IN THE SUPREME COURT OF FLORIDA

NO. 76,039

JIM ERIC CHANDLER,

Petitioner,

v.

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

Respondent.

PETITION FOR EXTRAORDINARY RELIEF
AND FOR A WRIT OF HABEAS CORPUS

LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. 0125540

JEROME H. NICKERSON
Assistant CCR
Florida Bar No. 0829609
MARK EVANS
Assistant CCR
Florida Bar No. 0104061

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

COUNSEL FOR PETITIONER

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. Chandler's capital conviction and sentence of death.

PROCEDURAL HISTORY

The Circuit Court of the Nineteenth Judicial Circuit, Indian River County, entered the judgment at issue; and the Circuit Court of the Nineteenth Judicial Circuit, St. Lucie County, entered the sentence at issue.

Mr. Chandler was charged by indictment in Indian River County, Florida, with two counts of first-degree murder, two counts of robbery with a deadly weapon, three counts of trafficking in stolen property.

Mr. Chandler entered pleas of not guilty.

Trial commenced on May 6, 1981. May 18, 1981, the jury returned a verdict finding Mr. Chandler guilty inter alia of two counts first-degree murder.

The penalty phase was conducted on May 19, 1981. The sentencing jury returned an advisory sentence of death. On May 19, 1981, the court imposed sentences of death.

On direct appeal the Florida Supreme Court affirmed the verdicts of guilt, but vacated the sentence of death and remanded to the trial court. Chandler v. State, 442 So. 2d 171 (Fla. 1983).

On remand, the trial court granted a motion for change of venue from Indian River County to St. Lucie County.

The trial court conducted the resentencing on September 13 through September 17, 1986. The jury recommended death sentences on September 17, 1986. On September 18, 1986, the trial court sentenced Mr. Chandler to death.

On direct appeal, the Florida Supreme Court affirmed. Chandler v. State, 543 So. 2d 701 (Fla. 1988), cert. denied, 109 S. Ct. 2089 (1989).

Mr. Chandler applied for executive clemency on June 28, 1989. Clemency was denied August 14, 1989. A death warrant was signed on April 30, 1990.

On June 8, 1990, this Court granted a stay of execution and leave to amend Mr. Chandler's prior application for a writ of habeas corpus. Chandler v. Dugger, No. 76, 039 (Fla.).

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. Chandler 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. Chandler's capital conviction and sentence of death, and of this Court's appellate review. Mr. Chandler'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. Chandler's claims.

With regard to ineffective assistance, the challenged acts and omissions of Mr. Chandler's appellate counsel occurred before this Court. This Court therefore has jurisdiction to entertain Mr. Chandler'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. Chandler 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. Chandler'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 at trial will follow the pagination of the Record on Appeal, and will be referred to as "(R. ___)." References to the resentencing proceeding will be designated "(RS. ___)." All other references are self-explanatory or will

be 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. Chandler's case, substantial and fundamental errors occurred in both the guilt and penalty phases of trial. These errors were uncorrected by the appellate review process. As shown below, relief is appropriate.

CLAIM I

THE TRIAL COURT'S REFUSAL TO EXCUSE FOR CAUSE JURORS WHO HAD EXPRESSED A CLEAR AND UNEQUIVOCAL BIAS IN FAVOR OF THE IMPOSITION OF A SENTENCE OF DEATH DEPRIVED MR. CHANDLER OF HIS RIGHT TO A FAIR AND IMPARTIAL JURY, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, AND APPELLATE COUNSEL WAS PREJUDICIALLY INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE ON DIRECT APPEAL.

The most fundamental right guaranteed a criminal defendant is the right to a trial before a fair and impartial jury. See,

e.g., Glasser v. United States, 315 U.S. 60, 84-86 (1942); Irvin v. Dowd, 366 U.S. 717, 722-23 (1961); Turner v. Louisiana, 379 U.S. 466, 471-473 (1965); see also Singer v. State 109 So. 2d 7 (Fla. 1959); Luske v. State, 446 So. 2d 1038 (Fla. 1984). To this end, the standard for determining juror impartiality is "whether the juror can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given by the court." Lusk, supra, 446 So. 2d at 1041. Thus,

> if there is a basis for any reasonable doubt as to any jurors possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial, he should be excused on the motion of a party, or by [the] court on its own motion.

Singer, supra, 109 So. 2d at 24.

As this and other courts have repeatedly affirmed, the constitutional guarantees of juror impartiality are particularly crucial in capital proceedings. See, e.g., Stroud v. United States, 251 U.S. 15 (1919); Crawford v. Bounds, 395 F.2d 297 (4th Cir. 1968), cert. denied, 397 U.S. 936 (1970); Hill v. State, 477 So. 2d 553 (Fla. 1985); Thomas v. State, 403 So. 2d 371 (Fla. 1981); Poole v. State, 194 So. 2d 903 (Fla. 1967); cf. Witherspoon v. Illinois, 391 U.S. 510, 523 (1968). Thus, in capital proceedings,

> [i]t is exceedingly important for the trial court to ensure that a prospective juror who may be required to make a recommendation concerning the imposition of the death penalty does not possess a preconceived opinion or presumption concerning the appropriate punishment for the defendant in the particular case. A juror is not impartial when one side must overcome a preconceived opinion in order to prevail. When any reasonable doubt exists as to whether a juror possesses the state of mind necessary to render an impartial recommendation as to punishment, the juror must be excused for cause.

Hill, supra, 477 So. 2d at 556 (emphasis added), citing Thomas v. State, supra; see also Stroud, supra; Crawford, supra.

A juror who expresses a predisposition toward the death penalty, and/or an unwillingness recommend a life sentence, cannot sit as a fair and impartial juror, and must be excused for cause upon the motion of the affected party -- i.e., the capital defendant. See Thomas, supra, Hill, supra; compare Witherspoon supra; Witt v. Wainwright, 469 U.S. 420 (1985); Adams v. Texas 448 U.S. 38 (1980). A trial court's failure to excuse such a juror, upon motion of a party, "violate[s] express requirements in the sixth amendment to the United States Constitution and in article I, section 16, of the Florida Constitution, that an accused be tried by 'an impartial jury.'" Thomas, supra, 403 So. 2d at 375.

Several individuals in the venire from which Mr. Chandler's jury was selected expressed such a predisposition for and bias

towards the death penalty. For example, Mr. Mellin stated unequivocally that he believed that anyone convicted of first degree murder should be sentenced to death, under any circumstances:

> MR. UDELL: Under what circumstances, generally speaking, do you think that the death penalty is appropriate?
>
> MR. MELLIN: Contract murder would be one. A felony murder, in the sense of during a robbery or espionage during war-time.
>
> MR. UDELL: Let me ask you, you named three types. Do you want to impose the death penalty in all three of those types?
>
> MR. MELLIN: Yes, sir.
>
> MR. UDELL: Automatically?
>
> MR. MELLIN: Automatically.

(RS. 333).

The prosecutor nor the Court even attempted to rehabilitate Mr. Mellin. Nor did they directly question Mr. Mellin concerning his views on the death penalty. Defense counsel challenged Mr. Mellin for cause (RS. 408) and was denied by the Court (RS. 409).

Mr. Mellin was not the only venire person predisposed towards the death penalty:

> MR. UDELL: Instead of asking you under what circumstances the death penalty would be appropriate, tell me, is there any type of murder where it should never be imposed, or any type of murder where it should always be imposed?
>
> MS. KING: It should be imposed on, I

think, any one that is not in self-defense murder.

MR. UDELL: Okay.

Any murder that's not committed in self-defense, you would impose the death penalty?

MS. KING: Yes.

MR. UDELL: Would that be true no matter what the other circumstances are?

MS. KING: I would have to say yes.

MR. UDELL: Is that a yes.

MS. KING: Yes.

(RS. 363).

Again, the prosecutor nor the Court attempted to rehabilitate Ms. King. Nor did they question Ms. King concerning her views on the death penalty. Defense counsel challenged Mrs. King for cause (RS. 406) and it was denied (RS. 408).

Yet another venire expressed understanding and belief that death was "automatically" appropriate in kidnapping, etc. Kidnapping is one of the aggravators the court found in its order in support of the death penalty:

MR. UDELL: Under what circumstances do you think the death penalty is appropriate?

MR. RUGGIRELLO: Like Mr. Mellin said, contract killing, assassination, kidnapping that results in the death of the victim. I think those are certainly crimes that should almost always, you know, the death penalty imposed.

MR. UDELL: Any crime in which someone doesn't die?

MR. RUGGIRELLO: In which someone doesn't die?

MR. UDELL: Treason?

MR. RUGGIRELLO: Okay.

MR. UDELL: Yes?

MR. RUGGIRELLO: Yes. Or --

(RS. 344).

Once again, the prosecutor nor the Court attempted to rehabilitate Mr. Ruggirello. Nor did they directly question Mr. Ruggirello concerning the death penalty. Defense counsel challenged Mr. Mellin for cause (RS. 404) and it was denied (RS. 408). Nor did they question Ms. King concerning her views on the death penalty.

Finally, Ms. Martino expressed understanding and belief that death penalty was appropriate automatically a life for life:

MR. UDELL: The question was asked of you about the death penalty and you said if the crime fits it should be imposed?

MS. MARTINO: Right.

MR. UDELL: Give me an example of a crime that fits.

MS. MARTINO: Well, I would assume a <u>life for a life</u>.

MR. UDELL: Is that the way you think?

MS. MARTINO: Yes.

MR. UDELL: The Judge has already instructed the jury, I believe, or if he hasn't he will instruct you that Mr. Chandler has been found guilty of two counts of first degree murder.

MS. MARTINO: Yes.

MR. UDELL: I feel comfortable that you could presume from that there are two death resulted.

MS. MARTINO: Right.

MR. UDELL: Not one but two deaths.

MS. MARTINO: Right.

MR. UDELL: Two lives. Right?

Based upon that alone are you going to recommend the death penalty?

MS. MARTINO: Yes.

(RS. 684-685).

State prosecutor, Mr. Colton attempts to rehabilitate Ms. Martino in the following colloguy:

MR. COLTON: Let me make sure that I understand or, let me make sure that the record is clear, that you said that you are in favor of the death penalty under certain circumstances?

MS. MARTINO: Yes, I am.

MR. COLTON: But, would you <u>automatically</u> vote for the death penalty?

MS. MARTINO: If the <u>crime fits</u> it, <u>yes</u>.

MR. COLTON: If the crime fits it?

MS. MARTINO: Right.

MR. COLTON: And would that be based solely on the evidence and the law that the Judge gives you?

MS. MARTINO: Yes.

MR. COLTON: And if the crime doesn't fit it, based on the evidence and the law, you would not vote for it; is that right?

MS. MARTINO: No.

MR. COLTON: And in this particular case you haven't made up your mind as to what you're going to do?

MS. MARTINO: No.

The defense counsel challenge for cause and it was denied (RS. 690). The prosecution failed to rehabilitate Ms. Martino. Ms. Martino is still predisposed in applying the death penalty automatically.

Pre-emptory challenger where made by note during the trial and <u>are not reflected in the transcript</u>. The defense challenged prospective jurors Mr. Mellin, Ms. Martino, Ms. King and Mr. Ruggirello over state's argument. The court denied challenges for causes in all cases. The above prospective jurors were subsequently excused. It would only make sense that defense counsel exercised preemptory strikes to excuse the above prospective jurors.

All of the potential jurors discussed herein clearly existed, at a bare minimum, "a reasonable doubt . . . as to whether [they] possesse[d] the state of mind necessary to render

an impartial recommendation as to punishment," Hill, supra, 477 So. 2d at 556,[1] and the trial judge was thus required to excuse them for cause upon the defense's motion as well. See Hill, supra; Thomas, supra, 403 So. 2d at 375. However, the jurors were not excused for cause, forcing the defense to expend its peremptory challenges.

As in Thomas, all of these potential jurors "should have been excused because of a fundamental violation -- the presence of bias against the defendant in the sentencing aspect of a capital case." Id., 403 So. 2d at 375. As in Thomas,

> [t]his bias violated the express requirements in the Sixth Amendment to the United States Constitution and in article I, section 16, of the Florida Constitution, that an accused be tried by an "impartial jury."

Thomas, 403 So. 2d at 375. As was Mr. Thomas, Mr. Chandler is

---

[1]As the United States Supreme Court explained in Wainwright v. Witt, 469 U.S. 412, 425 (1985):

> [t]he proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment . . . is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath" . . . this standard . . . does not require that a juror's bias be proved with unmistakable clarity.

Id. (emphasis added).

also entitled to relief. See also Hill, supra, 477 So. 2d at 556.

Because the trial court erroneously refused to grant the defendant's motion and excuse the potential jurors discussed herein for cause, and thus deprived him of his rights to a fair and impartial jury, Mr. Chandler was forced to exhaust his peremptory challenges in order to remove these clearly biased venire persons. As the United States Supreme Court and this Court have repeatedly held, "the denial or impairment of the right [to freely exercise peremptory challenges] is reversible error without a showing of prejudice." Swain v. Alabama, 380 U.S. 202, 220 (1965). Accord Lewis v. United States, 146 U.S. 370 (1892); Pointer v. United States, 151 U.S. 396 (1894); Harrison v. United States, 163 U.S. 140 (19___); see also Francis v. State, 413 So. 2d 1175 (Fla. 1982); cf. Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981). This is so because

> [t]he exercise of peremptory challenges has been held to be essential to the fairness of a trial by jury and has been described as one of the most important rights secured to a defendant. Pointer v. United States, 151 U.S. 396, 14 S.Ct. 410, 38 L.Ed. 208 (1894); Lewis v. United States, 146 U.S. 370, 13 S.Ct. 136, 36 L.Ed. 1011 (1892). It is an arbitrary and capricious right which must be exercised freely to accomplish its purpose. It permits rejection for real or imagined partiality and is often exercised on the basis of sudden impressions and unaccountable prejudices based only on the bare looks and gestures of another or upon a juror's habits and associations. It is sometimes exercised on grounds normally thought irrelevant to

> legal proceedings or official action, such as the race, religion, nationality, occupation or affiliations of people summoned for jury duty. Swain v. Alabama, 380 U.S. 202, 85 S. Ct. 824, 13 L.Ed.2d 759 (1965).

Francis, supra, 413 So. 2d at 1178-79.

The law is thus crystal clear that the error that occurred here cannot be deemed harmless -- when, as here, a trial court erroneously refuses to dismiss for cause even a single excludable juror, thus forcing the defendant to use peremptory challenges, the defendant is entitled to relief. In Hill, supra, where the trial court refused to dismiss for cause one potential juror who expressed a predisposition towards death, and who thus "did not possess the requisite impartial state of mind," id., 477 So. 2d at 556, this Court found that the error could not be harmless "because it abridged appellant's right to peremptory challenges by reducing the number of those challenges available him." Id. Here, as in Hill, the defendant had requested additional peremptories. (See RS. 917). Here also the trial court's erroneous refusal to grant defendant's challenges for cause forced him to exhaust the peremptories which he had been allotted by statute. Mr. Chandler is thus entitled to the same relief afforded Mr. Hill.

In Hill, supra, the error involved a single juror. In Mr. Chandler's case, there are four jurors involved. All four of these jurors were challenged for cause by Mr. Chandler, and all

four challenges were denied by the trial court. The error here is thus even more egregious than that which entitled Mr. Hill to relief. Cf. Thomas, supra.

