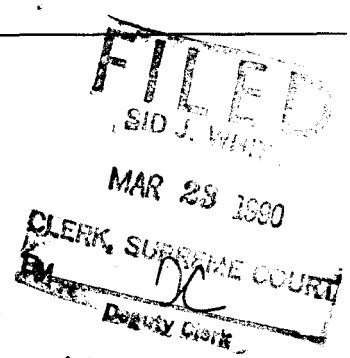
IN THE SUPREME COURT OF FLORIDA

NO. 75739



WILLIE MITCHELL, JR.,

Petitioner,

v.

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

Respondent.

PETITION FOR EXTRAORDINARY RELIEF,
FOR A WRIT OF HABEAS CORPUS

LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. 0125540

JUDITH J. DOUGHERTY
Assistant CCR
Florida Bar No. 0187786

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

COUNSEL FOR PETITIONER

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

A. JURISDICTION

This is an original action under Fla. R. App. P. 9.100(a). This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents constitutional issues which directly concern the judgment of this Court during the appellate process, and the legality of Mr. Mitchell's capital conviction and sentence of death. In November, 1986, Mr. Mitchell was sentenced to death. Direct appeal was taken to this Court. The trial court's judgment and sentence were affirmed. Mitchell v. State, 527 So. 2d 179 (Fla. 1988). Jurisdiction in this action lies in this Court, see, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein involved the appellate review process. See Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); see also Johnson v. Wainwright, 498 So. 2d 938 (Fla. 1987); cf. Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Mitchell to raise the claims presented herein. See, e.g., Jackson v. Dugger, 547 So. 2d 1197 (Fla.

1989); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); Wilson, supra.

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

With regard to ineffective assistance, the challenged acts and omissions of Mr. Mitchell's appellate counsel occurred before this Court. This Court therefore has jurisdiction to entertain Mr. Mitchell'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. Mitchell 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. Mitchell's claims are presented below. They demonstrate that habeas corpus relief is proper in this case.

II. GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Mitchell 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. Mitchell'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

THE PRECLUSION OF CROSS-EXAMINATION OF THE STATE'S WITNESS, ANNIE HARDEN, VIOLATED MR. HEINEY'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

The defendant's right to confront and cross-examine the witnesses against him is fundamental safeguard "essential to a fair trial in a criminal prosecution." Pointer v. Texas, 380 U.S. 403, 404 (1965). Mr. Mitchell was denied his right to confront and cross-examine the witnesses against him when trial counsel was precluded from conducting full cross-examination of Annie Harden.

Annie Harden was called as witness for the State. She was called upon to recount her knowledge of the facts on the night of the homicide. After the State concluded their direct examination, the court refused to allow Mr. Lufriu to proceed with cross-examination regarding her prior convictions:

Q. Have you ever been convicted of a crime?

A. Yes, I have.

Q. How many times?

A. Twice.

Q. What have you been convicted of?

MR. BENITO: Judge, objection.

THE COURT: Sustain the objection.

THE WITNESS: Oh, I was convicted of --

THE COURT: Excuse me. You don't have to answer that question. Next question.

MR. LUFRIU: Excuse me, Your Honor.

BY MR. LUFRIU:

Q. Have you ever been convicted of a felony?

THE COURT: Well, excuse me. Let's pass it.

(R. 81)(emphasis added).

Annie Harden was the State's most critical witness. It was upon her testimony that the State constructed their argument that Mr. Mitchell was wearing a bloody shirt. Obviously, it was critical to the defense to fully explore this witness' credibility and to effectively impeach her testimony before the jury. However, cross-examination was never permitted.

There can be no doubt that this 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 the there may be other reasons to doubt the State's reliance upon the witnesses testimony. For example, where a witness who had claimed to have heard something could have misunderstood. Sometimes a witness

will herself have a benign explanation for what appears to be very incriminating evidence. For that reason 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 of prejudice would cure it.

Smith v. Illinois, 390 U.S. 129, 131, 88 S. Ct. 748, 749, 19 L.Ed.2d 956, 959 (1968).

