in banc). This claim involves a **"perversion"** of the jury's deliberations concerning the ultimate question of whether Mr. Correll should live or die. See Correll v. Murray, 106 S. Ct. 2661, 2668 (1986). No bars apply under such circumstances. Id. A writ of certiorari has been granted to resolve the split of authority between Adamson and the Arizona Supreme Court. Walton v. Arizona, 110 S. Ct. 49 (1989).

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

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

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

The focus of a jury instruction claim is "what a reasonable juror could have understood the charge as meaning." Francis v. Franklin, 471 U.S. 307 (1985); see also Sandstrom v. Montana, 442 U.S. 510 (1979). Here, the jury was in essence told that death was presumed appropriate once aggravating circumstances were established, unless Mr. Correll proved that mitigating circumstances existed which outweighed the aggravating

circumstances. A reasonable juror could have well understood that mitigating circumstances were factors calling for a life sentence, that aggravating and mitigating circumstances had differing burdens of proof, and that life was a possible penalty, while at the same time understanding, based on the instructions, that Mr. Correll 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 the eighth amendment principles. Hitchcock constituted a change in law in this regard. The constitutionally mandated standard demonstrates that relief is warranted in Mr. Correll's case.

The United States Supreme Court recently granted a writ of certiorari in Blystone v. Pennsylvania, 109 S. Ct. 1567 (1989), to review a very similar claim. The question presented in Blystone has obvious ramifications here. Under Pennsylvania law, the jury is instructed that where it finds an aggravating circumstance present and no mitigation is presented, it "must" impose death. However, if mitigation is found then the jury must

decide whether the aggravating circumstances outweigh the mitigating. In Pennsylvania, the legislature chose to place upon a capital defendant a burden of production as to evidence of mitigation and a burden of persuasion as to whether mitigation exists. However, once evidence of a mitigating circumstance is found, then the State bears the burden of persuasion as to whether the aggravating circumstances outweigh the mitigating such that a death sentence should be returned.

Under the instructions and standard employed in Mr. Correll's case, once one of the statutory aggravating circumstances was found, by definition sufficient aggravation existed to impose death. The jury was then directed to consider whether mitigation had been presented which ~~outweished~~ the aggravation. Thus, under the standard employed in Mr. Correll's case, the finding of an aggravating circumstance operated to impose upon the defendant the burden of production and the burden of persuasion of the existence of mitigation, **and** the burden of persuasion as to whether the mitigation outweighs the aggravation. Where as here, the prosecution contends that the jury finding of guilt establishes the "in the course of a felony" aggravating circumstance, a presumption of death automatically arises. Certainly, the standard employed here was more restrictive of the jury's ability to conduct an individualized sentencing than the Pennsylvania statute at issue in ~~Blystone~~.

See also Boyde v. California, 109 S. Ct. 2447 (Cert. granted June 5, 1989).

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

Under Hitchcock and its progeny, no bars apply, because Hitchcock, decided after Mr. Correll's trial, worked a change in law. Habeas relief is thereby appropriate, and Mr. Correll's sentence of death must be vacated.

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

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

CLAIM XI

MR. CORRELL'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.

In State v. Dixon, 283 So. 2d 1, 9 (1973), this Court provided the following limiting construction of the "heinous,

atrocious, or cruel" aggravating circumstance:

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

Mr. Correll's jury was not advised of these limitations on the "heinous, atrocious or cruel" aggravating factor. As a result, the instructions failed to limit the jury's discretion and violated Maynard v. Cartwright, **108** S. Ct. **1853 (1988).** In addition, the judge employed the same erroneous nonstandard when sentencing Mr. Correll to death, as did this Court when it affirmed this aggravating circumstance on direct appeal. Correll v. State, **523** So. 2d **562, 568** (Fla. **1988)**("We also find no error with respect to the rest of the aggravating factors . . . ."**)**.

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

> The crime for which the defendant is to be sentenced was especially wicked,

evil, atrocious or cruel.

(R. 2002-2003). The Tenth Circuit's in banc opinion (unanimously overturning the death sentence) explained that the jury in Cartwrisht received a more detailed instruction which was still held inadequate:

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

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

The Dixon construction has not been consistently applied, was not applied here, and the jury in this case was never apprised of such a limiting construction. Here, the jury, the

judge, and this Court applied precisely the construction condemned in Cartwrisht.1

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

> In analyzing the role of the sentencing jury, the Supreme Court of Florida has apparently been influenced by a normative judgment that a jury recommendation of death carries great force in the mind of the trial judge. This judgment is most clearly reflected in cases where an error has occurred before the jury, but the trial judge indicates that his own sentencing decision is unaffected by the error. As a general matter, reviewing courts presume that trial judges exposed to error are capable of putting aside the error in reaching a given decision. The Supreme Court of Florida, however, has on occasion declined to apply this presumption in challenges to death sentences. For example, in Messer V. State, 330 So.2d 137 (1976), the trial court erroneously prevented the defendant from putting before the sentencing jury certain psychiatric reports as mitigating evidence. The jury recommended death and the trial judge imposed the death penalty. The supreme court vacated the sentence, even though the

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

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, 1072 (Fla.1987); Riley v. Wainwrisht, 517 So.2d 656, 659-60 (Fla.1987); Valle v. State, 502 So.2d 1225, 1226 (Fla.1987); Flovd 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.[2] As the en banc Eleventh Circuit noted in earlier portions of the Mann opinion:

'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

(footnote continued on following page)

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

Id. at 1452 n.7.

> The legislature created a role in the capital sentencing process for a jury because the jury is "the one institution in the system of Anglo-American jurisprudence most honored for fair determinations of questions decided by balancing opposing factors." Cooper v. State, 336 So.2d 1133, 1140 (Fla.1976), cert. denied, 431 U.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

(footnote continued from previous page)

> 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).

> 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); Nearv v. State, 384 So.2d 881, 885-88 (Fla. 1980); Mallov v. State, 283 So.2d 1190, 1193 (Fla.1979); Shue v. State, 366 So.2d 387, 390-91 (Fla.1978); McCaskill v. State, 344 So.2d 1276, 1280 (Fla.1977); Thompson v. State, 328 So.2d 1, 5 (Fla.1976).