After the defense counsel exhaust all pre-emptory challenges and request additional pre-emptory challenges, the defense try to challenge for cause Ms. Dodge and was denied (RS. 939). Ms. Dodge had read about the case recently:

> MR. MORGAN: Well, was it at this time or was it when it just --
>
> MRS. DODGE: No. I think it was last weekend it was in the paper and, then when it happened I remember reading about it too.

(RS. 931).

Mrs. Dodge stated that Mr. Chandler had mowed the lawn and he had came in and killed the victims, Mrs. Dodge stated that she had read the story Saturday or Sunday in the Miami Herald. Mrs. Dodge was confused on whether or not Mr. Chandler had received the death penalty in the first trial. Defense counsel was concerned that Mrs. Dodge would remember that the death penalty was imposed in the first trial. The exhausting of pre-emptory challenges cause prejudice to Mr. Chandler as required Ford v. State, ___ So. 2d ___ (Fla. 1990).

Errors which deprive a defendant of the right to a trial by a fair and impartial jury are fundamental, and thus may be raised for the first time in collateral proceedings notwithstanding the fact that they could have been, but were not, raised on direct

appeal. See Nova v. State, 439 So. 2d 255, 261 (Fla. 3d DCA 1983); cf. O'Neal v. State, 308 So. 2d 569 (Fla. 2d DCA 1975); Dozier v. State, 361 So. 2d 727 (Fla. 4th DCA 1978); Clark v. State, 363 So. 2d 331 (Fla. 1978); Flowers v. State, 351 So. 2d 387 (Fla. 1st DCA 1977). Because "[t]he right of an accused to a trial by jury is one of the most fundamental rights guaranteed by our system of government," Floyd v. State, 90 So. 2d 105, 106 (Fla. 1956), and is "the cornerstone of a fair and impartial trial," Nova, supra, 439 So. 2d at 262, citing Florida Power Corporation v. Smith, 202 So. 2d 872 (Fla. 2d DCA 1967), an infringement of that right constitutes fundamental error. Nova, supra. The trial court's refusal to excuse for cause those jurors who expressed a bias towards death was precisely such an error, as it "violated the express requirements in the Sixth Amendment to the United States Constitution and in article I, section 16 of the Florida Constitution, that an accused be tried by 'an impartial jury.'" Thomas, supra, 403 So. 2d at 375; Hill, supra, Poole, 477 So.2d at 556. This issue is thus before this Court on the merits, and the merits demand relief. See Hill, supra; Thomas, supra.

Appellate Counsel's Ineffectiveness

This Court is especially vigilant in its policing of counsel's performance on appeal. When this Court learns of

unreasonable attorney omissions, it does not hesitate to act:

> It is true that we have imposed upon ourselves the duty to independently examine each death penalty case. However, we will be the first to agree that our judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate. It is the unique role of that advocate to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged derivations from due process.

Wilson v. Wainwright, 474 So. 2d 1162, 1165 (Fla. 1985)(emphasis supplied).

Appellate counsel, however, did nothing with respect to this issue. He did not present the clear legal analysis demonstrating that relief was appropriate. Nor did he inform the court that the other jurors had expressed similar preconceptions regarding the propriety of a death sentence for any murder, and that trial counsel's challenges with regard to those jurors were denied as to both the guilt and penalty phase. Most importantly, appellate counsel did not "highlight" the fundamental deprivation of his client's constitutional rights engendered by the trial court's refusal to dismiss the jurors for cause and "present it to the court . . . in such a manner designed to persuade the court of the gravity of the alleged derivations from due process." Wilson, supra, 474 So. 2d at _____. Appellate counsel did

nothing, and this Court was thus deprived of the "careful, partisan scrutiny of a zealous advocate." Id. at 1165.

The claim was clearly preserved and ripe for appellate review under Hill and Thomas: counsel had asked for, but was never given, additional peremptory challenges; counsel at trial had moved to strike each of the jurors for cause; the trial court had denied each request; and trial counsel had been forced to expend peremptories on each of the jurors at issue. There simply exists no tactical or strategic reason which can be ascribed to appellate counsel's failure to present this claim. See, e.g., Wilson, supra; Johnson (Paul) v. Wainwright, 498 So. 2d 939 (Fla. 1986)(habeas corpus relief appropriate where counsel fails to urge clear claim of reversible error on appeal). Counsel's ineffectiveness is made even more apparent when this failure to present this claim is considered in the context of the three issues counsel presented in his strikingly weak direct appeal brief. This Court found one issue, a suppression of evidence claim, "not preserved for appeal by a timely objection at trial," Chandler, 492 So. 2d at 1320; the second issue, involving a challenge to essentially insignificant collateral evidence, was found clearly harmless, id. at 1320; the third, a penalty phase issue, was found by the court to be without merit. Id., 492 So. 2d at 1319. What was available, but ineffectively ignored, was of substantial merit: this claim would have provided Mr. Chandler

with relief. See Wilson, supra (Court's independent review of record cannot cure harm caused by counsel's failure to zealously advocate a meritorious claim on direct appeal). There simply was no reason whatsoever for counsel to ignore the claim; the omission could not but have resulted from counsel's ignorance of the law. In any event, counsel's omission was a clear example of prejudicial ineffective assistance, see Johnson (Paul) v. Wainwright, supra, and relief is now appropriate.

Wilson places this Court in the forefront of appellate court scrutiny of attorney advocacy. Undeniably, the appellate level right to counsel also comprehends the sixth amendment right to effective assistance of counsel. Evitts v. Lucey, 469 U.S. 387, 105 S. Ct. 830 (1985). Appellate counsel must function as "an active advocate on behalf of his client," Anders v. California, 386 U.S. 738 (1967), who must receive "expert professional . . . assistance . . . [which is] necessary in a legal system governed by complex rules and procedure . . . ." Lucey, 105 S. Ct. 830, 835 n.6. An indigent, as well as "the rich man, who appeals as of right, [must] enjoy[] the benefit of counsel's examination into the record, research of the law, and marshaling of arguments on his behalf. . . ." Douglas v. California, 372 U.S. 353, 358 (1985)(equal protection right to counsel on appeal).

The process due appellant is not simply an appeal with representation by "a person who happens to be a lawyer. . . ."

Lucey, 105 S. Ct. at 835 (quoting Strickland v. Washington, 104 S. Ct. 2052 (1984).) The attorney must act as a "champion on appeal," Douglas, 372 U.S. at 356, not as "amicus curiae." Anders, 386 U.S. at 744.

These are not merely arcane jurisprudential precepts: "Lawyers in criminal cases are necessities, not luxuries." United States v. Cronic, 466 U.S. 648, 654 (1984). Counsel is crucial, not just to spew the legalese unavailable to the layperson, but also to "meet the adversary presentation of the prosecution." Lucey, 105 S. Ct. at 835 n.6. Thus, effective counsel does not leave an appellate court with "the cold record which it must review without the help of an advocate." Anders, 386 U.S. at 745. Neither may counsel play the role of "a mere friend of the court assisting in a detached evaluation of the appellant's claim." Lucey, 105 S. Ct. at 835. Counsel must "affirmatively promote his client's position before the court . . . to induce the court to pursue all the more vigorously its own review because of the ready references not only to the record, but also to the legal authorities as furnished it by counsel." Anders, 386 U.S. at 745; see also Mylar v. Alabama, 671 F.2d 1299, 1301 (11th Cir. 1982)("unquestionably a brief containing legal authority and analysis assists an appellate court in providing a more thorough deliberation of an appellant's case").

Here, as discussed above, the trial court's refusal to dismiss for cause those jurors who "possessed preconceived opinions or presumptions concerning the appropriate punishment for the defendant," Hill, supra, 477 So. 2d at 556, was per se reversible error, as it deprived Mr. Chandler of his state and federal constitutional rights to a trial before a fair and impartial jury. Hill, supra; Thomas, supra. Had the issue been raised on direct appeal, Mr. Chandler would have been entitled to a new trial. Thomas; Hill. Trial counsel had objected, had requested additional peremptories, and had exhausted those peremptories which he was granted: the issue was preserved, and ripe for appeal. Appellate counsel nevertheless unreasonably, inexplicably, and ineffectively failed to raise the issue, to Mr. Chandler's demonstrable prejudice.

The United States Court of Appeals for the Eleventh Circuit has found similar appellate attorney conduct to "fall below the wide range of competence required of attorneys in criminal cases," and thus to violate the appellant's sixth amendment right to the effective assistance of counsel. See Matire v. Wainwright, 811 F.2d 1430 (11th Cir. 1987). In Matire, the state trial court had allowed, over objection, the trial prosecutor to comment on the defendant's exercise of his fifth amendment right to remain silent. The Eleventh Circuit found counsel's failure to raise the issue, an issue which "leaped upon even a casual

reading of the transcript," on direct appeal prejudicially deficient, particularly "[i]n light of the then Florida rules of per se reversal," which created a "near certainty that Matire's conviction would have been reversed." 811 F.2d at 1439. The same analysis applies to Mr. Chandler's case.

As in Matire, supra, Johnson, supra, and Wilson, supra, the adversary process simply did not work in Mr. Chandler's direct appeal, because counsel rendered ineffective assistance. Mr. Chandler was deprived of his sixth, eighth and fourteenth amendment rights to the effective assistance of appellate counsel, and he, like Mr. Matire, Mr. Johnson, and Mr. Wilson, is entitled to habeas corpus relief.

CLAIM II

MR. CHANDLER'S CONVICTION VIOLATES THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE HE WAS TRIED BY A PETIT JURY WHICH WAS NOT SELECTED FROM A FAIR CROSS-SECTION OF THE COMMUNITY.

The State's sole reliance on voter registration lists in the selection of petit jurors deprived Mr. Chandler of his sixth and fourteenth amendment right to be tried by a jury selected from a representative cross-section of the community. Moreover, the selection process violated the fourteenth amendment because Mr. Chandler was tried by a state-court system which substantially excluded blacks from service on petit juries.

The use of voter registration lists as the singular source for prospective jurors results in the systematic exclusion and significant under representation of black individuals. The decreased proportion of those eligible to register in conjunction with the proportionally lower registration rate of minorities results in the virtual exclusion of black individuals from the pool of prospective jurors. "[I]f the use of voter registration lists as the origin for jury venires were to result in a sizable underrepresentation of a particular class or group on the jury venires, then this could constitute a violation of a defendant's 'fair cross section' rights under the sixth amendment. Bryant v. Wainwright, 686 F.2d 1373, 1378 n. 4 (11th Cir. 1982), cert. denied, 461 U.S. 932. See Taylor v. Louisiana, 419 U.S. 522 (1975); Duren v. Missouri, 439 U.S. 357 (1979). Accordingly, the sixth and fourteenth amendments mandate that Mr. Chandler be granted relief.

Counsel for Mr. Chandler made timely objection to the venire, basing his objection on the virtual absence of any black individuals on the venire (RS. 213).

The sixth amendment prohibits discrimination, whether intentional or not, in the overall jury selection process. The Constitution insures every criminal defendant "the right to . . . an impartial jury." Decisions by the Supreme Court of the United States and the United States Courts of Appeals have repeatedly

held that a defendant may challenge the discriminatory selection of jurors pursuant to the protections of the sixth amendment. See Duren v. Missouri, 439 U.S. 357 (1979); Taylor v. Louisiana, 419 U.S. 522 (1975); Bowen v. Kemp, 769 F. 2d 672 (11th Cir. 1985); Gibson v. Zant, 705 F. 2d 1543, 1547 (11th Cir. 1983). In Duren the United States Supreme Court enunciated the elements which must be established to constitute a fair cross-section prima facie case:

> [T]he defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Once a prima facie case is set forth, the burden shifts to the State to disprove the defendant's claim. Discriminatory intent is irrelevant to a sixth amendment challenge. Id. at 368, n.26. See also Bowen v. Kemp, 769 F. 2d 672, 684 n.7 (11th Cir. 1985); Batson v. Kentucky, 106 S. Ct. 1712 (1986); and Griffith v. Kentucky, 107 S. Ct. 708 (1987).

If the jury selection system resulted in a representative cross-section of the community, it would be anticipated that the composition of any one jury pool would be reflective of the constitution of the eligible community. In assessing whether a jury selection system accomplishes the constitutional mandate of

obtaining a representative sample of the community, courts focus on a cognizable group within the community, and compare the percentage of those groups appearing in the jury pool to the percentage of the group in the general population. The goal of a representative jury may be compromised at various stages of the selection process. Specifically, if the list from which prospective jurors are selected does not represent a fair cross-section of the community, then the jury selection process is constitutionally defective ab initio.

The percentage of eligible blacks registering to vote is appreciably below that of the general population. Nationwide, in 1972, 34.5% of the population was not registered to vote. This figure rose to 41.5% in 1976. In 1978, the number of blacks not registered to vote increased to 42.9%. People v. Harris, 679 P.2d 433, 441 (Cal. 1984), cert. den., 105 S. Ct 365 (1984). Because fewer blacks are registered to vote as compared to those who are eligible to register, sole reliance on voter registration lists as the exclusive source for selection of prospective jurors results in the underrepresentation of black individuals on jury venires. Voter registration lists do not reflect a fair cross-section of the community as many voting age blacks simply do not register.

The procedures used to obtain the jury panel in Mr. Chandler's case were those regularly practiced in St. Lucie

County. The cause of the underrepresentation was systematic and was inherent in the jury selection system involved. This process, marked by its complete reliance on voter registration lists, and its inherent and non-random exclusion of black individuals, results in the underrepresentation of black jurors.

At a evidentiary hearing prior to the resentencing Mr. Chandler demonstrated that the underrepresentation of black individuals on the venire is a direct result of the random selection of persons from voter registration lists.

The total population and estimated population in Indian River County between the years 1980 to 1985 was 116, 235 (RS. 120) of that number 80.6% or 93,743 individuals were white while 19.4% or 22,492 of individuals in the county were non-white (RS. 120). 57,198 individuals comprised the electorate for Indian River County in 1986 (RS. 121), of this number 87.9% of the electorate or 50,262 are white while 12.2% of the electorate is non-white (RS. 120). As represented on the 175 member venire called in Mr. Chandler's case 86.3% of the 151 were white while 13.7% or 24 individuals are non-white.

The statistical difference between the white registered voters to non-white registered voter is 6.3 (RS. 124). While 80% of the white residents are registered only 50.3% of the non-white resident to are registered (RS. 124).

Mr. Chandler's conviction was obtained in violation of the

due process and the equal protection clauses of the fourteenth amendment and the fair cross-section requirement of the sixth amendment. Such error is one of fundamental dimension, cognizable in habeas corpus proceedings, and per se prejudicial. Mr. Chandler's petit jury was also unconstitutional because another cognizable group, women with children under the age of 15, were also virtually excluded, and thus underrepresented. Mr. Chandler's conviction and death sentence should be reversed.

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. Chandler 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 III

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

As Booth v. Maryland, 428 U.S. 496 (1987), illustrates,

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. Here the State's use of victim impact was multilayered. Not only did the State introduce evidence on the impact of the crime against the Steinbergers, but victim impact evidence from Mr. Chandler's 1972 Texas offense. The temptation to provoke such an unbridled and unprincipled emotional response from Mr. Chandler's judge and jury proved irresistible to the State. The State Attorney's opportunity to unleash these emotions at Mr. Chandler's trial and resentencing came at several stages of the proceedings but were especially evident during the direct testimony of the State witnesses: John Karasek,[2] and; Lowell Wolf[3]. Clearly, the testimony and argument was manipulated to elicit maximum emotional impact.