The prejudice to the petitioner resulting from this denial of cross-examination and confrontation rights is manifest when the testimony of this witness is analyzed in the context of the testimony that may have been elicited during cross-examination.

Information could have been elicited for the jury that not only did Annie Harden have a prior record, but that the prosecutor was assisting her in regard to a pending charge just prior to her testimony in Mr. Mitchell's case. Many critical questions for the defense remained unanswered due to the preclusion of the cross-examination.

In Alford v. United States, 282 U.S. 687, 51 S. Ct. 218, 75 L.Ed. 624 (1931), the Supreme Court in recognizing that cross-examination of a witness is a matter of right, stated:

> [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, 75 L.Ed. at 628.

This constitutional error contributed to Mr. Mitchell'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. 1792 (1988).

This violation of the confrontation clause allowed the jury to assess Annie Harden's testimony without the knowledge that cross-examination would have revealed. The jury should have been granted the opportunity to properly weigh Ms. Harden's testimony. The preclusion of cross-examination prevented the jury from reaching a reliable verdict.

A criminal defendant's right to cross-examine witnesses is one of the basic guarantees to 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 has 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, 1413, 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, the 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 off 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).

The State of Florida has recognized the overriding importance of the right to confront a witness time and time again. In State v. Stubbs, 239 So. 2d 241, 242 (Fla. 1970), the court pointed out that the effect of the preclusion of cross-examination of even written evidence taints the evidence which is offered:

> It is clear that the rationale of Bruton is simply that when oral evidence, even if reduced to writing, is introduced which may be considered by the jury as evidence against a defendant, the opportunity for cross-examination should be given else the evidence is tainted.

A mere formal proffer of an opportunity to cross-examine is not a sufficient observance of the right.

> The right of a defendant to cross-examine witnesses and his right to present evidence in opposition to or in explanation of adverse evidence are essential to a fair hearing and due process of law. See Horton v. State, Fla.App.1964, 170 So.2d 470 at 474.
>
> After a careful examination of the record on appeal, we conclude that there was no indication of probable tampering with the packets of heroin and thus, these packets should have been introduced into evidence.

> See Bernard v. State, Fla.App.1973, 275 So.2d 34 and cases cited therein. The packets in the case sub judice having been marked for identification, but not introduced into evidence, defendant was denied thereby of a real opportunity to cross-examine the witnesses of the prosecution. For a mere formal proffer of an opportunity to cross-examine, where the circumstances as in the case at bar are such that the accused cannot effectively avail himself of it, is not a sufficient observance of the right. 21 Am.Jur.2d Criminal Law sec. 333 (1965).

(Emphasis added). Alexander v. State, 288 So. 2d 538, 539 (Fla. 3d DCA 1974). Furthermore, the right of confrontation cannot be taken from a defendant without a knowing and voluntary waiver of the constitutional gurantees of due process, right to counsel, and right to confront adverse witnesses, Whitney v. Cochran, 152 So. 2d 727 (Fla. 1963), cert. denied 375 U.S. 888 rehearing denied, 375 U.S. 949. It is only after the defendant has had the opportunity to exercise the right to full cross-examination that the discretion of the court to limit the scope of the examination becomes operative. U.S. v. Greenberg, 423 F.2d 1106 (1970).

Here, Mr. Mitchell's cross-examination of Annie Harden was not merely limited as in Davis, but actually precluded. The preclusion of cross-examination here is far more serious but with a much less substantial basis than the limitation which occurred in Davis.

The preclusion of cross-examination at Mr. Mitchell's trial presented a wholly irrelevant factor for the jury's

consideration.

Without the opportunity of subjecting Annie Harden to full cross-examination, Mr. Mitchell was deprived of his fundamental rights. What is more basic to the right to defend than the right to cross-examine? The State relied on the evidence provided by Annie Harden to make its case and its argument in both the guilt and penalty phases. Yet, the State deliberately precluded the defense's right to cross-examine.

As a result, the proceedings against Mr. Mitchell were fundamentally flawed. His conviction and sentence of death are unreliable and 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. Mitchell. For each of the reasons discussed above the Court should vacate Mr. Mitchell's unconstitutional sentence of death.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Mitchell'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. Mitchell of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra. Accordingly, habeas relief must be accorded now.

