IN THE SUPREME COURT OF FLORIDA

NO. 75846

ETHERIA VERDEL JACKSON,

Petitioner,

v.

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

Respondent.

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

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I. JURISDICTION TO ENTERTAIN PETITION, 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. Jackson's capital conviction and sentence of death.

PROCEDURAL HISTORY

The Circuit Court of the Fourth Judicial Circuit, Duval County, entered the judgments of conviction and sentence under consideration.

Mr. Jackson was convicted and judgment was entered on June 20, 1986. The jury rendered an advisory sentence of death on July 8, 1986. The trial court sentenced Mr. Jackson to death on August 8, 1986. Mr. Jackson appealed from the judgment of conviction and sentence. Mr. Jackson's conviction and sentence were affirmed. Jackson v. State, 530 So. 2d 269 (Fla. 1988). Certiorari to the United States Supreme Court was denied on January 23, 1989. Jackson v. Florida, 109 S. Ct. 882 (1989) Jurisdiction in this action lies in this Court, see, e.g., Smith

v. State, 400 So. 2d 956, 960 (Fla. 1981), because 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. Jackson to raise the claims presented herein. See, e.g., Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); Wilson, supra.

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

justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. See, e.g., Riley; Downs; Wilson; Johnson, supra. The petition pleads claims involving fundamental constitutional error. See Dallas v. Wainwright, 175 So. 2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So. 2d 362 (Fla. 1984). The petition includes claims predicated on significant, fundamental, and retroactive changes in constitutional law. See, e.g., 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. Jackson's claims.

With regard to ineffective assistance, the challenged acts and omissions of Mr. Jackson's appellate counsel occurred before this Court. This Court therefore has jurisdiction to entertain Mr. Jackson's claims, Knight v. State, 394 So. 2d at 999, and, as

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

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

In the instant motion, references to the transcripts and record of these proceedings will follow the pagination of the Record on Appeal. All other references are self-explanatory or otherwise explained.

II. GROUNDS FOR HABEAS CORPUS RELIEF

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

CLAIM I

THIS COURT'S DISPOSITION OF MR. JACKSON'S CASE ON DIRECT APPEAL AFTER STRIKING AN AGGRAVATING FACTOR CANNOT BE SQUARED WITH CLEMONS V. MISSISSIPPI AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE STATE LAW PLACED EXCLUSIVE SENTENCING AUTHORITY WITH THE TRIAL COURT JURY AND JUDGE AND THIS COURT THUS COULD NOT AND IN THIS CASE DID NOT REWEIGH AGGRAVATION AND MITIGATION, AND DID NOT ENGAGE IN ANY APPROPRIATE HARMLESS ERROR REVIEW UPON THE STRIKING OF AGGRAVATING CIRCUMSTANCES.

The United States Supreme Court's recent decision in Clemons v. Mississippi, 58 U.S.L.W. 4395, concerning the striking of aggravating circumstances on direct appeal requires that this Court revisit its disposition of Mr. Jackson's direct appeal. As in Clemons, Mr. Jackson's death sentence violates the eighth and fourteenth amendments "[b]ecause we cannot be sure which course was followed" by this Court on direct appeal and because the mandate of Clemons was not met. On direct appeal, after striking two aggravating circumstances as not supported by the record, the Florida Supreme Court held:

> Although we have rejected the cold, calculated, and premeditated aggravating factor, four valid aggravating circumstances remain. After reviewing this record, we are convinced that elimination of the cold and calculated aggravating factor would not have resulted in a life sentence for this appellant. We note the trial judge found no mitigating circumstances. See, e.g., Hill v. State, 515 So.2d 176 (Fla.1987), cert. denied, ___ U.S. ___, 108 S.Ct. 1302, 99

L.Ed.2d 512 (1988); Bassett v. State, 449 So.2d 803 (Fla.1984).

Jackson v. State, 530 So. 2d 269, 274 (Fla. 1988).

The aggravating circumstance which was struck in this case, cold, calculated, and premeditated was found improper because the Court could not find evidence in the record to support this aggravator.

In Clemons, the United States Supreme Court held that the "[f]ederal Constitution does not prevent a state appellate court from upholding a death sentence that is based in part on an invalid or improperly defined aggravating circumstance" either by 1) reweighing of the aggravating and mitigating evidence or by 2) harmless error review. The Court also held that an appellate court's employment of a "presumption" of death (a ruling that the error is harmless simply because other aggravators remain) violates the eighth amendment. Yet such an inappropriate disposition is precisely what this Honorable Court did on direct appeal in Mr. Jackson's case.

The Clemons court proceeded to vacate the judgment in that case and to remand it to the state courts because "[i]t is unclear whether the Mississippi Supreme Court correctly employed either of these methods." Clemons, 58 U.S.L.W. 4395 (1990). As in Clemons, Mr. Jackson's death sentence must be vacated because of the failure of this Court to employ a constitutionally acceptable standard of review upon the striking of the improper

aggravating circumstance.

A. REWEIGHING AFTER STRIKING IMPROPER AGGRAVATING CIRCUMSTANCES

In Clemons, the Court held that it was permissible although not required for a state appellate court, upon the striking of improper aggravating circumstances, to reweigh the remaining aggravating circumstances against the mitigation:

> Nothing in the Sixth Amendment as construed by our prior decisions indicates that a defendant's right to a jury trial would be infringed where an appellate court invalidates one of two or more aggravating circumstances found by the jury but affirms the death sentence after itself finding that the one or more valid remaining aggravating factors outweigh the mitigating evidence.

Clemons, supra, 58 U.S.L.W. at 4397. However, the Court made it abundantly clear that such "reweighing" was proper only if such were allowed by the state's own laws:

> Contrary to the situation in Hicks, the state court in this case, as it had in others, asserted its authority under Mississippi law to decide for itself whether the death sentence was to be affirmed even though one of the two aggravating circumstances on which the jury had relied should not have been or was improperly presented to the jury. The court did not consider itself bound in such circumstances to vacate the death sentence and to remand for a new sentencing proceeding before a jury. We have no basis for disputing this interpretation of state law . . . .

Id.

This Court has unequivocally held that Florida law does not allow it to "reweigh" aggravating and mitigating circumstances on appeal. Further, the court did not engage in such a weighing in this case, but rather seemingly applied a presumption that death was proper because other aggravators remained.

This Court has consistently held that it does not act as a sentencer or resentencer upon review of death sentences. The capital sentencing statute itself ascribes the role of weighing aggravating and mitigating factors and imposing sentence strictly to the jury and judge. Fla. Stat. 921.141. This Court's own long-standing decisional authority also makes this abundantly clear. For example, in Elledge v. State, 346 So. 2d 998, 1003 (Fla. 1977), the Court expressly held that if improper aggravating circumstances are found, "then regardless of the existence of other authorized aggravating factors we must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death." Thereafter, the Court did not reweigh, but rather it remanded for resentencing by the trial court.

This Court has in fact identified its role on appellate review of capital cases as having two functions: 1) to determine whether the "jury and judge acted with procedural rectitude in applying [the death penalty statute] and [Florida] case law," and 2) to insure "relative proportionality among death sentences

which have been approved statewide." Brown v. Wainwright, 392 So. 2d 1327, 1331 (Fla. 1981), cert. denied, 454 U.S. 1000 (1981).

> Neither of our sentence review functions . . . involves weighing or reevaluating the evidence adduced to establish aggravating and mitigating circumstances. Our sole concern on evidentiary matters is to determine whether there was sufficient competent evidence in the record from which the judge and jury could properly find the presence of appropriate aggravating and mitigating circumstances. If the findings . . . are so supported, if the jury's recommendation was not unreasonably rejected, and if the death sentence is not disproportionate to others properly sustainable under the statute, the trial court's sentence must be sustained even though, had we been triers and weighers of fact, we might have reached a different result in an independent evaluation.

Id. at 1331.

This Court's precedents have thereafter uniformly reaffirmed that the Court's role in reviewing death sentences is that of a reviewer and not that of a sentencer or resentencer, and that the Court therefore does not reweigh. See Quince v. State, 414 So. 2d 185, 187 (Fla. 1982)("Neither of our sentence review functions . . . involves weighing or reevaluating the evidence adduced to establish aggravating and mitigating circumstances"); Lucas v. State, 417 So. 2d 250, 251 (Fla. 1982)("This Court's role after a death sentence has been imposed is 'review,' a process qualitatively different from sentence 'imposition'"); Bates v.