During voir dire the assistant state attorney set the stage for their presentation of victim impact evidence to come

---

[2]Mr. Karasek (RS 514-520) was a neighbor of the Steinbergers when they lived in Ft. Lauderdale not Sebastian where the couple was residing at the time of the offense.

[3]Mr. Wolfe (RS 549-571) was the victim from a 1972 Texas crime who testified to the immediate and continuing effects of that aggravated battery, for which Mr. Chandler was never convicted.

throughout Mr. Chandler's trial by asking prospective juror Vineis before Mr. Chandler's entire venire the following question:

> MR. MORGAN [ASSISTANT STATE ATTORNEY]: Your Honor, I'm leaning toward going into the area but, in an abundance of caution, I'll withdraw the question.
>
> MR. MORGAN: Now, you know, Mr. Udell has talked to you a little bit about, you know, the rights of his client. He's asked a couple of questions regarding that.
>
> Would everybody agree, or has anybody ever thought about the concept that victims have rights?
>
> MR. UDELL: Judge, I object.
>
> May we approach the bench?
>
> THE COURT: You may.
>
> MR. UDELL: May I have one moment, Judge?
>
> (Whereupon the following proceedings were had outside the hearing of the prospective jurors.)
>
> MR. UDELL: Judge, at this time, we're going to ask for a mistrial and I cite as grounds the Brooks v. Kemp -- I can give you this citation.
>
> The case clearly stands for the proposition that the prosecutor may not, and it's prosecutorial misconduct to get at all into the issue of the victims rights.
>
> I'll give you the case but basically it says that the defendant's exercise of his constitutional rights, in effect, that the system coddles criminals by

providing them with more procedural rights than the victims is clearly improper.

. . .

MR. UDELL: So the record is clear, I made my motion and if they're not ruled on I assume they're denied.

[sic] Yes, sir.

MR. MORGAN: That's an invalid assumption.

Your Honor, if the State is withdrawing the question -- all right? -- that takes away any question before the Court.

THE COURT: I'll handle it at this time.

MR. MORGAN: Yes, sir.

THE COURT: I will deny his motion for a mistrial.

(RS 808-12)(emphasis added).

During his opening argument the assistant state attorney stressed to Mr. Chandler's jury the victims' age, employment status, and physical handicaps, all personal characteristics of the victims expressly prohibited from consideration by a capital sentencer. The following is illustrative:

[MR. MORGAN]: On July 22nd, 1980, about six years ago, a little over six years ago, Harold and Rachel Steinberger had just moved from Ft. Lauderdale, Florida to the small town of Sebastian which is a small city located in the north end of Indian River County. They had moved from Ft. Lauderdale finally on the 15th of July so they had just been there for about a week, a little over a

> week, at the time. When they moved to Sebastian they made arrangements to have a home built. Mr. Steinberger and Mrs. Steinberger were in their 70's and they were gonna retire there. And the evidence will show that Sebastian is a small town . . . As they were building the house they went ahead and moved into a rental []. The rental was located on Mistletoe Lane in Sebastian. And they were going about the business of packing boxes and unpacking boxes, going to the bank for the mortgages and so forth in anticipation of building this house. This is all on July 22nd, 1980.
>
> Also on that day they got up and Mr. Steinberger eat--ate breakfast, ate some cereal I think the evidence'll show, drank a glass of milk. Mrs. Steinberger had put on her housecoat for the morning. I think the evidence will show that Mrs. Steinberger was very sick, she walked in a stooped condition with great pain, she moved around quite slowly because of her illness. And they were in their home on Mistletoe Lane on the morning of July 22nd, 1980.

(RS 178-79)(emphasis added).

During the testimony of Detective Redstone, the assistant state attorney sought to introduce the family photos of the couple (RS. 240-41). And sought to emphasize the sale of items allegedly stolen during the crime as a desecration of the victims' marriage. Once again counsel objected to and moved for a mistrial based on this impact evidence:

> A It indicated to me that the engagement ring was given to his wife before her name was changed and it still had her maiden name, RM, the initials.
>
> Q And within two to three hours of her death it was sold in a bar?

MR. UDELL: Objection, it's a leading question. It's also testifying.

BY MR. COLTON:

Q Where was it sold within two to three hours of her death?

A It was sold at The Shed House Bar in Sebastian.

Q For how much?

A Thirty dollars.

Q Thank you, I have nothing further.

(RS. 245)(emphasis added).

The State's incipient pandering of victim impact evidence to Mr. Chandler's sentencer included grotesque recreations of how Rachel Steinberger walked as a result of degenerative bone disease, demonstrated by her male neighbor from Ft. Lauderdale, John Karasek:

[MR. MORGAN:] Did you know a couple by the name of Rachel and Harold Steinberger?

[MR. KARASEK:] Yes, I did.

Q. How long had you know [sic] Rachel and Harold Steinberger as of 1980, the year that they were killed?

A. Nineteen years.

Q. Tell the jury how you came to know Rachel and Harold Steinberger, please, sir.

A. I bought a piece of property to the left of them when I moved to Florida about 23 years ago and I was there [sic] neighbor. I lived next door and I was building, two

different stages of buildings there on my property so I knew them very well.

Q. Okay. Did you know their habits and so forth.

A. Yes, very well, more than anybody.

Q. Do you know whether or not Mr. Steinberger or Mrs. Steinberger for that matter were in the habit of letting strangers into their home?

A. No, never. They weren't sociable people. They were loners.

Q. All right. Were they pretty much private people?

A. Yes, very much so.

Q. All right. Now let me draw your attention to the period of time that they were moving from Fort Lauderdale to Sebastian. Okay? Could you tell the jury and explain to them how Mrs. Steinberger's health was?

A. She was healthy until the last few years and then something happened to her spine and she couldn't walk straight any more. She was completely doubled over and couldn't walk very fast, very slowly. She walked very slowly.

Q. Did she ever indicate that she was in some kind of pain as she walked?

A. Never told me that, no.

MR. MORGAN: May the witness step down from the witness stand, Your Honor?

Q. Would you go ahead and step down from the witness stand, Mr. Karasek. Would you demonstrate to the jury how Mrs. Steinberger would walk?

A. She would be bent over like this, walking slowly like this.

Q. Okay. In that fashion?

A. Yes.

. . .

Q. Now, do you recall, sir, how Mrs. Steinberger would dress around the home?

Do you recall, sir, how Mrs. Steinberger would dress when she was around the home?

A. Yes. She always wore smocks all the time that she was home. A housecoat so to speak. A little smock.

Q. Was this because of her condition? Her pelvic condition?

A. Yes.

MR. MORGAN: That's all the questions that we have. Thank you, Mr. Karasek. You may inquire.

(RS. 514-21)(emphasis added).

Lowell Wolfe was called by the State at trial for questionable identity evidence, and at the resentencing to present nothing more than bald victim impact evidence. There was simply no relevant purpose for the bulk of Wolf's testimony at the resentencing other than to inflame the sentencer with naked, 14 year old, victim impact evidence. He too would be asked to display his scars to Mr. Chandler's jury in what was quickly becoming a victim's theater, as the following demonstrates:

[STATE ATTORNEY] MR. COLTON: You say that you were knocked unconscious for about

how long do you think?

MR. WOLD: I am going to say an hour. I don't know what happened. The next thing I knew I was in the middle of that dirt road and a farmer that lived up the road had picked me up, took me up, put me on the porch, cut the tie away from my hands, wiped up a bunch of blood. I asked him I said I have got a terrific headache and I have got to get to a phone and could I have a couple of aspirins. They had already called the Sheriff of Van Zandt County and he was on his way out but I was hurting.

Q. Of course was Mr. Chandler still around?

A. Oh, no sir.

Q. Was your car around?

A. Oh, no.

Q. Was your watch or your wallet or your credit cards?

A. Oh, no. No.

Q. So the Sheriff came out?

A. Yes sir, he came out.

Q. And, were you taken to a Doctor?

A. Yes sir, I was taken to Doctor Taylor's Clinic.

Q. And what happened then?

A. He shaved my head and sewed my head up.

Q. And from there what took place?

A. He put me in an ambulance with a highway patrol and took me back seventy miles on highway 80.

Q. To where?

A. To Longview to Good Shephard Hospital.

Q. And you were admitted to the hospital?

A. Yes, sir.

Q. And do you recall how long you were in the hospital?

MR. UDELL: Judge, just for the record we are going to object to any testimony from this witness as to anything which occurred after this point in time, anything that occurred once he was admitted to the hospital we think is irrelevant to the aggravating factor.

MR. COLTON: We think it is relevant in showing the injuries that he sustained which goes to the part of the reason why this testimony is admissible in the first place.

THE COURT: I will admit the testimony.

Q. Do you recall, Mr. Wolfe, how long you were in the hospital?

A. I was in and out of consciousness for over fifteen days, sir, and then it was several weeks before I got out of the hospital.

Q. Can you tell the jury what the injuries were that you sustained?

A. I had a broken neck between the fifth and sixth vertebra my back was injured; they put an awful lot of stitches up here in my head and on the side.

Q. How many separate areas on your

head --

A. Three, sir.

Q. So you were struck three times?

A. Yes sir.

MR. UDELL: Judge, I am going to object to that. That is leading the witness. So you were struck three times. Why don't you just tell him what the answer is.

MR. COLTON: Okay. So, how many times were you struck? According to the areas where you were cut.

MR. UDELL: I will object to that. It asks him to draw a medical conclusion. Ask him how many times he was struck.

MR. COLTON: That is what I just said. How many times were you struck.

THE COURT: I will permit the question.

A. I don't know. I know I was struck once. The Doctor said I was struck three times.

MR. UDELL: Judge, I am going to object to what the Doctor told him. I will ask you to strike that from the record and ask the jury to disregard. Hearsay might be admissible but I have to have a reasonable opportunity to rebut it. If the State wants to say I should have taken the deposition of a Doctor who they haven't even listed and that's a reasonable opportunity to rebut it then, fine, we will have the Appellate Court deal with it.

Q. Mr. Wolfe, --

MR. UDELL: (indiscernible)

MR. COLTON: We are asking a

different question.

Q. Mr. Wolfe, how many different places did you have cuts or gashes to your head?

A. Three, sir.

Q. Okay. What other injuries did you sustain?

A. At that time that was enough. The results of those injuries are still here, sir.

Q. That is my next question. What has been the results of those injuries?

A. I have had five operations on my eyes because the optic nerves were messed up. I was in a -- first in a heavy brace and then in a Queen Anne's collar for all during March of 1974. But for years I have gone back to Dr. William Harrison, the opthamologist in Dallas for repairs on my eyes.

Q. As a result of these --

A. As a result of that.

Q. In addition to the cuts to your head that required stitches, did you receive a concussion or fracture to your skull?

A. It was a fractured skull, yes sir. They brought a specialist in from Shrevesport for this broken neck because of the position in it.

Q. You still have scars from those injuries in your head?

A. I hope they have gone away but I have had them.

Q. Can you show the jury if not the scars themselves if they don't show, show the jury where those scars were on your head.

A. Yes.

Q. Just point out those parts of your head.

A. Here, here and right here.

Q. Have you had any problems with your ears as a result of these injuries?

A. This one drains constantly, sir.

(RS. 566-71)(emphasis added).

During his closing argument the State Attorney again could not resist a return to sympathy and emotional appeal.

> [MR. COLTON:] What did Lowell Wolf (phonetic) tell you? He spent two weeks in a hospital, most of that time unconscious. At least three separate blows to the head. He told you about the fractures he received. He told you about the operations he's had to have on his eyes since that time. He's told you about the problems he's still having with his ears.

(RS. 827)(emphasis added).

Moments later the State Attorney again attempted to inflame the jury.

> You know one of the saddest parts about a case like this, not quite as sad as the pictures that you see there, but one of the other sad parts about a situation like this is that not only has this man retavit (phonetic) and caused desperation and despair to the families of the victims but he's done the same thing to his family.

(RS. 849)(emphasis added).

The State Attorney's final argument to Mr. Chandler's jury

was unmistakably blunt -- consider and rely upon victim impact evidence in deciding Mr. Chandler's ultimate fate. Once again counsel objected and moved for a mistrial:

> But the state's position is that mercy is not a mitigating factor in this case under the circumstances and evidence that you've heard. But while Mr. Udell is up here asking you to show mercy to his client, after he does that I ask you to review in your minds whether or not he deserves mercy. Does he deserve you to consider what's been presented as other aspects of his character which should on mitigation [sic]. And when you're considering Mr. Udell's request that you give him mercy I ask you to consider the facts of this case. And I ask you to examine whether he deserves mercy after he put himself in the position of being God as to the fate of Rachel and Howard Steinberger. I submit to you that back there in those woods behind that house on July of 1980 they didn't have a lawyer provided for 'em..
>
> MR. UDELL: Oh Judge I...
>
> MR. COLTON: They didn't have anybody arguing mitigating circumstances for 'em.
>
> THE COURT: Mr..Mr. Colton..
>
> MR. UDELL: Judge can we approach the bench?
>
> THE COURT: You may.
>
> COUNSEL APPROACH THE BENCH
>
> MR. UDELL: Judge again I move for a mistrial, ask the court to instruct the jury to disregard that state's comment or the prosecutor's comment that Mr. and Mrs. Steinberger didn't have lawyer back there with them. That's highly improper, we'd ask for a curative instruction and ask that that be stricken from the record. We'd cite in

support Brooks v. Kemp (phonetic) 762 F 2nd 1383. I've nothing further.

MR. COLTON: Your Honor of this case is that those comments are acceptable. Those were comments made in closing argument in the last trial and that case was reviewed by the Supreme Court and they were upheld. And I submit to you there's nothing improper about it and that Mr. Udell knew there was nothing improper. And that I have..I would request that he stop interrupting for frivolous objections.

THE COURT: I'll permit you to make those statements and I thank you. Deny your motion.

END OF BENCH CONFERENCE

MR. COLTON: As I was saying and you consider if Mr. Udell request that you consider mercy for his client I ask that you consider the mercy that he showed them, that he showed Rachel and Howard Steinberger who didn't have a paid attorney.

MR. UDELL: Standing objection.

THE COURT: Noted..

. . .

MR. COLTON: Ask yourselves as Mr. Udell talks to you, Mr. Udell where was their juror? Where was their mercy? Where were their mitigating circumstances? Who argued them for 'em? Nobody brought in pictures of them when they were children. Did he consider the 40 years of marriage that he destroyed? Did he show mercy when he yanked those wedding rings off of her fingers and was so callous that he took 'em into a bar before the sweat dried on his neck and sold those rings? Is that what deserves mercy?

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

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 an 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. Chandler'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 their family.

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

Here, the proceedings violated Booth and Gathers, thus calling into question the reliability of Mr. Chandler's penalty

phase. The State's evidence and argument were a deliberate effort to invoke "an unguided emotional response" in violation of the eighth amendment. Penry v. Lynaugh, 109 S. Ct. 2934, 2952 (1989).

Florida law also recognizes the constitutionally unacceptable risk that a jury may impose a sentence of death in an arbitrary and capricious manner when exposed to victim impact evidence. In Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989), this court held that the principles of Booth are to be given full effect in Florida capital sentencing proceedings. Jackson is procedurally and factually indistinguishable from the instant case. As in Jackson, defense counsel for Mr. Chandler vigorously objected during the State's repeated introduction of victim impact evidence. Jackson dictates that relief post-Booth and Gathers is now warranted in Mr. Chandler's case. Compare Jackson v. State, 498 So. 2d 406, 411 (Fla. 1986), with Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989). Accordingly, no bars apply. Jackson is a change of law to which Mr. Chandler having properly preserved the issue at trial is now entitled to relief. However, Mr. Chandler respectfully submits that should a procedural bar be found to exist the application of such a bar is the direct result of unreasonable omissions of appellate counsel.

