IN THE SUPREME COURT OF FLORIDA

NO. 75751

OSCAR TORRES-ARBOLEDA,

Petitioner,

v.

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

Respondent.

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

LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. 0125540

BILLY H. NOLAS
Chief Assistant CCR
Florida Bar No. 806821

JEROME H. NICKERSON
Assistant CCR
Florida Bar No. 0829609

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

COUNSEL FOR PETITIONER

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. Torres-Arboleda's capital convictions and sentences of death. Mr. Torres-Arboleda was sentenced to death, and on direct appeal this Court affirmed the judgment and sentence. Torres-Arboleda v. State, 524 So. 2d 403 (Fla. 1988). Jurisdiction of 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. Torres-Arboleda to raise the claims presented herein.

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. This petition presents substantial constitutional questions which go to the heart of the fundamental fairness and reliability of Mr. Torres-Arboleda's capital convictions and sentences of death, and of this Court's appellate review.

As discussed herein, the ends of justice call on the Court to grant the relief sought in this case. 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, 547 So. 2d 1197 (Fla. 1989); 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. Torres-Arboleda's claims.

Mr. Torres-Arboleda's claims are presented below. They demonstrate that habeas corpus relief is proper.

B. REQUEST FOR STAY OF EXECUTION

Mr. Torres-Arboleda's petition includes a request that the Court stay his execution, presently scheduled for Tuesday, April 24, 1990. As will be shown, the issues presented are substantial and warrant a stay of execution. This Court has not hesitated to stay executions when warranted to ensure judicious consideration of the issues presented by petitioners litigating during the pendency of a death warrant. See Marek v. Dugger (No. 73,175, Fla. Nov. 8, 1988); Gore v. Dugger (No. 72,202, Fla. April 28, 1988); Riley v. Wainwright (No. 69,563, Fla., Nov. 3, 1986).

The claims presented by Mr. Torres-Arboleda's petition are no less substantial than those involved in the cases cited above. He therefore respectfully urges that the Court enter an order staying his execution, and, thereafter, that the Court grant habeas corpus relief.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Petitioner asserts that his conviction and his sentence of death were

obtained and then affirmed during the Court's appellate review process in violation of his rights as guaranteed by the 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. Torres-Arboleda's case, substantial and fundamental errors occurred in the guilt and penalty phases of trial, and relief is appropriate.

CLAIM I

MR. TORRES-ARBOLEDA WAS CONVICTED ON THE BASIS OF GROSSLY SUGGESTIVE PHOTOGRAPHIC IDENTIFICATIONS AND APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE THIS ISSUE ON DIRECT APPEAL IN VIOLATION OF MR. TORRES-ARBOLEDA'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

Eyewitness identification testimony must be suppressed where, as here, results from unreliably suggestive identification procedures that violate due process by creating a substantial likelihood of mistaken identification. Neil v. Biggers, 409 U.S. 188 (1972); Simmons v. United States, 390 U.S. 377 (1968). "The central question. . .[is] whether under the totality of the circumstances the identification was reliable even though the confrontation procedure was suggestive.'" Manson v. Brathwaite, 432 U.S. 98, 106 (1977), quoting Neil, 409 U.S. at 199. The character of the identification procedure is an important consideration: although an unnecessarily suggestive procedure,

without more, will not result in a per se exclusion of the eyewitness testimony, the "totality of the circumstances," including those specific factors identified in Manson and Neil as indicia of reliability, must be weighed against "the corrupting effect of the suggestive identification itself." Manson, 432 U.S. at 114.

It is thus a matter of degree -- the more unnecessarily suggestive the identification procedure, the more likely the chance of irreparably mistaken identification which would require exclusion of the fatally unreliable testimony. Although "[r]eliability of properly admitted eyewitness identification, like credibility of other parts of the prosecution's case, is a matter for the jury . . . in some cases procedures leading to eyewitness identification may be so defective as to make identification constitutionally inadmissible as a matter of law." Foster v. California, 394 U.S. 440, 442 n.2 (1969). This is such a case.

In Manson, the United States Supreme Court held that the showing of a single photograph is highly suggestive and that such suggestivity is unnecessary absent compelling circumstances, 432 U.S. at 116.[1] See also Nassar v. Vinzant, 519 F.2d. 798, 801 (1st Cir 1975)("Single photo identifications . . . present so serious a danger of suggestiveness as to require that they be given extremely careful scrutiny . . . "). Similarly, the manner in which photographs are shown can be suggestive. For example,

it is improper for a police officer to direct the attention of a witness to a particular photograph, as the officers did in Mr. Torres-Arboleda's case, see United States v. Trivette, 284 F. Supp. 720 (D.D.C. 1968)(impermissibly suggestive where detective asked: "Is that the man?", when defendant's picture was shown), or for the police to make any other type of "suggestive comments" in the course of an identification procedure. See Bundy v. State, 455 So. 2d 330, 343 (Fla. 1984)(and authorities cited therein).

A single photo identification is analagous to the practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, a practice which has been widely condemned. See Stovall, 388 U.S. 302; Foster, 394 U.S. at 443. The effect of such a procedure is to tell the witness, "this is the man who did it," and demand that he or she agree. See, Foster, supra, at 443 ("In effect, the police repeatedly said to the witness, 'this is the man'"). Although confrontations of this type have been upheld when the record shows that, under the exigencies of the surrounding circumstances, this type of confrontation was imperative, see Stovall, supra, at 302 (witness in hospital on verge of death), and when, under the totality of the circumstances, there are

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[1]There were no such compelling circumstances here.

sufficient independent indicia of reliability of the identification testimony, this is not the case here.

The Supreme Court warned against the dangers of suggestive photographic identifications in Simmons v. United States, 390 U.S. 377 (1968):

> It must be recognized that the improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals. A witness may have obtained only a brief glimpse of a criminal, or may have seen him under poor conditions. . . . This danger may be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw, or if they show him the pictures of several persons among which the photograph of a single such individual recurs or is in someway emphasized. The chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime. Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of the subsequent lineup or courtroom identification.

Id. at 383-84 (emphasis added). The fears expressed in Simmons describe precisely what happened in this case. At the time of direct appeal the following "of record" facts were known to appellate counsel. Instead of presenting this issue on direct appeal, counsel did nothing. Counsel's actions in this regard were unreasonable. But for counsel's unreasonable performance the only evidence connecting Mr. Torres-Arboleda to this crime went unchallenged and Mr. Torres-Arboleda's conviction and jury

override were allowed to stand. The prejudice to Mr. Torres-Arboleda by counsel's unreasonable performance was patent. The issue had been properly preserved at trial and merely required presentation. This Court would have done the rest. The facts of record which were known to appellate counsel but which he chose to ignore included the following.

George Williams was the only witness who could place Mr. Torres-Arboleda inside the body shop at the time of the homicide. His identification testimony and the credibility of that identification meant the difference between acquittal or conviction.

However, Williams' own independent recollection of the three robbers could simply not get the job done. His opportunity to observe any of the suspects prior to the offense was negligible. As Williams testified at trial, "Mr. Patricio [the victim] was talking to me, next to me, when he came --- when they came in and said, 'I want to speak to [the victim].' Since a lot of people --- since a lot of people come in for estimates, one does not pay attention when someone wants to talk to him." (R. 723-24). Immediately prior to the shooting Williams was painting a refrigerator and could not see the three men or the victim who had gone around a corner (R. 725). After hearing the shots the suspects all ran out of the body shop and Williams was unable to state which door they exited (R. 726). It was then that Williams allegedly encountered Mr. Torres-Arboleda with a gun. But even

here Williams testified that his opportunity to observe was limited as he was distracted in looking for a length of pipe which he subsequently threw at the gunman. Williams' recollection as to the gunman's clothing at trial was limited exclusively to a green cap (R. 731). The detective who took Williams' statement at the scene almost an hour after the shooting noted that Williams was still "very excited at this time and had to be cautioned to slow down on several occasions."

The unreliability of Williams' identification is personified by two separate events. First, Williams inability to independently recall the physical characteristics of the gunman only minutes after the offense was made crystal clear by his aggravated assault upon Kenneth Myers, who he believed to be one of the three assailants. Mr. Myers resembles Mr. Torres-Arboleda only in the most general way, i.e., they are both black males. Since Williams description of the gunman to the police was not made until after his assault on Mr. Myers, it is unclear if Williams, in his "very excited" state, was in fact projecting the green cap worn by Myers' on to the gunman.[2]

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[2]Although another witness did testify at trial that Mr. Torres-Arboleda was wearing a green hat, none of the witnesses in their prior statements or depositions described the robber (alleged to be Mr. Torres-Arboleda) as wearing a green cap, but, rather a brown beret, a jeans cap or no hat at all.

The assault by Williams on Myers alone constitutes compelling evidence that both Williams' subsequent photo identification and in court identification of Mr. Torres-Arboleda more than three years later were patently unreliable. Given that the State could not establish Mr. Torres-Arboleda's presence in the body shop at the time of the murder, without Williams' identification the prejudice to Mr. Torres-Arboleda from appellate counsel's unreasonable omission in failing to urge this claim on direct appeal is patent.

Secondly, three days after the offense Williams was unable to identify Mr. Torres-Arboleda's photo from an array presented by Officer Peterson. Officer Peterson noted in his report not only Williams' uncertainty but in addition the singularly suggestive procedures employed which virtually ensured the misidentification to follow.

When questioned at the suppression hearing regarding this meeting with Williams, Detective Peterson not unexpectedly denied he had identified Mr. Torres-Arboleda in what amounted to the functional equivalent of a single photo identification. Detective Peterson's testimony in this regard was as unconvincing as it was bizarre:

> Q Officer Peterson, did you have occasion to be involved in the investigation regarding the attempted robbery and murder of one Patricio Lorenzo?
>
> A I was, yes, sir.

Q Did you have occasion to interview or talk to any of the witnesses in that case?

A Yes, sir, I did.

Q More specifically, let me take you back to the date of June 27th, 1981.

A Yes, sir.

Q Do you recall that date?

A Yes, sir.

Q Do you remember what time you were working?

A I was working an evening shift at that time.