CLAIM II

MR. MITCHELL'S SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS SHIFTED THE BURDEN TO MR. MITCHELL TO PROVE THAT DEATH WAS INAPPROPRIATE AND DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN FAILING TO OBJECT TO THE ERROR.

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 <u>if the state showed the aggravating circumstances outweighed the mitigating circumstances</u>.

<u>State v. Dixon</u>, 283 So. 2d 1 (Fla. 1973)(emphasis added). This straightforward standard was never applied at the penalty phase of Mr. Mitchell's capital proceedings. To the contrary, both the court and the prosecutor shifted to Mr. Mitchell the burden of proving whether he should live or die. In <u>Hamblen v. Dugger</u>, 546 So. 2d 1039 (Fla. 1989), a capital post-conviction action, the Florida Supreme 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 <u>Hamblen</u> opinion reflects that these claims should be addressed on a case-by-case basis in capital post-conviction actions. Mr. Mitchell 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. See Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990).

Shifting the burden to the defendant to establish that mitigating circumstances outweigh aggravating circumstances conflicts with the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), and Dixon, for such instructions unconstitutionally shift to the defendant the burden with regard to the ultimate question of whether he should live or die. In so instructing a capital sentencing jury, a court injects misleading and irrelevant factors into the sentencing determination, thus violating Caldwell v. Mississippi, 472 U.S. 320 (1985), Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), and Maynard v. Cartwright, 108 S. Ct. 1853 (1988).

Mr. Mitchell's jury was unconstitutionally instructed (R. 611, 632). In addition the jury was improperly allowed to consider the cold, calculated and premeditated aggravating circumstance. There is thus a special need for a proper weighing to determine if valid aggravating circumstances outweigh the mitigation.

At the penalty phase of trial, the judge instructed Mr. Mitchell's jury that its task was to decide whether mitigating factors outweighed aggravating factors:

> The State and the defendant may now present evidence relative to the nature of the crime and the character of the defendant.
>
> You are instructed that this evidence, when considered with the evidence you've heard, is presented in order that you might determine, first, whether sufficient aggravating circumstances exist that would justify the imposition of the death penalty, and, second, whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any.
>
> At the conclusion of the taking of the evidence and after argument of Counsel, you will be instructed on the factors in aggravation and mitigation that you may consider.

(R. 611).

In its final instructions to the jury, the court repeated the inaccurate and erroneous instructions:

> As you have been told, the final decision as to how punishment shall be imposed is my responsibility; however, it is your duty to follow the law that will now be given you by the Court and render to me 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.

(R. 632). And again the court instructed the jury:

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

(R. 633).

The consistent repetition of this burden-shifting instruction must have misled the jury. The inevitable result is a shift to Mr. Mitchell of the burden to prove a life sentence appropriate.

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. Mitchell should live or die. See Smith v. Murray, 106 S. Ct. 2661, 2668 (1986). No bars apply under such circumstances. Id. A writ of certiorari has been granted to resolve the split of authority between Adamson and the Arizona Supreme Court. Walton v. Arizona, 110 S. Ct. 49 (1989).

The jury instructions here employed a presumption of death which shifted to Mr. Mitchell the burden of proving that life was the appropriate sentence. As a result, Mr. Mitchell'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. Mitchell'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. Mitchell 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. Mitchell'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 and give effect to mitigation, in violation of Penry v. Lynaugh, 109 S. Ct. 2935 (1989), a decision declared on its face to apply retroactively to cases on collateral review.

Here, the jury was told that death was, in essence, presumed appropriate once aggravating circumstances were established, unless Mr. Mitchell 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. Mitchell had the ultimate burden to prove that life was appropriate, and that unless mitigation outweighed aggravation the mitigation was to be given no effect. This violates the eighth amendment.