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

In Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), the United States Supreme Court reversed a Florida sentence of death because

the jury had been erroneously instructed not to consider nonstatutory mitigation. "In Hitchcock, the Supreme Court reversed [the Eleventh Circuit's] en banc decision in Hitchcock v. 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. Dugger, 863 F.2d 705, 708 (11th Cir. 1989). See also Harsrave v. Dugger, 832 F.2d 1528 (11th Cir. 1987)(en banc); Stone V. Dugger, 837 F.2d 1477 (11th Cir. 1988). This Court has treated the jury as sentencer for purposes of eighth amendment instructional error review, as has the Eleventh Circuit. 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); Meeks V. Dugger, 14 F.L.W. 313 (Fla. June 22, 1989)(since it

could not be said beyond a reasonable doubt that a properly instructed jury would not return a recommendation of life, resentencing was required). Thus, it is clear that, after Hitchcock, for purposes of reviewing the adequacy of jury instructions in Florida the jury is the sentencer. Instructional error is reversible where it may have affected the jury's sentencing verdict. Meeks, supra; Riley, supra. The bottom line here is that this jury was unconstitutionally instructed, Mavnard v. Cartwrisht, supra, and that the State cannot prove the error harmless beyond a reasonable doubt.

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

The United States Supreme Court affirmed the Tenth Circuit's grant of relief in Cartwrisht, explaining that the death sentence did not comply with the fundamental eighth amendment principle

requiring the limitation of capital sentencers' discretion. That Court's eighth amendment analysis fully applies to Mr. Correll's case; proceedings as egregious as those upon which relief was mandated in Cartwrisht are present here. The result here should be the same as in Cartwrisht. See id., 108 S. Ct. at 1858-59.

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

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

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

Godfrey v. Georsia, 100 S. Ct. 1759 (R. 1517). The court refused to provide the instruction (Id.).

Clearly, this Court has held that, under Hitchcock, the sentencing jury must be correctly and accurately instructed as to the mitigating circumstances to be weighed against aggravating circumstances. Under Maynard v. Cartwrisht, 108 S. Ct. 1883 (1988), the jury must also be correctly and accurately instructed regarding the aggravating circumstances to be weighed by it against the mitigation when it decides what sentence to recommend. In Mikenas v. Dugger, 519 So. 2d 601 (Fla. 1988), a new jury sentencing was ordered because the jury was instructed without objection that mitigating circumstances were limited by statute. A subsequent resentencing by trial judge alone did not cure the instructional error, although at the resentencing, the trial judge considered nonstatutory mitigation. The jury's recommendation was not reliable because the jury did not know what to balance in making its recommendation. In Mr. Correll's case, the jury did not receive instructions narrowing aggravating circumstances in accord with the limiting and narrowing constructions adopted by this 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. Cartwrisht, 108 S. Ct. 1853 (1988), first held that the principle of Godfrev v. Georgia, 446 U.S. 420 (1980), applied to a state where the jury weighs the aggravating and mitigating circumstance found to exist, and required the jury to receive instructions adequately channeling and narrowing its discretion. In Cartwright, the United States Supreme Court determined that error had occurred where the sentencing jury received no instructions regarding the limiting constructions of an aggravating circumstance.

Under Florida law, aggravating circumstances "must be proven beyond a reasonable doubt." Hamilton v. State, 547 So. 2d 630, 633 (Fla. 1989). In fact, Mr. Correll's jury was so instructed. Florida law also establishes that limiting constructions of the aggravating circumstances are "elements" of the particular aggravating circumstance. "[T]he State must prove [the] element(s) beyond a reasonable doubt." Banda v. State, 536 So. 2d 221, 224 (Fla. 1988). Unfortunately, Mr. Correll'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 Cartwright.

Florida law requires the jury to weigh the aggravating

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

Similar conclusions have been reached in other cases where the jury was erroneously instructed. Meeks v. 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 Mr. Correll's case, the jury received no guidance as to the "elements" of the aggravating circumstances against which the evidence in mitigation was balanced. In Florida, the jury's pivotal role in the capital sentencing process requires its sentencing discretion to be channeled and limited. The failure to provide Mr. Correll's sentencing jury the proper "channeling and limiting" instructions violated the eighth amendment principle discussed in Maynard v. Cartwrisht.

In Maynard v. Cartwright, the United States Supreme 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 Mr. Correll's case, the jury was not instructed as to the limiting constructions placed upon of the

"heinous, atrocious or cruel" aggravating circumstance. The failure to instruct on the **"elements"** of this aggravating circumstance in this case left the jury free to ignore those **"elements,"** and left no principled way to distinguish Mr. Correll'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 Cartwright 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. Marvland, 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. Cartwriaht, Mr. Correll's jury received inadequate instructions and his sentence of death violates the eighth amendment.

This Court should now correct Mr. Correll'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).

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

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

each of the reasons discussed above this, Court should vacate Mr. Correll's unconstitutional sentence of death.

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

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

Under Maynard v. Cartwrisht, 108 S. Ct 1853 (1988), the overbroad application of aggravating circumstances violates the eighth amendment. Here as the record in its totality reflects, the sentencing jury never applied the "heightened premeditation" limiting construction of the cold, calculated aggravating circumstance, as required by Maynard v. Cartwrisht.

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

This circumstance is to be applied when:

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

921.141(5)(i), Florida Statutes.

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

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

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

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

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

Concern over the severity and finality of the death penalty has mandated that any discretion in imposing the death penalty be narrowly limited. Gregg v. Georgia, 428 U.S. 153, 188-89 (1976);

Furman v. Georgia, 408 U.S. 238 (1972). The Court in ~~Gregg~~ interpreted the mandate of ~~Furman~~ as one requiring that severe limits be imposed due to the uniqueness of the death penalty:

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

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

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

circumstance to be unconstitutional under traditional "void for vagueness" standards. 224 S.E.2d at **391**. The Court went on to note the special scrutiny (for possible vagueness) required under a death penalty statute:

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

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

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

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

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

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

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

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

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

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

> That aggravating circumstance [(5)(i)] ordinarily applies in those murders which are characterized as executions or contract

> murders, although that description is not intended to be all-inclusive.