Q Okay. And would you have been on duty sometime around eighteen hundred hours?

A Yes, sir.

Q And during that time, did you happen to come into contact with some witnesses and family members in the -- in this particular case; Patricio Lorenzo case?

A Yes, sir.

Q Did you happen to specifically come into contact with one George Williams?

A I did, yes, sir.

Q Would you please state to the Court what occurred when you came into contact with George Williams?

* * *

THE WITNESS: I was working evening shift, as I indicated. I was informed after business hours, like 4:30, that there were people at the information counter wishing to see a detective involved in this particular case. I had those people sent upstairs to me. Once they arrived upstairs, I believe,

there were four individuals, if memory serves me correctly. I believe there were two members of the family, Mr. George Williams and an individual, another Cuban male, whom they had brought along to question me about it. He may have possibly have worked with an individual that maybe a suspect in this particular investigation.

At that time, I sat down the individual in question that wanted to see the photographs. He didn't wish to give his name in this kind of thing. He just wanted to see if this individual was the person that worked at the Columbian Restaurant where he worked.

Again, if memory serves me correctly, they had made arrangements to come down to the police station and see a photo pack through, I take it, Detective Pennington, who wasn't on duty, so having some knowledge of the investigation and where the photo packs were at, I went ahead and showed a photo pack to the individuals at the conclusion of which, nobody identified anybody.

Q Is that including George Williams?

A Yes, sir.

Q He did not identify anybody?

A He didn't identify anybody out of the photo pack, but the primary purpose was for this witness that they brought me up there, was to see if he could see anybody in these photographs that worked at that restaurant, and he said he didn't know anybody in the photographs.

Q After you showed them the photo pack and had no identification by anybody, including Mr. Williams, did there come a time when you identified the photo pack of the Defendant -- I mean the picture of the Defendant, Oscar Torres-Arboledo to any individuals?

A To the family members only.

Q Had you asked Oscar Torres-Arboledo and -- I mean George Williams and this other individual to leave the room?

A No, sir. I think what had happened is after everybody had seen this photo pack and we were leaving I was telling them they could get back in touch with Detective Pennington. The family members, I believe, it was again two males, turned back and asked me, did we know who the guy was? Did we know where he was at, and this type thing, and at that time I pointed to a photograph and showed them the picture of the Defendant, said this was the guy, we had a warrant on him, a matter of time we were going to pick him up, or whatever and that the Tampa Police Department would cooperate in any way. If they had any more questions, they could get in contact with Detective Pennington.

Mr. Williams was not present at any time when I made the statement or made the statement about the warrant.

* * *

Q Did there come a time when you had a conversation with Detective Pennington sometime later? Specifically on the 6th of July?

A I'm sure I had several with him, counselor. I don't know what you're relating to.

Q Do you remember having a conversation with Detective Pennington, in which he indicated to you that on that date, the 6th of July, George Williams identified the Defendant, Oscar Torres-Arboledo out of a photo pack?

A That's very possible. That could have happened. I don't recall. I don't have any notes on that.

Q You recall then, advising Officer Pennington, as stated in his report, that you

advised him that the witness in this offense, George Williams, had viewed this photo pack on a previous date and at that time, could not identify anyone, and possibly the reason he could identify him now is because, he was made aware there was a warrant out for him?

A I never told George Williams that.

Q You never told Detective Pennington that?

A That's possible. I could have told Detective Pennington that. He might have overheard the conversation, but as far as George Williams being present when I told the family members, he was not.

Q Pointing out the picture of the Defendant?

A No. Mr. Williams was not present. He was there in the Detective Division, but like I say, we were dismissing everything, and the two witnesses came back, meaning the family members, and asked me about the situation. But he wasn't present when I showed the picture nor said that statement. He may have overheard the statement, but he never saw the photograph.

Q And he left with those two people that you had just shown the photos to?

A Yes, sir. They left together. They had all came together. They left together.

(R. 268-73)(emphasis added).

As implausible as Detective Peterson's version was, his testimony had at least managed to put some physical distance between Williams and his statement "this is the guy." What Detective Peterson's testimony had failed to account for was the possibility that Detective Pennington would place Peterson's own

doubts about Williams' contamination from this patently suggestive procedure in his own report.

Thus not surprisingly, on July 7th when the same array was presented to Williams, this time by Detective Pennington, Williams identified Mr. Torres-Arboleda's photo. As Detective Pennington's report clearly states, this was the very same array from which Williams had been unable to identify Mr. Torres-Arboleda's photo on June 27th.

When Detective Peterson was asked whether or not Detective Pennington had shown Williams the same array which Williams had previously been unable to identify Mr. Torres-Arboleda, he responded that he did not know which array had been presented to Williams by Detective Pennington (R. 277). When asked whether or not Williams had seen or heard Peterson's statment allegedly made to only the family members, "this is the guy," or the statement that a warrant had been issued for Mr. Torres-Arboleda's arrest, Peterson also denied that Williams could have overheard this unorthadox and suggestive statement even though Pennington's report indicates that Peterson believed this is precisely what happened and was the basis for Williams' identification of July 7th.

Even if Williams was not in the room, Detective Peterson's action in pointing out to the victim's family the person with an arrest pending unquestionably created a unreasonable likelihood that Williams would misidentify Mr. Torres-Arboleda as the gunman

in the body shop. If for no other reason then the photos used in that array contained both Tampa Police Department numbers and additional identifying information by which Williams could later select Mr. Torres-Arboleda's photo on July 7th.

There was no question that Williams was critical to the State's case. His photo identification likely provided the sole basis for his subsequent identification of Mr. Torres-Arboleda in court three years later. The state attorney candidly admitted as much:

> [MR. OBER:] There's many photopacks shown in this case. Every witness that's going to come in and identify this defendant in the courtroom has seen a photopack. We've got three seperate witnesses that have seen photo packs.
>
> * * *
>
> MR. OBER: The reason though, Judge, it's unfair is because George Williams is the only eye witness to this murder. He is the only person that is going to come into this courtroom and say, "I saw this man shoot and kill Patricio Lorenzo"

(R. 255-56). Unmistakeably, Williams' identification of Mr. Torres-Arboleda was the sole basis of his conviction for murder. His out of court identification made possible his later identification of Mr. Torres-Arboleda at trial. If this identification had been suppressed the evidence would not have been sufficient to support that conviction.

Under the totality of the circumstance Williams' photo identification had no independent basis. All factors pointed to

the inescapable conclusion that the identification was unreliable. Williams' opportunity to observe was limited and his attention was neither focused or acute. The description provided to the police was but the most general of characteristics. Williams' attack on Myers demonstrated as much. His level of certainty was such that Williams was unable to pick Mr. Torres-Arboleda's photo from the first array and was uncertain and tentative when he finally selected Mr. Torres-Arboleda's photo after Detective Peterson's machinations.

Counsel's deficient performance and the prejudice to Mr. Torres-Arboleda are manifest.

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

No tactical decision can be ascribed to counsel's failure to urge the claim. No procedural bar precluded review of this issue. See Johnson v. Wainwright, supra, 498 So. 2d 938.

However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Torres-Arboleda 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. TORRES-ARBOLEDA'S JUDGE AND JURY CONSIDERED AND RELIED UPON THE VICTIM'S PERSONAL CHARACTERISTICS AND THE IMPACT OF THE OFFENSE ON THE VICTIM'S DAUGHTER, OVER DEFENSE COUNSEL'S TIMELY AND REPEATED OBJECTIONS, IN VIOLATION OF MR. TORRES-ARBOLEDA'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS, AS RECOGNIZED IN BOOTH V. MARYLAND, SOUTH CAROLINA V. GATHERS, JACKSON V. DUGGER, AND SCULL V. STATE.

From the very beginning of Mr. Torres-Arboleda's trial, the State set out to prejudice to the judge and jury with impermissible victim impact and victim characteristic evidence, in circumvention of firmly established constitutional principles.

As a result of the prosecutor's efforts, Mr. Torres-Arboleda was sentenced to death in proceedings which allowed for the unchecked exercise of passion, prejudice and emotion. Here, as in South Carolina v. Gathers and Booth v. Maryland, the prosecutor's efforts were intended to and did "serve no other purpose than to inflame the jury [and judge] and divert [them] from deciding the case on the relevant evidence concerning the crime and the defendant." Booth v. Maryland, 107 S. Ct. 2529,

2535 (1987). Since a decision to impose the death penalty must "be, and appear to be, based on reason rather than caprice or emotion," Gardner v. Florida, 430 U.S. 349, 358 (1977)(opinion of Stevens, J.), such efforts to fan the flames are "inconsistent with the reasoned decision making" required in a capital case. Booth, 107 S. Ct. at 2536. Mr. Torres-Arboleda's death sentence stands in stark violation of the eighth and fourteenth amendments and must be vacated.

During opening statement, the State commenced this barrage of impermissible evidence:

> The testimony and all the evidence in the blank slate that you have up there now, will come from the witness stand, from these numerous witnesses, and that testimony, with the items of evidence that you'll be allowed to look at, will show beyond and to the exclusion of every reasonable doubt, that on June 24th of 1981, as fifty-five year old Patricio Lorenzo was minding his shop, he had a paint and body shop at the corner of 15th and Lake, thirty-seven-O-one North Fifteenth Street, to be exact, as he was minding his shop trying to earn a living, this man over here, Oscar Torres-Arboledo (sic), came into that shop with two other individuals and Mr. Lorenzo had a medallion, a gold medallion, a chain around his neck that was valued probably, I'm making an estimate, I believe the testimony will reveal about four hundred dollars.
>
> The Defendant came up to him and tried to take that chain from him, and he gunned down Patricio Lorenzo firing two shots into his body, because Mr. Lorenzo held on tight to the property that he had tried to earn, which was rightfully his.

(R. 296)(emphasis added).

The State continued:

> The State of Florida, will produce testimony . . . of witnesses who transported a wounded Patricio Lorenzo to the hospital as the life faded from his body. You will hear from the Associate at the Hillsborough County Medical Examiner's office, Doctor Diggs, who will relate to you, the circumstances under which Patricio Lorenzo senselessly met his death. . . .

(R. 297)(emphasis added).