State, 465 So. 2d 490, 493 (Fla. 1985)("As a reviewing Court, we do not reweigh the evidence"); Atkins v. State, 497 So. 2d 1200, 1203 (Fla. 1986)("It is not this court's function to engage in a general de novo re-weighing of the circumstances. Rather, we are to examine the record to ensure that the findings relied upon are supported by the evidence"). Recently, this Court has again reiterated that it does not act as a resentencer (a reweigher) when it reviews death sentences on direct appeal:

> Our function in reviewing a death sentence is to consider the circumstances in light of our other decisions and determine whether the death penalty is appropriate . . . . [and] [i]t is not within this Court's province to reweigh or reevaluate the evidence presented as to aggravating or mitigating circumstances.

Hudson v. State, 538 So. 2d 829, 831 (Fla. 1989)(citations omitted).

Thus, unlike the Mississippi Supreme Court, this Court could not and did not "assert[] its authority under [state] law" to reweigh the remaining aggravating circumstances against the mitigation in Mr. Jackson's case. Rather, the disposition of Mr. Jackson's case should have been controlled by Hicks v. Oklahoma, 447 U.S. 349 (1977). There, the Court held that because "only the [trial level sentencer] could impose sentence,"

> under state law Hicks had a liberty interest in having the jury [and judge] impose punishment, an interest that could not be overcome by the 'frail conjecture' that the jury 'might' have imposed the same sentence

> in the absence of the recidivist statute. [Hicks, 477 U.S.], at 346.

Clemons, 58 U.S.L.W. at 4397. Capital defendants in Florida have, by virtue of state law, and this Court's construction of that law, a liberty interest in having the trial jury and judge impose capital punishment. Petitioner respectfully submits that this Court's opinion on direct appeal in Mr. Jackson's case also involved the "frail conjecture" condemned in Hicks and Clemons.

B. REWEIGHING AFTER APPLYING PROPER LIMITING CONSTRUCTION

The Supreme Court in Clemons also held that an appellate court could perform a weighing process after finding that the sentencer had not been given a proper limiting construction of an aggravating circumstance. Thus, the weighing function could be performed

> either by disregarding entirely the 'especially heinous' factor and weighing only the remaining aggravating circumstance against the mitigating evidence or by including in the balance the 'especially heinous' factor as narrowed by its prior decisions and embraced in this case.

Clemons, 58 U.S.L.W. at 4398. However, the Court concluded that it was unclear which weighing function was undertaken by the Mississippi high court, and thus reversed.

In Mr. Jackson's case, the second type of reweighing was certainly not conducted by this Court. First, this Court has never conducted this type of reweighing in a capital case. To

the contrary, this Court has steadfastly construed its role under Florida capital sentencing statute as one prohibiting appellate reweighing. See Hudson, supra, 538 So. 2d at 831 ("it is not within this Court's province to reweigh or reevaluate the evidence presented as to aggravating or mitigating circumstances."); Brown, supra, 392 So. 2d at 1331 ("neither of our sentence review functions . . . involves weighing or reevaluating the evidence adduced to establish aggravating and mitigating circumstances.")

The fact that such a weighing (employing a proper construction on aggravators improperly construed below) did not occur here is obvious not only because this Court has specifically held that its function is not to reweigh, but because it did not, and could not, reweigh on direct appeal in this case. Here, the Court struck an aggravating circumstance on direct appeal; the Court struck an aggravating circumstance as improper, and did not conduct a review on the basis of instructional error. Since an aggravating circumstance was improper, it should never have been allowed to play a part in the trial jury's and judge's consideration.

C. HARMLESS ERROR BEYOND A REASONABLE DOUBT

Lastly, the United States Supreme Court held in Clemons that a sentence of death could be salvaged upon the striking of

improper aggravating circumstances by an appellate court finding of harmlessness beyond a reasonable doubt, although the Court noted that it was not expressing an opinion on whether a court should do so.

> Even if under Mississippi law, the weighing of aggravating and mitigating circumstances were not an appellate, but a jury function, it was open to the Mississippi Supreme Court to find that the error which occurred during the sentencing proceeding was harmless.

Clemons, 58 U.S.L.W. at 4399. In fact, the Supreme Court cited Satterwhite v. Texas, 486 U.S. 249 (1988), for the proposition that a state appellate court could apply a standard of eighth amendment harmlessness review. See Clemons, id. Satterwhite plainly held that such a standard can only be applied on the basis of a finding of harmlessness beyond any reasonable doubt. This standard, however, was expressly not applied by the this Court on direct appeal in Mr. Jackson's case. The Clemons opinion noted that the test of harmless error must be one of harmlessness beyond a reasonable doubt: "Although [Mississippi] applied the proper 'beyond a reasonable doubt' standard, see Chapman v. California, 386 U.S. 18, 24 (1967) . . . ." Id. Chapman, of course, is the classic articulation of the harmlessness beyond a reasonable doubt standard.

In Mr. Jackson's case, that standard was simply not applied on direct appeal -- it was never even mentioned. Indeed, in this

case the Court applied a "presumption" of death because there were other aggravating circumstances. See Jackson v. Dugger, 837 F.2d 1469, 1473 (11th Cir. 1988)(noting that this Court in some cases on direct appeal has applied such a presumption that the death sentence remains valid if there are other aggravating circumstances). However, the presumption employed in Mr. Jackson's case is precisely what Clemons condemned. On direct appeal in Mr. Jackson's case, the court held:

> Since death is presumed in this situation, the trial court's improper consideration of the factors discussed above does not render the sentence invalid.

Jackson v. State, 395 So.2d 501, 506 (Fla. 1981)(emphasis added).

It is precisely because the record is not clear that a proper standard was applied, while it is clear that an improper one (one "presum[ing] death in this situation") was applied, that the matter should now be reconsidered in light of Clemons. Here, as in Clemons, there is nothing to clearly reflect that the Court properly undertook any of the permissible functions of appellate review:

> Because we cannot be sure which course was followed in Clemons's case, however, we vacate the judgment insofar as it rested on harmless error and remand for further proceedings.

Clemons, id. at 4399. The result should be the same here, and Mr. Jackson should be allowed a new appeal during which these

issues can be properly briefed and considered in light of Clemons.

D. AUTOMATIC RULE OF AFFIRMANCE

The Court in Clemons made it absolutely clear that an automatic rule of affirmance when aggravating circumstances are stricken but other aggravating circumstances remain is impermissible under Lockett v. Ohio, 438 U.S. 586 (1978), and Eddings v. Oklahoma, 455 U.S. 104 (1982),

> for it would not give defendants the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances.

Clemons, 58 U.S.L.W. at 4399. As the Clemons court noted, an "automatic" rule of affirmance upon the striking of improper aggravators when there are other aggravators does not "give defendants the individualized treatment" that the eighth amendment requires. But that is what the court did here, "presum[ing]" death to be appropriate because other aggravators remained. Jackson, 530 So. 2d at 274. Given the holding of Clemons, reconsideration at this juncture is as appropriate here as it was when this Court revisited its prior disposition in Ms. Jackson's direct appeal in light of Booth v. Maryland. See Jackson v. Dugger, supra.

Further, the judgment of the Mississippi Supreme Court was

vacated in Clemons because that court's opinion was virtually silent as to the particulars of the mitigating evidence presented by the defendant to the jury. Clemons, at 4399. The Court in Mr. Jackson's case also made no mention of the mitigation before the judge and jury, thus making it unclear that "the court fully heeded [the United States Supreme Court's] cases emphasizing the importance of the sentencer's consideration of a defendant's mitigating evidence." Clemons, id. at 4399.

On Mr. Jackson's direct appeal, the Court did the one thing specifically held impermissible in Clemons: it automatically affirmed because of the existence of other aggravating factors. Such an affirmance of a death sentence should be allowed to go uncorrected and the matter should now be revisited. See Kennedy, 483 So. 2d at 426. See also Jackson v. Dugger, supra.

E. CONCLUSION

In Mr. Jackson's case, this Court on direct appeal struck an aggravating circumstance as being unsupported by the evidence and thus improper. The Court nevertheless affirmed Mr. Jackson's death sentence without articulating a proper reason for doing so, without mentioning mitigation, and by employing a presumption that death was proper because there were other aggravators -- precisely what Clemons forbids. The United States Supreme Court reversed in Clemons, precisely because the state court's decision

was ambiguous. Here, the decision on Mr. Jackson's direct appeal is even more wanting -- the only thing that is not ambiguous from this Honorable Court's direct appeal opinion is that an improper presumption of death was employed.