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

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

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

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

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

Because neither Mr. Correll's jury nor trial judge had the benefit of the narrowing definition set forth in Rosers, his sentence violates the eighth and fourteenth amendments. Moreover, the decision in Rogers preceded the direct appeal in Mr. Correll's case by several months. Mr. Correll is entitled to the benefit of the Rosers rule. The judge did not require any "heightened" premeditation as required by McCray, supra, and certainly he did not properly instruct the jury on this limiting construction.

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

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

Furman v. Georsia, 408 U.S. 238 (1972).

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

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

> Godfrey v. Georsia [] which is very relevant here, applied this central tenet of Eighth Amendment law. The aggravating circumstance at issue there permitted a person to be sentenced to death if the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Id., at 422. The jury had been instructed in the words of the statute, but its verdict recited only that the murder was "outrageously or wantonly vile, horrible or inhuman." The Supreme court of Georgia, in affirming the death sentence, held only that the language used by the jury was "not objectionable" and that the evidence supported the finding of the presence of the aggravating circumstance, thus failing to rule whether, on the facts, the offense involved torture or an aggravated battery to the victim. Id., at 426-427. Although the Georgia Supreme Court in other cases had spoken in terms of the presence or absence of these factors, it did not do so in the decision under review, and this Court held that such an application of the aggravating circumstance was unconstitutional, saying:
>
> > "In the case before us, the Georgia Supreme Court has affirmed a sentence of death based upon no more than a finding that the offense was 'outrageously or wantonly vile, horrible and inhuman.' There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterized

> almost every murder as 'outrageously or wantonly vile, horrible and inhuman.' Such a view may, in fact, have been one to which the members of the jury in this case subscribed. If so, their preconceptions were not dispelled by the trial judge's sentencing instructions. These 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 vague construction applied, there was "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." Id., at 433. Compare Proffit v. Florida, 428 U.S. 242, 254-256, 96 S.Ct. 2960, 2967-2968, 49 L.Ed.2d 913 (1976). It plainly rejected the submission that a particular set of facts surrounding a murder, however shocking they might be, were enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty.

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

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

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

Florida law requires the jury to weigh the aggravating circumstances against mitigating evidence. In fact, Mr. Correll's jury was so instructed. This Court has produced considerable case law regarding the import of instructional error to a jury regarding the mitigation it may consider and balance against the aggravating circumstances. In Mikenas V. Dugger, the court ordered a new sentencing because the jury had not received an instruction explaining that mitigation was not limited to the statutory mitigating factors. The error was cognizable in post-conviction proceedings even though there had been no objection at trial, the issue had not been raised on direct appeal, and at a resentencing to the judge alone, the judge had known that mitigation was not limited to the statutory mitigating factors. It was cognizable because this Court determined that Hitchcock required the sentencing jury in Florida to receive accurate information which channeled and limited its sentencing discretion, but allowed the jury to give full consideration to

the defendant's character and background. Because of the weight attached to the jury's sentencing recommendation in Florida, instructional error is not harmless unless the reviewing court can "conclude beyond a reasonable doubt that an override would have been authorized." Mikenas, 519 So. 2d at 601. In other words, there was sufficient mitigation in the record for the jury to have a reasonable basis for recommending life and thus preclude a jury override.

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

which might mitigate against death."). In Mr. Correll's case the jury received no guidance as to the **"elements"** of the aggravating circumstances against which the evidence in mitigation was balanced. In Florida, the jury's pivotal role in the capital process requires its sentencing discretion to be channeled and limited. The failure to provide Mr. Correll'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, Godfrev v. Georgia, **446** U.S. **420, 433 (1980).** In Mr. Correll's case, the jury was not instructed as to the limiting constructions placed upon of the "cold, calculated and premeditated" aggravating circumstance. The failure to instruct on the **"elements"** of this aggravating circumstance in this case left the jury free to ignore those **"elements,"** and left no principled way to distinguish Mr. Correll'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 Mavnard V. Cartwright.

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

The Tennessee Supreme Court concluded that under Mavnard 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. 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, Mr. Correll's jury received inadequate instructions and his sentence of death violates the eighth amendment.

This Court should now correct Mr. Correll'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).

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

This error undermined the reliability of the jury's sentencing determination and prevented the jury from assessing

the full panoply of mitigation presented by Mr. Correll. For each of the reasons discussed above the Court should vacate Mr. Correll's unconstitutional sentence of death.

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

MR. CORRELL'S SENTENCING JURY WAS REPEATEDLY MISLED BY INSTRUCTIONS AND ARGUMENTS WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED THEIR SENSE OF RESPONSIBILITY FOR SENTENCING, CONTRARY TO HITCHCOCK V. DUGGER, 107 S. CT. 1821 (1987); CALDWELL V. MISSISSIPPI, 105 S. CT. 2633 (1985); AND MANN V. DUGGER, 844 F.2D 1446 (11TH CIR. 1988), AND IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. MR. CORRELL RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO ZEALOUSLY ADVOCATE AND LITIGATE THIS ISSUE.

In Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(in banc), cert. denied, 44 Cr. L. 4192 (1988), relief was granted to a capital habeas corpus petitioner presenting a Caldwell v. Mississippi, 472 U.S. 320 (1985), claim involving prosecutorial and judicial comments and instructions which diminished the

jury's sense of responsibility and violated the eighth amendment in the identical way in which the comments and instructions discussed below violated Mr. Correll' eighth amendment rights. Jerry Correll should be entitled to relief under ~~Mann~~, for there is no discernible difference between the two cases. A contrary result would result in the totally arbitrary and freakish imposition of the death penalty and violate the eighth amendment principles.

Caldwell v. Mississippi, 472 U.S. 320 (1985), involved prosecutorial/judicial diminution of a capital jury's sense of responsibility which is far surpassed by the jury-diminishing statements made during Mr. Correll's trial. The in banc Eleventh Circuit in Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988), and Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988), determined that Caldwell assuredly does apply to a Florida capital sentencing proceeding and that when either judicial instructions or prosecutorial comments minimize the jury's role relief is warranted. See Mann, ~~supra~~. Caldwell involves the most essential eighth amendment requirements to the validity of any death sentence: that such a sentence be individualized (~~i.e.~~, not based on factors having nothing to do with the character of the offender or circumstances of the offense), and that such a sentence be reliable. Id., 105 S. Ct. at 2645-46.