These impermissible and highly inflammatory statements are not only violative of the eighth amendment, they also violate basic due process.

The State went to great efforts to elicit sympathy from the judge and the jury for the victim and his family. The State called the victim's daughter during their case-in-chief under the guise that she was needed to provide a chain of custody to connect the item Mr. Torres-Arboleda allegedly attempted to steal from her father, the victim. This charade was wholly unnecessary since Dr. Mallea's testimony had already established that the victim was wearing the gold chain with the medallion and that he had given it to a family member of the victim:

> Q What was Mr. Lorenzo's condition when you first saw him?
>
> A Well, at that moment he was alert, because he -- you know, he talked to me. He told me to give his medal to his family, and a couple of people were trying to steal his medal.
>
> Q All right. Did he tell you how he had come to be injured?

A Well, like I said, this is very difficult to remember exactly his words, but he told me a couple of people were trying to steal his medal, and he told me "they can't do it with me" or "I am too strong", or something like that. But, I don't remember exactly his words.

* * *

Q And he gave you that medal and told you to do what with it?

A To give -- I'm not sure if he told me to give it to his daughter or to his family, but --

* * *

Q And were you present when Mr. Lorenzo expired on June 24th?

A Yes. I was there in the room.

Q And how long was that after you had first seen him?

A Probably was after one hour or an hour and a half. Doctor Makaris pronounced him dead.

Q All right. Did he indicate to you the race of the people that had injured him?

A Well, I remember asking him. He told me it was some black people.

Q And he told you that he was shot, because he wouldn't give them his medallion?

A Yes. Yeah, that word I don't remember exactly.

(R. 363-365)(emphasis added).

In light of Dr. Mallea's testimony and the photograph showing the medallion, Maria Ferrer's testimony was wholly

cumulative and totally unnecessary. The State's only purpose in offering Ms. Ferrer's testimony was to inflame and prejudice the judge and the jury by showing a vivid reminder of the impact of the victim's death on his daughter. As could be expected and as anticipated by the State, Ms. Ferrer broke down and began to cry shortly after she took the stand.

The court ordered that the jury be removed from the courtroom to give Ms. Ferrer a chance to compose herself. By that time the judge and the jury had been contaminated and prejudiced against Mr. Torres-Arboleda.

In response to the State's examination, Ms. Ferrer described what the family had done with the chain and medallion, further prejudicing the judge and the jury with irrelevant and highly prejudicial testimony:

> Q Where is that medallion today?
>
> A Okay. We decided between my mother and myself, to cut it, you know. It was a big chain, so we cut it and made it into four bracelets. One's for my little girl, my sister and my mother and me, and the medallion we donated to the church.

(R. 384)(emphasis added).

The State offered a meager excuse as a reason for offering Ms. Ferrer's testimony (R. 380) and asked questions designed to elicit irrelevant and impermissible victim characteristic evidence:

> Q Where did your father live?
>
> A With me. 3822 Rich Avenue.

Q How old was your father?

A When he died, about fifty-four.

Q And did you live there with your father and mother at that address?

A Yes, sir.

(R. 383)(emphasis added).

During George Williams' redirect examination by the State, further victim impact testimony was elicited:

Q And when you identified that photograph in July of 1981, were you in jail at that time?

A No. I went to jail after I lost -- I lost the job that I had, because that man gave me what I earned, and he was teaching me the system of work, here in this -- so, then when I lost that job, and it is so difficult to be -- to be Cuban, not to speak English in order to find work.

MR. PALOMINO: Judge --

THE WITNESS: And, so then I did --

MR. PALOMINO: Judge, objection. Object to the answer.

THE COURT: Mr. Bailiff, take the jury out.

* * *

MR. PALOMINO: Judge, the question was: "were you in jail at that time?" The answer was totally unresponsive. He starts to talk about the job that he had with Mr. Lorenzo. I'm in the process -- the Court has admonished me not to interrupt the interpreter. The interpreter answers, "he had a job. I was working for him. He was teaching me" statements, and then he starts with, "well, it's rough for a poor Cuban to

try and find a job." Now, the answer is totally unresponsive, and designed to create sympathy for the witness.

He can answer, "yes" or "no" was he in jail, and to move to strike it, after the entire colloquy has been brought out for a five minute period, prejudices my client.

THE COURT: How does it prejudice your client for this witness to be asked, "were you in jail?" and then, in essence, he says, "no" and explains his answer?

MR. PALOMINO: Well, all he has to answer is, "no", Judge.

THE COURT: You don't think a witness has the right to explain his answer?

MR. PALOMINO: Well, Judge --

THE COURT: How does the answer prejudice your client?

MR. PALOMINO: It brings sympathy upon this witness, that the State is trying to prove in order to prejudice the Defendant, showing this man -- he's going to say, "I'm out of a job now, because this man killed my boss." That's what he's saying.

* * *

THE COURT: Objection overruled. The Court will not strike the witness's testimony.

The Court is of the opinion the witness responded to the question and has the right to explain his answer.

Mr. Bailiff, bring the jury back, please.

(R. 742-46)(emphasis added).

This testimony was clearly violative of firmly established constitutional principles. The court, by allowing the

prejudicial, unresponsive and impermissible testimony, allowed evidence in the record which tainted Mr. Torres-Arboleda's conviction and set the stage for the override of the jury's recommendation. The court's override of the jury's recommendation was based on impermissible evidence, allowed in the record by the court.

During the guilt phase closing arguments, the State informed the judge and the jury that the victim was a working man (R. 810). This fact was not relevant to any of the issues at trial.

In disregard of the Constitution, but in the spirit of a theatrical production, the prosecution ended his guilt phase arguments with an emotional salvo, calculated to inflame and prejudice the judge and jury with proscribed victim impact and victim character evidence:

> Finally, ladies and gentlemen of the jury, I want to look at George Williams. George Williams, a Cuban, a man with no skills, a man who was pulled from the streets by Mr. Lorenzo, given a job, a trade, and he tells you, "I saw that man at this table on three separate occasions. He pulled a gun on me, and I threw something at him. I threw a tool at him." Why did he not select that photograph when it was first shown to him? He gave you an explanation. He said, "this man took away my livelihood and I want to seek revenge."
>
> * * *
>
> Ladies and Gentlemen of the jury, you can recall the facts collectively. I have said enough. I told you last Monday that, when all is said and done, although sometimes it's a tedious process, the truth comes to

> the top. Your twelve minds can recall the facts, the memory of Patricio Lorenzo and his family, they don't cry out for vengence. They don't want that vengence. They want justice. You cannot in good faith, acquit this man as he sits in this courtroom on the charges lodged against him. The facts and the witnesses come together. They come together like the pieces of a puzzle, and, you know, sometimes you've got to get those pieces of a puzzle and you have to turn them a little bit, but all the major pieces are there, and sometimes there's -- the pieces don't fit right, but you've got to get rid of all of that. The motivation for people doing things, and it would be great, it would be great if all the people would come in here and told the truth, but you've got to look at the people, that were involved in this, and their motivation for that. But, when it all comes down, when you look at all the facts and the evidence, those pieces are fitting together, and they fit together. They interlock, and they present a total complete picture, and that picture that they present is a fifty-four year old man, gunned down by Oscar Torres-Arboleda. Why? For a gold medallion. His life, ladies and gentlemen of the jury, has to be worth more than that gold medallion. A verdict of anything less than first degree murder, and attempted robbery with a firearm, is not only contrary to the evidence, it is contrary to logic, when you sit down and look at this thing logically, it is contrary to any sense of justice.

(R. 856-58)(emphasis added).

In furtherance of its strategy of inflaming and prejudicing the judge and the jury, the State embarked on a line of questions which reminded the judge and jury of several notorious murderers, under the guise of cross-examining Dr. Mussenden, the only witness presented by the defense in the penalty phase. Trial counsel's objections are overruled:

Q Have you heard just through acts of murderers like Ted Bundy -- have you heard of Mr. Bundy?

A Yes, I have.

MR. PALOMINO: Judge, I'm going to object to this line of questioning, as being outside the scope of direct, totally, and the questions that were asked were of the Defendant here, that he examined, and not anyone else or what he may have heard. It calls for hearsay.

THE COURT: Overruled.

BY MR. OBER:

Q Again, more specifically, are you familiar with a Doctor, by the name of Doctor Carl Coppolino?

A Well, you know, when I say I'm familiar, I'm only familiar as I see it in the newspapers, and TV. I don't really tune into crime, since I evaluate all the time. I'm vaguely familiar with that.

(R. 929)(emphasis added).

During penalty phase argument, the State took one more shot at inflaming and prejudicing the judge and the jury:

The Lorenzo family has been here, and I'm sure the Defendant's family has. You are sworn to uphold the law and not to take that into consideration, because the outcome of this decision, of your decision, will effect alot of people. It has effected alot of people.

* * *

We've seen no productivity of Oscar Torres-Arboledo in the State of Florida. What we've seen is a trail of blood, of dispair and destruction and families who have had a loved one shot to death. Is that a factor in mitigation that you should consider? I tell

you to reject that factor in mitigation, because if he has the intellectual ability, if he had the intellectual ability to do something with his life, why didn't he do it?

Mr. Palomino will suggest to you, because of this one factor, to allow the State of Florida, allow Judge Graybill, who's sentence is in his discretion, to sentence him to life imprisonment for twenty-five years before he's eligible for parole. Eligible. He can be released in twenty-five years.

Mr. Jackson from the Alameda District Attorney's Office, says that generally in California they're paroled in the end of two-thirds of their twenty-seven years sentence. Paroled to do what? To go back on the street again.

(R. 950-51)(emphasis added).

The State's assault on the judge and the jury, with impermissible victim characteristic evidence, continued unabated:

What do we know about him coming to this country for economic opportunity? What economic opportunity? To go into a man's business as he tries to work, to go in there as he tries to provide for his family and probably a very difficult job, and trying to hold onto the thing that he's earned, and to have some man come in there and take the life away from him for a gold medallion? That factor alone out weighs any mitigation, but there's more than that. Because, in 1981, after Patricio Lorenzo was killed. . . .