In Florida, sentencing authority rests with the trial judge and jury. This Court was and is foreclosed, by statute and by its own case law, from reweighing aggravation and mitigation in order to uphold a death sentence after the invalidation of aggravating circumstances, and certainly did not reweigh on Mr. Jackson's direct appeal. Further, on direct appeal the Court did not apply a standard of review of harmlessness beyond a reasonable doubt, while it did apply a presumption of death. This Court's diposition is thus plainly in error. Clemons has now made this clear. The matter should be revisited. Habeas corpus relief should be granted and Mr. Jackson should be allowed to properly present these issues in a new appeal in order for the Court to fully and fairly consider this case in light of Clemons. See Wilson v. Wainwright, 474 So. 2d at 1165. ("We therefore grant petitioner's request for writ of habeas corpus and grant him a new direct appeal on the merits of his convictions and sentence").

In light of Clemons, and given Florida's penalty scheme, the failure of the Florida Supreme Court on direct appeal to remand for resentencing deprived Mr. Jackson of his rights to due

process and equal protection by denying him the liberty interest created by Florida's capital sentencing statute. The very ambiguities in the Florida Supreme Court's opinion demonstrate that the affirmance of Mr. Jackson's death sentence is infirm under the eighth amendment. See Vitek v. Jones, 445 U.S. 480 (1980); Hicks v. Oklahoma, 447 U.S. 343 (1980); Clemons v. Mississippi. The invalidity of the presumption of death employed here has been made manifest by Clemons. Mr. Jackson was not afforded the protections provided under Florida's capital sentencing statute, and was denied his eighth and fourteenth amendment rights. Habeas corpus relief is appropriate.

CLAIM II

IN LIGHT OF THIS COURT'S RECENT DECISIONS THAT 1) THE SENTENCING COURT MUST EXPRESSLY EVALUATE ALL MITIGATING FACTORS PROPOSED BY THE DEFENDANT, MUST FIND EACH PROPOSED FACTOR THAT HAS BEEN REASONABLY ESTABLISHED BY THE EVIDENCE AND IS MITIGATING IN NATURE, AND MUST WEIGH THOSE MITIGATING CIRCUMSTANCES AGAINST THE AGGRAVATING CIRCUMSTANCES; 2) THAT THE SENTENCER MAY FIND THAT SOME AGGRAVATING CIRCUMSTANCES ARE ENTITLED TO LITTLE WEIGHT; AND 3) THAT THE AGGRAVATING FACTOR OF ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL DOES NOT APPLY UNLESS THE CRIME WAS MEANT TO BE DELIBERATELY AND EXTRAORDINARILY PAINFUL, THIS COURT SHOULD REVISIT ITS EARLIER DECISION THAT THE TRIAL COURT CORRECTLY FOUND THERE WERE SUFFICIENT AGGRAVATING CIRCUMSTANCES TO SUPPORT A SENTENCE OF DEATH AND NO MITIGATING FACTORS.

It is appropriate for this Court to exercise its habeas

corpus jurisdiction to revisit its earlier decisions in light of changes and evolutionary developments in the law. When petitioner asserts that new developments warrant further review of a claim that was previously considered by this Court and is record based, this Court has recognized that it is appropriate for this Court to consider the claim. See Preston v. State, 444 So. 2d 939, 942 (Fla. 1984)("an appellate court does have the power to consider and correct erroneous rulings notwithstanding that such rulings have become the law of the case"), citing Strazilla v. Hendrick, 177 So. 2d 1, 4 (Fla. 1965); Kennedy v. Wainwright, 483 So. 2d 424, 426 (Fla. 1986)("In the case of error that prejudicially denies fundamental constitution rights . . . this court will revisit a matter previously settled by the affirmance of a conviction or sentence.") Given this Court's recent rulings in Campbell v. State, 15 F.L.W. 342 (Fla., June 14, 1990), Porter v. State, No. 72,301 (Fla., June 14, 1990), and Hallman v. State, 15 F.L.W.S. 207 (Fla., April 12, 1990), it should consider Mr. Jackson's claim that the evidence did not support the trial court's findings that there were no mitigating factors and that there were sufficient aggravating factors to support a sentence of death.

In the July 1986 penalty phase, Mr. Jackson presented ample testimony on nonstatutory mitigation which was dismissed by the trial court without the least explanation, clearly contrary to

the requirements of Campbell. This included unrefuted testimony that Mr. Jackson was a loving and attentive father to his four children (R. 1317-18, 1338-40, 1362 and 1367); that he was devoted to his family and performed particular service to a father and sister who were confined to wheelchairs (R. 1360-62 and 1366-68); that he had considerable artistic talent (R. 1357-58); that he performed acts of kindness to neighbors (R. 1363-64); that he had a serious drug problem (R. 451-52, 596-97, 711-16, 722 and 1342); and had offered cooperation with the State against an earlier co-defendant (R. 1291-1309).

A. THIS COURT HAS RECENTLY RENDERED DECISIONS THAT CALL FOR REVISITING OF ITS DECISION ON DIRECT APPEAL

In Campbell v. State, supra, this Court recognized that trial courts "continue to experience difficulty in uniformly addressing mitigating circumstances," id., 15 F.L.W. at 343. Because of this, the court suggested that capital defendants may have been deprived of their fundamental eighth amendment right to have all relevant mitigation considered by the capital sentencer, citing Eddings v. Oklahoma, 455 U.S. 104, 114-15 (1982). See also Zant v. Stephens, 462 U.S. 862, 879 (1983)(Eighth Amendment guarantees a capital defendant an "individualized determination" of the appropriate sentence). Moreover, this Court noted that the failure to set forth specific findings concerning aggravating and mitigating circumstances could prevent it from adequately

carrying out its responsibility of providing the constitutionally required meaningful appellate review, including proportionality review. Campbell, supra, 15 F.L.W. at 343-44; Dixon v. State, 283 So. 2d 1, 9 (Fla. 1973). Indeed, lack of uniformity in the application of aggravating and mitigating circumstances invariably would result in the arbitrary and capricious imposition of the death penalty. Furman v. Georgia, 408 U.S. 238 (1972); see Grossman v. State, 525 So. 2d 833, 850 (Fla. 1988) (Shaw, J., concurring).

Therefore, in Campbell this Court set out detailed requirements for sentencing courts to follow in making findings with respect to mitigating circumstances:

> When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature. The court must find as a mitigating circumstance each proposed factor that has been reasonably established by the evidence and is mitigating in nature. .... The court must next weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance. Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight. To be sustained, the trial court's final decision in the weighing process must be supported by

> "sufficient competent evidence in the record." Brown v. Wainwright, 392 So. 2d 1327, 1331 (Fla. 1981).

Campbell, 15 F.L.W. at 344 (footnotes and citations omitted). In footnote 6 the court listed five possible general categories of nonstatutory mitigating circumstances as follows:

1) abused or deprived childhood.

2) contribution to community or society as evidenced by an exemplary work, military, family or other record.

3) remorse and potential for rehabilitation; good prison record.

4) disparate treatment of an equally culpable codefendant.

5) charitable or humanitarian deeds.

As is discussed in detail below, the trial court's treatment of the mitigation advanced by petitioner is clearly inconsistent with Campbell, supra. See also Nibert v. State, Case No. 71,980 (Fla. July 26, 1990).

On the same day that this Court rendered its opinion in Campbell, it also issued a decision in Porter, supra. In Porter, this Court addressed the recurring question of the meaning of the "especially heinous, atrocious or cruel" aggravating factor, an issue that has troubled the trial courts and this Court ever since this Court's decision in Dixon, supra. In Dixon, this Court limited the applicability of the aggravator to the "conscienceless or pitiless crime which is unnecessarily

torturous to the victim." Dixon, 283 So. 2d at 9. However, subsequent to Dixon, it was unclear whether in applying this factor, sentencing courts and juries should focus on the objective facts of the manner in which the crime was carried out, the degree of suffering presumably experienced by the victim, or the intent of the perpetrator to cause suffering. See Barnard, The 1988 Survey of Florida Law: Death Penalty, 13 Nova L. Rev. 905, 929-35 (1989).

In Pope v. State, 441 So. 2d 1073 (Fla. 1983), in rejecting the notion that a lack of remorse could be properly considered in assessing the presence of the heinous, atrocious or cruel aggravator, this Court held that any definition of heinous, atrocious, or cruel should focus on "the manner in which the crime was accomplished," rather than on "the perpetrator of the act" and "the mindset of the murderer," Id. at 1077. It is further noted that the 1981 revised Standard Jury Instructions in Criminal Cases reflected the fact that the mindset of the defendant was not relevant to the heinous, atrocious, or cruel aggravator. Id. at 1077-78. Both the trial court in imposing sentence and this Court in reviewing the sentence presumably followed the dictates of Pope. However, in Porter, supra, this Court effectively overruled Pope, deciding that the mindset of the defendant is a crucial factor in deciding whether the "especially heinous, atrocious or cruel" aggravating circumstance

applies. Specifically, this Court reversed a trial court finding that this aggravator was present, stating:

> [T]his record is consistent with the hypothesis that Porter's was a crime of passion, not a crime that was meant to be deliberately and extraordinarily painful. The state has not met its burden of proving this factor beyond a reasonable doubt, and the trial court erred in finding to the contrary.