This error cannot be deemed harmless. In Mills v. Maryland, 108 S. Ct. 1860 (1988), the court concluded that, in the capital sentencing context, the Constitution requires resentencing unless a reviewing court can rule out the possibility that the jury's verdict rested on an improper ground. Id. 108 S. Ct. at 1866-67. Under Hitchcock, Florida juries must be instructed in accord with the eighth amendment principles. Hitchcock constituted a change in law in this regard. The constitutionally mandated standard demonstrates that relief is warranted in Mr. Mitchell's case.

Under the instructions and standard employed in Mr. Mitchell's case, once one of the statutory aggravating circumstances was found, by definition sufficient aggravation existed to impose death. The jury was then directed to consider whether mitigation had been presented which outweighed the aggravation. Thus, under the standard employed in Mr. Mitchell's case, the finding of an aggravating circumstance operated to create a presumption of death. 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.

The effects feared in Adamson and Mills are precisely the effects resulting from the burden-shifting instruction given in Mr. Mitchell'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. Mitchell'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. Mitchell should live or die. Mitchell v. Murray, 106 S. Ct. at 2668.

Under Hitchcock and its progeny, no bars apply, because Hitchcock, decided after Mr. Mitchell's trial, was a change in law.

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

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

CLAIM III

MR. MITCHELL'S SENTENCE OF DEATH WAS BASED UPON MISINFORMATION OF CONSTITUTIONAL MAGNITUDE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

In United States v. Tucker, 404 U.S. 443, 447-49 (1972), the Supreme Court held that a sentence in a noncapital case must be set aside as a violation of due process if the trial court relied even in part upon "misinformation of constitutional magnitude."

As articulated in Zant v. Stephens, 462 U.S. 879 (1983) this rule is absolute and does not depend upon the presence or absence of other aggravating or mitigating factors for its application. Reconsideration of the sentence is required. See Tucker, 404 U.S. at 448-449; Lipscomb v. Clark, 468 F. 2d 132, 1323 (5th Cir. 1972).

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

> The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special "'need for reliability in the determination that death is the appropriate punishment'" in any capital case. See Gardner v. Florida, 430 U.S. 349, 363-364, 97 S. Ct. 1197, 1207-1208, 51 L.Ed.2d 393 (1977) (quoting Woodson v. North Carolina, 428 U.S. 280, 305, 96 S. Ct. 2978, 2991-92, 49 L.Ed.29 944 (1976)) (White, J., concurring in judgment). Although we have acknowledged that "there can be 'no perfect procedure for deciding in which cases governmental authority should be used to impose death,'" we have also made it clear that such decisions cannot be predicated on mere "caprice" or on "factors that are constitutionally impermissible or totally irrelevant to the sentencing process." Zant v. Stephens, 462 U.S. 862, 884-885, 887, n.24, 103 S. Ct. 2733, 2747, 2748, no.24, 77 L.Ed.2d 235 (1983).
>
> . . . .
>
> Contrary to the opinion expressed by the Mississippi Supreme Court, the fact that petitioner served time in prison pursuant to an invalid conviction does not make the conviction itself relevant to the sentencing

> decision. The possible relevance of the conduct which gave rise to the assault charge is of no significance here because the jury was not presented with any evidence describing that conduct-the document submitted to the jury proved only the facts of conviction and confinement, nothing more. That petitioner was imprisoned is not proof that he was guilty of the offense; indeed it would be perverse to treat the imposition of punishment pursuant to an invalid conviction as an aggravating circumstance.

At Mr. Mitchell's penalty phase proceeding, the following occurred:

> MR. BENITO: Your Honor, at this time I would move into evidence a certified copy, State's Exhibit 45, a certified copy of the defendant's prior conviction on April 5, 1971, of robbery.
>
> THE COURT: I will note the defense objection. It will be received.
>
> [State's Exhibit 45 was received.]
>
> MR. BENITO: That is all I have, Judge.

(R. 613).

State's Exhibit 45 was in fact not a copy of the Defendant's prior conviction on April 5, 1971, of robbery. It was a receipt for Mr. Mitchell's arrival at the Reception and Medical Center at Lake Butler, Florida. It noted that Mr. Mitchell had been sentenced to twenty (20) years for the crime of robbery. It was not, as represented by the State, the judgment and sentence.