At all trials there are only a few occasions when jurors

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

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

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

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

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

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

From the very start of the trial the role of the jury in sentencing was trivialized in a steady stream of misstatements. The jury was repeatedly told it was the court -- not the jury -- that decides the sentence (R. 198, 202, 211, 252, 256, 263, 266, 270, 278). What was emphasized to Mr. Correll's jury was not, as required, that the jury's sentencing role is integral, central and critical. Rather they were told the "ultimate decision" was the judge's and that the jury only makes a **"recommendation."**

During voir dire the trial judge told Mr. Correll's jury:

> The trial of a capital case is done in

> two phases. In the first phase, evidence is presented concerning the guilt or innocence of the Defendant.
>
> In the event that a defendant is found guilty of first-degree murder, then the second phase will take place. At that phase the jury will be presented with additional evidence and instructed on the law to return a recommended sentence to the Court.
>
> The Court considers this recommendation but is not bound by it. Ultimately, the Court will decide the sentence to be imposed based upon the facts of the case and the law.

(R. 251-52)(emphasis added).

The court's instructions prior to the guilt-innocence deliberations only served to further impermissibly diminish the jury's sense of responsibility:

> I will now inform you of the maximum and minimum possible penalties in this case. The penalty is for the Court to decide. You are not responsible for the penalty in any way because of your verdict. The possible results of this case are to be disregarded as you discuss your verdict.

(R. 1845)(emphasis added).

Prior to the penalty phase the trial court instructed Mr. Correll's jury that:

> THE COURT: Ladies and gentlemen, you have found the defendant guilty of first degree murder. The punishment for this crime is either death or life imprisonment without the possibility of parole for twenty-five years. The final decision as to what punishment shall be imposed rests solely with the Judge of this Court. However, the law requires that you, the jury, rendered to the Court an advisory sentence as to what

punishment should be imposed upon the defendant.

(R. 1863-64). The trial court reemphasized only minutes prior to undertaking penalty phase deliberations the advisory nature of these proceedings:

> THE COURT: Ladies and gentlemen of the jury, it is now Your duty to advise the Court to what punishment should be imposed upon the defendant for his crime of first desree murder.
>
> As You have been told, the final decision as to what punishment shall be imposed, is the responsibility of the Judge; however, it is your duty to follow the law that will now be given to you by the Court and render to the Court an advisory sentence, based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.
>
> Your advisory sentence should be based upon the evidence you have heard while trying the guilt or innocence of the defendant and evidence that has been presented to you in these proceedings.

(R. 2001)(emphasis added).

Rather than stressing that the jury's sentencing decision is integral, and will stand unless patently unreasonable, the trial court stressed to Mr. Correll's jury that the "final decision" belonged to the court.

Again and again, the jury was told it is the judge who "pronounces" sentence. The jury, as if their sentencing

determination were but a political straw poll, was told that they were simply making a recommendation, providing a view which could be taken for whatever it was worth by the true sentencing authority who carried the entire responsibility on his shoulders -- the judge.

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

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

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

Under Florida's capital statute, the jury has the primary responsibility for sentencing. In Hitchcock v. Dusser, 107 S. Ct. 1821 (1987), the United States Supreme Court for the first time held that instructions for the sentencing jury in Florida were governed by the eighth amendment. This was a retroactive change in law. See Downs v. Dusser, 514 So. 2d 1069 (Fla. 1987), which excuses counsel's failure to object to the adequacy of the jury's instructions and the impropriety of prosecutor's comments. Thus, the intimation that a capital sentencing judge has the sole responsibility for the imposition of sentence, or is in any way free to impose whatever sentence he or she sees fit, irrespective of the sentencing jury's own decision, is inaccurate, and is a misstatement of the law. See Mann v. Dusser, 844 F.2d at 1450-55 (discussing critical role of jury in Florida capital sentencing scheme). The judge's role, after all, is not that of the "sole"

or "ultimate" sentencer. Rather, it is to serve as a "buffer where the jury allows emotion to override the duty of a deliberate determination" of the appropriate sentence. Cooper v. State, 336 So. 2d 1133, 1140 (Fla. 1976). While Florida requires the sentencing judge to independently weigh the aggravating and mitigating circumstances and render sentence, the jury's recommendation, which represents the judgment of the community, is entitled to great weight. Mann, supra; McCampbell v. State, 421 So. 2d 1072, 1075 (Fla. 1982). The jury's sentencing verdict may be overturned by the judge only if the facts are "so clear and convincing that virtually no reasonable person could differ." Tedder, 322 So. 2d at 910. Mr. Correll's jury, however, was led to believe that its determination meant very little, as the judge was free to impose whatever sentence he wished. Cf. Mann v. Duaaer.

In Caldwell, 105 S. Ct. 2633, the Court held "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death lies elsewhere," id., 105 S. Ct. at 2639, and that therefore prosecutorial arguments which tended to diminish the role and responsibility of a capital sentencing jury violated the eighth amendment. Because the "view of its role in the capital sentencing procedure" imparted to the jury by the

improper and misleading argument was "fundamentally incompatible with the eighth amendment's heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case,'" the Court vacated Caldwell's death sentence. Caldwell, 105 S. Ct. at 2645. The same vice is apparent in Mr. Correll's case, and Mr. Correll is entitled to the same relief.

The constitutional vice condemned by the Caldwell Court is not only the substantial unreliability that comments such as the ones at issue in Mr. Correll's case inject into the capital sentencing proceeding, but also the danger of bias in favor of the death penalty which such "state-induced suggestions that the sentencing jury may shift its sense of responsibility" create. Id. at 2640. A jury which is unconvinced that death is the appropriate punishment might nevertheless vote to impose death as an expression of its "extreme disapproval of the defendant's acts" if it holds the mistaken belief that its deliberate error will be corrected by the 'ultimate' sentencer, and is thus more likely to impose death regardless of the presence of circumstances calling for a lesser sentence. See Caldwell, 105 S. Ct. at 2641. Moreover, a jury "confronted with the truly awesome responsibility of decreeing death for a fellow human," McGautha v. California, 402 U.S. 183, 208 (1971), might find a diminution of its role and responsibility for sentencing attractive. Caldwell, 105 S. Ct. at 2641-42. As the Caldwell

Court explained:

> In evaluating the prejudicial effect of the prosecutor's argument, we must also recognize that the argument offers jurors a view of their role which might frequently be highly attractive. A capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument on the issue of whether another should die, and they are asked to decide that issue on behalf of the community. Moreover, they are given only partial guidance as to how their judgment should be exercised, leaving them with substantial discretion. Given such a situation, the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize its role. Indeed, one could easily imagine that in a case in which the jury is divided on the proper sentence, the presence of appellate review [or judge sentencing] could effectively be used as an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless give in.