Porter, slip op. at 7. A week later, this Court approved an amendment to the Standard Jury Instructions in Criminal Cases. Standard Jury Instructions Criminal Cases - 90-1, No. 75,956 (Fla. June 21, 1990)(Motion for Rehearing Pending). The effect of the amendment was to re-incorporate language from Dixon, supra, that had been removed from the 1981 version of the Standard Jury Instructions. It was this deletion that was relied upon by the Pope court in rejecting the relevance of the mind set of the murderer to heinous, atrocious, and cruel aggravation. Porter, like Campbell, provides a further reason for this Court to revisit its earlier decision, particularly given the importance of the heinous, atrocious, or cruel aggravator to the capital sentencing determination.

Finally, in Hallman, supra, this Court reversed a jury override. In doing so, it noted that not only was there mitigating evidence on which the jury may have relied in recommending the death sentence, but also that the sentencing jury "may well have decided that, although four aggravating

factors were proved, some were entitled to little weight." Hallman, 15 F.L.W. at S208. The court thus recognized that in recommending or imposing sentence the capital sentencer is free to discount the weight to be given aggravating circumstances even if they are legally established. Again, like Campbell and Porter, this aspect of the Hallman decision calls for this Court to revisit its earlier decision in this matter that the trial court acted properly in identifying and weighing the relevant aggravating and mitigating circumstances.

B. THE TRIAL COURT FAILED TO MAKE EXPLICIT FINDINGS CONCERNING THE MITIGATION PROPOSED BY MR. JACKSON, IN VIOLATION OF THE STANDARDS SET FORTH IN CAMPBELL

Mr. Jackson introduced evidence of the statutory mitigating circumstances of age (he was 26 at the time of the offense), and a number of nonstatutory mitigating circumstances. These included evidence that Mr. Jackson had a serious drug problem, a loving and positive relationship with his four children, an especially close and supportive relationship with his father and a sister confined to wheelchairs, had performed acts of kindness in his neighborhood, had unusual artistic talent, and had previously offered cooperation against a co-defendant to local prosecutors.

This Court has previously recognized that each of the above moral factors is a nonstatutory mitigating circumstance. See,

e.g., Cochran v. State, 547 So. 2d 928 (Fla. 1989) (age, family situation and remorse); Pentecost v. State, 545 So. 2d 861 (Fla. 1989) (no prior history of violence); Spivey v. State, 529 So. 2d 1088 (Fla. 1988) (poverty and deprived childhood); Perry v. State, 522 So. 2d 817 (Fla. 1988) (good character, stress and age); Fead v. State, 512 So. 2d 176 (Fla. 1987) (good worker and provider, good prison record); Amazon v. State, 487 So. 2d 8 (Fla. 1986) (poor family setting and age (19)); Thompson v. State, 456 So. 2d 1072 (Fla. 1984) (good son); McCampbell v. State, 421 So. 2d 1072 (Fla. 1982) (employment and prison record, difficult home life); Neary v. State, 384 So. 2d 881 (Fla. 1980) (age (18) and no male in household while growing up). See also Campbell, supra, 15 F.L.W. at 344, n.6, setting forth a partial list of categories of valid nonstatutory mitigating circumstances.

In response to this evidence of mitigating circumstances. While there is no rule that the age of a young defendant must automatically be considered as a mitigating factor, Scull v. State, 533 So. 2d 1137, 1143 (Fla. 1988), Campbell clearly requires that a trial court make explicit findings setting forth its reasoning as to whether a mitigating factor proposed by the defendant is mitigating in nature. Campbell, supra, 15 F.L.W. at 344 and n.6. This Court cannot review a trial court's "feeling" that a mitigating factor proposed by the defendant and supported

by the evidence is not mitigating in nature. Thus, the trial court's conclusion without any supporting justification that Mr. Jackson's evidence was not a mitigating factor does not satisfy the requirements of Campbell.

This totally fails to meet the requirements set forth in Campbell. There is no way to tell whether the court found 1) that the proposed mitigating factors were not mitigating in nature, Campbell, supra, 15 F.L.W. at 343-44, or 2) that the proposed mitigating factors were not "reasonably established by the evidence," i.d..

The lack of any factual findings or reasons for the trial court's conclusions regarding the proposed nonstatutory mitigation falls far short of the requirements set forth in Campbell that the trial court must make specific findings concerning each proposed mitigating circumstance, including the weight to be accorded to each mitigating factor. Campbell, supra, 15 F.L.W. at 343-44. The trial court's non-findings are intolerable in a case involving life or death. They made the constitutionally requisite meaningful appellate review impossible. This is perhaps implicit in this Court's apparent confusion concerning the findings.

The trial court's treatment of the mitigation advanced by petitioner simply cannot withstand scrutiny in light of Campbell. The result is that there is no way to know whether the trial

court properly considered all the relevant mitigation advanced by petitioner. Further, the trial court's noncompliance with Campbell foreclosed the meaningful appellate review to which petitioner was constitutionally entitled.

C. This Court's Affirmance of the Trial Court's Finding That the Killing Was Especially Heinous, Atrocious or Cruel is Inconsistent with This Court's Subsequent Decisions in Porter v. State and Brown v. State, 526 So. 2d 903 (1988)

As noted earlier, in Porter v. State, this Court held that the aggravating factor of "especially heinous, atrocious or cruel" does not apply unless the crime is one that "was meant to be deliberately and extraordinarily painful." Porter, supra, slip op. at 7 (emphasis original). This definition, requiring that the defendant have intended to cause extraordinary suffering, replaces the earlier definition that did not focus on the perpetrator of the act. See Pope, supra. It is clear that there was insufficient evidence to find beyond a reasonable doubt that the especially heinous, atrocious or cruel aggravating factor was established under the Porter standard.

There was no evidence that Mr. Jackson intended to cause the victim extraordinary pain. Thus, under the current standards applied by this Court, the finding of the especially heinous, atrocious or cruel aggravating circumstance would have to be reversed.

Moreover, this Court's approval of the trial court's finding

of the especially heinous, atrocious or cruel aggravating circumstance in Mr. Jackson's case cannot be squared with the Court's reversal of the finding of the same circumstances in Brown v. State, 526 So. 2d 903 (1988). These facts of the crime in Brown are similar to those in Jackson. In Brown, police officer James Bevis tried to arrest Brown and a codefendant. Brown assaulted the police officer, fought him to the ground, seized his revolver and shot him in the arm. Brown then stood over the virtually paralyzed officer, who pleaded for his life before Brown shot him twice in the head. Brown, supra, 526 So. 2d at 906-07 n.11.

This Court reversed the finding of heinous, atrocious or cruel, stating:

> It appears from the sentencing order that the trial judge based his finding that the murder was especially heinous, atrocious or cruel to a large degree upon the victim's status as a law enforcement officer. The mere fact that the victim is a police officer is, as a matter of law, insufficient to establish this aggravating circumstance. Nor is an instantaneous or near-instantaneous death by gunfire ordinarily a heinous killing.
>
> In this case, the evidence indicated that the fatal shots came almost immediately after the initial shot to the arm. The murder was not accompanied by additional acts setting it apart from the norm of capital felonies and the evidence disproved that it was committed so as to cause the victim unnecessary and prolonged suffering.

Id. at 906-07 (footnote and citations omitted) (emphasis supplied).[1]

This Court's conclusions in Brown are equally applicable to Mr. Jackson's case. Although the trial court's findings in Mr. Jackson's case were much less explicit than in Brown, it appears that the court based its finding of the especially heinous, atrocious and cruel aggravating factor to a large degree on the facts that the victim was an older man with asthma (R. 1532). Like the fact that the victim was a law enforcement officer, see Brown, supra, other personal characteristics of the victim such as his size or sex do not in themselves justify the finding of this aggravating factor. See South Carolina v. Gathers, 109 S. Ct. 2207 (1989) (error for prosecutor to urge death penalty based on personal characteristics of victim).

There is no other rational basis for a distinction between Brown and Jackson.