As long as 50 years ago, the United States Supreme Court established the principle that a prosecutor's knowing use of

false evidence violates a criminal defendant's right to due process of law. Mooney v. Holohan, 294 U.S. 103 (1935). The fourteenth amendment's due process clause, at a minimum, demands that a prosecutor adhere to fundamental principles of justice: "The [prosecutor] is the representative . . . of a sovereignty . . . whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88 (1935).

A prosecutor not only has the constitutional duty to alert the defense when a State's witness gives false testimony, Napue v. Illinois, 360 U.S. 264 (1959); Mooney v. Holohan, supra, but also to correct the presentation of false state witness testimony when it occurs. Alcorta v. Texas, 355 U.S. 28 (1957). The State's use of false evidence violates due process whether it relates to a substantive issue, Alcorta, supra, the credibility of a State's witness, Napue, supra; Giglio v. United States, 405 U.S. 150, 154 (1972), or interpretation and explanation of evidence, Miller v. Pate, 386 U.S. 1 (1967); such State misconduct also violates due process when evidence is manipulated. Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974).

In short, the State's knowing use of false or misleading testimony is "fundamentally unfair" because it is "a corruption of the truth-seeking function of the trial process." United

States v. Agurs, supra, 427 U.S. at 103-04 and n.8. Consequently, unlike cases where the denial of due process stems solely from the suppression of evidence favorable to the defense, in cases involving the use of false testimony, "the Court has applied a strict standard . . . not just because [such cases] involve prosecutorial misconduct, but more importantly because [such cases] involve a corruption of the truth-seeking process." Agurs, 427 U.S. at 104.

Here, the only evidence supporting the aggravating circumstance of prior crime of violence was improperly admitted and considered. It was misleading evidence. Since no other evidence was introduced to support the aggravating circumstance, that aggravating factor must be stricken as it was in Johnson v. Mississippi, supra.

Since previously one other aggravating factor has already been stricken, a new sentencing is required. The error cannot be found harmless beyond a reasonable doubt. This Court normally remands for resentencing when aggravating circumstances are invalidated. See, e.g., Alvin v. State, 548 So. 2d 1112 (Fla. 1989)(remanded for resentencing where one of two aggravators struck and no mitigating factor found before circuit court); Schafer v. State., 537 So. 2d 988 (Fla. 1989) (remanded for resentencing where three of five aggravating circumstances stricken and no mitigating circumstances identified); Nibert v.

State, 508 So. 2d 1 (Fla. 1987) (remanded for resentencing where one of two aggravating circumstances stricken and no mitigating circumstances found); cf. Rembert v. State, 445 So. 2d 337 (Fla. 1984) (directing imposition of life sentence where one of two aggravating circumstances stricken and no mitigating circumstances found). The striking of this additional aggravating factor requires resentencing. Schafer, supra. Id. The "harm" before the jury is plain -- a jury's capital sentencing decision, after all, is not a mechanical counting of aggravators and involves a great deal more than that. The error denied Mr. Mitchell an individualized and reliable capital sentencing determination. Knight v. Dugger, 863 F.2d 705, 710 (11th Cir. 1989). The errors committed here cannot be found to be harmless beyond a reasonable doubt.

Currently pending before the United States Supreme Court is the case of Clemons v. Mississippi, 109 S. Ct. 3184 (1989). The issue there is whether a court can usurp the sentencing function by reweighing the aggravation and mitigation when eighth amendment error tainted the original jury sentencing.

Mr. Mitchell's jury, after being instructed to weigh the aggravating circumstances against the mitigating and determine if the mitigating outweighed the aggravating, returned a seven to five death recommendation. Only one of the seven jurors needed to have changed sides because of the prior crime of violence or

because of the cold, calculated and premeditated aggravating circumstance.

As noted in Johnson, "[M]ore importantly, the error here extended beyond the mere invalidation of an aggravating circumstance ... Here the jury was allowed to consider evidence that has been revealed to be materially inaccurate." Johnson, 108 S. Ct. at 1989. In Mr. Mitchell's case, the identical eighth amendment violation occurred.