Id. at **2641-42** (emphasis supplied).

The comments and instructions here went a step further -- they were not isolated, as were those in Caldwell, but as in Mann were heard by the jurors at each stage of the proceedings. These cases teach that, given comments such as those provided to Mr. Correll's capital jury, the State must demonstrate that the statements at issue had "no effect" on the jury's sentencing verdict. Id. at **2646**. This the State cannot do. Here the significance of the jury's role was minimized, and the comments

at issue created a danger of bias in favor of the death penalty. Had the jury not been misled and misinformed as to their proper role, had their sense of responsibility not been minimized, and had they consequently voted for life, such a verdict, for a number of reasons, could not have been overridden -- for example, the evidence of non-statutory mitigation was more than a "reasonable basis" which would have precluded an override. See Hall v. State, 14 F.L.W. 101 (Fla. 1989); Brookings v. State, supra, 495 So. 2d 135; McCampbell v. State, supra, 421 So. 2d at 1075. The Caldwell violations here assuredly had an effect on the ultimate sentence. This case, therefore, presents the very danger discussed in Caldwell: that the jury may have voted for death because of the misinformation it had received. This case also presents a classic example of a case where no Caldwell error can be deemed to have had "no effect" on the verdict.

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

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

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

In Florida, the "usual form" of indictment for first degree murder under sec. **782.04,** Fla. Stat. **(1987),** is to "charge[e] murder . . . committed with a premeditated design to effect the death of [the victim.]" Barton v. State, **193** So. 2d **618, 624** (Fla. 2d DCA **1967).**

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

In this case, it is likely that Mr. Correll was convicted on the basis of felony murder. The State argued for a conviction based on the felonies charged, and argued that the victims were killed in the course of a felony. The jury received instructions on premeditated and felony murder. Even though the defense

counsel had requested a special verdict form (R. 1822), the jury it returned a general verdict of guilt on first-degree murder.

If felony murder was the basis of Mr. Correll's conviction, then the subsequent death sentences were unlawful. Cf. Stromberq v. California, 283 U.S. 359 (1931). This is because the death penalties in this case were predicated upon an unreliable automatic finding of a statutory aggravating circumstance -- the felony murder finding that formed the basis for conviction. Automatic death penalties upon conviction of first-degree murder violate the eighth and fourteenth amendments, as was recently stated by the United States Supreme Court in Sumner v. Shuman, 107 S. Ct. 2716 (1987). In this case, felony murder was found as a statutory aggravating circumstance. The murders were committed while the defendant was engaged, or was an accomplice in the commission of a sexual battery and robbery (R. 1792). The sentencing jury was instructed that it was entitled automatically to return a death sentence upon its finding of guilt of first degree (felony) murder because the underlying felony justified a death sentence. Every felony-murder would involve, by necessity, the finding of a statutory aggravating circumstance, a fact which, under the particulars of Florida's statute, violates the eighth amendment: an automatic aggravating circumstance is created which does not narrow ("[A]n aggravating circumstance must genuinely narrow the class of persons eligible for the death

penalty . . . ." Zant v. Stephens, 462 U.S. 862, 876 (1983)). "[L]imiting [] the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." Maynard v. Cartwright, 108 S. Ct. 1853, 1858 (1988). In short, if Mr. Correll was convicted for felony murder, he then faced statutory aggravation for felony murder. This is too circular a system to meaningfully differentiate between who should live and who should die, and it violates the eighth and fourteenth amendments.

The United States Supreme Court recently addressed a similar challenge in Lowenfield v. Phelps, 108 S. Ct. 546 (1988), and the discussion in Lowenfield illustrates the constitutional shortcoming in Mr. Correll's capital sentencing proceeding. In Lowenfield, petitioner was convicted of first degree murder under Louisiana law, which required a finding that he had "a specific intent to kill to inflict great bodily harm upon more than one person," which was the exact aggravating circumstance used to sentence him to death. The United States Supreme Court found that the definition of first degree murder under Louisiana law provided the narrowing necessary for eighth amendment reliability:

> To pass constitutional muster, a capital-sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the

imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, **462** U.S. **862, 877 (1983)**; cf. Gregg v. Georgia, **428** U.S. 153 **(1976)**. Under the capital sentencing laws of most States, the jury is required during the sentencing phase to find at least one aggravating circumstance before it may impose death. Id., at **162-164** (reviewing Georgia sentencing scheme); Proffitt v. Florida, **428** U.S. **242, 247-250 (1976)** (reviewing Florida sentencing scheme). By doing so, the jury narrows the class of persons eligible for the death penalty according to an objective legislative definition. Zant, supra, at **878 ("[S]tatutory** aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty").

* * *

The use of "aggravating circumstances," is not an end in itself, but a means of genuinely narrowing the class of death eligible persons and thereby channeling the jury's discretion. We see no reason why this narrowing function may not be performed by jury findings at either the sentencing phase of the trial or the guilt Phase. Our opinion in Jurek v. Texas, **428** U.S. **262 (1976)**, establishes this point. The Jurek Court upheld the Texas death penalty statute, which, like the Louisiana statute, narrowly defined the categories of murders for which a death sentence could be imposed. If the jury found the defendant guilty of such a murder, it was required to impose death so long as it found beyond a reasonable doubt that the defendant's acts were deliberate, the defendant would probably constitute a continuing threat to society, and, if raised by the evidence, the defendant's acts were an unreasonable response to the victim's provocation. Id., at **269**. We concluded that the latter three elements allowed the jury to consider the mitigating aspects of the crime

and the unique characteristics of the perpetrator, and therefore sufficiently provided for jury discretion. Id., at 271-274. But the Court noted the difference between the Texas scheme, on the one hand, and the Georgia and Florida schemes discussed in the cases of Gregg, supra, and Proffitt, supra:

> While Texas has not adopted a list of statutory aggravating circumstances the existence of which can justify the imposition of the death penalty as have Georgia and Florida, its action in narrowins the categories of murders for which a death sentence may ever be imposed serves much the same purpose . . . . In fact, each of the five classes of murders made capital by the Texas statute is encompassed in Georgia and Florida by one or more of their statutory aqsravatins circumstances . . . . Thus, in essence, the Texas statute requires that the jury find the existence of a statutory aggravating circumstance before the death penalty may be imposed. So far as consideration of aggravating circumstances is concerned, therefore, the principal difference between Texas and the other two States is that the death penalty is an available sentencing option--even potentially--for a smaller class of murders in Texas." 428 U.S., at 270-271 (citations omitted).