Application of the especially heinous, atrocious or cruel aggravating factor to the facts of Jackson, but not to those of Brown, appears on its face to be arbitrary and capricous, especially in light of this Court's subsequent decision in Porter. Unless an aggravating factor is interpreted

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[1]Although it is not entirely clear, the emphasized language may indicate that in Brown this Court had already adopted the standard applied in Porter, supra.

consistently, it fails to fulfill its purpose of providing a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many in which it is not." Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring). Given the change in the interpretation of the especially heinous, atrocious or cruel aggravating factor announced by this Court in Porter and the inconsistently between Jackson and Brown it is incumbent to this Court to revisit its decision on direct appeal.

D. The Trial Court Failed to Make Findings Concerning the Weight of the Aggravating Circumstances Which it Found, in Violation of Campbell and Hallman v. State.

This Court's decision in Campbell also has clear implications regarding trial court findings with respect to aggravating factors. Under Campbell, the trial court must weigh the aggravating circumstances against the mitigating circumstances, after making explicit findings concerning each proposed mitigating circumstance. (The trial court must "expressly consider in its written order each established mitigating circumstance," and its final decision weighing the aggravating and mitigating circumstances "must be supported by 'sufficient competent evidence in the record.'" Campbell, supra, 15 F.L.W. at 344, quoting Brown v. Wainwright, 392 So. 2d 1327, 1331 (Fla. 1989)).

If the procedures set forth in Campbell are to serve their

purpose of promoting the uniform, reliable and consistent imposition of the death sentence and the facilitation of meaningful appellate review, then it is self evident that they also must require the trial court to specify what weight he is giving to the aggravating circumstances and why. This is the case because the weighing process

> is not a mere counting process of X number of aggravating circumstances against Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present. Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case.

Dixon v. State, 283 So. 2d 1, 10 (1973) (emphasis added). If the weighing process requires a "reasoned judgment" concerning the weight of the aggravating and mitigating circumstances, one that will be subject to review by this Court to insure the proportionality of death sentences, then surely the trial court must specify the weight he is affording the aggravating circumstances and why.

This Court recently implicitly recognized this fact in Hallman v. State, 15 F.L.W. 207 (Fla., April 12, 1990). In Hallman, this court held that a jury may properly recommend life based on its belief that "although four aggravating factors were

proved, some were entitled to little weight." Id., 15 F.L.W. at S208. As examples of aggravating factors entitled to little weight, this Court mentioned the fact that Hallman's role in a prior armed robbery of which he had been convicted was relatively minor, and the fact that although, on parole at the time of the murder, "he had done very well with his parole until his DUI." Id. Thus, this Court recognized that in the weighing process, some aggravating factors, like some mitigating factors, are entitled to more weight than others. Under Campbell, therefore, trial courts must explicitly state how much weight they accord to each aggravating factor, as well as to each mitigating factor and the reasons for same.

In the instant case, the trial court said little about the weight accorded to any of the aggravating factors it found. Instead, the court simply set forth its findings that those aggravating factors were present.

The trial court's failure to specify the weight it accorded to the various aggravating circumstances that it found and why it did so, like its failure to make specific findings concerning the mitigating circumstances proposed by Mr. Jackson, deprived Mr. Jackson of his rights to a sentence arrived at by reliable and consistent procedures and precluded the constitutionally requisite meaningful appellate review to which he was entitled.

Recent decisions of this Court, specifically, Campbell,

Porter and Hallman as set forth above, call into question the validity of this Court's affirmance of the trial court's findings that there were three aggravating circumstances and no mitigating circumstances and that death was the appropriate sentence. The trial court's findings with regard to mitigating circumstances do not meet the requirements of Campbell. Given Porter, the aggravator of especially heinous, atrocious or cruel was improperly found. Finally, under Campbell and Hallman at least one of the aggravating circumstances was entitled to little weight. These facts demand that this Court revisit its findings regarding aggravating and mitigating circumstances and the appropriateness of a death sentence made on direct appeal and at a minimum require a remand to the trial court for further consideration in light of Campbell, Porter and Hallman.

CLAIM III

MR. JACKSON'S RIGHTS TO AN INDIVIDUALIZED AND RELIABLE CAPITAL SENTENCING DETERMINATION WERE DENIED BY THE SENTENCING COURT'S REFUSAL TO ALLOW ACCURATE EVIDENCE AND TO PROVIDE INSTRUCTIONS REGARDING THE CONSEQUENCES OF THE JURY'S VERDICT, IN CONTRAVENTION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The eighth and fourteenth amendments require that a sentencer in a capital case not be precluded from considering, in mitigation, any aspect of a defendant's character or record, or any circumstance of the offense that a defendant proffers as a

basis for a sentence less than death. Lockett v. Ohio, 438 U.S. 586 (1978). Excessively vague sentencing standards were condemned in Furman v. Georgia, 408 U.S. 238 (1972), and it is well recognized that in order to pass constitutional muster, a death penalty 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 (1983). Moreover, as discussed in Claim IV, infra, accurate information regarding the consequences of a capital sentencing verdict must not be withheld from a capital sentencing jury. California v. Ramos, 463 U.S. 992, 103 S. Ct. 3446, 77 L.Ed.2d 1171 (1983); Caldwell v. Mississippi.

To that end, defense counsel for Mr. Jackson attempted to present information to the jury that the 25-year minimum mandatory term on a life sentence meant exactly that: that the defendant would indeed serve at least 25 years before being paroled. Mr. Jackson filed pre-trial a motion in limine concerning parole prospects for individuals serving life sentences for first-degree murder convictions. It was denied by the trial court (R. 125-27, 412).

Prior to the commencement of the penalty phase on July 11, 1986, Mr. Jackson renewed his pre-trial motion concerning the penalty, requesting that the jury be advised that under a life

sentence for first degree murder, there is no realistic possibility of parole. The motion was denied (R. 125-26, 659, 667, 1215-16).

In a similar case, the United States Supreme Court held that under the eighth amendment it was proper for such information (accurate information regarding the result of the jury's sentencing verdict) to be presented to the jury. In California v. Ramos, 463 U.S. 992 (1983), a capital case, the Supreme Court reversed a state court decision disallowing a jury instruction that stated that the Governor "is empowered to grant a reprieve, pardon, or commutation of a sentence following conviction of a crime." Id. at 995-96. In so holding, the Ramos Court found that the matter at issue was relevant to the question of capital sentencing, and that it did not run afoul of relevant constitutional safeguards.

> The Briggs instruction gives the jury accurate information of which both the defendant and his counsel are aware, and it does not preclude the defendant from offering any evidence or argument regarding the Governor's power to commute a life sentence.

Id. at 1004 (emphasis added).

Likewise, Mr. Jackson here should not have been precluded from offering accurate information concerning parole, commission, philosophy not to grant parole to defendants convicted of capital offenses. Similarly, counsel should not have been precluded from presenting his argument. The requested instruction was

constitutionally appropriate as well. It was a violation of the eighth amendment not to allow the jury to hear this accurate information: the result was an unreliable sentencing proceeding, and the eighth amendment was violated in this case. This Court should now vacate Mr. Jackson's unconstitutional sentence of death.

CLAIM IV

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

Crimes against the elderly are unparalleled in their capacity to evoke the human emotion of sympathy for the victim's family while simultaneously engendering the emotional and unprincipled responses of rage, hatred, and revenge against the accused. The temptation to provoke such an unbridled and unprincipled emotional response from Mr. Jackson's judge and jury proved irresistible to the State. The Assistant State Attorney's opportunity to unleash these emotions at Mr. Jackson's trial came at several stages of the proceedings but were especially evident during the direct testimony of the State's key witness, Linda Riley, and during argument. Clearly, the testimony and argument was manipulated to elicit maximum emotional impact.

During opening argument the assistant state attorney sought the jury's sympathy with the following:

> MR. MULLANEY: He told his girlfriend to go through the pockets of Mr. Moody. Mr. Moody looked at Linda Riley, the girlfriend, and told her to do whatever he says; and she did, she went through his pockets. The defendant also went through the pockets of Mr. Moody, and got the money from Mr. Moody.
>
> The defendant at that time, ladies and gentlemen, told Linda Riley to tie up his hands. And you will hear from Linda Riley about what he said, and what the victim said. And the victim told Ms. Riley, "Do whatever he says." He offered no resistance.
>
> MR. CHIPPERFIELD: Your Honor, I'm going to have to object at this time to any statements made by Mr. Moody, those aren't arguably relevant, and I would object to them being referred to in opening statement.
>
> MR. MULLANEY: They fall in the exception of excited utterance, and on premeditation, and all the elements in the case --
>
> THE COURT: Let me see counsel at the bench.