* * *

George Williams came from Cuba. Alot of people in this country come from foreign countries, and that's what makes this country so great, because we can come into this country and we can work, but don't come in here and kill our citizens. You can, each of you, after the conversation which you had, you can turn your heads to my words and you

> cannot carry out your responsibility under the law, because of a human factor, but you should not do that. You should look at the facts and you know as citizens of Hillsborough County, many times -- we many times say the law doesn't deal with criminals. The system doesn't deal with criminals. You are now the system. As the citizens of this County and State have been, you are the system. It is your turn to make a decision based on convenience, but based on the law.

(R. 952-53)(emphasis added).

It is likely that the State's continuous flood of impermissible and prejudicial victim impact and victim character evidence caused the override of the jury's recommendation and thus confidence in the reliability of Mr. Torres-Arboleda's sentence is undermined.

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. Torres-Arboleda's trial contains not only victim impact evidence and argument but, in addition, characterizations and opinions of the same kind as condemned in Booth. The judge could not but be influenced by the victim impact and the victim characteristic evidence and argument in sentencing Mr. Torres-Arboleda to death.

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 because 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 his family and friends.

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. Torres-Arboleda's sentence. 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 sentence of death be imposed in an arbitrary and capricious manner when exposed to victim impact evidence. In Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989), the court held that the principles of Booth are to be given full retroactive effect in Florida capital sentencing proceedings. Jackson dictates that relief post-Booth and Gathers is now warranted in Mr. Torres-Arboleda'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 850 relief is wholly appropriate.

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, particularly when as in the instant case, the trial judge overrode the jury's recommendation of a life sentence and imposed death. 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.

Defense counsel objected. Cf. Jackson, supra. His objections to the improer evidence and arguments were overruled, and the State's unconstitutional presentation was allowed to continue unbated. When the issue was raised on direct appeal, this Court declined to reverse. See Torres-Arboleda v. State, 524 So. 2d 403 (Fla. 1988). Under Jackson, this issue whould not be revisted. Under Booth, Gathers, and Jackson, the egregious constitutional errors discussed above required relief.

The question in this case is whether the errors may have affected the sentencing decision. As in Booth and Gathers, the State here cannot show that the improper argument had "no effect" on the judge's sentencing decision. Mr. Torres-Arboleda presented valid mitigation, and the prosecutor's improper evidence and arguments served only to deflect the sentencers attention away from the mitigating evidence and toward impermissible, irrelevant considerations. Since the prosecutor's arguments "could [have] result[ed]" in the imposition of death because of impermissible considerations, Booth, 107 S. Ct. at 2534, relief is appropriate in Mr. Torres-Arboleda's case.

CLAIM III

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

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

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

Furman v. Georgia, 408 U.S. 238, 274, 92 S. Ct. 2726, 2744 (1972)(Justice Brennan concurring)(footnote omitted).

When then faced with a challenge to Florida's capital sentencing scheme, the Unites 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. 242, 96 S. Ct. 2960, 2969 (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). In Miller, this Court said:

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

242, 258, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

Miller v. State, 373 So. 2d at 885. See also Riley v. State, 366 So. 2d 19 (Fla. 1979); Robinson v. State, 520 So. 2d 1 (Fla. 1988).

The prosecutor in his closing argument before the judge during sentencing specifically referred to Mr. Torres-Arboleda's lack of remorse, a factor that cannot be considered as an aggravating circumstance. The prosecutor argued:

> In addition to that I would cite to the Court that based on the facts now available to the Court that came out in the sentencing proceeding that the Defendant shows and has shown little or no remorse for having committed any of these offenses, by his continuning course of conduct, and based on the testimony that was presented during the course of the second phase of this proceedings, that Doctor Musseden indicated that he's an intelligent human being, and although he was well able to work back in 1981, back in 1982, in Oakland California, the Defendant showed little, if any inclination to seek out and hold any type of employment, and that he continues to live a life of lawlessness.

(R. 1125-26)(emphasis added). The prosecutor stressed Mr. Torres-Arboleda's lack of remorse in an attempt to elicit an emotional response from the sentencer.

Another area in aggravation that the State argued was the possibility of future dangerousness. The prosecutor argued before the sentencing court:

> I would also suggest to the Court that the Defendant's prior history of assaults and violent behavior establishes a pattern of

> conduct that renders a continuing and serious threat to the community.

(R. 1125)(emphasis added). "'[A] person may not be condemned for what might have occurred. The attempt to predict future conduct cannot be used as a basis to sustain an aggravating circumstance.' [Emphasis in original.]" Dougan v. State, 470 So. 2d 697, 702 (Fla. 1985), cert. denied, 475 U.S. 1098 (1986) (quoting White v. State, 403 So. 2d 331, 337 (Fla. 1981), cert. denied, 463 U.S. 1229 (1983)). See also King v. State, 514 So. 2d 354, 360 (Fla. 1987).

While these nonstatutory aggravators were austensibly argued in support of the prosecutor's request that the Court go beyond the sentencing guidelines range on the conviction for attempted armed robbery, they were argued in the sentencing phase of the capital case and thus influenced the trial court in its eventual override of the jury's recommendation of life. These arguments are without a doubt improper in a capital sentencing phase.

Further, the prosecutor argued to the sentencing court that it should give little weight to the jury's recommendation of life imprisonment:

> This jury recommened [sic] on a vote of seven to five, life. Based on what? . . . . What strong reasons as suggested in the Tedder case are there to suggest that reasonable persons could not agree with this recommendation? Allow me to count them for the Court. Number one, the seven to five jury recommendation is based on human emotion and sympathy, not on the law of the facts. Five citizens of Hillsborough County, had the fortitude to follow the law, to follow the

> facts. It is not a one-sided recommendation, like twelve to nothing. It is not eleven to one. Sympathy is not a factor in mitigation. That would outweigh the facts presented during the course of this proceeding, that the Court found, as a matter of law, are aggravating circumstances.

(R. 1128-29)(emphasis added).

The prosecutor's entire argument was based on this "narrow life recommendation" (R. 1130).

> This factor alone, [in the course of an attempted robbery] out-weighs any factor in mitigation. This factor alone, is strong reason to believe that reasonable persons could not agree with this recommendation of seven to five.

(R. 1130)(emphasis added).

> That factor alone [prior conviction] and the facts of this case present overly sufficient evidence for this Court to override that narrow life recommendation.

(R. 1130)(emphasis added). Indeed, in the court's sentencing order, specific mention is made of the fact that only seven jurors recommended a sentence of life. Clearly the court was tainted by the prosecutor's arguments.

This Court has expressly held that the margin by which a jury recommends life imprisonment cannot be considered as aggravating:

> The fact that the jury recommended a sentence of life imprisonment for the murder of Eubanks by a vote of seven to five was not a proper matter to consider as an aggravating circumstance regarding that murder. Although vote counts by which juries have recommended death or life imprisonment have been referred to by this Court in opinions deciding capital

> sentencing cases, e.g., Walsh v. State, 418 So.2d 1000, 1003 (Fla. 1982); Raulerson v. State. 358 So.2d 826, 831 (Fla.), cert. denied, 439 U.S. 959, 99 S.Ct. 364, 58 L.Ed.2d 352 (1978), the margin by which a jury recommends life imprisonment has no relevance to the question of whether such recommendation should be followed. Even when based on a tie vote, a jury recommendation of life is entitled to great deference.

Craig v. State, 510 So. 2d 857, 867 (Fla. 1987)(emphasis added).

The prosecutor's introduction and use of these wholly improper and unconstitutional nonstatutory aggravating factors starkly violated the eighth amendment. Mr. Torres-Arboleda's sentence of death therefore stands in violation of the eighth and fourteenth amendments. As the United States Supreme Court has noted:

> Furman held that Georgia's then standardless capital punishment statute was being applied in an arbitrary and capricious manner; there was no principled means provided to distinguish those that received the penalty from those that that did not. E.G., id., at 310, 92 S.Ct., at 2762-2763 (Stewart, J., concurring); id., at 311, 92 S.Ct., at 2763 (WHITE, J., concurring). Since Furman, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action.

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

Florida is a weighing state. The judge and the jury weigh narrowly defined and limited aggravating circumstances and the evidence offered in mitigation. The sentencers' discretion under

Cartwright must be limited. Consideration of aggravators outside the appropriate limitations violates Cartwright.

The introduction of nonstatutory aggravating factors resulted in a capricious sentencing of Mr. Torres-Arboleda in violation of the eighth and fourteenth amendments. This fundamental error entitles Mr. Torres-Arboleda to relief, as do the new legal precedents cited above.

This error undermined the reliability of the sentencing determination and prevented the sentencer from assessing the full panoply of mitigation presented by Mr. Torres-Arboleda. For each of the reasons discussed above the Court should vacate Mr. Torres-Arboleda's unconstitutional sentence of death. Relief is now proper.

CLAIM IV

THE OVERRIDE IN THIS CASE WAS ARBITRARY AND CAPRICIOUS AND VIOLATED THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

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, 1452-1454 (11th Cir. 1988) (in banc), representing the judgment of the community. Id. A Florida sentencing jury's recommendation of life is entitled to "great weight," and can only be overturned by a sentencing judge if "the facts suggesting a sentence of death [are] so clear and

convincing that virtually no reasonable person could differ." Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975)(emphasis supplied). See also Mann, 844 F.2d at 1450-51 (and cases cited therein).

The standard established under Florida law is thus that if a jury recommendation of life is supported by any reasonable basis in the record that jury recommendation cannot be overridden. See Mann, supra, 844 F.2d at 1450-54 (and cases cited therein); see also Ferry v. State, 507 So. 2d 1373, 1376-77 (Fla. 1987); Wasko v. State, 505 So. 2d 1314, 1318 (Fla. 1987); Brookings v. State, 495 So. 2d 135, 142-43 (Fla. 1986); Tedder, supra, 322 So. 2d at 910. Cf. Hall v. State, 541 So. 2d 1125 (Fla. 1989). This is "the nature of the sentencing process," Mann, supra, 844 F.2d at 1455 n.10, under Florida law. This standard has in fact been recognized by the United States Supreme Court as a "significant safeguard" provided to a Florida capital defendant. Spaziano, supra, 468 U.S. at 465.