It seems clear to us from this discussion that the narrowing function required for a regime of capital punishment may be provided in either of these two ways: The legislature may itself narrow the definition of capital offenses, as Texas and Louisiana have done, so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowins by jury findings of aggravating circumstances at the penalty phase. See also Zant, supra, at 876, n. 13, discussing Jurek

> and concluding, "in Texas, aggravating and mitigating circumstances were not considered at the same stage of the criminal prosecution."

Id. at 554-55 (emphasis added).

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

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

Clearly, "the possibility of bloodshed is inherent in the commission of any violent felony, and . . . is foreseen," Tison v. Arizona, 107 S. Ct. 1676, 1684 (1987), but armed robbery, for example, is nevertheless an offense "for which the death penalty is plainly excessive." Id. at 1683. The same is true of burglary, as Florida cases have made clear. With felony-murder

as the narrower in this case, neither the conviction nor the statutory aggravating circumstance meet constitutional requirements. There is no constitutionally valid criteria for distinguishing Mr. Correll's sentence from those who have committed felony (or, more importantly, premeditated) murder and not received death.

According to this Court the aggravating circumstance of "in the course of a felony" is not sufficient by itself to justify a death sentence in a felony-murder case. Rembert v. State, 445 So. 2d 337, 340 (Fla. 1984)(no way of distinguishing other felony murder cases in which defendants "receive a less severe sentence"); Proffitt v. State, 510 So. 2d 896, 898 (Fla. 1987)("To hold, as argued by the State, that these circumstances justify the death penalty would mean that every murder during the course of a burglary justifies the imposition of the death penalty"). However, here, the jury was instructed on this aggravating circumstance and told that it was sufficient for a recommendation of death unless the mitigating circumstances outweigh the aggravating circumstance. The jury did not receive an instruction explaining the limitation contained in Rembert and Proffitt. There is no way at this juncture to know whether the jury relied on this aggravating circumstance in returning its death recommendation. In Maynard v. Cartwrisht, 108 S. Ct. at 1858, the United States Supreme Court held that the jury

instructions must "adequately inform juries what they must find to impose the death penalty." Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), and its progeny require Florida sentencing juries to be accurately and correctly instructed in compliance with the eighth amendment. Under Mills v. Maryland, 108 S. Ct. 1860, 1870 (1988), "[t]he possibility that a single juror" read the instructions in an unconstitutional fashion requires a resentencing.

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

These fundamental principles of fairness

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

Presnell, **439** U.S. at **18.**

Moreover, Hitchcock and its progeny according to this Court was a change in law which excuses procedural default of penalty phase jury instructional error. Mikenas v. Dugger, **519** So. 2d **601** (Fla. **1988).** There is neither an adequate nor an independent procedural bar.

Surely the jury should have been informed that the automatic aggravating circumstance alone would render a death sentence violative of the eighth amendment. Maynard v. Cartwright, **108** S. Ct. **1853, 1858 (1988);** Zant v. Stephens, **462** U.S. **862, 876 (1983);** Rembert v. State, **445** So. 2d **337, 340** (Fla. **1984).** A stay of execution and habeas relief are warranted.

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

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

THE APPLICATION OF RULE 3.851 TO MR. CORRELL'S CASE WILL VIOLATE, AND THE PRESENT WARRANT HAS VIOLATED, HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW AND DENIED HIM HIS RIGHTS TO REASONABLE ACCESS TO THE COURTS.

The Governor of Florida signed a death warrant against Mr. Correll on January 10, 1990, and Mr. Correll's execution is presently scheduled for March 14, 1990. Under Rule 3.851 and the 13-day extension granted by this Court, Mr. Correll's pleadings must therefore be filed by February 22, 1990. However, under the two-year limitation provision of Rule 3.850, Mr. Correll had until October 3, 1990, to file for post-conviction relief. The signing of Mr. Correll's death warrant has therefore accelerated the time within which he must file for post-conviction relief by eight (8) months. Unlike all of the other more than 32,000 inmates sentenced by Florida courts who have two years from final judgment to bring such actions, Mr. Correll has arbitrarily been deprived of the time remaining in which he could timely file under Rule 3.850. This acceleration is unreasonable and furthers no legitimate state interest. To the contrary, it impedes Mr. Correll's right to properly investigate, research, prepare, and present a Rule 3.850 motion. As this Court has recognized, Rule

3.850 proceedings are governed by due process principles. See Holland v. State, 503 So. 2d 1250 (Fla. 1987). The timing of the litigation of Mr. Correll's post-conviction actions, however, has now been dictated by the Governor, a non-judicial officer and a party opponent, through the signing of a death warrant. Due process and equal protection do not countenance such a result.

The Governor's stated policy is to issue death warrants as soon and as frequently as possible to "keep the pressure on" capital defense attorneys. Rule 3.851, under these circumstances, indeed creates a pressure-cooker atmosphere. This Court, however, through the creation and implementation of Rule 3.851, could not have intended that the State receive a windfall benefit, or that the inmate suffer a significant detriment -- the arbitrary acceleration of the litigation of this action is a substantial detriment to Mr. Correll, as is the arbitrary deprivation of five months from the time allotted for the filing of a Rule 3.850 motion; both benefit the State at Mr. Correll's expense. No rule of criminal procedure could possibly be interpreted as an attempt by the Court to provide a strategic advantage to one of a controversy's litigants. (In this case, not only does Rule 3.851 provide the state's executive with such a strategic advantage, but it has allowed the executive [a party opponent] to specifically determine the timing of this action.) Indeed, the Court's rationale was that Rule 3.851 "[was]