(R. 443).

Shortly thereafter the assistant state attorney again returned to his appeal to sympathy:

> MR. MULLANEY: Ladies and gentlemen, when the defendant told his girlfriend, Linda Riley, to tie up Mr. Moody's hands, Mr. Moody looked at Linda Riley and said, "Do whatever he says," and she did, she tied up the hands. And the defendant looked at the way the hands had been tied, and told her it was too loose, and if Mr. Moody got loose, the defendant was

going to kill her.

Ladies and gentlemen, after Mr. Moody's hands had been tied, and after his pockets had been gone through, he begged for his life. He told this defendant that his brother owned the furniture store, that he would give him whatever he wanted, and to please not kill him.

A little bit later, ladies and gentlemen, the defendant told his girlfriend to gag his mouth, and she did.

She then went, ladies and gentlemen, towards the stairwell, the children were making some noise, and a few minutes later when she looked back she saw the defendant choking Mr. Moody. He was on the ground, and he lost consciousness for a while. After he regained consciousness he was squirming a little bit on the ground, and the defendant with the cast on his arm struck the defendant several times in his face with the cast.

(R. 447-48).

Still later in opening argument the assistant state attorney returned to his appeal to sympathy for the victim and his family:

MR. MULLANEY: Also, ladies and gentlemen, you will hear from Wendell Moody, the victim's brother, that he did not come back to the store at 11:00, which was the practice of the business. At that time Mr. Moody, the victim's brother, called the victim's wife. The victim had been married 39 years.

MR. CHIPPERFIELD: Your Honor, I'm going to object to that, and ask to approach the bench.

(And thereupon a bench conference was had out of the hearing of the jury as follows:)

THE COURT: Let the record reflect we're at the bench.

MR. CHIPPERFIELD: Your Honor, I'm going to move for a mistrial. I don't know what possible relevance, or any testimony about the number of years that the two of them had been married, would have in this trial. I think it's an attempt to gain the sympathy of the jury for the victim, and . . .

(R. 469).

The victim's brother, Wendell L. Moody, was called by the State during the guilt phase in part to present irrelevant testimony seeking sympathy from the jury. In response to questions from the assistant state attorney he testified:

Q. Mr. Moody, did you know a man by the name of Linton Moody?

A. My brother.

Q. And what business were you and your brother in, sir?

A. In the retail furniture business.

Q. Was that a family business, sir?

A. Beg your pardon?

Q. Was that a family business?

A. Yes.

Q. And what year did your family enter into the retail furniture business?

A. 1947.

Q. Approximately 40 years?

A. Yes, sir, about 41.

Q. How old are you, Mr. Moody?

A. I'm 68.

Q. And how old was your brother, Linton?

A. He was 64.

(R. 493).

The State's key witness, Linda Riley, was also asked by the prosecutor to testify to sympathy matters that were not relevant to the issues at hand. She testified:

BY MR. MULLANEY:

Q. What did Mr. Moody say when he was on his stomach?

A. He told him that he was having problems breathing, and could he turn over or sit up, that he had asthma, and that he couldn't breathe.

Q. What did the defendant say or do when Mr. Moody told him that?

A. He told him just to lay on his stomach.

Q. What happened next, Ms. Riley?

A. He let him turn over on his side. He told me to check his pockets.

Q. Did Mr. Moody say anything when the defendant told you that?

When the defendant told you to go through his pockets, did Mr. Moody say anything?

A. He said, "Just do whatever he says."
So --

Q. Was Mr. Moody fighting or resisting in any way?

A. No. No, he wasn't.

Q. Did you go through Mr. Moody's pockets?

A. Yes, I did.

Q. And what did you find?

A. His wallet and the keys, I think it was.

Q. Did Etheria also go through the pockets of Mr. Moody?

A. Yes.

Q. Who got the money?

A. Etheria did.

Q. After going through the pockets, what happened next?

A. He got the money that Mr. Moody cashed my check with, and I asked him why was he taking mine, because I had bills to pay and everything, and he said, "Well you can get your check."

So Mr. Moody told me where it was, and that it was all right for me to get it, so I got my check.

Q. What was the next thing the defendant told you to do?

A. He told me to tie him up, his hands up.

Q. Whose hands?

A. Mr. Moody's hands.

Q. And did Mr. Moody say anything?

A. He just told me to do whatever he said, so I did it.

Q. What did you do?

A. I tied his hands up, but it wasn't very tight, he could have gotten it loose. He was moving his hands about, and Etheria told him that -- he was talking to me, and he was -- like said he could get loose, you can tie them tighter than that.

And I told him I couldn't, and he said the if I -- if he gets loose, that he was going to kill me. And he was, you know, talking to both of us back and forth, like -- I don't know, like he was mad.

Q. Was Etheria talking to you and Mr. Moody back and forth at that time?

A. Yes.

Q. After the hands were tied, what did Mr. Moody say?

A. He told him to have mercy, and he said that his brother owns a furniture store, and that he can get anything he wanted, just don't hurt him.

(R. 575-77).

During his closing argument the assistant state attorney again could not resist a return to sympathy and emotional appeal.

MR. MULLANEY: Now, Linda Riley, consistent with portions of Mr. Chipperfield's opening statement, admitted that she tied up Mr. Moody at the defendant's instruction. She admitted that she put a gag on Mr. Moody at the defendant's instructions, and with the victim telling her, "Do what he says," while the victim begged for his life.

(R. 1087).

Moments later the assistant state attorney again attempted to enflame the jury.

> MR. MULLANEY: What's interesting is the statements he makes next, the insulting statements. "Mr. Moody and Linda had been tricking," prostitution, that's his term. Not only did this man here brutally murder Linton Moody, then he adds the additional indignity of the accusations he makes about Mr. Moody.
>
> MR. CHIPPERFIELD: Your Honor, I'll object, and ask to approach the bench.
>
> (And thereupon a bench conference was had out of the hearing of the jury as follows:)
>
> MR. CHIPPERFIELD: Your Honor, I don't think that, No. 1, is proper rebuttal.
>
> No. 2, I don't think that it has anything to do with the proof of the charge. I think it's only calculated to arouse the sympathy and the passion of the jury, and I would move for a mistrial, I think it's improper argument.
>
> THE COURT: Okay, I'll overrule the objection, and deny the motion for mistrial.
>
> (At the conclusion of the bench conference, the further proceedings were had in the presence of the jury as follows:)
>
> MR. MULLANEY: Ladies and gentlemen, as I was saying, the very man who put the knife in Linton Moody, and who beat him severely on December 3rd, is the same man who told his mother that Linda and Mr. Moody had been tricking, and he then told the police later they had this affair while he was in prison. And I suggest the only evidence before you that Linton Moody worked for 40 years as a

> furniture man, paid his electric bills to JEA, like any man in the community --
>
> MR. CHIPPERFIELD: Your Honor, I object again, on the same grounds, same motion.

(R. 1168-69).

In Booth v. Maryland, 482 U.S. 496, 107 S. Ct. 2529 (1987), the United States Supreme Court held that "the introduction of [a victim impact statement] at the sentencing phase of a capital murder trial violates the Eighth Amendment." Id. at 2536. The victim impact statement in Booth contained descriptions of the personal characteristics of the victim, the emotional impact of crimes on the family and opinions and characterizations of the crimes and the defendant "creat[ing] a constitutionally unacceptable risk that the [sentencer] may [have] impose[d] the death penalty in a arbitrary and capricious manner." Id. at 2533 (emphasis added). Similarly, in South Carolina v. Gathers, 109 S. Ct. 2207 (1989), the court vacated the death sentence there based on admissible evidence introduced during the guilt-innocence phase of the trial from which the prosecutor fashioned a victim impact statement during closing penalty phase argument. Booth and Gathers mandate reversal where the sentencer is contaminated by victim impact evidence or argument. Mr. Jackson's trial contains not only victim impact evidence and argument but, in addition, characterizations and opinions of the crimes condemned in Booth.

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

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

arbitrarily or capriciously' . . ." Caldwell v. Mississippi, 472 U.S. 320, 344 (1985)(O'Connor, J., concurring).