Booth was decided on June 15, 1987. Mr. Chandler's direct appeal of his resentencing was decided on December 8, 1988.

Reasonable attorney performance would dictate that capital appellate counsel be aware of capital cases pending before the United States Supreme Court particularly when such cases present an indistinguishable factual and procedural posture. Here, however, counsel filed no request for additional briefing or notice of supplemental authority.

Counsel's performance in this regard was deficient. The victim impact evidence here was unmistakable. Had counsel been aware of the Booth decision, and accordingly presented that issue to this court Jackson would now not compel relief. It simply cannot be said that Mr. Chandler as a result of appellate counsel's glaring ignorance of relevant law was not prejudiced. Given that appellate counsel's brief on the resentencing appeal contained only four issues, the prejudice is manifest.

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

issue.

This record is replete with Booth error. Mr. Chandler was sentenced to death on the basis of the very constitutionally impermissible "victim impact" evidence and argument which the Supreme Court condemned in Booth and Gathers. The Booth court concluded that "the presence or absence of emotional distress of the victim's family, or the victim's personal characteristics are not proper sentencing considerations in a capital case." Id. at 2535. These are the very same impermissible considerations urged on (and urged to a far more extensive degree) and relied upon by the jury and judge in Mr. Chandler'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), the Supreme Court discussed when eighth amendment error required reversal: "Because we cannot say that this effort had no effect on the sentence decision, that decision does not meet the standard of reliability that the Eighth Amendment requires." Id., 105 S. Ct. at 2646. Thus, the question is whether the Booth errors in this case may have affected the sentencing decision. As in Booth and Gathers, contamination occurred, and the eighth amendment will not permit a death sentence to stand where there is the risk of unreliability. Since the prosecutor's evidence and argument "could [have] result[ed]" in the imposition of death because of impermissible considerations, Booth, 107 S. Ct. at 2534, the writ should accordingly issue.

CLAIM IV

INEFFECTIVE ASSISTANCE OF COUNSEL AND THE PROSECUTORS' INFLAMMATORY, EMOTIONAL, AND THOROUGHLY IMPROPER COMMENT AND ARGUMENT TO THE JURY DURING THE INITIAL TRIAL AND RESENTENCING RENDERED MR. CHANDLER'S CONVICTION AND RESULTANT DEATH SENTENCE FUNDAMENTALLY UNFAIR AND UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Throughout the course of the trial, the prosecution team utilized improper comments that denied Mr. Chandler a fair trial. This parade of improper remarks, both objected to and not objected to, considered either individually or cumulatively, rendered defendant's trial fundamentally unfair.

During the jury selection process of the first trial the

prosecutor (Mr. Midelis) asked a prospective juror if he understood the term "circumstantial evidence." The following exchange occurred between the prospective juror and prosecutor Midelis:

> MR. LAPORTE: There are quite a few cases -- I read pretty elaborately. There are quite a few cases where they don't hold water if it's just circumstantial evidence.
>
> MR. MIDELIS: Well, I'm sure that if the case didn't hold water, you would never get to hear it and make a deliberation; do you understand what I'm saying?

(R. 377).

Mr. Midelis' comment to the effect that the jury would not be allowed to deliberate unless the "case holds water" was certainly a prejudicial remark as a comment on how strong the evidence is. Oglesby v. State, 23 So. 2d 558 (1945). Moreover, this comment also minimized the role of the jury as an objective trier of fact by implying that the judge would predetermine that the case "held water."

During jury selection, defense counsel asked the following question of a prospective juror and Mr. Stone [prosecutor] objected:

> MR. MASLANIK: Would it take evidence from Jim Chandler to change your opinion about the situation?
>
> MR. ROUNDS: Well, I'd have to consider all of the evidence totally.

> MR. STONE: May it please the Court. I'm going to object to the form of the question. If that's the situation, I think it would be about the guilt or innocence of the defendant. The situation is he feels bad about this happening. I think everybody in here does that. Well, almost everybody.
>
> MR. MASLANIK: I object to that, Your Honor. Your Honor, that's a personal comment by Mr. Stone. It's highly prejudicial. It's intended to inflame the jury. He did that intentionally. He knows that's improper.

(R. 588-590).

Although the trial court instructed the jury to disregard the personal comment, the prosecutor's comment that the defendant didn't "feel bad" about two people being killed was so highly prejudicial that no instruction could eradicate its evil influence. The personal comment was so prejudicial it fundamentally tainted his right to a fair trial. The due process clause of the state and federal constitutions impose a special duty upon a prosecutor. In Kirk v. State, 227 So. 2d 40 (Fla. 4th DCA 1969), the court stated:

> His duty is not to obtain convictions but to seek justice, and he must exercise that responsibility with the circumspection and dignity the occasion calls for. His case must rest on evidence, not innuendo. If his case is a sound one, he should not resort to innuendo to give it a false appearance of strength. Cases brought on behalf of the State of Florida should be conducted with a dignity worthy of the client.

227 So. 2d at 45; see also Martin v. State, 411 So. 2d 987, at 990 (Fla. 4th DCA 1982).

It is well established that personal comments during a criminal trial that are "of such character that neither rebuke nor retraction may entirely destroy their sinister influence . . . a new trial should be granted, regardless of the lack of objection or exception." Ailer v. State, 114 So. 2d 348 at 351 (Fla. 2d DCA 1959); see also Peterson v. State, 376 So. 2d 1230 at 1234 (Fla. 4th DCA 1979):

> Trials should be conducted coolly and fairly, without the indulgence in abusive or inflammatory statements made in the presence of the jury by the prosecuting officer. Goddard v. State, 143 Fla. 28, 196 So. 596 (1940).

See also Stewart v. State, 51 So. 2d 494 (1951); Grant v. State, 194 So. 2d 612 (1967); Gonzales v. State, 450 So. 2d 585 (Fla. 3rd DCA 1984).

During the jury selection process, defense counsel asked the following question to a prospective juror and prosecutor Stone objected:

> MR. MASLANIK: Do you feel comfortable about sitting on a jury where you might have to make a recommendation whether a person should live or die?
>
> MR. STONE: Again, Your Honor, I think it's totally a recommendation whether they would impose a sentence, not whether or not they live or die. The Court imposes the sentence. That has to go to the Clemency Board, that goes to many, many processes before life or death is ever imposed. (No objection raised).

(R. 223).

The prosecutor's comment was extremely prejudicial because it led the jury to believe that any decision they made would be reviewed by the "Clemency Board" and go through "many, many processes." This comment may have well made the impression in the juror's minds that if they mistakenly found Mr. Chandler guilty, their decision would be reviewed. The Supreme Court of Florida has long held that it is improper for the prosecutor to use language that tends to minimize the jury's importance or language that tends to shift the burden of their responsibility to a higher authority. In Blackwell et al. v. State, 76 Fla. 124, 79 So. 731 (1918), the Florida Supreme Court held:

> It is improper for counsel, in his argument to the jury, to say, "If there is any error committed in this case, the Supreme Court, over in the capital of our state, is there to correct it, if any error should be done," as the effect of this would be to cause the jury to lessen their estimate of the weight of their responsibility, and the refusal of the court to strike the same from the consideration of the jury is reversible error.

79 So. at 732. See also Pait v. State, 112 So. 2d 380 (Fla. 1959).

In the instant case, the prosecutor's comment that their decision would be reviewed and go through "many, many processes" shifted the jury's burden of responsibility to a higher authority and thus deprived Mr. Chandler of a fair trial.

During the course of jury selection, the prosecutor referred to the offense Mr. Chandler was charged with as a "horrendous crime" (R. 510):

> MR. STONE: Do you feel that they would affect you from being a fair and impartial juror, the fact that it is a very horrendous crime that he is charged with?

Although no objection was raised by defense counsel, it is improper for a prosecutor to make personal comments about the nature of the crime. Prosecutor Stone once again made the same personal comment a short time later that was objected to and the trial court instructed the jury to disregard it (R. 1157-1158):

> MR. STONE: Remember the Court imposes life or death. Now, in this particular case, which is a case of murder in the first degree, a horrendous crime, . . .

Although defense counsel timely objected and the trial judge admonished to disregard the improper comment, in light of the parade of improper comments, both objected to and not objected to, Mr. Chandler was denied a full and fair trial as guaranteed under the due process clause of the federal and state constitutions.

During the course of jury selection, the prosecutor made the following comment to the jury:

> MR. STONE: And I believe that Mr. -- well, the two defense lawyers here have said that he's entitled to a presumption of innocence and they asked you can you presume or believe he is innocent. Can you do that?

(R. 510).

This comment was highly prejudicial. The prosecutor, in phrasing this question, made the insinuation that only "the two defense lawyers" feel Mr. Chandler is entitled to a presumption of innocence.

In its examination of state witness Dave Dunham, the State intentionally elicited or, at the very least, intentionally circumvented the trial court's admonition not to elicit testimony regarding character evidence against Mr. Chandler. At page 2644 of the record on appeal defense counsel objected to any comment concerning "more stolen stuff." Prosecutor Midelis went on to elicit from the witness the following colloquy:

> Q. Did you participate in that conversation in any way?
>
> A. Maybe a little bit.
>
> Q. Do you recall what, if anything, you said?
>
> A. Yes, sir.
>
> Q. What, if anything, did you say?
>
> A. Do you want the exact words?
>
> Q. Do you remember the exact words?
>
> A. Yes, sir.
>
> Q Okay. Say them, if you recall them.
>
> A. I said, <u>Jim, what shit did you steal now</u>?

(R. 2648).

Defense counsel, thereafter, objected to the statement and moved to strike it from the record. The trial court did strike the comment from the record and instructed the jury not to consider that portion of Dave Dunham's testimony. However, the court failed to restrain or admonish the prosecution team for bringing such patently inadmissible matter into evidence. In addition, Mr. Chandler's defense counsel were negligent for not objecting to this string of questioning before the ultimate answer was given by Mr. Dunham.

It is improper for the State to elicit testimony, or introduce evidence, attacking the character of the accused unless the accused first places his character in issue. Andrews v. State, 172 So. 2d 504 (Fla. 3rd DCA 1965); Roti v. State, 334 So. 2d 146 (Fla. 1976); Jackson v. State, 451 So. 2d 458 (Fla. 1984).

During the course of trial, the prosecutor intentionally elicited testimony from a state witness about an unrelated crime for which Mr. Chandler was never convicted and with which he was never even charged. On pages 2866-2868 of the record on appeal the prosecutor deliberately elicited testimony of a burglary for which Mr. Chandler was never charged. In addition, the prosecutor brought out testimony of a second crime for which Mr. Chandler was never charged, the theft of a carpet shampooer that occurred several months after the burglary. These two unrelated

crimes had no bearing on the crimes for which Mr. Chandler was on trial, and the prosecution's use of the two crimes was solely for the purpose of attacking the character of Mr. Chandler. It is improper for the prosecution to attack Mr. Chandler's character unless Mr. Chandler first places his character at issue. Andrews v. State, 172 So. 2d 504 (Fla. 1 DCA 1965). Moreover, the prosecutor eliciting testimony of uncharged crimes is improper and highly prejudicial. Gonzales v. State, 97 So. 2d 127 (Fla. 2nd DCA 1957); Robinson v,. State, 487 So. 2d 1040 (Fla. 1986). The Third District Court of Appeals in Glassman v. State, 377 So. 2d 208 (1979), held that:

> . . . no defendant can get a fair trial when the state's representative in the courtroom, based on no evidence, accuses the defendant before the jury of crimes for which he is not on trial.

377 So. 2d at 211.

The prosecution's deliberate use of this highly prejudicial testimony deprived Mr. Chandler of his right to a fair and impartial trial which is guaranteed him by the fifth, sixth and fourteenth amendments of the United States Constitution and by Article I of the Florida Constitution.

During the course of jury selection, the prosecutor, while questioning prospective jurors, made an improper comment which implied the existence of additional evidence against Mr. Chandler which the jury should not have been permitted to hear. The

following comment was made by prosecutor Stone:

> MR. STONE: Okay. Now, there has been a lot of talk about evidence that's going to come in at this point. We all know what we want to get in, but nobody knows what evidence you're going to see, observe or hear.

(R. 1158-1159).

It's improper for the prosecution to make any comment that implies the existence of evidence that the jury won't hear. Libertucci v. State, 395 So. 2d 1223, at 1225 (Fla. 3rd DCA 1981); Richardson v. State, 335 So. 2d 835 (Fla. 4th DCA 1976). In Williamson v. State, 459 So. 2d 1125 (Fla. 3rd DCA 1984), the court held that:

> Prosecutor's comments which implied existence of additional, highly incriminating testimony that was not presented to jury was improper.

The prosecutor's comment led the jury to believe that they would not be permitted to hear all the evidence against Mr. Chandler. This comment deprived Mr. Chandler of a fair and impartial trial to which he is entitled.

In addition, Mr. Chandler's defense counsel were negligent in not objecting to this comment.

During the jury selection process, the prosecutor asked a prospective juror the following question:

> Miss Teague, yesterday I believe you told Mr. Kanarek that the reason that you were somewhat opposed to the death penalty is because you felt that a person should be

> given another chance or words to that effect. I believe you said that everyone, you know, makes a mistake and can change; is that correct?
>
> MISS TEAGUE: Well, certain people can. I'm not saying everyone can.
>
> MR. MIDELIS: Okay. Let me ask you this: How many mistakes do you think a person is entitled to before you render an advisory sentence of death based upon the evidence the Judge will give you?
>
> MR. KANAREK: Your Honor, I object to the form of the question.
>
> THE COURT: Sustain the objection to the form of the question.
>
> MR. MIDELIS: Have you thought about the number of mistakes a person can make?
>
> MR. KANAREK: Your Honor, I have the same objection.

(R. 736-737).

The prosecution's question as to "how many mistakes do you think a person is entitled to make" is highly prejudicial in that it implies the existence of a past criminal history, which is improper for the jury's consideration.

During the course of jury selection, the prosecutor made the following statement to a prospective juror, which was heard by the entire jury panel:

> MR. MIDELIS: The defendant doesn't have to say anything, he doesn't have to prove anything. The exceptions, or one of the exceptions, is where the defense of alibi is raised.

(R. 945).

The comment by the prosecutor was improper in that it led the jury to believe the defendant must testify in order to present the defense of alibi. Moreover, the comment is an indirect comment conflicting with Chandler's constitutional right not to testify. The Florida Supreme Court in Trafficante v. State, 92 So. 2d 811 (Fla. 1957), held that:

> Our law prohibits any comment to be made, directly or indirectly, upon the failure of the defendant to testify. This is true without regard to the character of the comment, or the motive or intent with which it is made, if such comment is subject to an interpretation which would bring it within the statutory prohibition and regardless of this susceptibility to a different construction.

