OCT 4 1993

CLERK, SUPREME COURT Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

OSCAR TORRES-ARBOLEDA,

Petitioner,

V.

HARRY K. SINGLETARY, JR.,

Respondent.

REPLY TO RESPONDENT'S RESPONSE TO PETITION FOR EXTRAORDINARY RELIEF AND FOR WRIT OF HABEAS CORPUS

Respondent, Harry K. Singletary, Jr., challenges Mr. Torres-Arboleda's Petition for Extraordinary Relief and for Writ of Habeas Corpus. The response fails to establish that this Court should deny relief. Relief is appropriate at this time.

I. CLAIM I

Respondent concedes that the issue of whether appellate counsel was ineffective for failing to challenge the propriety of George Williams' identification of Mr. Torres-Arboleda is an issue cognizable in a petition for habeas corpus (Page 4, Respondent's Response to Petition for Writ of Habeas Corpus, hereinafter, "Response"). He contends, however, that the issue was without merit, and therefore does not justify relief (Page 7, Response). As Respondent points out, however, the merit of this issue is dependent upon whether Mr. Williams' testimony could be ("That current counsel disbelieves the testimony given by a witness at trial does not mean that appellate counsel was

derelict "Page 7, Response). As Petitioner points out in his petition, there was no basis in the record to accept Mr. Williams' testimony to the effect that he recognized Mr. Torres-Arboleda in the original photopak, but withheld that information from police. Had this issue been presented to this Court on direct appeal, it would have been able to prevent Mr. Torres-Arboleda's wrongful conviction and sentence of death. It should do so now.

II. CLAIM II

Respondent also concedes that Petitioner's Claim II, at least in part, is cognizable in a petition for writ of habeas corpus (Page 7, Response). Respondent characterizes that portion of Claim II as a <u>Booth</u> claim and urges this Court to reject the same under <u>Payne v. Tennessee</u>, 501 U.S. _____, 111 S.Ct. 2597 (1991). An examination of Claim II reveals, however, that this claim, as well as Petitioner's Claim VI on direct appeal, go not to just the type of character evidence allowed in <u>Payne</u>, but also to the prosecutor's outrageous reliance on non-statutory aggravating factors as he implored the jury again and again to place themselves in the victim's shoes. <u>Payne</u> did not justify this type of comment. This Court had often rejected it as improper. As stated in the Petition, this Court should revisit the issue and grant relief at this time.

III. CLAIM IV

Notwithstanding Appellee's protestations to the contrary, Claim IV, that the jury override in this case was arbitrary and

capricious, was raised both on direct appeal (Claim IX) and in the petition. While this Court rejected the claim on direct appeal, its position was rejected in <u>Parker v. Dugger</u>, 111 S. Ct. 731 (1991). In fairness, that claim should be revisited now and relief granted.

IV. OTHER CLAIMS

Respondent does not address any of the remaining claims contained in the petition, claiming that none state a cognizable claim in habeas corpus proceedings. Each, however, are based upon ineffective assistance of appellate counsel (Pages 79-82, Petition). Insofar as Respondent fails to address the effectiveness of appellate counsel or the merits of the underlying claims, Petitioner relies upon those arguments contained in his petition and incorporates the same in this reply.

CONCLUSION

Respondent does not even attempt to demonstrate to this

Court why it should not grant relief based upon the vast majority

of Petitioner's claims. As to the remaining claims, Respondent

demonstrates no reasons which justify the denial of Mr. Torres
Arboleda's petition. Relief should be granted.

I HEREBY CERTIFY that a true copy of the foregoing motion has been furnished by United States Mail, first class postage prepaid, to all counsel of record on October 4, 1993.

Respectfully submitted,

MICHAEL J. MINERVA Capital Collateral Representative Florida Bar No. 092487

MARTIN J. MCCLAIN Chief Assistant CCR Florida Bar No. 0754773

STEPHEN M. KISSINGER Assistant CCR Florida Bar No. 0979295

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

By:

Copies furnished to:

Robert Landry Assistant Attorney General Westwood Building 7th Floor 2002 North Lois Avenue Tampa, FL 33607