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

Florida law also recognizes the constitutionally unacceptable risk that a jury may impose a sentence of death in an arbitrary and capricious manner when exposed to victim impact evidence. In Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989), the court held that the principles of Booth are to be given full effect in Florida capital sentencing proceedings. Jackson is procedurally and factually indistinguishable from the instant case, and directs Mr. Jackson to present the instant Booth claim to this Court in seeking Rule 3.850 relief. Jackson, 547 So. 2d at 1200 n.2. As in Jackson, defense counsel for Mr. Jackson vigorously objected during the State's repeated introduction of victim impact evidence (R. 624-625, 628-629, 644-647). As in Jackson, this claim was presented pre-Booth and Gathers. See Smith v. State, 515 So. 2d 182 (Fla. 1987). Jackson dictates that relief post-Booth and Gathers is now warranted in Mr. Jackson's case. Compare Jackson v. State, 498 So. 2d 406, 411

(Fla. 1986), with Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989).

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. As noted above, this is precisely what transpired at Mr. Jackson's sentencing. Scull, viewed in light of this Court's pronouncement in Jackson that Booth represents a significant change in law, illustrates that Rule 3.850 relief is wholly appropriate.

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

Id. Since a decision to impose the death penalty must "be, and appear to be, based on reason rather than caprice or emotion," Gardner v. Florida, 430 U.S. 349, 358 (1977)(opinion of Stevens, J.), such efforts to fan the flames are "inconsistent with the reasoned decision making" required in a capital case. Booth, supra, 107 S. Ct. at 2536. The decision to impose death must be a "reasoned moral response." Penry, 109 S. Ct. at 2952. The sentencer must be properly guided and must be presented with the evidence which would justify a sentence of less than death.

In Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633 (1985), this Court discussed when eighth amendment error required reversal: "Because we cannot say that this effort had no effect on the sentence decision, that decision does not meet the standard of reliability that the Eighth Amendment requires." Id., 105 S. Ct. at 2646. Thus, the question is whether the Booth errors in this case may have affected the sentencing decision. As in Booth and Gathers, contamination occurred, and the eighth amendment will not permit a death sentence to stand where there is the risk of unreliability. Since the prosecutor's evidence and argument "could [have] result[ed]" in the imposition of death because of impermissible considerations, Booth, 107 S. Ct. at 2534, habeas relief is appropriate.

Moreover, 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. Jackson 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 V

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

In Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(in banc), cert. denied, 109 S. Ct. 1353 (1989), relief was granted to a capital habeas corpus petitioner presenting a Caldwell v. Mississippi claim involving prosecutorial and judicial comments and instructions which diminished the jury's sense of responsibility and violated the eighth amendment in the identical way in which the comments and instructions discussed below violated Mr. Jackson's eighth amendment rights. Etheria Jackson should be entitled to relief under Mann, for there is no discernible difference between the two cases. A contrary result

would result in the totally arbitrary and freakish imposition of the death penalty and violate the eighth amendment principles.

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

At all trials there are only a few occasions when jurors learn of their proper role. At voir dire, the prospective jurors are informed by counsel and, on occasion, by the judge about what is expected of them. When lawyers address the jurors at the close of the trial or a segment of the trial, they are allowed to give insights into the jurors' responsibility. Finally, the judge's instructions inform the jury of its duty. In Mr.

Jackson's case, as in Mann v. Dugger, at each of those stages, the jurors heard statements from the judge and/or prosecutor which diminished their sense of responsibility for the awesome capital sentencing task that the law would call on them to perform.

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

Mann v. Dugger makes clear that proceedings such as those resulting in Mr. Jackson's sentence of death violate Caldwell and the eighth amendment. In Mann, as in Mr. Jackson's case, the prosecutor sought to lessen the jurors' sense of responsibility during voir dire and repeated his effort to minimize their sense of responsibility during his closing argument. In Mann, the in banc Eleventh Circuit held that "the Florida [sentencing] jury plays an important role in the Florida sentencing scheme," 844 F.2d at 1454, and thus:

> Because the jury's recommendation is significant . . . the concerns voiced in Caldwell are triggered when a Florida sentencing jury is misled into believing that its role is unimportant. Under such

> circumstances, a real danger exists that a resulting death sentence will be based at least in part on the determination of a decisionmaker that has been misled as to the nature of its responsibility. Such a sentence, because it results from a formula involving a factor that is tainted by an impermissible bias in favor of death, necessarily violates the eighth amendment requirement of reliability in capital sentencing.

Id. at 1454-55. The comments and arguments provided to Mr. Jackson's jurors were as egregious as those in Mann and went far beyond those condemned in Caldwell. Pertinent examples are reproduced immediately below.

From the very start of the trial the role of the jury in sentencing was trivialized in a steady stream of misstatements. The jury was repeatedly told it was the court -- not the jury -- that decides the sentence (R. 288; 289; 319; 1464; 1472; 1473). What was emphasized to Mr. Jackson's jury was not, as required, that the jury's sentencing role is integral, central and critical. Rather they were told that they only give an advisory sentence, a "recommendation", and that the "ultimate decision" was the judge's (R. 288; 289; 319; 1211; 1464; 1465; 1472; 1473; 1474; 1475; 1476).

The State misinformed the jury concerning the seriousness of their role in determining whether Mr. Jackson's lived or was put to death. The prosecutor told the entire venire panel from which Mr. Jackson's jury was selected:

> The second phase of the trial is what's called the sentencing phase, and the jury sits and recommends, I would like to stress that word, recommends, a sentence to the Judge.
>
> Judge Haddock, he can ignore that recommendation or follow that recommendation once the State proves its case and if you return a verdict of guilty of first degree and there are two possible penalties that the Judge has a choice of one of the two in the sentencing phase.
>
> In the sentencing phase, the jury is asked to weigh a series of factors, aggravating factors and mitigating factors. If the aggravating factors outweigh the mitigating factors, you will be instructed to return a recommendation of death as a sentence in this case.

(R. 319)(emphasis added). The court likewise misinformed the venire as to the seriousness of their role in sentencing Mr. Jackson:

> the jury will render an advisory sentence to the Court as to whether the defendant should be sentenced to life imprisonment or death.
>
> Thereafter, the Judge will sentence the defendant to life imprisonment or death, and the Judge is not required to follow the advisory sentence of the jury. Thus, the jury does not impose punishment.

(R. 288-89)(emphasis added).

The jury was lulled into a false and improper sense of non-responsibility for determining the sentence. During the defendant's closing argument at the penalty phase, defense counsel stated that if the jury recommended the death penalty,

they would be putting Mr. Jackson to death.

The State objected and stated before the jury:

> I'm going to object to the characterization that this jury is doing that, I think the jury is making a recommendation to the Court, and that's the extent of what the jury is doing.

(R. 1464)(emphasis added).

Defense counsel pointed out the State's mis-characterization of the jury's role in sentencing, and then the judge overruled the State's objection without instructing the jury to disregard the State's comments.

The judge went on to dilute the impact of defense counsel's statement, by saying:

> I think the jury understands the use of the word, a figure of speech, when you do something, you do this, is a common way of expressing yourself.

(R. 1464-65). In so saying, the court implied that the prosecutor's misstatement was in fact a true characterization of the law.

The court instructed the jury during the penalty phase:

> Ladies and Gentlemen of the Jury, it is now your duty to advise the Court as to what punishment should be imposed upon the defendant for his crime of murder in the first degree.
>
> As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge; however, it is your duty to follow the law that will now be given you by the Court, and

> render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstance exist to justify the imposition of the death penalty, and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.
>
> Your advisory sentence should be based upon the evidence that you have heard while trying the guilt or innocence of the defendant, and evidence that has been presented to you in these proceedings.

(R. 1472-73)(emphasis added).

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

Again and again, the jury was told it is the judge who "pronounces" sentence. The jury, as if their sentencing determination were but a political straw poll, were told that they were simply making a recommendation, providing a view which could be taken for whatever it was worth by the true sentencing authority who carried the entire responsibility on his shoulders -- the judge.

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

is the responsibility of the judge." [Emphasis in original]).

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

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

Under Caldwell the central question is whether the

prosecutor's comments minimized the jury's sense of responsibility. See Mann, 844 F.2d at 1456. If so, then the reviewing court must determine whether the trial judge sufficiently corrected the prosecutor's misrepresentation. Id. Applying these questions to Mann, the in banc Court of Appeals found that the prosecutor did mislead or at least confuse the jury and that the trial court did not correct the misapprehension. Applying these same questions to Mr. Jackson's case, it is obvious that the jury was equally misled by the prosecutor, and that the prosecutor's persistent misleading and jury minimizing statements were not adequately remedied by the trial court. In fact, the trial court compounded the error.