92 So. 2d at 814.

During the course of trial, state witness, Dr. Franklin Cox, Medical Examiner, was permitted to use an autopsy report to refresh his memory (R. 2389). The autopsy report was prepared and signed by a different medical examiner, Dr. Schofield (R. 2389). Defense counsel made numerous objections to Dr. Cox's using Dr. Schofield's autopsy report to refresh his memory (R. 2389). During closing argument to the jury, Prosecutor Stone made the following statement:

> You don't need five hundred medical examiners in here to tell you that. What could Doctor Schofield say? He could tell you that the cut was one centimeter. Would that make it not a cut or make it a cut? What could Doctor

> Schofield add? Not one thing. There is absolutely no evidence that their heads weren't fractured, that they weren't beat to death by Jim Chandler, that they weren't stabbed after death.
>
> You know, what's amazing is that he could have called Doctor Schofield. He called some other witnesses. If Doctor Schofield was going to tell you anything other than what Doctor Cox told you, why didn't he call him? He could. He has subpoena power. He could have had him right in here. He was on the witness list, too. But Doctor Schofield could not add one thing to what Doctor Cox told you.

(R. 3596-3597).

This argument is improper and highly prejudicial. Doctor Schofield did not testify at the trial. Thus, this statement refers to matters not in evidence. It is improper for the prosecutor to express his personal opinion or to state facts of his own knowledge which are not in evidence and not part of the evidence presented to the jury. Smith v. State, 414 So. 2d 7 (Fla. 3 DCA 1982); Duque v. State, 460 So. 2d 416 (Fla. 2d DCA 1980) (Harmless error rule inapplicable to comments outside the evidence and contemporaneous objection unnecessary). The Third District Court of Appeals in Salazar-Rodriquez v. State, 436 So. 2d 269 (1983), stated:

> State's comments relative to testimony of witnesses not called by defense would have given had they testified was reversible error as comments on defendant's failure to call witness; by placing before jury testimony that was never elicited because witnesses were not called to testify, State itself

testifies (436 So. 2d at 270). See also Clinton v. State, 53 Fla. 98, 43 So. 312 (1907); Bradham v. State, 41 Fla. 541, 26 So. 730 (1899); Thompson v. State, 318 So. 2d 549 (Fla. 4th DCA 1975), cert. denied, 333 So. 2d 465 (Fla. 1976).

In addition, the prosecutor's comments improperly attacked defense counsel's trial tactics in not calling Dr. Schofield in violation of Mr. Chandler's sixth amendment right to affective assistance of counsel.

Dr. Scholfield was the state's witness, under the state control, and thus, not freely available to testify for the defense. Also, defense counsel had correctly objected during Dr. Cox's testimony to Dr. Cox's relying, second-hand, on Dr. Schofield's report. Therefore, the prosecutor's comments in closing not only only misconstrued the rules of evidence, but also implied that the defendant's objections were baseless, frivolous, and intended to subvert justice by misleading and keeping evidence from the jury.

A defense attorney's only recourse to avoid such damaging comments would be to sit silent, not objecting to evidentiary violations and/or such not cross-examining witnesses. Such prosecutorial argument chills a defendant's right to confront the witnesses against him and to put on a full and vigorous defense.

Surely a state which constitutionally guarantees everyone access to the courts cannot tolerate the subversion of Mr. Chandler's using his day in court to procure a fair trial.

The prosecutor's actions denied Mr. Chandler the right to a fundamentally fair trial in violation of the State and Federal Constitutions.

Mr. Chandler was denied effective assistance of counsel in that any reasonably effective counsel in the context of a capital case would have put forth a specific objection to such prejudicial and improper argument.

In closing argument, Prosecutor Stone commented as to the credibility of Nancy Doyle. Nancy Doyle was called as a State witness and only after Ms. Doyle proved herself unreliable did the court declare her a court witness subject to cross-examination by both sides (R. 2568-2569). In his statement to the jury, Prosecutor Stone stated:

> Now, good old Nancy Doyle. Mr. Kanarek again takes one statement the witness says at one time and wants you to believe that and disbelieve everything else, because if you believe everything Nancy Doyle told you, she is the biggest liar in Indian River County because she told us four different stories about times . . . .

(R. 3604).

The prosecutor's comment is grossly improper and highly prejudicial. It is improper for the prosecution to assert his personal opinion as to the credibility of a witness. The Court in Dukes v. State, 356 So. 2d 878 at 875-876 (Fla. 4th DCA 1978), condemned the same improper argument. In Glassman v. State, 377

So. 2d 208 (Fla. 3rd DCA 1979) the court stated:

> It is improper for prosecutor to apply offensive epithets to defendant or their witnesses and engage in vituperative characterizations of them. See also, Johnson v. State, 88 Fla. 461, 102 So. 2d 5490 (1924), United States v. Peyro, 786 F.2d 826 (11th Cir. 1986), O'Callaghan v. State, 429 So. 2d 691 (Fla. 1983).

The credibility of a witness must be determined by the jury, not the State.

In addition, Prosecutor Stone argued to the jury in his summation that:

> What did she tell Syd Dubose? He came in, had one beer and left. Which is true? I can't know, but you notice we didn't call her as our witness because we couldn't rely on her credibility.

(R. 3605).

As set out above, this comment is improper because it is a statement of personal belief as to the credibility of a witness. In addition, the inference of this comment is that defense counsel are not reliable because they would call such a witness. However, Nancy Doyle was a State witness.

In another example of prosecutorial misconduct, the prosecutor, Mr. Stone, made the following closing argument to the jury:

> I'm not going to call Mrs. Messer (defendant's mother) a liar. I think the greatest instinct that a human has is protecting your offspring. I don't think she intentionally came in here and lied, I really

> don't. I think it's a little unusual that we didn't find the brown shirts until after this trial had started, until after the brother had been sitting in the front row for two or three days hearing the evidence. That's the first time we find the brown Hootin Owl shirt coming in here when she's called back. I think it's a little strange that we didn't find it until then.

The comment calls Mrs. Messer a liar, or atleast, it insinuates that she is. These statements as to the prosecutor's personal beliefs about a witness's credibility are improper. Murry v. State, 425 So. 2d 157 (Fla. 4th DCA 1983).

Moreover, the prosecutor's statement that the State was not aware of the brown shirt until after the trial had started was false. Prosecutor Stone deliberately misrepresented the testimony to the jury. Pretrial depositions of Detective DuBose, Detective Quillen, as well as Mrs. Messer, will show that the State had knowledge of the two brown shirts approximately ten months before trial. In addition, Mrs. Messer testified twice that she showed both shirts to Detectives DuBose and Quillen (R. 2824 and 2869).

The prosecutor deliberately misled the jury by stating that the State was not aware of the brown shirt. Such comments by the prosecutor, which are untrue and unsupported by any evidence, are grounds for dismissal. Coleman v. State, 420 So. 2d 354 (Fla. 5th DCA 1982); Vaczek v. State, 477n So. 2d 1034 (Fla. 5th DCA 1985); Lane v. State, 459 So. 2d 1145 (Fla. 3rd DCA 1984).

In closing argument to the jury, Prosecutor Stone improperly vouched for the credibility of a key state witness, as well as praising his work as a police officer. The following argument was made by the prosecutor:

> Now, if you can't knock holes in the State's case someplace else, let's put the police department on trial. Let's take Phil Redstone, because Phil Redstone is the man who looks him in, let's put him on trial. Let's try to destroy Phil Redstone. Well, I submit to you, members of the jury, that citizens of Indian River County thank God for the police officers like Phil Redstone who are methodical, thorough and detailed, a man who each day went back and dictated what happened.. . ." (R. 3607).
>
> Usually they're up here saying, "hey this guy's no good because he didn't do a very thorough report." But in this case, they have to pick on Mr. Redstone because if they didn't get him, didn't try to discredit him, didn't try to get his testimony out of the way, then he's gone. Absolutely no way. So try to put Mr. Redstone on trial (R. 3608).
>
> "Sergeant Redstone did one of the most thorough jobs that I've seen a law enforcement officer do in this case and I tell you the State is grateful for that job."

(R. 3613).

The prosecutor's comments were improper because they were designed to bolster the witness' credibility. Richmond v. State, 387 So. 2d 493 (Fla. 5th DCA 1980). The Florida Supreme Court in Blackburn v. State, 447 So. 2d 424 (1984) held that"

> "Prosecutor's personally vouching for veracity of police officer who was primary State witness was improper." (447 So. 2d at

425). See also Murry v. State, 425 So. 2d 157, 158 (Fla. 4th DCA 1983).

Prosecutor Stone asserted in his closing argument to the jury the following persuasive argument:

> "I submit to you there was one stab wound for each year he spent in prison. That's why there were seven of them."

(R. 3622).

The prosecutor's comment was highly prejudicial in that it was totally unsupported by any evidence, and is, in truth, a false statement. The prosecutor's statement refers to a previous conviction for which Mr. Chandler was sentenced to prison for a term of twenty (20) years. Testimony of this crime was ruled admissible under Florida Statute 90.404. Mr. Chandler was in prison for a period of five year, seven months for this previous conviction (R. 3292-3293). The prosecutor deliberately used this false statement to enhance the strength of his case.

It is well settled that a prosecutor must confine his closing argument to evidence in the record and must not make comments which could not be reasonably inferred from the evidence. Blanco v. State, 150 Fla. 98, 7 So. 2d 333, 339 (1942); Vaczek v. State, 477 So. 2d 1034 (5th DCA Fla. 1985); Lane v. State, 459 So. 2d 1145 (Fla. 3rd DCA 1984).

Further, in his summation to the jury, Prosecutor Stone argued to the jury that no one was aware that the victims had been stabbed, with the exception of the medical examiner. In an

effort to discredit the statement allegedly made by the defendant on the basis of knowledge available only to the actual perpetrator, Mr. Stone stated to the jury:

> "What did he say up there? What I called you up here to tell you was those people were stabbed after death. Nobody knew that, absolutely nobody knew that except the medical examiner. The police department didn't even know that. The protocol hadn't even been typed up at that point. Nobody knew that except the medical examiner. I submit to you, at that time, the state attorney didn't even know it. . . .

(R. 3615).

Prosecutor Stone was again mispresenting the testimony to the jury because the record clearly shows that Detective Redstone was present at the autopsy of both victims and was aware of this information (R. 2484-2485, 2405-2505). Certainly, Prosecutor Stone's reference to the knowledge -- or the lack of knowledge -- of the state attorney is purely conjecture and not part of the evidence.

In yet another attempt to mislead the jury as to the testimony, Prosecutor stone stated:

> "You couldn't see the bodies, you couldn't see anything from where the weeds were situated."

(R. 3526).

> In reference to Mr. Fitzgerald, the photographer, he said that you couldn't see the people from there. I think Mr. Fitzgerald was asked at one time, when he was

> shown the picture of the powerline, he said you couldn't even tell those were bodies.

(R. 3595).

Prosecutor Stone's summations to the jury on these key issues are totally inconsistent with what the testimony revealed (R. 2271-2272, 2286-2288, 2310). Prosecutor Stone's comments are deliberate misrepresentations of testimony to the jury and are improper. Kirk v. State, 227 So. 2d 40 (Fla. 4th DCA 1969); State v. Davis, 411 So. 2d 1354 (Fla. 3rd DCA 1982).

The prosecutor's closing argument to the jury, in which the prosecutor repeatedly slammed the alleged murder weapon, a baseball bat, down on a briefcase, fundamentally tainted the defendant's constitutional right to a fair trial. In addition to Prosecutor Stone's theatrical use of crashing the baseball bat on defense counsel's briefcase, the prosecutor viciously pumped his hand up and down in a description of how he felt the victims were stabbed.

The Fourth District Court of Appeals in Spriggs v. State, 392 So. 2d 9 (1981), condemned this type of improper action by the prosecution. In Spriggs, the Court held that the defendant's bizarre behavior in the courtroom, coupled with the overwhelming evidence against the defendant, rendered the prosecutorial misconduct harmless error. In the case at hand, the evidence against Mr. Chandler was purely circumstantial and the prosecutor's conduct was in no way provoked by the defendant.

In Stewart v. State, 51 So. 2d 494 (Fla. 1951), the Court stated:

> The trial of one charged with a crime is the last place to parade prejudicial emotions or exhibit punitive or vindictive exhibitions of temperament.

See also Johnson v. State, 88 Fla. 461, 102 So. 2d 549 (1924); Glassman v. State, 377 So. 2d 208 (Fla. 3rd DCA 1979). The prosecutor's actions were so prejudicial that they fundamentally tainted his trial. Rhodes v. State, 93 So. 2d 80 (Fla. 1957); Abbott v. State, 334 So. 2d 642 (Fla. 3rd DCA 1976); Ailer v. State, 114 So. 2d 348 (Fla. 2d DCA 1959).

This error, either individually or cumulatively with the other areas of prosecutorial misconduct rendered Mr. Chandler's trial fundamentally unfair in violation of Mr. Chandler's constitutional rights. It is well settled that improper prosecutorial misconduct can "so infect the trial with unfairness as to make the resulting conviction a denial of due process." Dunnelly v. DeChristoforo, 416 U.S. 637, 643 (1974), cited in Sawyer v. Smith, 110 S. Ct. 2822, 2827 (1990). Florida courts have recognized that prosecutorial misconduct, when taken as a whole, can deprive a defendant of his fundamental right to a fair trial Pope v. Wainwright, 496 So. 2d 798, 801 (Fla. 1986); Peterson v. State, 376 So. 2d 1230 (Fla. 4th DCA 1979) cert. denied, 386 So. 2d 1230 (Fla. 4th DCA 1979) cert. denied, 386 So.

2d 386 So. 2d 642 (Fla. 1980).

Significantly, Pope, supra, also cites to Pollard v. State, 444 So. 2d 561 (Fla. 2d DCA 1984) for the proposition that a "court may look to the 'cumulative effect' of nonobjected to errors in determining whether substantial rights have been affected." Pope, supra at 801.

It is clear that under Florida and Federal constitutional principles, the "cumulative effect" of improper prosecutorial comments can amount to fundamental error; even in the absence of objection. If there is any case in which the requisite quantum of "cumulative effect" is present, it is the case at hand.

In addition to the prosecutor's inflammatory, emotional, and throughly improper comment and argument at the intial trial, the following highly improper conduct occurred at the resentencing.

Prosecutor Morgan made the following comment during voir dire:

> "Mr. Fuhr, defense lawyer asked, you know, about the crime problem and he's asked all the folks about the crime problem, and for various reasons.
> You know, one solution might be the swift exercise of justice in particular cases. In other words, the court system speed up a little bit, to be a little swifter.
>
> Mr. Fuhr, "Oh, yeah. I agree with that, after sitting here for three days."
>
> Mr. Morgan, "I want to ask for a show of hands. Would it be safe to say most of you folks feel that way?"

(R. 716-717).

Although no objection was raised, this comment is improper because the prosecutor is imposing his personal opinion on the jury and because the comment itself is highly prejudicial. Defense counsel should be cited for ineffective assistance of counsel for his failure to object.

Defense counsel asked prospective juror "Vineis" if she owned a car and if so, did she have any bumper stickers on her car. (Defense counsel was perhaps trying to determine what type of person she was via her bumper stickers). Ms. Vineis replied she had a "I slow for Manatees" bumper sticker (R. 749).

When Prosecutor Colton questioned Ms. Vineis he asked her the following question:

> Mr. Colton, Ms. Vineis, I have one question:
>
> "Do you think there's some hidden meaning to the fact that you had that Manatee bumper sticker on the back of your car?"
>
> Ms. Vineis, "No."
>
> Mr. Colton, "I don't think so either."

(R. 751).

Prosecutor Colton was apparently trying to belittle defense counsel in violation of Mr. Chandler's sixth amendment right to effective assistance of counsel.