A. THE AGGRAVATING FACTORS IN THIS CASE ARE INSUFFICIENT TO SUPPORT A SENTENCE OF DEATH

In Florida, the sentencer's task is first to determine whether the aggravating circumstances proven beyond a reasonable doubt are sufficient to support a death sentence. Section 921.141, Fla. Stat. Only if that threshhold is met may the jury move on to a balancing of mitigating circumstances. Id. The United States Supreme Court has allowed the individual states to

so structure or guide the jury's determination of the appropriate punishment. See Franklin v. Lynaugh, 108 S. Ct. 2320 (1988).

The jury in Mr. Torres-Arboleda's case could have found insufficient aggravating factors to justify a sentence of death in the first instance. The following discussion will include each of the two aggravating factors argued to the jury and found by the trial court (R. 1139).

While in the Course of a Burglary

This case was tried on an alternative theory of premeditated or felony murder. The State's primary theory, however, was that Mr. Torres-Arboleda and two other black Colombians went to the Paint & Body Shop to commit a robbery, and in the course thereof, Mr. Lorenzo was shot.

In a remarkably similar case, this Court held that the aggravating circumstance "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). In fact, in a footnote, it was noted that the State conceded in oral argument that in similar circumstances many people receive a less severe sentence. Id. The facts of Rembert show that the defendant entered a bait and tackle shop, hit the elderly victim over the head once or twice with a baseball bat and took forty to sixty dollars from the victim's cash drawer. Id. at 338.

Similarly, in Proffitt v. State, 510 So. 2d 896, 898 (Fla.

1987), this Court said that "[t]o 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." That case involved a defendant, during a burglary, who killed an occupant of a house with one stab wound to the chest while the victim was lying in bed. Id. at 897.

Proffitt was distinguished from Mason v. State, 438 So. 2d 374 (Fla. 1983), because the defendant in Mason had previously been convicted of attempted murder, arson, as well as robbery and rape. "We think Mason's prior convictions for attempted murder and rape distinguish Mason from the present case." Id. at 898.

Finally, the jury may not have given this aggravating factor much weight because it was automatic upon the finding of felony murder (See Claim IX).

Prior Crime of Violence

In the jury penalty phase, the prosecution introduced evidence of one prior conviction, for murder (R. 895). The facts of that prior conviction as presented to the jury are relevant to its weight as an aggravator.

The facts of Mr. Torres-Arboleda's prior conviction that were presented to the jury were:

> A There was evidence that someone had been involved in a hit and run, in which a young child was injured, but that had to basically do with Mr. Arboledo [sic] and the victim being together, but there was no

evidence introduced in the trial as to who was the driver. I had some independent evidence as to what had happened, but nothing in the trial came out about that.

Q And, your independent evidence indicated that the victim had been the driver?

A (Pause.) My recollection of that evidence, was that the Defendant told some people that the victim was driving, but I had no evidence of who was actually -- other than that, they were together in that particular incident, and had been in a borrowed vehicle, but that was part of -- there had been some animosity between the two, allegedly over the responsibility for this hit and run, because it was in fact, a hit and run.

Q A young child?

A I don't recall the specific age, but I do know there was a hit and run.

(R. 905-06).

The jury may have given this aggravator little weight, in light of the facts presented.

Any additional facts of this prior conviction should not have been used by the judge to override the jury's recommendation of life. In fact, the trial court specifically stated that it was considering only the evidence presented to the jury (R. 1139-40). Further, it is in derogation of a defendant's right to a jury recommendation for the prosecution to withhold evidence or argument for later use before the judge. This is an unconstitutional circumvention of the standard set out in Tedder v. State, 322 So. 2d 908 (Fla. 1985), and the Florida statutes. "[T]he sentencing proceeding shall be conducted before a jury

impaneled for that purpose, unless waived by the defendant." Section 921.141(i), Fla. Stat. (emphasis added).

It should also be noted that this conviction in California is presently under collateral attack by post-conviction counsel appointed in that state. Undersigned counsel has been in contact with California counsel, who represents that he is in the process of preparing a post-conviction petition based upon the ineffective assistance of trial counsel in that case. Mr. Torres-Arboleda respectfully requests, therefore, leave to amend this petition with relevant decisions from the California courts on that conviction.

Finally, this Court has held that this aggravating factor alone also does not automatically require a sentence of death, nor does it automatically justify an override of a life recommendation by a jury:

> We are mindful of the concerns raised by the dissent. Without question, the trial court was authorized to weigh in aggravation the fact that this defendant was convicted of a prior murder. However, this aggravating factor alone does not and cannot automatically nullify a jury's life recommendation, as the dissent suggests. This Court has directly held to the contrary. Fead v. State, 512 So.2d 176 (Fla. 1987)(jury override improper despite prior murder conviction where mitigating evidence supported jury's life recommendation). Both judge and jury still must weigh this aggravating factor against the available mitigating evidence.
>
> Indeed, to suggest that death always is justified when a defendant previously has

> been convicted of murder is tantamount to saying that the judge need not consider the mitigating evidence at all in such instances. The United States Supreme Court consistently has overturned cases in which mitigating evidence was deliberately and directly ignored. Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). Accord Woodson v. North Carolina, 428 U.S. 280, 286-87, 96 S.Ct. 2978, 2982-83, 49 L.Ed.2d 944 (1976).

Cochran v. State, 547 So. 2d 928, 932-33 (Fla. 1989).

The jury may well have found the aggravation insufficient in this case to even support a recommendation of death in the first instance. They were instructed to make that determination before they even proceeded to weigh the mitigation. That decision would have been reasonable in light of this Court's decisions.

B. THE JURY OVERRIDE IN MR. TORRES-ARBOLEDA'S CASE RESULTED IN AN ARBITRARILY, CAPRICIOUSLY, AND UNRELIABLY IMPOSED SENTENCE OF DEATH, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The jury override procedure in Florida is constitutionally valid only to the extent that it is utilized within specific, reliable procedural parameters, and so long as it does not lead to freakish and arbitrary capital sentencing. Spaziano v. Florida, 468 U.S. 447, 465 (1984). The override in this case was predicated upon an improper standard, thus demonstrating the unreliability and arbitrariness of Mr. Torres-Arboleda's sentence of death.

If the jury override here, and the method by which it was sustained, is acceptable under the Florida statute, then "the application of the jury override procedure has resulted in arbitrary or discriminatory application of the death penalty . . . in general . . . [and] in this particular case." Spaziano, supra. Where a particular override results in an arbitrary imposition of the death penalty, the eighth and fourteenth amendments are violated.

Mr. Torres-Arboleda's jury recommended that he be sentenced to life. However, although mitigation was present in the record, and although there were reasonable bases for the jury's recommendation, the trial judge ignored the law and imposed death. This Court then misapplied its override standard in affirming that sentence. See Torres-Arboledo v. State, 524 So. 2d 403, 413 (Fla. 1988). Review at this juncture is therefore appropriate.

Under the law in this State, if a Florida jury recommends life, death may not be imposed if there is any "reasonable basis in the record" for the recommendation. Mann v. Dugger, 844 F.2d 1446, 1450-54 (11th Cir. 1988)(in banc); Ferry v. State, 507 So. 2d 1373, 1376 (Fla. 1987); see also Hansbrough v. State, 509 So. 2d 1081, 1086 (Fla. 1987)("a reasonable basis for the jury to recommend life" cannot be overridden); Wasko v. State, 505 So. 2d 1314, 1318 (Fla. 1987)(no override "unless no reasonable basis exists for the opinion").

Here, "reasonable people could differ as to the propriety of the death penalty in this case, [and thus] the jury's recommendation of life must stand." Brookings v. State, 495 So. 2d 135, 143 (Fla. 1986). There were numerous valid and eminently reasonable bases supporting the jury's verdict of life in this case. Moreover, the jury could quite reasonably have reached different conclusions than the judge regarding the aggravation, and its weight in relation to the mitigation. Whatever balance the trial judge may have struck, the jury's balancing and resulting life recommendation, were undeniably reasonable under Florida law. See Mann, supra, 844 F.2d at 1450-55; Ferry, supra; Wasko, supra. The trial judge, however, did not provide Mr. Torres-Arboleda with the right which the law clearly afforded him: the right not to have a reasonable jury verdict overturned.

While the trial judge acknowledged the Tedder standard, he failed to explain why the jury had no rational basis for its recommendation, as Tedder requires. A jury life recommendation magnifies the sentencing judge's duty to actually consider statutory and nonstatutory mitigating factors, because the usual presumption in Florida that death is the proper sentence upon proof of one or more aggravating factors does not apply (and indeed is reversed) when a jury recommendation for a life sentence has been made. Williams v. State, 386 So. 2d 538, 543 (Fla. 1980).

The judge's sentencing order listed the aggravating

circumstances, and found no statutory mitigaing circumstances and no nonstatutory circumstances "notwithstanding the expert testimony to the effect Defendant is a very intelligent and rehabilitable person" (R. 1139). The order then noted that great weight was to be given to the jury's recommendation, and finally concluded that the jury's recommendation was "unreasonable" (R. 1140). The order does not explain why the sentencing court refused to consider Mr. Torres-Arboleda's "intelligence" and "rehabilitativeness" as nonstatutory mitigation.

This Court has expressly recognized that "positive character traits are also relevant factors to be considered in mitigation since those factors may show potential for rehabilitation and productivity within the prison system. Holsworth, 522 So.2d at 354; Fead v. State, 512 So.2d 176 (Fla. 1987), receded from on other grounds, Pentecost v. State, No. 71,851 (Fla. June 29, 1989 (14 F.L.W. 319); McCampbell v. State, 421 So. 2d 1072 (Fla. 1982)." Stevens v. State, 552 So2d 1082 (Fla. 1989). The trial court in this case did not explain why this mitigation was not found, nor why it did not support a reasonable basis for the jury's recommendation of life. The experty testimony presented by Dr. Mussenden in regards to the mitigation was based on extensive psychological testing. Neither Dr. Mussenden's opinion nor his testing was rebutted by the State in any way, and thus could easily have provided a reasonable juror with a basis for a life recommendation. The trial court did not explain why it did

not credit this testimony. Neither did this Court explain why it apparently rejected Dr. Mussenden's opinion on direct appeal.