Mr. Mitchell's sentence of death violates the eighth amendment as explained in Johnson v. Mississippi.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Mitchell'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. 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. Mitchell of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra. Accordingly, habeas relief must be accorded now.

CLAIM IV

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

The State went to great efforts to elicit sympathy from the jury for the victim and his family. The State called the victim's son, Bruce Shonyo, during their case-in-chief under the guise that he was needed to connect the items Mr. Mitchell stole from the truck to his father, the victim. This charade was wholly unnecessary. Mr. Mitchell admitted taking the items from the truck. This fact was not at issue.

What was at issue was the State's desire to put Bruce Shonyo, a Tampa Police Officer, on the stand in full uniform to elicit sympathy from the jury. Although wholly irrelevant to the case trial counsel unreasonably failed to object. The State asked the son of the victim such relevant questions as:

> Q: How long have you been with the Tampa Police Department?
>
> A: Approximately five-and-a-half years.

(R. 115).

Under the guise of rebutting an allegation that Mr. Shonyo was the victim of a homosexual rage killing, the State inquired into the family history of the victim (R. 120).

During the guilt phase closing argument the prosecutor again informed the jury that the victim was a family man (R. 502). This fact is not relevant to any issue at bar.

In disregard of the constitution, but in the spirit of theatrical production, the prosecutor ended his guilt phase argument with this emotional salvo:

> Ladies and gentlemen, during the course of this trial, three people -- three people -- have sat at that defense table. I have sat over there. I've not sat there alone. I have sat there with Walter Shonyo. Every time there is a mention about homosexual activity, every time there is a mention about anal intercourse, and every time there is a mention about oral intercourse, every time there is a mention about semen in the anus, Mr. Shonyo winced and Mr. Shonyo angered and Mr. Shonyo gripped the edge of the table.

> He is not here to tell you what happened in that truck that night, but the evidence has told you what happened, and now you can tell him you know what happened, and you can tell him that by coming back in this courtroom, looking him straight in the eye and saying, "You're guilty, Mr. Mitchell. You're guilty as charged in the two-count indictment of the armed robbery and the first-degree murder of Walter Shonyo."
>
> Tell him you know what happened in that truck. Thank you, ladies and gentlemen.

(R. 570-72). This inflammatory argument is not only violative of the eighth amendment, it violates basic due process.

During penalty phase argument the state took one last shot at inflaming the jury before they decided whether to recommend if Mr. Mitchell should live or die.

> If Walter Shonyo had had a choice to go to jail for life rather than die, what choice would Mr. Shonyo have made? People want to live. Walter Shonyo did not have that choice, and you know why he didn't have that choice? Because this man decided for himself that Walter Shonyo should die.

(R. 629).

In Booth, the United States Supreme Court held that "the introduction of [a victim impact statement] at the sentencing phase of a capital murder trial violates the Eighth Amendment." Id. at 2536. The victim impact statement in Booth contained descriptions of the personal characteristics of the victim, the emotional impact of crimes on the family and opinions and characterizations of the crimes and the defendant "create[ing] a

constitutionally unacceptable risk that the [sentencer] may [have] impose[d] the death penalty in a arbitrary and capricious manner." Id. at 2533 (emphasis added). Similarly, in South Carolina v. Gathers, 109 S. Ct. 2207 (1989), the court vacated the death sentence there based on admissible evidence introduced during the guilt-innocence phase of the trial from which the prosecutor fashioned a victim impact statement during closing penalty phase argument. Booth and Gathers mandate reversal where the sentencer is contaminated by victim impact evidence or argument. Mr. Mitchell'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. Thus, Mr. Mitchell'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 (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." Gregg v. Georgia, 428 U.S. 153, 189 (1976)(joint opinion of Stewart, Powell, and Stevens, JJ.); see also California v. Ramos, 463 U.S. 992, 999 (1983). The Booth court ruled that the sentencer was required to provide, and the defendant had the right to receive, an "individualized determination" based upon the "character of the individual and the circumstances of the crime." Booth v. Maryland, supra; see also Zant v. Stephens, 462 U.S. 862, 879 (1983); Eddings v. Oklahoma, 455 U.S. 104, 112 (1982). Here, however, the death sentence resulted after 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. Mitchell'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, 14 F.L.W. 355 (Fla. 1989), the 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. Mitchell's case. Compare Jackson v. State, 498 So. 2d 406, 411 (Fla. 1986) with Jackson v. Dugger, supra.