The prosecutor made the following statement during jury selection:

> "And it's very important -- in fact, ladies and gentlemen of the jury, the most important thing to the State of Florida, in all candor, is that each of you can promise the State that you will follow the law because we feel, like, if you follow the law and listen to the Judge's instructions carefully and apply the facts, there's only one possible recommendation.
>
> (R. 596).
>
> So, that's why it's so important that each of you commit yourself to doing do."

The prosecutor is giving his opinion to prospective jurors of what he thinks their recommendation should be before they have heard the evidence.

Defense counsel questioned whether Mr. Chandler's age could be considered in determining a sentence. The prosecutor objected and a discussion was held in open court, within hearing of all prospective jurors. The prosecutor stated:

> "The question is mainly, "Can you follow the law?" <u>If a juror says yes, I am not going to speculate as to whether they are lying or not. They have taken an oath. I don't think we can go behind it</u>. Your Honor, it is not proper."
>
> (R. 161-162).

This statement is highly prejudicial to Mr. Chandler because the prosecutor is insinuating <u>within</u> <u>hearing</u> of the jury that defense counsel believes the prospective jurors are lying.

The prosecution asked the medical examiner the following question:

> Q. Now, the defense lawyer asked you if the wounds that were received from the blunt trama (trauma) from the baseball bat, asked you if they were consistent with being struck from behind and you indicated that yes, that could have been the case. It is also consistent with perhaps two victims being on their knees and being struck on the top of their heads?

(R. 434-435).

An objection was timely raised by defense counsel. The original trial testimony clearly revealed that the victims were standing when they were struck. The prosecutor's question is improper and is designed to prejudice Mr. Chandler. The prosecutor knew or should have known that there was no evidence that the victims were on their knees. Clearly this question was asked to elicit extreme prejudice against Mr. Chandler.

Responding to an objection from the above comment, the prosecutor comments on Mr. Chandler's right not to testify:

> "Your Honor, Mr. Udell asked him if this was, you know, consistent from behind, you know, what evidence is there that he was hit from behind, mean, no one knows at this point except Mr. Chandler."

(R. 434-435).

An objection was timely raised by defendant. A curative instruction given by the court after a recess, but it was far too late to the cure devastating affect it had on Mr. Chandler's fifth amendment rights not to testify (R. 442-443).

Prosecutor Colton argued to the jury facts not in evidence.

He stated:

> "And in addition to that you recall the medical examiner talking about the contusions to his face. So he not only hit him in the head in the skull more than once with that baseball bat but he he also beat him in the face."

(R. 834).

At no time during the original 1981 trial or the 1986 resentencing hearing did the medical examiner testify that there were contusions on the face or that the victims were "beat in the face." Mr. Colton is commenting on facts not in evidence. Once again, the prosecutor presented false information that was highly prejudicial to Mr. Chandler's right to a fair trial.

Prosecutor Colton stated during closing argument:

> "Remember what Dr. Rifkin said, "I would be very uncomfortable with the thought of him being paroled." Basically what Dr. Rifkin has told you is that he is mean, that he's got a bad temper and that he doesn't know how to deal with it and that he's mean. And I submit to you that if he receives a sentence of life imprisonment under that sentence, you're eligible for parole in 25 years, Jim Eric Chandler would be eligible for parole in less than 19 years."

(R. 847-848).

As objection was timely made by defense counsel, but it was overruled by the judge. The judge granted defense's oral motion to preclude the State from commenting in closing argument that the defendant would be released on parole in 25 years or less (R. 811-812). Mr. Colton violated the court's order. The judge

erred in not sustaining defense's motion or at least giving a curative instruction to the jury.

Prosecutor Colton made the following inflamatory argument:

> "I submit to you that back there in those woods behind that house on July of 1980 they didn't have a lawyer provided for 'em...."
>
> Mr. Udell: Oh Judge I....
>
> Prosecutor: They didn't have anybody arguing mitigating circumstances for 'em (R. 856).

Objection was timely made by defense and a motion for mistrial was made. Defense requested a curative instruction and asked that the comment be stricken from the record. The judge overruled defense's objection, denied motion for curative instruction and mistrial and permitted the prosecutor to make that argument. Once again Mr. Colton makes the same argument that victim did not have a "paid lawyer" (R. 857).

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. Chandler 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

THE INTRODUCTION OF OTHER CRIMES AND BAD ACT EVIDENCE AT THE RESENTENCING PROCEEDING VIOLATED MR. CHANDLER'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS.

The State never noticed the defense of its intent to rely upon numerous other crimes and bad act evidence at Mr. Chandler's resentencing. See Fla. Stat. 90.404(2)(b)(1) (1989). The only ruling regarding such Williams rule evidence was the identity evidence at the 1981 trial of Lowell Wolf who testified regarding a 1972 crime for which Mr. Chandler had been convicted of kidnapping.[4] See Chandler v. State, 422 So. 2d 171, 172 (Fla. 1984).

The State, however, sought and obtained admission over the defense's objection of evidence of three uncharged other crimes, including: a aggravated assault on a police officer with an unloaded .22 rifle (RS. 336); a high speed chase involving Mr. Chandler and the police (RS 339); and, a violation of his Texas parole, possession of the unloaded .22 rifle (RS. 336).

All of this evidence was wholly irrelevant to any issue at the resentencing or, for that matter, the facts of the offense.

This blatant propensity evidence was clearly inadmissible.

---

[4]It should be noted that the bulk of Mr. Wolfe's testimony there as well as at the resentencing had nothing to do with the element of identity but with the victim impact of the unadjudicated aggravated battery in that case. See Claim II.

Accordingly resentencing counsel noted proper objections to its introduction and perfected the record by moving for a mistrial when the objection was overruled and the Williams evidence admitted (R. 336).

The caustic effect of this evidence on the defense was realized during the testimony of Detective Phil Redstone as the following illustrates.

> DETECTIVE REDSTONE: I contacted him on Saturday morning and told him that I wanted to meet with him on Saturday afternoon at two o'clock and he said that he would meet me at two o'clock. He never showed up for his meeting at two o'clock. I went to Sebastian and looked for him, looked all around for him and couldn't find him. Finally located him after in the afternoon. He was at the Neptune Marina. I had him put under surveillance by another Detective at that time.
>
> STATE ATTORNEY COLTON: Who was that?
>
> A. Detective Hamilton. Returned to the Detective Bureau Office and received a call from Chandler at the Detective Bureau and said that he knew that we got the calculator from Mr. Copp; he knew that we had sold the two of them; and he said he wasn't going back to the prison again and he said there's a cop across the street watching him and he will kill him and --
>
> MR. UDELL: I will object.
>
> A. He will kill me.
>
> MR. UDELL: I will object again. Not responsive to the question. May we approach the bench?

THE COURT: You may.

MR. UDELL: Judge, I don't think it is proper to ask a question and have him just relay a whole series of events. You ask a question and you got an answer. You ask a question and you get an answer. That's what I would be required to do. I would also move for a mistrial at this time in response to his answers about him not going back to prison. Clearly unresponsive. Totally intended to prejudice this jury.

MR. COLTON: Your Honor, his answer is responsive. He -- Mr. Udell went into great detail regarding his client's actions towards law enforcement and his cooperation whether he chooses to remember it or not, throughout his cross-examination. What we are pointing out is the same Defendant is the one who was not only not cooperative but threatened law enforcement and committed an aggravated assault upon an officer that day and he opened the door to that.

MR. UDELL: Okay. You can call my questions whatever you want but if you go into that area of the assault I am going to object. It's a non-statutory aggravating factor and move for a mistrial.

MR. COLTON: But, it was -- it is something the State did not go into on direct, did not intend to go into on direct, only went into it because the defense attorney is going into it and making a point of the Defendant's cooperation with law enforcement.

MR. MORGAN: -- (inaudible) -- the State -- (inaudible) -- prejudice because at this point without going into this Mr. Udell is going to be able to argue to that jury you heard Mr. Redstone. He was cooperating with him on this day. He told all these things he would never have found out. The truth of the matter is he wasn't cooperative all the time and that is why it is definitely probative as

to cross-examination, I mean, now on re-direct.

MR. UDELL: Judge, I never used the word cooperative.

MR. MORGAN: So what.

MR. UDELL: Mr. Morgan can tell the Court all day long what I am going to argue but I am going to argue what I want to argue and -- (indiscernible) --

THE COURT: (inaudible) -- I do think indeed he is entitled under the cross-examination to ask these questions.

Q. Detective Redstone, would you go on and relate to the jury in the Court what the Defendant said in your telephone conversation with him on Saturday, the 26th.

A. He said that he knew that there was a Detective across the street. He said he would kill him. He said he would kill as many cops it took to keep him from going back to prison. He wanted me to come to the Neptune Marina and meet him there alone and unarmed. He said he had a sixteen gauge shotgun and a 9mm pistol and a rifle and he wanted me to meet him alone and unarmed at the Neptune Marina.

Q. And, what, if anything, did you do at that point?

A. At that time I told him that I wouldn't meet him unarmed and alone and that was the end of the conversation at that time. He said that if anybody followed him, if anybody came near him that he would waste them.

Q. What happened after that?

A. He got in his vehicle, headed south to the Sebastian area. At the time I gave Orders to Detective Hamilton to arrest Mr.

Chandler.

Q. And did Detective Hamilton attempt to do that.

A. Yes, he did.

Q. What happened when Detective Hamilton attempted to do that?

MR. UDELL: Same objection, Your Honor, statutory -- (inaudible) --

THE COURT: I will permit the question, as I have indicated.

A. Detective Hamilton displayed his blue light and attempted to stop the Defendant. A chase ensued down towards Sebastian. A roadblock was set up during the chase. Chandler picked up a 22 rifle from in the cab of the vehicle.

MR. UDELL: I object. He is testifying based upon -- we don't even know how he knows any of this. I think it is proper for him to either say how he knows it or have Deputy Hamilton, Detective Hamilton, whichever it is, testify to these facts.

Q. How do you know the things that you are relating?

A. I took a statement from Detective Hamilton, Detective Brandes, and the other deputies that were involved in the chase and the roadblock in Sebastian.

Q. Okay. Go ahead.

A. During the chase Defendant Chandler --

MR. UDELL: Just so the record is clear there is a standing objection to hearsay to this testimony.

THE COURT: Noted.

A. He picked up a 22 rifle out of the cab of the truck and pointed it in the direction of Detective Hamilton and threatened him with it during the chase.

(RS. 336-340)(emphasis added).

This Williams rule evidence was inadmissible on several counts. First, the State had failed to comply with any of the provisions of Fla. Stat. 90.404 et. seq (1989); second, none of this propensity evidence met any of the exceptions to other crimes evidence pursuant to Fla. Stat. 90.141(2)(a) (1989); third, it was nothing more than naked propensity evidence.

Having properly objected and thereby preserving the issue for appeal, appellate counsel merely had to present the error to this Court. Here, once again, counsel unreasonably failed to present this otherwise meritorious issue on direct appeal, an appeal which raised only four issues which even this Court frankly noted "does not challenge his death sentences." Chandler v. State, 534 So. 2d 701, 704 (Fla. 1988). Properly understood the State's presentation of other crimes evidence where those crimes failed to establish any element in aggravation pursuant to Fla. Stat. 921.141 et. seq. (1989) constitutes nothing more than extremely prejudicial non-statutory aggravating factors and as such clearly is inadmissible. All counsel had to do was identify the error and this Court would have done the rest.

Appellate counsel's performance in this regard was deficient

and Mr. Chandler was prejudiced by this ineffective performance. Accordingly this court should now correct Mr. Chandler's denial of his sixth, eighth and fourteenth amendment rights to effective assistance of appellate counsel. The writ should now issue.

CLAIM VI

MR. CHANDLER WAS ENTITLED TO CONFLICT FREE COUNSEL ON THE CHARGE OF "CONSPIRACY" TO ESCAPE. SIMULTANEOUS REPRESENTATION BY THE OFFICE OF THE PUBLIC DEFENDER OF MR. CHANDLER AND OTHER INMATES SEEKING TO CURRY FAVOR WITH THE STATE BY TESTIFYING OR REFUSING TO TESTIFY AT MR. CHANDLER'S RESENTENCING VIOLATED MR. CHANDLER'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS. DESTROY COMPLETELY THE DEFENSE CLAIM THAT MR. CHANDLER WAS A MODEL PRESENCE, ABLE TO CONFORM POSITIVELY TO A PENAL SETTING AND POSED NO RISK OF ESCAPE.

During penalty phase, one of Mr. Chandler's witnesses, Dr. Rifkin, was asked by the State whether he was aware of Mr. Chandler's conspiracy to escape charge. Prior to this question, Dr. Rifkin had testified that Mr. Chandler had improved greatly and would not be a threat to himself or others in prison (R. 613-621).

The State introduced into evidence an indictment/information, not a judgment and sentence, and asked the witness whether the escape information would change the doctor's opinion as to dangerousness (R. 642). The State then inquired of the doctor whether he got his information about the escape attempt from newspapers (R. 641). The information about

the escape was to say the least extremely prejudicial.

The Office of the Public Defender represented all the alleged "escape conspirators" including Mr. Chandler. Failure to defend against the introduction of this escape "information" was due to conflict of counsel here the Office of the Public Defender, the very same office who not only represented Mr. Chandler on the escape was also advising itger clients charged with the conspiracy to take the "Fifth." Thus, the State deprived Mr. Chandler not only of his right to present pertinent mitigation, but deprived him of his right to counsel and also the only witness who could rebut the bogus conspiracy.

Although Mr. Chandler need not show prejudice in order to succeed on his claim, see Cuyler v. Sullivan, 446 U.S. 347 (1980); Holloway v. Arkansas, 435 U.S. 475 (1978), the petition also sets forth facts demonstrating that Mr. Chandler was in fact prejudiced by the actual conflict of interest resulting from the Office of the Public Defender's divided loyalties.

"[I]t is beyond dispute that the sixth amendment guarantee of effective assistance of counsel comprises two correlative rights: the right to counsel of reasonable competence . . . and the right to counsel's undivided loyalty." Virgin Islands v. Zepp, 748 F.2d 125, 131 (3d Cir. 1984). "The assistance of counsel means assistance which entitles an accused to the undivided loyalty of his counsel and which prohibits the attorney

from representing conflicting interests or undertaking the discharge of inconsistent obligations." People v. Washington, 461 N.E.2d 393, 396 (Ill. Sup. Ct.), cert. denied, 469 U.S. 1022 (1984). Because the right to counsel's undivided loyalty "is among those constitutional rights so basic to a fair trial . . . [its] infraction can never be treated as harmless error . . . . [W]hen a defendant is deprived of the presence and assistance of his attorney . . . in, at least, the prosecution of a capital offense, reversal is automatic." Holloway v. Arkansas, 435 U.S. 475, 489 (1978)(citations omitted). Defense counsel is guilty of an actual conflict of interest when he "owes duties to a party whose interests are adverse to those of the defendant, . . ." Zuck v. Alabama, 588 F.2d 436, 439 (5th Cir. 1979).