The trial court's order and this Court also failed to recognize other mitigation clearly appearing on the record. This included the disparate treatment of Mr. Torres-Arboleda's co-defendants. While the jurors were not aware of Victoriano Sinisteria-Ballescya's complete immunity, they were aware that the third man had never been identified and thus would never even face the death penalty. This clearly was also a valid basis for a recommendation of life, but was never discussed by the sentencing court.

The override was thus predicated upon the judge's own weighing of the aggravation and mitigation, not upon any analysis of why there was no reasonable basis for the jury. That is not the law:

> The state, however, suggests that the override was proper here because the trial court judge is the ultimate sentencer and his sentencing order represents a reasonable weighing of the relevant aggravating and mitigating circumstances. According to the state's theory, this Court should view a trial court's sentencing order with a presumption of correctness and when the order is reasonable, this Court should uphold the trial court's sentence of death. We reject the state's suggestion. Under the state's theory there would be little or no need for a jury's advisory recommendation since this Court would need to focus only on whether the sentence imposed by the trial court was reasonable. This is not the law. Sub judice, the jury's recommendation of life was reasonably based on valid mitigating factors. The fact that reasonable people could differ

> on what penalty should be imposed in this case renders the override improper.

Ferry, 507 So. 2d at 1376-77 (emphasis added). Despite the presence of mitigation, this Court sustained the override. Torres-Arboledo v. State, supra. This affirmance was also predicated upon an improper analysis of law. This Court transferred the burden to the defendant to show that reasonable people could conclude that the mitigation outweighed the aggravation. This was improper.

While this Court initially set out the correct standard under Tedder, it then went on to state:

> In other words, when there are valid mitigating factors discernible from the record which reasonable people could conclude outweigh the aggravating factors proven in a given case, an overide will not be upheld. See Echols v. State, 484 So. 2d 568 (Fla. 1985), cert. denied, ___ U.S. ___, 107 S. Ct. 241, 93 L.Ed.2d 166 (1986).

Torres-Arboledo v. State, 524 So. 2d 403, 413 (Fla. 1988). This is the opposite of the correct standard. Once a life recommendation is given, the burden is on the state to show that no reasonable person could differ as to the propriety of a death sentence. The burden is not on the defendant to show that no reasonable person could differ as to the propriety of a life sentence. But this is exactly the burden placed on Mr. Torres-Arboleda by this Court.

Sentencing procedures which shift to the defendant the burden of proving that life is the appropriate sentence violate

the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), and violated due process and eighth amendment rights. See Sandstrom v. Montana, 442 U.S. 510 (1979); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988).

This Constitution simply does not permit presumptive death sentences and does not permit requiring the defendant to establish that mitigation outweighs aggravation, i.e., to establish that life is the appropriate sentence. Due process and the eighth amendment require the State to establish that death is the appropriate sentence, i.e., that aggravation outweighs mitigation. If any presumption is to be employed in capital sentencing, that presumption should be the same as is employed in every other setting where liberty, proverty, or life are at stake -- that the defendant is presumed innocent (of the sentence in this case) until the State establishes otherwise. This burden shifting is even more improper once a majority of the jury actually determines that a life sentence is proper, as did the jury in this case.

Under this Court's interpretations of the Tedder standard, a trial judge may not override a jury's verdict of life when there is a "reasonable basis" for that verdict. Mr. Torres-Arboleda's jury had an eminently reasonable basis for its life recommendation, e.g., extensive psychological testing which showed that Mr. Torres-Arboleda was intelligent, had many positive personality features, and was a good candidate for

rehabilitation; the disparate treatment afforded to the codefendants (neither Sinisteria-Balleysca nor the third person will ever be on death row, and both are on the streets today, one with total immunity from the State). If the trial judge's override of this jury recommendation for life passes muster under the eighth amendment, the United States Supreme Court can no longer be confident that this Court still "takes that [Tedder] standard seriously." Spaziano, 104 S. Ct. at 3165.

The override scheme and the application of the Tedder standard were upheld in Spaziano on the basis of the "significant safeguard" provided by the Tedder standard, the United States Supreme Court's satisfaction that this Court took that standard seriously, and the lack of evidence that this Court had failed in its responsibility to perform meaningful appellate review. Spaziano, supra, 468 U.S. at 465-66. Mr. Torres-Arboleda's claim is that in his case the assurances upon which the United States Supreme Court relied in Spaziano have not been fulfilled. On the contrary, although a "reasonable basis" for the jury's life recommendation was present, the trial judge overrode that recommendation, and this Court shifted the burden to Mr. Torres-Arboleda to show that no reasonable person could differ from that recommendation in order for it to be upheld. This was patently improper.

The trial court's override is based on insufficient aggravation, the failure to recognize mitigation, the refusal to

abide by proper override principles, and the argument of non-statutory aggravation by the prosecution. The resulting death sentence is arbitrary, and this Court's affirmance was in error.

CLAIM V

MR. TORRES-ARBOLEDA WAS DENIED HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL BY IMPROPER PROSECUTORIAL COMMENTS DURING CLOSING ARGUMENT IN THE GUILT, PENALTY AND SENTENCING PHASES OF THIS CAPITAL TRIAL.

During this capital trial, the prosecutor began by promising the jury that he would not end his case until he had presented all of the evidence in the possession of the State relating to Oscar Torres-Arboleda (R. 294). This was clearly not the State's true intention, as evidenced by the prosecutor's muteness when witness after witness understated or misremembered the number of times they had been convicted of felonies. The prosecutor's true intention to withhold evidence prejudicial to the State is also demonstrated by his failure to introduce evidence of the weapons, including a .38 revolver, kept at the Paint and Body Shop, and in fact arguing the opposite. He also argued that George Williams would testify that he "saw" Mr. Torres-Arboleda fire two shots into his friend's body and then turn the gun at him (R. 303). Even in his deposition, Mr. Williams testified that he did not see the shots fired. The prosecutor summed up his opening statement by telling the jury that "when it's all said and done, the truth will be at the top" (R. 306).

In his closing argument at the guilt phase, the prosecutor again misled the jury by assuring them that they now knew everything there was to know about the facts of the case (R. 803-04). In rebuttal to the defense closing argument, the prosecutor argued that both Desiree Bell and Raymond Jacobs came forward and talked to the police because they had nothing to hide (R. 847; 851) even though they were charged with the same first degree murder charge as Mr. Torres-Arboleda. This certainly implied that Mr. Torres-Arboleda had "something to hide" because rather than freely talking to the police, he exercised his rights to trial and to an attorney.

He further argued to the judge and jury that Mr. Munoz could not have been involved in this crime because the unidentified third suspect did not have his front teeth, and that the judge and jury saw Mr. Munoz's teeth when he testified (R. 848). This was clearly misleading, as these are dentures.

The prosecutor also argued to the jury and numerous times to the Court that Mr. Torres-Arboleda was the only person armed with a gun (R. 853; 799; 129-30). This was untrue, as Detective Pennington testified in his deposition that there were numerous weapons kept at the paint and Body shop and one of them, a .38, was missing after the shooting.

The State attorney also improperly argued for the sentencers to place themselves in the position of the victim.

The prosecutor made additional improper comments at the

penalty phase. He urged the sentencers to consider evidence improper under the dictates of Booth v. Maryland, 482 U.S. 496 (1987). He argued that the sentencers could not consider sympathy in violation of Hitchcock v. Dugger, 481 U.S. 393 (1987). He argued that in California, prisoners serving a life term are generally paroled at the end of two-thirds of their twenty-seven year sentence. "Paroled to do what? To go back on the street again" (R. 951). This implied both that if given life the defendant might be released earlier than anticipated, and that the sentencers should consider future dangerousness, clearly a nonstatutory aggravator.

He further urged the sentencers to consider themselves the "system" which must now deal with "criminals" (R. 953).

> [Y]ou speak for each of us in this community, for all of the community who are afraid and sick and tired of the lawlessness, who are sick and tired of --

(R. 955). While the jury recommended a sentence of life in spite of these improper arguments, there is no way to determine from the record how they affected the jury's guilt determination, or how they affected the sentencing judge's decision to override the jury's recommendation.

The arguments made to the sentencing judge were equally improper. The prosecutor argued:

> This Court is under an obligation to the citizens of this County, of this State to relieve itself of the emotion of that jury. It is time for the public, under the facts of this particular case, to be protected from

> men like Oscar Torres-Arboledo [sic] who conduct themselves more like animals than human beings, survival of the fittest, to kill, maim, and injur --
>
> * * *
>
> MR. OBER: Thank you, Your Honor.
>
> A man who has shown to this Court his propensity and obsession for violence. The law demands, Judge, that he must die. How many murders will the law allow him?

(R. 1130-31).

The prosecutor further argued that Mr. Torres-Arboleda showed no signs of remorse, and was a future threat to the community (R. 1125-26), and that the jury's life recommendation should be ignored because it was by a "narrow" majority (R. 1128-30). These are clearly nonstatutory aggravating circumstances.

The United States Supreme Court has ruled that due process and the right to a fair trial may be breached when a prosecutor engages in improper comment. United States v. Young, 470 U.S. 1, 7-8 (1985). The Court noted:

> Nearly a half century ago this court counseled prosecutors "to refrain from improper methods calculated to produce a wrongful conviction . . . " Berger v. United States, 295 U.S. 78, 88 (1935). The court made clear, however, that the adversary system permits the prosecutor to "prosecute with earnestness and vigor." Ibid. In other words, "while he may strike hard blows, he is not at liberty to strike foul ones." Ibid.
>
> The line separating acceptable from improper advocacy is not easily drawn; there is often a gray zone. Prosecutors sometimes breach their duty to refrain from overzealous conduct by commenting on the defendant's

> guilt and offering unsolicited personal views on the evidence. Accordingly, the legal profession, through its Codes of Professional Responsibility, and the federal courts, have tried to police prosecutorial misconduct. In complementing these efforts, the American Bar Association's Standing Committee on Standards for Criminal Justice has promulgated useful guidelines, one of which states that
>
> > '[it] is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.' ABA Standards for Criminal Justice 3-5.8(b)(2nd Ed. 1980)(footnotes omitted).