necessary to provide more meaningful and orderly access to the courts when death warrants are signed." In re Florida Rules of Criminal Procedure, Rule 3.851, 503 So. 2d 320, 321 (Fla. 1987) (emphasis added). The arbitrary and discriminatory acceleration of the filing requirements applicable to Mr. Correll's case, however, denies that very right to "orderly access to the courts," and disrupts precisely the order sought by this Court. Cf. Davis v. Dugger, 829 F.2d 1513, 1521 (11th Cir. 1987) (Dismissal of habeas petition reversed and case remanded, because "[i]t was . . . the scheduling of petitioner's execution . . . [that] created the prejudice that respondent contends justified the district court's [dismissal] of the habeas petition . . . [P]rejudice must be due to the petitioner's delay and not to some other factor . . ."(emphasis in original); see also id. at 1520 ("[I]t would be anomalous to hold that pursuit of collateral relief within the two-year statutory limitations period in Florida might nevertheless constitute unreasonable delay . . .").

Rule 3.851 provides:

> Expiration of the thirty-day period procedurally bars any later petition unless it is alleged (1) that the facts upon which the claim is predicated were unknown to the movant and could not have been ascertained by the exercise of due diligence prior to the end of the thirty-day period, ...

This rule, to the extent that it grants to the Governor of Florida, a non-judicial officer, and a party opponent, the

ability to curtail access to the courts by shortening the two-year period in which a Rule 3.850 motion may be filed is unconstitutional. Moreover, the facts supporting a post-conviction claim for relief cannot become known unless the case is adequately investigated. A case cannot be adequately investigated when counsels' duties are made impossible to fulfill, or where, as here, a death warrant is arbitrarily signed, and arbitrarily accelerates the relevant filing date.

The United States Supreme Court in a long line of cases beginning with Griffin v. Illinois, 351 U.S. 12 (1956), recognized the right of convicted inmates to unrestricted access to the courts in order to use established avenues for seeking post-conviction relief.

In Lane v. Brown, 372 U.S. 477 (1963), the United States Supreme Court addressed the Indiana post-conviction procedure which authorized an appeal to the Indiana Supreme Court from the denial of a writ of error coram nobis. The appeal, however, was dependent upon the filing with the Indiana Supreme Court of a trial transcript -- in fact this was a jurisdictional requirement. An indigent petitioner could only get a transcript for purposes of meeting the jurisdictional requirement if the state public defender believed there was merit in the appeal and agreed to direct that the transcript be prepared and sent to the Supreme Court. The United States Supreme Court struck this

procedure down saying: "The provision before us confers upon a state officer outside the judicial system power to take from an indigent all hope of any appeal at all." 372 U.S. at 485.

Three years later in Rinaldi V. Yeaser, 384 U.S. 305 (1966), the United States Supreme Court addressed the constitutionality of a New Jersey provision which authorized the withholding of prison pay from an unsuccessful indigent appellant in order to recoup the cost of the appeal. In striking the provision down that Court pronounced: "This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts."

The Court again discussed the Griffin progeny in Bounds v. Smith, 430 U.S. 817 (1977). There the question was an inmate's right to a law library or legal assistance. The Court's opinion observed: "It is now established beyond doubt that prisoners have a constitutional right of access to the courts." 430 U.S. at 821. Implicit in the Court's reasoning was the notion that Griffin and its progeny are founded upon the fundamental right to court access and thus that under either substantive due process or equal protection analyses distinctions between individuals and/or groups must withstand strict scrutiny.

The United States Supreme Court has thus made it very clear

that where a state provides an inmate with a procedure for seeking post-conviction relief, there arises the fundamental right of access to the courts in order to take advantage of the established procedure. At issue here, in the application of Rule **3.851** to Mr. Correll's case, are two distinctions: first, the distinction between the capital defendant and the non-capital defendant; and second, the distinction between the capital defendant under warrant and the capital defendant not under warrant. For Rule **3.851** to be constitutionally applied to deprive Mr. Correll of any of his remaining time to seek Rule **3.850** relief these distinctions must be shown to be necessary to a compelling state interest. There exists no such interest here.

Obviously, the two-year limitation established by Rule **3.850** itself for seeking relief was created to give convictions finality. However, if that was the only consideration, this Court could have easily established a one month, or one week, as opposed to a two-year limitation. The Court could not but have had another competing concern in mind. This was the realization that time is essential to prepare a Rule **3.850** motion **--** time to investigate, to research, and to prepare. The Legislature in creating CCR to assist death row inmates in the preparation and presentation of Rule **3.850** motions must also have recognized the time, energy, skills, and costs associated with pursuing a Rule **3.850** motion. Rule **3.850** contains no distinction between capital

and non-capital movants; the rule applies equally to all. However, the time that the death row inmate has to marshall his resources and prepare his Rule **3.850** motion can without warning be slashed to thirty days. A distinction can arbitrarily be made between one death row inmate and another death row inmate, and between capital and non-capital litigants. The distinction is made by the executive, a party opponent, when he signs a warrant before the two-year period to file a Rule 3.850 motion has run. When that occurs, whatever remains of the two-year period under Rule 3.850 is automatically converted to thirty days. **See** Rule 3.851. Mr. Correll has been denied quite an important portion of that two-year period.

In addition, the Governor by signing unprecedented numbers of warrants over the past year has placed intolerable burdens upon CCR's resources. The signing of the warrants has reached the height of capriciousness. Mr. Correll was arbitrarily chosen by the Governor to be one (1) of the twenty-five **(25)** warrant cases litigated by an overtaxed CCR since August 30, **1989.** Counsel for CCR are presently overwhelmed with eight **(8)** active death warrant cases in addition to numerous non-warrant briefs, pleadings, oral arguments, and evidentiary hearings. The CCR's small staff of eleven attorneys must represent the vast majority of Florida's **310** (+) capital inmates whose actions are in the post-conviction stage of proceedings, pursuant to CCR's statutory

mandate.

The distinction made by the Governor in the words of Rinaldi v. Yeaqer, supra, 384 U.S. 305, is "unreasoned", and arises when the two-year limitation is applied only against the death row inmate but not against the State. The two-year limit in Rule 3.850 represented a balancing which gave to the State a date certain and which created, in return, an obligation on the State to honor that date. The state's executive officer, however, is allowed to flout the rule by the arbitrary signing of a death warrant, and by arbitrarily chosing to sign unprecedented numbers of death warrants, thus whipsawing collateral counsel.