Although the general rule is that a criminal defendant who claims ineffective assistance of counsel must show both a lack of professional competence and prejudice, a defendant predicating an ineffectiveness claim on a conflict of interest faces no such requirement. Strickland v. Washington, 466 U.S. 668, 693 (1984); Kimmelman v. Morrison, 477 U.S. 365, 381 n.6 (1986); Cuyler v. Sullivan, 446 U.S. 335, 345-50 (1980). He need not show that the lack of effective representation "probably changed the outcome of his trial." Walberg v. Israel, 766 F.2d 1071, 1075 (7th Cir. 1985), cert. denied, 474 U.S. 1013 (1985). Rather, as this Circuit has recognized, "it is well established that when counsel

is confronted with an actual conflict of interest, prejudice must be presumed, and except under the most extraordinary circumstances the error cannot be considered harmless." Baty v. Balkcom, 661 F.2d 391, 395 (5th Cir. 1982), cert. denied, 456 U.S. 1011 (1982).

Once an actual conflict is demonstrated, there is no need to adduce proof that the "actual conflict of interest adversely affect[ed] counsel's performance or impair[ed] his client's defense." Westbrook v. Zant, 704 F.2d 1487, 1499 (11th Cir. 1983). Instead, prejudice is presumed because "[a] conflict may affect the actions of an attorney in many ways, but the greatest evil . . . is in what the advocate finds himself compelled to refrain from doing. Holloway v. Arkansas, 435 U.S. at 490. . . . In such circumstances a reviewing court cannot be certain that the conflict did not prejudice the defendant. Accordingly, it is settled that once an actual conflict is shown, prejudice is presumed." Barham v. United States, 724 F.2d 1529, 1534 (11th Cir. 1984)(Wisdom, J. concurring)(emphasis added), cert. denied, 467 U.S. 1230 (1984).

Conflicts of interest are especially egregious violations of the sixth amendment where, as here, the conflict is not disclosed to the defendant. A surreptitious conflict such as this one is at odds with the very foundation of our criminal justice system's truth-finding function: the adversary testing process. As the

United States Supreme Court has instructed, "'(T)ruth' . . . 'is best discovered by powerful statements on both sides of the question.' This dictum describes the unique strength of our system of criminal justice. 'The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.'" United States v. Cronic, 466 U.S. 648, 655 (1984)(quoting Herring v. New York, 422 U.S. 853, 862 (1975)). Where the system is not subject to true adversarial testing -- where, for example, as here, defense counsel conceals conflicting loyalties -- there is a breakdown of the adversarial process and an assault on its truth-finding function. See Ferri v. Ackerman, 444 U.S. 193, 204 (1979)("Indeed, an indispensable element of the effective performance of [defense counsel's] responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation").

Although conflicts of interest arise in a variety of contexts, courts have distinguished between those that are per se violations of the sixth amendment and those in which the defendant must show that the conflict "actually affected" counsel's performance. Allegations of conflict of interest in the context of multiple representations, where the defendant fails to object at trial, are governed by the Cuyler standard

under which the defendant must show that the conflict of interest "actually affected the adequacy of his representation. . . ." Cuyler v. Sullivan, 446 U.S. 335, 349 (1980). See also People v. Washington, 461 N.E.2d 393, 397 (Ill. 1984) ("where a defendant alleges ineffective assistance of counsel due to conflicts arising from joint representation of co-defendants, the per se rule is not applicable"). In the context of multiple representations, merely demonstrating a conflict of interest without also showing that the conflict "actually affected" counsel's performance is not a sixth amendment violation because those kinds of "conflicts" are open, common and often beneficial to defendants; "thus, they invariably raise the possibility of harmful conduct that often does not exist in fact." United States v. Cancilla, 725 F.2d 867, 870 (2d Cir. 1984)(emphasis in original).[5]

---

[5]As Judge Johnson of the Eleventh Circuit explained: "Absent actual conflicting interests we see no objection to joint representation. . . . In some instances joint representation may even be of substantial benefit to defendants. 'Joint representation is a means of insuring against reciprocal recrimination. A common defense often gives strength against a common attack.'" Baty v. Balkcom, 661 F.2d 391, 398 n.14 (5th Cir. 1981)(quoting Glasser v. United States, 315 U.S. 60, 92 (1942) (Frankfurter, J., dissenting)). See also People v. Washington, 461 N.E.2d at 397, where the Illinois Supreme court explained that "[t]he approach in joint representation cases is different from the per se rule because, as was recognized in Cuyler 'a possible conflict inheres in almost every instance of multiple representation.'" (quoting Cuyler v. Sullivan, 446 U.S. at 348).

On the other hand, some conflicts are so invariably pernicious, so without the possibility of any redeeming virtue that they are "always real, not simply possible, and . . . by [their] nature, [are] so threatening as to justify a presumption that the adequacy of representation was affected." United States v. Cancilla, 725 F.2d at 870. In those kinds of conflicts, courts refrain from searching the record to determine what could or should have been done differently, and instead invoke a rule of per se illegality. See United States v. Cronic, 466 U.S. at 658 (1984)("There are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified"). The per se standard is invariably applied where, as here, an attorney conceals his divided loyalties (in this case to the client and to the State), in violation of statute or under other circumstances that do not support the presumption of undivided loyalty. See, e.g., Solina v. United States, 709 F.2d 160, 167-69 (2d Cir. 1983)(Friendly, J.); Berry v. Gray, 155 F. Supp. 494 (W.D. Ky. 1957); Zurita v. United States, 410 F.2d 477 (7th Cir. 1969).

In those cases, the illegal representation in and of itself is a per se violation of the sixth amendment; the defendant need not point to anything in counsel's performance that was ineffective or prejudicial. Id. at 497.

Accordingly Mr. Chandler is now entitled to relief and the

failure of appellate counsel to rise this "of record conflict" (RS. 685) on direct appeal constitutes attorney performance. It is undersigned counsel's belief that as this conflict was unusual in that it was of record and therefore available to appellate counsel on direct appeal it is now proper brought in the instant habeas proceeding. However if counsel for Mr. Chandler is mistaken Mr. Chandler would respectfully request leave to withdraw this instant claim for presentation to the trial court in Mr. Chandler's Fla. R. Crim. P. 3.850 proceedings.

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 have been based upon ignorance of the law, deprived Mr. Chandler 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 VII

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

A capital sentencing jury must be:

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

State v. Dixon, 283 So. 2d 1 (Fla. 1973)(emphasis added). This straightforward standard was never applied at the penalty phase of Mr. Chandler's capital proceedings. To the contrary, the burden was shifted to Mr. Chandler on the question of whether he should live or die. In Hamblen v. Dugger, 546 So. 2d 1039 (Fla. 1989), a capital post-conviction action, this Court addressed the question of whether the standard employed shifted to the defendant the burden on the question of whether he should live or die. The Hamblen opinion reflects that claims such as the instant should be addressed on a case-by-case basis in capital post-conviction actions. Mr. Chandler herein urges that the Court assess this significant issue in his case and, for the reasons set forth below, that the Court grant him the relief to which he can show his entitlement.

Shifting the burden to the defendant to establish that mitigating circumstances outweigh aggravating circumstances conflicts with the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), and Dixon, for such instructions unconstitutionally shift the burden to the defendant with regard to the ultimate question

of whether he should live or die. In so instructing a capital sentencing jury, a court injects misleading and irrelevant factors into the sentencing determination, thus violating Caldwell v. Mississippi, 472 U.S. 320 (1985); Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); Maynard v. Cartwright, 108 S. Ct. 1853 (1988). Mr. Chandler's jury was unconstitutionally instructed, as the record makes abundantly clear (See RS. 793, 794, 796, 825, 907, 930). This claim is now properly before this Court, and Rule 3.850 relief would be more than proper. Moreover, the claim is properly before the Court because trial counsel ineffectively failed to litigate this issue properly at the time of the original proceedings.

At the penalty phase of trial, prosecutorial argument and judicial instructions informed Mr. Chandler's jury that death was the appropriate sentence unless "mitigating circumstances exist to outweigh any aggravating circumstances" (RS. 825, 907). Such instructions, which shift to the defendant the burden of proving that life is the appropriate sentence, violate the eighth and fourteenth amendments, as the Court of Appeals for the Ninth Circuit recently held in Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(in banc). This claim involves a "perversion" of the jury's deliberations concerning the ultimate question of whether Mr. Chandler should live or die. See Smith v. Murray, 106 S. Ct. 2661, 2668 (1986). No bars apply under such circumstances. Id.

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

In Adamson, 865 F.2d at 1041-44, the Ninth Circuit held that because the Arizona death penalty statute "imposes a presumption of death on the defendant," the statute deprives a capital defendant of his eighth amendment rights to an individualized and reliable sentencing determination. What occurred in Adamson is precisely what occurred in Mr. Chandler's case. See also Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988). The instructions, and the standard upon which the sentencing court based its own determination, violated the eighth and fourteenth amendments. The burden of proof was shifted to Mr. Chandler on the central sentencing issue of whether he should live or die. Moreover, the application of this unconstitutional standard at the sentencing phase violated Mr. Chandler's rights to a fundamentally fair and reliable capital sentencing determination, i.e., one which is not infected by arbitrary, misleading and/or capricious factors. See Adamson, supra; Chandler, supra. The unconstitutional presumption inhibited the jury's ability to "fully" assess mitigation, in violation of Penry v. Lynaugh, 109 S. Ct. 2935 (1989), a decision which was declared, on its face, to apply

retroactively to cases on collateral review.

The focus of a jury instruction claim is "what a reasonable juror could have understood the charge as meaning." Francis v. Franklin, 471 U.S. 307 (1985); see also Sandstrom v. Montana, 442 U.S. 510 (1979). Here, the jury was in essence told that death was presumed appropriate once aggravating circumstances were established, unless Mr. Chandler proved that the mitigating circumstances outweighed the aggravating circumstances. A reasonable juror could have well understood that mitigating circumstances were factors calling for a life sentence, that aggravating and mitigating circumstances had differing burdens of proof, and that life was a possible penalty, while at the same time understanding, based on the instructions, that Mr. Chandler had the ultimate burden to prove that life was appropriate. This violates the eighth amendment.

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

Under the instructions and standard employed in Mr. Chandler's case, once one of the statutory aggravating circumstances was found, by definition sufficient aggravation existed to impose death. The jury was then directed to consider whether mitigation had been presented which outweighed the aggravation. Thus under the standard employed in Mr. Chandler's case, the finding of an aggravating circumstance operated to impose upon the defendant the burden of production and the burden of persuasion of the existence of mitigation, and the burden of persuasion as to whether the mitigation outweighs the aggravation.

The effects feared in Adamson and Mills are precisely the effects resulting from the burden-shifting instruction given in Mr. Chandler's case. In being instructed that mitigating circumstances must outweigh aggravating circumstances before it could recommend life, the jury was effectively told that once aggravating circumstances were established, it need not consider mitigating circumstances unless those mitigating circumstances outweighed the aggravating circumstances. This jury was thus constrained in its consideration of mitigating evidence, Hitchcock, 107 S. Ct. 1821 (1987), and from evaluating the "totality of the circumstances," Dixon v. State, 283 So. 2d 1, 10 (Fla. 1973), in determining the appropriate penalty. The jury was not allowed to make a "reasoned moral response" to the issues

at Mr. Chandler's sentencing or to "fully" consider mitigation. Penry v. Lynaugh, supra. There is a "substantial possibility" that this understanding of the jury instructions resulted in a death recommendation despite factors calling for life. Mills, supra. The death sentence in this case is in direct conflict with Adamson, Mills, and Penry, supra. This error "perverted" the jury's deliberations concerning the ultimate question of whether Mr. Chandler should live or die. Smith v. Murray, 106 S. Ct. at 2668. Accordingly the writ should now issue.

CLAIM VIII

MR. CHANDLER'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, accurate information regarding the consequences of a capital sentencing verdict must not be withheld from a capital sentencing jury. California v. Ramos; Caldwell v. Mississippi.

To that end, defense counsel for Mr. Chandler 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.

When resentencing counsel sought to have Mr. Chandler's jury correctly instructed as to a 25 year minimum mandatory sentence the requested instruction was denied (RS. 802).

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. Chandler here should not have been precluded from offering accurate information concerning parole. 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.

Although he litigated this issue before the trial court, Mr. Chandler's counsel rendered prejudicially ineffective assistance in failing to litigate this issue in direct appeal properly. See Johnson v. Wainwright, supra. Habeas corpus relief is appropriate.

CLAIM IX

MR. CHANDLER'S SENTENCES OF DEATH RESULTED FROM THE SENTENCING COURT'S COERCION OF DEFENSE COUNSEL TO DISCLOSE CONFIDENTIAL, , AND PRIVILEGED PSYCHIATRIC REPORTS SO AS TO REBUT MITIGATING CIRCUMSTANCES, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

A. INTRODUCTION

> Just as the Fifth Amendment prevents a criminal defendant from being made "the deluded instrument of his own conviction," it protects him as well from being made the "deluded instrument" of his own execution.

Estelle v. Smith, 451 U.S. 454, 462-63 (1981) (citations omitted).

Jim Eric Chandler was made the "deluded instrument" of his own death sentences by being compelled to elect between the presentation of mitigating evidence or the possibility of being sentenced to death on the basis of his own statements made during purportedly confidential and privileged examinations. The violation of Mr. Chandler's fifth, sixth, eighth and fourteenth amendment rights in these cases was shockingly simple: 1) Mr. Chandler exercised his State-created right to a confidential pretrial psychiatric examination on the issue of insanity incompetency and mitigation; 2) he spoke to an independent confidential psychologist; 3) he subsequently was forced by the court to give up his right to present an insanity defense, and forfeit his rights to put on positive mitigation.

Florida law promised that the pretrial evaluations would be privileged and confidential, see Parkin v. State, 238 So. 2d 817 (Fla. 1970); Jones v. State, 289 So. 2d 725, 727-28 (Fla. 1974); Pouncy v. State, 353 So. 2d 640, 641-42 (Fla. 3d DCA 1977); McMunn v. State, 264 So. 2d 868, 870 (Fla. 1st DCA 1972); see also Fla. R. Crim. P. 3.216, and the federal constitution promised that Mr. Chandler would not be sentenced to death "by the simple, cruel expedient of forcing it [words] from his own lips." Estelle v. Smith, 451 U.S. at 462, citing Columbe v. Connecticut, 367 U.S. 568, 581-82 (1961). See also, Parkin, 238 So. 2d at 820-21; McMunn, 264 So. 2d at 870. But these promises were ignored by the sentencing court. The procedures resulting in Mr. Chandler's death sentences simply cannot be squared with the Due Process Clause, the privilege against self-incrimination, the Confrontation Clause, the right to counsel, the eighth amendment, or Florida state law, and resentencing is proper.

The errors were and are substantial and fundamental in nature. On direct appeal in these cases, however, appellate counsel unreasonably failed to bring these errors to the Court's attention and thus was ineffective. Counsel failed to direct the Court's attention to the per se reversible, unconstitutional error involved in his client's sentences of death, and thus failed his client. Again, substantial errors were left uncorrected. Mr. Chandler respectfully urges that corrective

action now be taken.

B. THE PROCESS BY WHICH MR. CHANDLER WAS FIRST DELUDED, AND THEN SENTENCED TO DEATH

1. The Facts

Counsel retained psychiatric expert assistance to determine Mr. Chandler's sanity at the time of the alleged offenses and to gain assistance with respect to any penalty phase mitigation that might exist.

On March 7, 1975, defense counsel was ordered to have his mental health expert disclose what Mr. Chandler told him about the murders or be ordered to drop Dr. Krop from his witness list (R. 74-75). The doctor's report was neither submitted nor mentioned by defense counsel at the guilt-innocence or penalty phases of either trial. The doctor was not called as a defense witness at either stage of either trial.