The same outcome is dictated by the Florida Supreme 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. It is clear no independent or adequate procedural bar applies.

This record is replete with Booth error. Mr. Mitchell was sentenced to death on the basis of the very constitutionally

impermissible "victim impact" evidence and argument which the Supreme Court condemned in Booth and Gathers. The Booth court concluded that "the presence or absence of emotional distress of the victim's family, or the victim's personal characteristics are not proper sentencing considerations in a capital case." Id. at 2535. These are the very same impermissible considerations urged on (and urged to a far more extensive degree) and relied upon by the jury and judge in Mr. Mitchell'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 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, habeas 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. Mitchell. For each of the reasons discussed above the Court should vacate Mr. Mitchell's unconstitutional sentence of death.

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

CLAIM V

THIS COURT'S FAILURE TO REMAND FOR RESENTENCING AFTER STRIKING AN AGGRAVATING CIRCUMSTANCES ON DIRECT APPEAL DENIED MR. MITCHELL THE PROTECTIONS AFFORDED UNDER FLORIDA'S CAPITAL SENTENCING STATUTE, AND DUE PROCESS, EQUAL PROTECTION, AND THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

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

The jury and the trial court sentenced Mr. Mitchell to death on the basis of four aggravating circumstances. However, on direct appeal, this Court invalidated one of the aggravating circumstances given to the jury and found by the trial court. Mitchell v. State, 521 So. 2d 1071 (Fla. 1988). The Supreme Court found no evidence sufficient to establish that the offense was premeditated, much less cold and calculated. Id. However that court refused to order a new sentencing.

This Court's failure to reverse and remand for resentencing usurped the sentencing power from the eighth amendment sentencers. In Elledge v. State, 346 So. 2d 998, 1003 (Fla. 1977), this Court held that if improper aggravating circumstances

are found, "then regardless of the existence of other authorized aggravating factors we must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death." Accordingly, reversal is required when mitigation may be present and an aggravating factor is struck on appeal, Elledge, supra, or even when mitigation is not found and an aggravating factor is struck on appeal. Alvin v. State, 548 So. 2d 1112 (Fla. 1989); Schafer v. State, 537 So. 2d 988 (Fla. 1989); Nibert v. State, 508 So. 2d 1 (Fla. 1987).

In Alvin, supra, no mitigating circumstances and two aggravating circumstances had been found. After invalidating one aggravating circumstance, this Court remanded for resentencing because "we are not convinced that the judge would have imposed the same sentence had he known of the invalidity of one of the two aggravating circumstances." Alvin, 548 So. 2d at 1114.

The same is true in Mr. Mitchell's case, and the result should have been the same. In Mr. Mitchell's case, the jury recommended life and the trial court imposed death on the basis of four aggravating circumstances. As in Alvin, Schafer, Nibert, and Elledge, the Florida Supreme Court should have remanded for resentencing so that the sentencers could have reweighed aggravation and mitigation. This Court's failure to remand for resentencing deprived Mr. Mitchell of his rights to due process

and equal protection by denying him the liberty interest created by Florida's capital sentencing statute. See Vitek v. Jones, 445 U.S. 480 (1980); Hicks v. Oklahoma, 447 U.S. 343 (1980).

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

> Post hoc appellate rationalizations for death sentences cannot save improperly channeled determinations by a sentencing court. Not only are appellate courts institutionally ill-equipped to perform the sort of factual balancing called for at the aggravation-mitigation stage of the sentencing proceedings, but, more importantly, a reviewing court has no way to determine how a particular sentencing body would have exercised its discretion had it considered and applied appropriately limited statutory terms.