To the extent that Rule 3.851 is interpreted to permit the Governor to shorten the two-year period established by Rule 3.850, it creates a distinction which, in the words of Lane v. Brown, "confers upon a state officer outside the judicial system [the] power to take from an indigent." In Lane, the state officer involved was the public defender, not a party opponent. Even this, however, was not enough -- the Court struck down the statute. Certainly, the application of Rule 3.851 against Mr. Correll gives to the Governor the power to impede open and equal access to the courts; exactly what has been held time and again to be improper.

To be constitutional, Rule 3.851 must be construed as only applying to Rule 3.850 motions which are or may be filed beyond

the two-year time limit. Its application to those cases in which the two years has not run infringes upon the very right of access to the courts which Rule **3.850's** two-year standard sought to protect.

Moreover, due process and equal protection cannot be squared with the fact that although Rule **3.850** provided Mr. Correll two (2) years within which to prepare and file a Rule **3.850** motion, the executive is arbitrarily permitted to deny that state-created "liberty interest" through the signing of a death warrant. Cf. Hicks v. Oklahoma, **447** U.S. **343 (1980);** Vitek v. Jones, **445** U.S. **480, 488-89 (1980).** Rule **3.850's** two-year limitation was created, in part, to assure the inmates' right to reasonable access to a post-conviction forum. The dictates of Evitts v. Lucey thus apply to Mr. Correll's case and make clear his entitlement to the relief sought herein:

> [W]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the constitution -- and, in particular, in accord with the Due Process Clause.

469 U.S. **387, 401 (1985);** see also Johnson v. Avery, **393** U.S. **483, 488 (1969);** Smith v. Bennett, **305** U.S. 708, **713 (1961).** The Governor's arbitrary action in this case has violated the very test of due process which the United States Supreme Court has made mandatory in such instances -- Mr. Correll is deprived of "a

reasonable opportunity" to have his claims fairly presented to, and heard and determined by the state courts. See Michael v. Louisiana, 350 U.S. 91, 93 (1953); Reece v. Georgia, 350 U.S. 85 (1955). Finally, due process is violated because this case involves a classic example of "interference by [State] officials" -- the Governor -- which impedes Mr. Correll's rights to full and fair access to courts. Cf. Brown v. Allen, 344 U.S. 443, 486 (1953), quoted in Murray v. Carrier, 106 S. Ct. 2639, 2646 (1986).

As the in banc Eleventh Circuit Court of Appeals stated in Spencer v. Kemp, 781 F.2d 1458, 1470 (1986):

> [A] state procedural rule that is facially valid and has been consistently followed by the state courts will not preclude review of federal claims where its application in a particular case does not satisfy constitutional requirements of due process of law. Reece v. Georgia, 350 U.S. 85, 76 S.Ct. 167, 100 L.Ed. 77 (1955).

Here, the Governor's stated purpose is to "keep the pressure on" the capital defense attorneys. Mr. Correll has thus been denied the protections of Rule 3.850 through the arbitrary actions of the state's executive -- actions whose purposes (keeping the pressure on attorneys) have no relationship to any legitimate and constitutionally recognized state interest, but which have nevertheless impeded and restricted Mr. Correll's rights to due process, equal protection, and reasonable access to courts, and which have arbitrarily deprived him of the liberty interest

created by Rule 3.850. All parties, not just the defendant, must be required to honor the two-year limit established by Rule 3.850.

As noted, Mr. Correll's Rule 3.850 motion was due on October 3, 1990, until his death warrant was signed. After the signing of a death warrant against Mr. Correll on January 10, 1990, which advanced this due date to February 22, 1990 (with this Court's brief extension), Mr. Correll's counsel accelerated the steps necessary for the proper preparation of a post-conviction pleading. Cf. Spalding v. Dugger, 526 So. 2d 71 (Fla. 1988). Considering the crisis-posture CCR has been placed in by the Governor's action in signing twenty-five (25) death warrants within five (5) months, it is clear that the interests served by Rules 3.850 and 3.851 will be rendered illusory unless the relief herein sought is provided. Although investigation is underway, and duly diligent review of the voluminous record has begun, neither can possibly be professionally completed by February 22, 1990. At the very least, Mr. Correll should be given until October 3, 1990, the original, proper filing date, to further investigate and amend his 3.850 motion. Granting the requested relief will not prejudice the State respondent, in whose custody Mr. Correll will remain. See Davis v. Dugger, supra, 829 F.2d 1513. Granting the requested relief is further justified by the fact that the claims Mr. Correll asserts herein are significant

and deserve adequate investigation and consideration.

Accordingly, Mr. Correll urges that the Court enter an Order staying his execution and allowing him leave to amend his pleading.

~~CONCLUSION AND RELIEF SOUGHT~~

The 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 his client the "expert professional . . . assistance . . . necessary in a system governed by complex laws and rules and procedures. . . ." Lucey, 105 S. Ct. at 835 n.6.

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

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

> 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. Matire v. Wainwriaht, 811 F.2d 1430, 1438 (11th Cir.

1987). As in Matire, Mr. Correll is entitled to relief. See also Wilson v. Wainwright, supra; Johnson v. Wainwrisht, supra.

This petition also presents independent claims raising matters of fundamental error and/or claims predicated upon significant changes in the law. Because the foregoing claims present substantial constitutional questions which go to the heart of the fundamental fairness and reliability of Mr. Correll's capital conviction and sentence of death, and of this Court's appellate review, they should be determined on their merits. 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.

WHEREFORE, Jerry William Correll, through counsel, respectfully urges that the Court issue its writ of habeas corpus and vacate his unconstitutional conviction and sentence of death. He also prays that the Court stay his execution on the basis of, and in order to fully determine, the significant claims herein presented. Since this action also presents question of fact, Mr. Correll 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 the claims presented, including, inter alia, questions regarding counsel's deficient performance.

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing has been furnished by U.S. Mail, first class, postage prepaid, to Margene A. Roper, Assistant Attorney General, **125** North Ridgewood Avenue, Fourth Floor, Daytona Beach, **Florida 32014, this** 22ND **day of** February, **1990.**

_____
Attorney