Under Florida's capital statute, the jury has the primary responsibility for sentencing. In Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), the United States Supreme Court for the first time held that instructions for the sentencing jury in Florida was governed by the eighth amendment. This was a retroactive change in law. See Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987), which excuses counsel's failure to object the adequacy of the jury's instructions and the impropriety of prosecutor's comments. Thus, the intimation that a capital sentencing judge has the sole responsibility for the imposition of sentence, or is in any way free to impose whatever sentence he or she sees fit, irrespective of the sentencing jury's own decision, is inaccurate, and is a

misstatement of the law. See Mann v. Dugger, 844 F.2d at 1450-55 (discussing critical role of jury in Florida capital sentencing scheme). The judge's role, after all, is not that of the "sole" or "ultimate" sentencer. Rather, it is to serve as a "buffer where the jury allows emotion to override the duty of a deliberate determination" of the appropriate sentence. Cooper v. State, 336 So. 2d 1133, 1140 (Fla. 1976). While Florida requires the sentencing judge to independently weigh the aggravating and mitigating circumstances and render sentence, the jury's recommendation, which represents the judgment of the community, is entitled to great weight. Mann, supra; McCampbell v. State, 421 So. 2d 1072, 1075 (Fla. 1982). The jury's sentencing verdict may be overturned by the judge only if the facts are "so clear and convincing that virtually no reasonable person could differ." Tedder, 322 So. 2d at 910. Mr. Jackson's jury, however, was led to believe that its determination meant very little, as the judge was free to impose whatever sentence he wished. Cf. Mann v. Dugger.

In Caldwell, 105 S. Ct. 2633, the Court held "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death lies elsewhere," id., 105 S. Ct. at 2639, and that therefore prosecutorial arguments which tended to

diminish the role and responsibility of a capital sentencing jury violated the eighth amendment. Because the "view of its role in the capital sentencing procedure" imparted to the jury by the improper and misleading argument was "fundamentally incompatible with the eighth amendment's heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case,'" the Court vacated Caldwell's death sentence. Caldwell, 105 S. Ct. at 2645. The same vice is apparent in Mr. Jackson's case, and Mr. Jackson is entitled to the same relief.

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

McGautha v. California, 402 U.S. 183, 208 (1971), might find a diminution of its role and responsibility for sentencing attractive. Caldwell, 105 S. Ct. at 2641-42. As the Caldwell Court explained:

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

Id. at 2641-42 (emphasis supplied).

The comments and instructions here went a step further -- they were not isolated, as were those in Caldwell, but as in Mann were heard by the jurors at each stage of the proceedings. These cases teach that, given comments such as those provided to Mr. Jackson's capital jury, the State must demonstrate that the

statements at issue had "no effect" on the jury's sentencing verdict. Id. at 2646. This the State cannot do. Here the significance of the jury's role was minimized, and the comments at issue created a danger of bias in favor of the death penalty. Had the jury not been misled and misinformed as to their proper role, had their sense of responsibility not been minimized, and had they consequently voted for life, such a verdict, for a number of reasons, could not have been overridden -- for example, the evidence of non-statutory mitigation was more than a "reasonable basis" which would have precluded an override. See Hall v. State, 14 F.L.W. 101 (Fla. 1989); Brookings v. State, supra, 495 So. 2d 135; McCampbell v. State, supra, 421 So. 2d at 1075. The Caldwell violations here assuredly had an effect on the ultimate sentence. This case, therefore, presents the very danger discussed in Caldwell: that the jury may have voted for death because of the misinformation it had received. This case also presents a classic example of a case where no Caldwell error can be deemed to have had "no effect" on the verdict.

Moreover, trial counsel was ineffective for not objecting to the prosecutorial and judicial comments and judicial instruction. United States Supreme Court precedent, Caldwell, and longstanding Florida case law established the basis for such an objection. See Pait v. State, 112 So. 2d 380, 383-84 (Fla. 1959)(holding that misinforming the jury of its role in a capital case

constituted reversible error). See Breedlove v. State, 413 So. 2d 1 (Fla. 1982). No tactical decision can be ascribed to counsel's failure to object. Counsel's failure could not have been based upon ignorance of the law. It deprived Mr. Jackson of the effective assistance of counsel. Accordingly, Mr. Jackson's was denied his sixth and eighth amendment rights.

Mr. Jackson's sentence of death is neither "reliable" nor "individualized."

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. Jackson 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 VI

THE PROSECUTOR'S INFLAMMATORY, EMOTIONAL, AND THOROUGHLY IMPROPER COMMENT ON THE EVIDENCE DURING THE TRIAL RENDERED MR. JACKSON'S CONVICTION AND RESULTANT DEATH SENTENCE FUNDAMENTALLY UNFAIR AND UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

During the guilt innocence phase of Mr. Jackson's trial, the prosecutor, in submitting into evidence the carpet in which the

victim's body was rolled, made the following statements before the jury:

> MR. DELANEY: Your Honor, with the Court's permission, I would like to have the Detective, and with the help of a bailiff, lay this carpet out.
>
> THE COURT: Okay, the answer to your question is yes.
>
> MR. DELANEY: Do you need some help, Detective?
>
> THE WITNESS: Yeah, we're going to need probably one more.

(R. 557).

Trial counsel immediately requested a bench conference, where he objected to the prosecutor's comments about the carpet being so heavy two men would have to bring it into the courtroom and moved for a mistrial (T. 558). The trial court denied the motion and instructed the prosecutor to refrain from further commenting on the evidence (R. 559).

In light of the facts and circumstances of this case involving the killing of Mr. Linton Moody, where the defendant throughout the proceedings maintained his innocence, claiming that the state's key witness, Linda Riley, killed Mr. Moody, the prosecutor's comments constituted personal testimony as to the validity and credibility of the defendant's claim that Linda Riley murdered Mr. Moody or was even physically capable of murdering Mr. Moody. In essence, the comments constituted a

deliberate and undoubtedly successful effort by the prosecutor to testify as to the guilt of the defendant.

These comments were improper, and, at the very least, the jury should have been informed that comments made by the prosecutor on the evidence are not to be considered as evidence or taken into account during deliberations.

In making the comments the prosecutor violated the rules of professional responsibility established for prosecutors. Those standards specifically state that:

> It is unprofessional conduct for a prosecutor knowingly and for the purpose of bringing inadmissible matter to the attention of the judge or jury to offer inadmissible evidence, ask legally objectionable questions, or make other impermissible comments or arguments in the presence of the judge or jury. The Prosecution Function, standard 3-5.6(b).

The commentary on standard 3-5.6 points out the reasons for the standard and the damage which may be caused by violations of the standard. Specifically, the commentary says:

> The mere offer of known inadmissible evidence or asking a known improper question may be sufficient to communicate to the trier of fact the very material the rules of evidence are designed to keep from the fact finder. Moreover, the damage may only be emphasized by an objection to the evidence, so that the offer of inadmissible matter may leave opposing counsel with no effective remedy. This practice and the similar tactic of arguing to the bench or making comments on or off the record in a manner calculated to influence the jury clearly are improper. [citing the ABA, Code of Professional

> Responsibility DR7-106(C).] Many cases have held that such conduct is ground for declaring a mistrial or granting a new trial. [citing Annot., 109 A.L.R. 1089 (1937).]

Due to the clear impropriety and highly prejudicial nature the prosecutor's statements in this case, the trial court should have granted the defendant's motion for mistrial.

The jury could easily have been led to believe, from the prosecutor's repeating his comment that it would take two men to bring the carpet into the courtroom, that the state had disproved Mr. Jackson's contention that Linda Riley could and, indeed, did kill Mr. Moody; thereby tragically and erroneously dismissing a Mr. Jackson's claim of innocence.

Prosecution's inflammatory, emotional, and thoroughly improper comments to the jury during Mr. Jackson's trial rendered Mr. Jackson's conviction and resulting death sentence fundamentally unfair and unreliable in violation of the sixth, eighth, and fourteenth amendments. Darden v. Wainwright, 477 U.S. 168, 181 (1986); Donnelly v. DeChristoforo, 416 U.S. 637 (1974); Berger v. United States, 295 U.S. 78 (1935); Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985)(in banc). Unlike Darden, the prosecutor's comments here did manipulate and misstate the evidence.

The prosecutor's comments during the trial deprived Mr. Jackson of a fair trial and reliable sentence.

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

urge the claim. No procedural bar precluded review of this issue; this issue has been preserved for appeal. See Johnson v. Wainwright, supra, 498 So. 2d 938. However, counsel's failure, a failure which could not but have been based upon neglect or ignorance of the law, deprived Mr. Roberts 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. hearing regarding counsel's ineffective assistance in failing to litigate this claim, and thereafter grant Rule 3.850 relief.

CONCLUSION

For the reasons set forth above, Mr. Jackson respectfully requests that the petition for writ of habeas corpus be granted, and that he be granted the relief requested.

Respectfully submitted,

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