Adamson v. Ricketts, 865 F.2d 1011, 1036 (9th Cir. 1988)(in banc). The United States Supreme Court has granted certiorari in Clemons v. Mississippi, 109 S. Ct. 3184 (1989), to consider the very questions at issue here: whether the eighth amendment permits an appellate court to save a sentence of death by reweighing aggravating and mitigating factors where the authority for capital sentencing under state law rests exclusively with the trial court sentencer. Mr. Mitchell's execution must be stayed until Clemons is decided. Clemons will constitute new case law cognizible in habeas proceedings.

In Florida, the trial jury and judge are the only bodies authorized to weigh aggravating circumstances against mitigating circumstances. In Mr. Mitchell's case, this Court unconstitutionally took over that function, contrary to its own precedent, which requires the sentencers to engage in a meaningful weighing of aggravating and mitigating circumstances before imposing a death sentence. See, e.g., Nibert v. State, 508 So. 2d 1 (Fla. 1987); Muehleman v. State, 503 So. 2d 310 (Fla. 1987); Van Royal v. State, 497 So. 2d 625 (Fla. 1986). For example, the Court sets aside death sentences where findings of fact are issued long after the death sentence was imposed because in such circumstances, the Court cannot know that "the trial court's imposition of the death sentence was based on a 'reasoned judgment' after weighing the aggravating and mitigating circumstances." Van Royal, 497 So. 2d at 629-30 (Ehrlich, J., concurring). In Patterson v. State, 513 So. 2d 1257 (Fla. 1987), the Court observed that Nibert had held that the judge's failure to write his own findings did not constitute reversible error "so long as the record reflects that the trial judge made the requisite findings at the sentencing hearing." Patterson, 513 So. 2d at 1262, quoting Nibert, 508 So. 2d at 4. Recently, this Court again emphasized that sentencing responsibility rests at the trial level and that "the sentencing order should reflect that the determination as to which aggravating and mitigating

circumstances apply under the facts of a particular case is the result of 'a reasoned judgment' by the trial court." Rhodes v. State, 547 So. 2d 1201, 1207 (Fla. 1989).

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

Moreover, this Court also usurped the jury's role in Florida capital sentencing. The nature of Florida's capital sentencing process ascribes a role to the sentencing jury that is central and "fundamental," Riley v. Wainwright, 517 So. 2d 656, 657-58 (Fla. 1988); Mann v. Dugger, 844 F.2d 1446, 1452-54 (11th Cir. 1988)(in banc), representing the judgment of the community. Id. Thus, when error occurs before a Florida sentencing jury, resentencing before a new jury is required. Riley; Mann. Mr. Mitchell's jury was permitted to consider an aggravating circumstance which this Court later held was not properly considered. This Court should have remanded for resentencing before a new jury, rather than assuming (as it implicitly must have) that Mr. Mitchell's jury would still recommend death without the invalidated aggravating factors.

Under Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), a Florida capital jury is treated as a sentencer for eighth amendment purposes. Under Maynard v. Cartwright, 108 S. Ct. 1853 (1988), a sentencing jury must be properly instructed regarding the aggravation it may consider. Hitchcock and Cartwright are new law establishing that this claim is properly presented in these proceedings and establishing that Mr. Mitchell is entitled to relief. This Court unconstitutionally usurped the sentencing jury's function depriving Mr. Mitchell of his rights to due process and equal protection and violating the sixth, eighth, and fourteenth amendments.

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

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Mitchell'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, this issue is properly before this Court in light of the pending certiorari in the United States Supreme Court in Clemons v. Mississippi, 109 S. Ct. 3184 (1989). Accordingly, habeas relief must be accorded now.

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. Wainwright, 811 F.2d 1430, 1438 (11th Cir.

1987). As in Matire, Mr. Mitchell is entitled to relief. See also Wilson v. Wainwright, supra; Johnson v. Wainwright, 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. Mitchell'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, Willie Mitchell, Jr., 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. Mitchell 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. Mitchell 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,

LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. 0125540

JUDITH J. DOUGHERTY
Assistant CCR
Florida Bar No. 0187786

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

By: _____
Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing has been furnished by U.S. Mail, first class, postage prepaid, to Robert Butterworth, Attorney General, 125 North Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014, this 23d day of March, 1990.

_____
Attorney