Here the line was crossed. Mr. Torres-Arboleda was denied his rights under the sixth, eighth, and fourteenth amendments to the United States Constitution.

This error undermined the reliability of the court's sentencing determination in exercising an override of the jury's life rcommendation and prevented the court from assessing the full panoply of mitigation presented by Mr. Torres-Arboleda. For each of the reasons discussed above the Court should vacate Mr. Torres-Arboleda's unconstitutional sentence of death.

This claim also involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Torres-Arboleda'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 VI

MR. TORRES-ARBOLEDA WAS DENIED HIS FIFTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO A RELIABLE SENTENCING PROCEEDING WHEN HEARSAY STATEMENTS WERE INTRODUCED AT THE PENALTY PHASE OF HIS TRIAL.

During the penalty phase of Mr. Torres-Arboleda's capital trial, the State introduced into evidence testimony about his prior conviction. The State's evidence went beyond a mere recitation that Mr. Torres-Arboleda was convicted of the prior offense; it went into the details of the offense itself.

Testimony about the prior offense was presented through Deputy District Attorney Walter Jackson who prosecuted Mr. Torres-Arboleda in Alameda County, California, for first degree murder. Mr. Jackson's testimony went beyond establishing that Mr. Torres-Arboleda had been convicted. It established that the offense involved a firearm and, over defense objection, explained how many shots were fired, and how many shots actually hit the victim:

> Q All right. And, the individual that was fatally wounded in that incident, how many times was that individual shot?
>
> MR. PALOMINO: I'm going to object to that, your Honor. It's irrelevant.
>
> THE COURT: Overruled.
>
> BY MR. OBER:

> Q How many times was that individual shot, Mr. Jackson?
>
> A My recollection was about four times, that he had actually been hit. There was testimony of numerous shots, five, six, maybe, but my recollection is, that the pathologist testified to about four.

(R. 901-02).

Mr. Jackson's testimony also explained the use of fingerprints in that California case. Finally, the testimony elicited by the prosecutor here detailed the system of early release in California, thus implying to the judge and jury that Mr. Torres-Arboleda would not likely serve his entire minimum sentence in California (R. 899-904).

The evidentiary rules at the penalty phase of a capital trial are more relaxed than during the guilt phase. Hearsay testimony is admissible during the penalty phase as long as the defendant has an opportunity to confront and rebut the testimony. While Mr. Torres-Arboleda knew what evidence had been presented against him in California, he had no way of rebutting Mr. Jackson's testimony, or explaining the defense presented in that previous trial. The State merely needed to prove the existence of the prior felony. There was absolutely no reason to retry that case in Mr. Torres-Arboleda's capital penalty phase. The admission of Deputy District Attorney Jackson's hearsay testimony was error.

This Court recently addressed precisely this type of error

in Rhodes v. State, 547 So. 2d 1201 (Fla. 1989). In Rhodes, this Court recognized that it was proper to admit, at the penalty phase of a capital trial, evidence of the underlying factual basis of a prior felony conviction. The dictates of the sixth amendment limit the scope of evidence admissible to prove the prior offense. Hearsay about testimony presented in the prior trial is inadmissible unless the witness is available for cross-examination. Clearly, under Rhodes the statement by Deputy District Attorney Jackson explaining his recollection of testimony concerning the number of shots fired was inadmissible at Mr. Torres-Arboleda's trial. This Court explained:

> This Court has held that it is appropriate in the penalty phase of a capital trial to introduce testimony concerning the details of any prior felony conviction involving the use or threat of violence to the person rather than the bare admission of the conviction. See Tompkins v. State, 502 So.2d 415 (Fla. 1986), cert. denied, 107 S.Ct. 3277 (1987); Stano v. State, 473 So.2d 1282 (Fla. 1985), cert. denied, 474 U.S. 1093 (1986). Testimony concerning the events which resulted in the conviction assists the jury in evaluating the character of the defendant and the circumstances of the crime so that the jury can make an informed recommendation as to the appropriate sentence. It was not error for the trial court to admit Captain Rolette's testimony.
>
> However, we do find error in the introduction of the tape recorded statement of the Nevada victim. 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. Sec. 921.141(1), Fla. Stat. (1985). The statements made by the Nevada victim came

> from a tape recording, not from a witness present in the courtroom. In Engle v. State, 4338 So.2d 803, 814 (Fla. 1983), cert. denied, 465 U.S. 1074 (1984), we stated:
>
> > The sixth amendment right of an accused to confront the witnesses against him is a fundamental right which is made obligatory on the states by the due process of law clause of the fourteenth amendment to the United States Constitution. Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). The primary interest secured by, and the major reason underlying the confrontation clause, is the right of cross-examination. Pointer v. Texas. This right of confrontation protected by cross-examination is a right that has been applied to the sentencing process. Speech v. Patterson, [386 U.S. 605 (1967)].
>
> Obviously, Rhodes did not have the opportunity to confront and cross-examine this witness. By allowing the jury to hear the taped statement of the Nevada victim describing how the defendant tried to cut her throat with a knife and the emotional trauma suffered because of it, the trial court effectively denied Rhodes this fundamental right of confronting and cross-examining a witness against him. Under these circumstances if Rhodes wished to deny or explain this testimony, he was left with no choice but to take the witness stand himself.

Rhodes, 547 So. 2d at 1204 (footnote omitted).

The admission of Deputy District Attorney Jackson's testimony recounting testimony from a prior trial was error. Mr. Torres-Arboleda was denied the opportunity to confront this evidence because the out of court declarant was never available to testify. The right to cross-examine adverse witnesses has specifically been applied to capital sentencing hearings.

Proffitt v. Wainwright, 635 F.2d 1227, 1254 (11th Cir. 1982).

While the jury ultimately recommended life, it is impossible to assess the effect of this error upon the penalty decision by the sentencing court. For each of the reasons discussed above, this Court should vacate Mr. Torres-Arboleda's unconstitutional sentence of death.

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

CLAIM VII

MR. TORRES-ARBOLEDA'S SENTENCE OF DEATH WAS BASED UPON AN UNCONSTITUTIONALLY OBTAINED PRIOR CONVICTION AND THEREFORE ALSO ON MISINFORMATION OF CONSTITUTIONAL MAGNITUDE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

In United States v. Tucker, 404 U.S. 443, 447-49 (1972), the Supreme Court held that a sentence in a noncapital case must be set aside as a violation of due process if the trial court relied even in part upon "misinformation of constitutional magnitude," such as prior uncounseled convictions that were unconstitutionally imposed. In Zant v. Stephens, 462 U.S. 879 (1983), the Supreme Court made clear that the rule of Tucker

applies with equal force in a capital case. Id. at 887-88 and n.23. Accordingly, Stephens and Tucker require that a death sentence be set aside if the sentencing court relied on a prior unconstitutional conviction as an aggravating circumstance supporting the imposition of a death sentence. Accord Douglas v. Wainwright, 714 F. 2d 1532, 1551 n.30 (11th Cir. 1983). As articulated in Zant v. Stephens, 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). The question in this case is whether allowing petitioner's death

sentence to stand although based in part on a vacated conviction violates this principle.

In its opinion the Mississippi Supreme Court drew no distinction between petitioner's 1963 conviction for assault and the underlying conduct that gave rise to that conviction. In Mississippi's sentencing hearing following petitioner's conviction for murder, however, the prosecutor did not introduce any evidence concerning the alleged assault itself; the only evidence relating to the assault consisted of a document establishing that petitioner had been convicted of that offense in 1963. Since that conviction has been reversed, unless and until petitioner should be retried, he must be presumed innocent of that charge. Indeed, even without such a presumption, the reversal of the conviction deprives the prosecutor's sole piece of documentary evidence of any relevance to Mississippi's sentencing decision.

Contrary to the opinion expressed by the Mississippi Supreme Court, the fact that petitioner served time in prison pursuant to an invalid conviction does not make the conviction itself relevant to the sentencing decision. The possible relevance of the conduct which gave rise to the assault charge is of no significance here because the jury was not presented with any evidence describing that conduct-the document submitted to the jury proved only the facts of conviction and confinement, nothing more. That petitioner was imprisoned is not proof that he was guilty of the offense; indeed it would be perverse to treat the imposition of punishment pursuant to an invalid conviction as an aggravating circumstance.

It is apparent that the New York conviction provided no legitimate support for the death sentence imposed on petitioner. It is equally apparent that the use of that conviction in the sentencing hearing was prejudicial. The prosecutor repeatedly urged the jury to give it weight in connection with its assigned task of balancing aggravating

> and mitigating circumstances "one against the other." 13 Record 2270; App. 17; see 13 Record 2282-2287; App. 26-30. Even without that express argument, there would be a possibility that the jury's belief that petitioner had been convicted of a prior felony would be "decisive" in the "choice between a life sentence and a death sentence." Gardner v. Florida, 430 U.S., at 359, 97 S.Ct., at 1205 (plurality opinion).

Here the judge relied on Mr. Torres-Arboleda's conviction in California to establish the "prior crime of violence" aggravating circumstance upon which his death sentence was based.

This prior conviction was obtained in violation of the United States Constitution, and thus its use in overriding the jury's recommendation of life and imposing death violated the eighth and fourteenth amendments. Johnson v. Mississippi, supra. At the present, California counsel is in the process of marshalling an attack on that conviction on the basis of ineffective assistance of counsel. However, time constraints make it impossible to complete the litigation process prior to the filing date mandated in this case by the signing of the death warrant. Leave to amend is thus requested. Johnson v. Mississippi, supra, is new case law cognizable in post conviction proceedings. See Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989). As a result, this claim is cognizable as being based on a change in law. Leave to amend should be granted, and thereafter relief will be appropriate.

CLAIM VIII

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

The sentencers at Mr. Torres-Arboleda's trial were repeatedly admonished by the State that feelings of mercy or sympathy could play no part in their deliberations as to Mr. Torres-Arboleda's ultimate fate. Beginning with voir dire, the State made it plain that considerations of mercy and sympathy were to have no part in the proceedings (R. 106; 155).

The court indicated its agreement with this notion by instructing the jury that the case must not be decided because the jury felt sorry for anyone (R. 1379), and that sympathy was to play no part in the jury's deliberations (R. 1380). Other such comments were made at trial and sentencing(R. 1128).

In Wilson v. Kemp, 777 F.2d 621, 624 (11th Cir. 1985), the court found that statements which may mislead the sentencer into believing personal feelings of mercy or sympathy for the defendant must be cast aside, violate the eighth amendment. Requesting the sentencers to dispel any sympathy they have had towards the defendant undermined their ability to reliably weigh and evaluate mitigating evidence. The sentencers' role in the penalty phase is to evaluate the circumstances of the crime and the character of the offender before deciding whether death is an

appropriate punishment, Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978), and in doing so, they may not be precluded from considering any aspect of a defendant's character or record or any of the circumstances of the offense as mitigation. Id. An admonition to disregard the consideration of sympathy improperly suggests to the sentencer "that it must ignore the mitigating evidence about the [petitioner's] background and character." California v. Brown, 479 U.S. 538, 107 S. Ct. 837 (1987)(O'Connor, J., concurring).

The United States Supreme Court also recently held in a case declared to be retroactive on its face that a capital sentencer must make a "reasoned moral response to the defendant's background, character, and crime." Penry v. Lynaugh, 109 S. Ct. 2934, 2947 (1989). 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." 109 S. Ct. at 2952. In Mr. Torres-Arboleda's case, however, the trial judge believed that Florida law precluded considerations of sympathy and mercy. This is indicated by his acquiescence to the prosecutor's arguments and by his own instructions to the jury. The net result in this case is the unacceptable risk that the court's override of the jury's life recommendation was the product of its belief that feelings of compassion, sympathy, and mercy towards the defendant were not to be considered in determining its verdict. The resulting sentence

is therefore unreliable in Mr. Torres-Arboleda's case.

The eighth amendment cannot tolerate the imposition of a sentence of death where there exists a "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Penry, 109 S. Ct. at 2952. This error undermined the reliability of the judge's sentencing determination and prevented the sentencer from assessing the full panoply of mitigation presented by Mr. Torres-Arboleda. For each of the reasons discussed above the Court should vacate Mr. Torres-Arboleda's unconstitutional sentence of death.

CLAIM IX

MR. TORRES-ARBOLEDA'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 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).

In this case, Mr. Torres-Arboleda 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. Torres-Arboleda was convicted on the basis of felony murder. The State argued that the victim was killed in the course of a felony. The jury received instructions on premeditated and felony murder. The jury returned a general verdict of guilt on first-degree murder.

If felony murder was the basis of Mr. Torres-Arboleda's conviction, then the subsequent death sentences were unlawful. Cf. Stromberg v. California, 283 U.S. 359 (1931). This is because the death penalty in this case was predicated upon an unreliable automatic finding of a statutory aggravating circumstance -- the felony murder finding that formed the basis for conviction. Automatic death penalties upon conviction of first-degree murder violate the eighth and fourteenth amendments, as was recently stated by the United States Supreme Court in Sumner v. Shuman, 107 S. Ct. 2716 (1987). In this case, felony murder was found as a statutory aggravating circumstance. The murder was committed while the defendant was engaged in the commission of an attempted robbery with a firearm (R. 1396). The sentencing jury was instructed and the judge believed 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. Torres-Arboleda 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. Torres-Arboleda'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]statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty").
>
> * * *
>
> The use of "aggravating circumstances," is not an end in itself, but a means of genuinely narrowing the class of death eligible persons and thereby channeling the jury's discretion. We see no reason why this 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 narrowing the categories of murders for which a death sentence may ever be imposed serves much the same purpose . . . . In fact, each of the five classes of murders made capital by the Texas statute is encompassed in Georgia and Florida by one or more of their statutory aggravating circumstances . . . . Thus, in essence, the Texas statute requires that the jury find the existence of a statutory aggravating circumstance before the death penalty may be imposed. So far as consideration of aggravating circumstances is concerned, therefore, the principal difference between Texas and the other two States is that the death penalty is an available sentencing option--even potentially--for a smaller class of murders in Texas." 428 U.S., at 270-271 (citations omitted).

It seems clear to us from this discussion that the narrowing function required for a regime of capital punishment may be provided in either of these two ways: The legislature may itself narrow the definition of capital offenses, as Texas and Louisiana have done, so that the jury finding of guilt responds to

> this concern, or the legislature may more broadly define capital offenses and provide for narrowing 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. Torres-Arboleda'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. 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. Torres-Arboleda'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 judge relied on this aggravating circumstance to override the jury's recommendation.

"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. Thus is not sufficient to say that the jury found premeditation, as the jury's verdict was a general one and did not distinguish between premeditated and felony murder. The override in this case was predicated upon an improper aggravator factor.

This error undermined the reliability of the judge's sentencing determination and prevented the sentencer from assessing the full panoply of mitigation presented by Mr. Torres-Arboleda. For each of the reasons discussed above the Court should vacate Mr. Torres-Arboleda's unconstitutional sentence of death. Accordingly, habeas relief must be accorded now.

CLAIM X

THE TRIAL COURT'S FAILURE TO ASSURE MR. TORRESS-ARBOLEDA'S PRESENCE DURING CRITICAL STAGES OF HIS CAPITAL PROCEEDINGS, AND THE PREJUDICE RESULTING THEREFROM, VIOLATED THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A criminal defendant's sixth and fourteenth amendment right to be present at all critical stages of the proceedings against him is a settled question. See, e.g., Francis v. State, 413 So. 2d 493 (Fla. 19882); Illinois v. Allen, 397 U.S. 337, 338 (1970); Hopt v. Utah, 110 U.S. 574, 579 (1884); Diaz v. United States, 223 U.S. 442 (1912); Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982); see also Fla. R. Crim. P. 3.1880. "One of the most basic rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of

his trial." Illinois v. Allen, 397 U.S. at 338, Citing Lewis v. United States, 146 U.S. 370 (1892).

Mr. Torres-Arboleda was involuntarily absent from critical stages of the proceedings which resulted in his conviction and sentence of death on separate, distinct, and "critical" occasions. Mr. Torres-Arboleda never validly waived his right to be present. However, during his involuntary absences, important matters were attended to, discussed and resolved. Mr. Torres-Arboleda was excluded from the numerous side bar conferences and the jury instruction conferences, during the guilt-innocence and penalty phases of the trial, where many important issues were decided. The record is silent as to the reason for his exclusion from the proceedings. There is absolutely no evidence on the record that Mr. Torres-Arboleda made a knowing, intelligent, voluntary waiver of his fundamental right to be present at these critical stages of his trial.

The record is entirely devoid of any transcription of the jury instruction conference in the guilt-innocence phase. Apparently, no record was made of the jury instruction conference at all. Mr. Torres-Arboleda was denied his right to be present and he was denied a chance for meaningful review of what transpired during the conference.

> THE COURT: The jury has now left the court room. We will be in recess until ten a.m., tomorow morning. I will, however request counsel for the State and counsel for the Defendant to meet me in chambers, five

minutes from now, where we may have an informal conference concerning proposed jury instructions, to settle any possible differences that the State and Defense may have with reference to what instructions must given.

We will not require the Clerk nor the Court Reporter to be present. . . .

(R. 794)(emphasis added). Appellate and collateral issues were compromised by the court's failure to make a record of the conference. This Court's review of the case on direct appeal was thus thwarted.

This grievous mistake is repeated during the penalty phase of the trial. Mr. Torres-Arboleda is excluded, without any reason, from his instruction conference where decisions are made that affect the determination of whether Mr. Torres-Arboleda will live or die.

THE COURT: Members of the jury, we're going to recess for at least fifteen minutes, so that the Court may meet with counsel for the State and counsel for the defense, in order to finalize the law to be given to you, in this phase of the trial.

Mr. Baliff, please take the jury to the jury room.

Each of you are instructed thay you may not discuss this case among yourselves, while you're in the jury room at this time.

THE COURT: We'll be in recess. I would request counsel for the State and counsel for the Defendant, to accompany me into chambers, in order that we may finalize the instruction to the jury.

(Whereupon, there was a recess taken, after which the parties returned and the

> trial resumed out of the hearing of the jury as follows:)
>
> THE COURT: We have informally settled the jury instructions during the penalty phase of the trial.

(R. 939-40)(emphasis added).

The denial of Mr. Torres-Arboleda's right to be present violates the sixth, eighth and fourteenth amendments to the United State Constitution.

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

CONCLUSION AND RELIEF SOUGHT

The claims discussed above raised matters of fundamental error and/or are 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. Torres-Arboleda's capital conviction and sentence of death, and of this Court's appellate review, they should be determined on their merits. The relief sought herein should be granted.

Many of the claims set out above involve, inter alia,

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

Even a single, isolated error on the part of counsel may be sufficient to establish that the defendant was denied effective assistance, Kimmelman v. Morrison, 106 S. Ct. 2574, 2588 (1986); United States v. Cronic, 466 U.S. 648, 657 n.20 (1984)); Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1970); 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. 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 act as an advocate for his client. As in Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987), there simply was no reason here for counsel to fail to urge them on direct appeal. As in Matire, Mr. Torres-Arboleda is entitled to relief. See also Wilson v. Wainwright, supra; Johnson v. Wainwright, supra. The "adversarial testing process" failed during Mr. Torres-Arboleda's direct appeal -- because counsel failed. Matire at 1438, citing Strickland v. Washington, 466 U.S. 668, 690 (1984).

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

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

Mr. Torres-Arboleda urges that the Court grant him habeas corpus relief, or alternatively, a new appeal for 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

BILLY H. NOLAS
Chief Assistant CCR
Florida Bar No. 806821

JEROME H. NICKERSON
Assistant CCR
Florida Bar No. 0829609

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

By: _____
Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail, first class, postage prepaid to, Robert Landry, Assistant Attorney General, Department of Legal Affairs, Park Trammel Building, 1313 Tampa Street, Tampa, Florida 33602, this 26th day of March, 1990.

_____
Attorney