On September 5, 1986, the State moved the court to order Dr. Krop to disclose to the State what Mr. Chandler had told the doctor regarding the murder of the Steinbergers. The court did this on the phone to Dr. Krop and defense counsel instructed Dr. Krop not to answer (R. 74). Defense counsel refused to strike Dr. Krop from the list. The court notified defense counsel that if he did not comply the court would order Dr. Krop to disclose all information (R. 79).

On September 15, 1986, the court ordered Dr. Krop to submit to a deposition by the State in which he was to disclose to the State any information regarding the crime as related to Dr. Krop by Mr. Chandler. Defense counsel noted his objection for the record and indicated to the court that he would drop Dr. Krop as a witness.

This action on the part of the State and the court was no less than out right coercion to force the defense to forfeit significant mitigation from a noted expert. Florida law and the federal constitution guaranteed Mr. Chandler that the psychiatric reports and their contents would not be used against him. In fact, Florida law assured Mr. Chandler that even if he asserted an insanity defense, the statements he made to the court-appointed psychiatrists still could not be used against him. Id. The sentencing court ignored and flouted these laws and coerced defense counsel into sacrificing witnesses favorable to his client.

2. The False Promise

Florida law provided Mr. Chandler (an indigent criminal defendant) with the right to a court-appointed expert on the question of mental health and mitigation. See, e.g., State v. Hamilton, 448 So. 2d 1007, 1008-09 (Fla. 1984). Mr. Chandler, through counsel, asserted that right. Florida law promised and

assured Mr. Chandler that such a mental health evaluation would be confidential, and that the results of such an evaluation would not be used against him unless he "opened the door" by introducing an insanity defense. Hamilton, 448 So. 2d at 1008 ("[O]nce an expert is appointed, all matters related to that expert are confidential."); Parkin v. State, 238 So. 2d at 820-21; Jones v. State, 289 So. 2d 725, 727-28 (Fla. 1974); McMunn v. State, 264 So. 2d 868, 869-70 (Fla. 1st DCA 1972); Pouncy v. State, 353 So. 2d 640, 641-42 (Fla. 3d DCA 1977); Hamilton, supra. That promise was well-established at the time Mr. Chandler was tried. Parkin, supra; Jones, supra; McMunn, supra.

Moreover, Florida law promised and assured that even if Mr. Chandler were to introduce an insanity defense and/or the court-appointed experts' testimony, the statements he made to the court-appointed experts respecting the offense would remain confidential and would not be used against him or disclosed unless the statements themselves were first elicited by the defense. Parkin, 238 So. 2d at 820 ("[T]he Court and the State should not in their inquiry go beyond eliciting the opinion of the expert as to sanity or insanity, and should not inquire as to information concerning the alleged offense provided by a defendant during his interview; however, if the defendant's counsel opens the inquiry to collateral issues, admissions or guilt, the State's redirect examination properly could inquire

within the scope opened by the defense."); Jones, 289 So. 2d at 728 (Once defense introduces insanity defense, "the State would call the psychiatrist as a witness and elicit from him his opinion as to the sanity of the defendant, so long as the questions did not elicit from the psychiatrist what the defendant had told him about [the offense.]"); McMunn, 264 So. 2d at 870 ("An inquiry directed to court-appointed psychiatrists by the State must be limited to insanity or sanity..." Using the statements made to the psychiatrist against the defendant would be "a device for extracting a confession from a defendant . . . no less effective than the use of thumbscrews, racks and third degree," and "would transgress the defendant's constitutional guarantee against self-incrimination."); Smith v. State, 314 So. 2d 226, 229 (Fla. 4th DCA 1975). See also Isley v. Wainwright, 792 F.2d 1516, 1518-19 (11th Cir. 1986) citing, Parkin v. State.

Finally, Florida law assured and promised that the experts' evaluations, and Mr. Chandler's statements to the experts, would be privileged. Hamilton, 448 So. 2d at 1008-09; McMunn, 264 So. 2d at 870; Pouncy, 353 So. 2d at 641-42; Parkin, supra; Jones, supra; Isley v. Wainwright, supra. Similarly, the federal constitution assured Mr. Chandler that the defense evaluations, and any statements he may have provided during such evaluations, would not be used against him. See Estelle v. Smith, 451 U.S. at 462-63; Battie v. Estelle, 655 F.2d 692 (5th Cir. 1981); Parkin,

supra, 238 So. 2d at 820 (citing privilege against self-incrimination); Jones, supra, 289 So. 2d at 728 (citing Fifth Amendment).

Mr. Chandler asserted his right to privilege and confidentiality -- he withdrew Dr. Krop and introduced no expert psychiatric evidence.

C. MAKING A CAPITAL DEFENDANT THE DELUDED INSTRUMENT OF HIS OWN EXECUTION VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

The constitutional errors in this case are obvious. The procedures employed in sentencing Mr. Chandler to death were flatly unconstitutional, and prohibited by the fifth, sixth, eighth, and fourteenth amendments. See, e.g., Estelle v. Smith, supra; Parkin v. State, supra; Jones v. State, supra. Simply put, due process and fundamental fairness are abrogated by such practices, as is the Fifth Amendment:

> The Fifth Amendment, made applicable to the states through the Fourteenth Amendment, commands that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." The essence of this basic constitutional principle is "the requirement that the State which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips."

Estelle v. Smith, 451 U.S. at 462 (citations omitted) (emphasis in original).

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. 360 (1977). The central purpose of these requirements is to prevent the "unacceptable risk that 'the death penalty may be meted out arbitrarily or capriciously' or through 'whim or mistake,'" Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633 (1985) (O'Connor, J., concurring), quoting California v. Ramos, 463 U.S. 992, 999 (1983). Mr. Chandler was deluded into submitting to psychiatric evaluations which he was assured would remain privileged and confidential -- but which, without any warning, then became a key instrument used to sentence him to death. Mr. Chandler was made the "deluded instrument" of his own execution, Estelle v. Smith, 451 U.S. at 462-63, in the very sense condemned by the United States Supreme Court and by this Court. Id.; see also Parkin, supra; Jones, supra. Mr. Chandler has the absolute right to put on any relevant mitigation and was forced to abandon mitigation by court and State action. This is unacceptable. See Lockett v. Ohio, 438 U.S. 586 (1978); Shipper v. South Carolina, 476 U.S. 1 (1986); Caldwell v. Mississippi, supra.

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. Chandler 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 X

THE SENTENCING COURT ERRED BY FAILING TO INDEPENDENTLY WEIGH AGGRAVATING AND MITIGATING CIRCUMSTANCES, CONTRARY TO MR. CHANDLER'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

Mr. Chandler's sentence of death was illegally imposed because the Court failed to perform its statutorily and constitutionally mandated function of independently weighing aggravating and mitigating circumstances before imposing Mr. Chandler's death sentence.

Florida's death penalty statute clearly outlines the bifurcated penalty and sentencing proceedings that must be followed in a murder case where the death penalty is sought. Fla. Stat. 921.141.

The guidelines enacted by the legislature require the trial court to conduct an independent assessment of the propriety of the jury's recommendation if the penalty jury advises the court to impose a death sentence. The statute provides:

(3) FINDINGS IN SUPPORT OF SENTENCE OF

> DEATH.--Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set for in writing its findings upon which the sentence is based as to the facts:
>
> > (a) The sufficient aggravating circumstances exist as enumerated in subsection (5), and
> > (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.
>
> In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with S. 775.082

(Fla. Stat. 921.141(3))(emphasis added).

The trial court, when sentencing Mr. Chandler to death, failed in its duty to play an independent role in the sentencing process. Not only did the court fail to weigh aggravating and mitigating circumstances independently, as a comparison of Judge Lewis' sentencing order of 1981 (R. 4211) with Judge Tye's sentencing order of 1986 (RS. ___) makes plain. As we now know the trial court also relied exclusively upon the Office of the State Attorney to make the only alterations to the revised 1981 order.

Reference to the respective sentencing orders disclose that

Judge Tye in 1986 merely inserted hand written interdelineations on a copy of Judge Lewis' 1981 sentencing order demonstrating that notwithstanding the presentation of new mitigating evidence in 1986 the trial court failed to consider it. Rather than independently weighing aggravataing and mitigating circumstances, the trial court merely adopted the original sentencing order with the only modifications therein prepared by the State.

The fundamental precept of this Court's and the United States Supreme Court's modern capital punishment jurisprudence is that the sentencer must afford the capital defendant an individualized capital sentencing determination. To this end, this Court has mandated that capital sentencing judges conduct a reasoned and independent sentencing determination. This Court has consistently held that the trial judge must engage in an independent and reasoned process of weighing aggravating and mitigating factors in determining the appropriateness of the death penalty in a given case:

> Explaining the trial judge's serious responsibility, we emphasized, in State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed 2d 295 (1974):
>
> > [T]he trial judge actually determines the sentence to be imposed -- guided by, but not bound by, the findings of the jury. To a layman, no capital crime might appear to be less than heinous, but a trial judge with experience in the facts of criminality possesses the

> requisite knowledge to balance the facts of the case against the standard criminal activity which can only be developed by involvement with the trials of numerous defendants. Thus the inflamed emotions of jurors can no longer sentence a man to die. . . .
>
> The fourth step required by Fla. Stat. sec. 921.141, F.S.A., is that the trial judge justifies his sentence of death in writing, to provide the opportunity for meaningful review by this Court. Discrimination or capriciousness cannot stand where reason is required, and this is an important element added for the protection of the convicted defendant.

Patterson v. State, 513 So. 2d 1257 (Fla. 1987)(emphasis added).

In this case the trial court merely parroted the findings made in 1981, which were made by the State, with some minor modifications, again prepared by the State, despite the fact that no less than three additional witnesses testified on Mr. Chandler's behalf as to new mitigation during the 1986 resentencing who did not testify in 1981. Virtually no mitigation evidence was presented at the original jury and judge sentencing proceedings.

At the resentencing, the defense presented expert mental health testimony from Dr. Rifkin. Dr. Rifkin provided his expert opinion as to the mitigating circumstances that were never presented at the original sentencing: that Mr. Chandler within the heavily structured environment of prison life posed neither a threat to himself or other inmates. Of course, good

institutional adjustment is a classic source of nonstatutory mitigation upon which a sentence of less than death could rest. Skipper v. South Carolina, 476 U.S. 1 (1986). Here, the files and record establish that no independent weighing of the aggravating and mitigating circumstances whatsoever was afforded by the judge at resentencing despite the plethora of Skipper evidence and other new mitigating evidence presented. Here, the judge did not recite independent findings into the record but rather asked a party oponent to write them out. The judge here recited no findings at all -- the findings were those of Judge Lewis from 1981 as modified by the State in 1986.

This Court has addressed the ramifications of a trial judge's failure to engage in a meaningful weighing of aggravating and mitigating circumstances before imposing a death sentence. In a number of cases, the issue has been presented where findings of fact were issued long after the death sentence was actually imposed. Nibert v. State, 508 So. 2d 1 (Fla. 1987); Muehleman v. State, 503 So. 2d 310 (Fla. 1987); Van Royal v. State, 497 So. 2d 625 (Fla. 1986). In Van Royal, the Court set aside the death sentence because the record did not support a finding that the imposition of that sentence was based on a reasoned judgment. Chief Justice Ehrlich's concurring opinion explained:

> The statutory mandate is clear. This Court speaking through Mr. Justice Adkins in the seminal case of State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied sub nom. Hunter

v. Florida, 416 U.S. 943, 94 S.Ct 1950, 40 L.Ed2d 295 (1974), said with respect to the weighing process:

> It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and 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.

283 So. 2d at 10. (emphasis supplied).

> How can this Court know that the trial court's imposition of the death sentence was based on a "reasoned judgment" after weighing the aggravating and mitigating circumstances when the trial judge waited almost six months after sentencing defendant to death before filing his written findings as to aggravating and mitigating circumstances in support of the death penalty? The answer to the rhetorical question is obvious and in the negative.

497 So. 2d at 629-30.

In Patterson v. State, 513 So. 2d 1257 (Fla. 1987), this Court was presented with a nearly identical issue. The Court there ordered a resentencing, emphasizing the importance of the trial judge's independent weighing of aggravating and mitigating circumstances. In Patterson, the trial judge failed to engage in any independent weighing process. There, as here, the responsibility was delegated to the state attorney:

> [W]e find that the trial judge improperly delegated to the state attorney

> the responsibility to prepare the sentencing order, because the judge did not, before directing preparation of the order, independently determine the specific aggravating and mitigating circumstances that applied in the case. Section 921.141, Florida Statutes (1985), requires a trial judge to independently weigh the aggravating and mitigating circumstances to determine whether the death penalty or a sentence of life imprisonment should be imposed upon a defendant.

Patterson, supra, 513 so. 2d at 1261.

This Court in Patterson observed that in Nibert v. State, 508 So. 2d 1 (Fla. 1987), it had held that the judge's failure to write his own findings did not constitute reversible error "so long as the record reflects that the trial judge made the requisite findings at the sentencing hearing." Patterson, 513 So. 2d at 1262, quoting Nibert, 508 So. 2d at 4. Indeed, in Nibert, the judge made his findings orally and then directed the State to reduce his findings to writing. 508 So. 2d at 4. The record in Patterson demonstrated that there the trial judge "delegat[ed] to the state attorney the responsibility to identify and explain the appropriate aggravating and mitigating factors." 513 So. 2d at 1262. This constitutes sentencing error because the Court fails to engage in independent assessment of the appropriate sentence.

Here, the trial court denied Mr. Chandler's right to an individualized and reliable sentencing determination by failing to conduct the independent weighing which the law requires. The

judge merely adopted the findings from the original sentencing with minor modifications, prepared by the State. The trial judge here never exercised independent judgment. The Florida Supreme Court has made it clear in Dixon, supra, Van Royal, supra, and Patterson, supra, that the trial court must (a) engage in a reasoned weighing process of aggravating and mitigating circumstances, and (b) not delegate the responsibility for that weighing process to another entity.

The trial court here abdicated its responsibility on both points. A trial court cannot impose a death sentence in an arbitrary or capricious manner:

> In order to satisfy the requirements of the eighth and fourteenth amendments, a capital sentencing scheme must provide the sentencing authority with appropriate standards "that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition." Proffitt v. Florida, 428 U.S. 2542, 258, 96 S.Ct. 2960, 2969, 49 L.Ed.2d 913, 926 (1976). After reviewing the psychiatric evidence that was before the state court, we must conclude that the state court's rejection of the two mental condition mitigating factors is not fairly supported by the record and that, as such, Magwood was sentenced to death without proper attention to the capital sentencing standards required by the Constitution.

Magwood v. Smith, 791 F.2d 1438, 1449 (11th Cir. 1986). In Magwood the court found that it was error for the trial court to totally disregard evidence of mitigation. Similarly, the court

here acted in an arbitrary and capricious manner in totally failing to provide any independent consideration to the mitigation set forth in the record.

In Ross v. State, 388 So. 2d 1191, 1197 (Fla. 1980), the defendant's death sentence was vacated when the trial judge did not make an "independent judgment of whether or not the death penalty should be imposed." This Court based its analysis on State v. Dixon, supra. This Court found that the failure to conduct an independent weighing violates the dictates of Tedder v. State, 322 So. 2d 908 (Fla. 1975) stating:

> Although this Court in Tedder v. State, supra, and Thompson v. State, supra, stated that the jury recommendation under our trifurcated death penalty statute should be given great weight and serious consideration, this does not mean that if the jury recommends the death penalty, the trial court must impose the death penalty. The trial court must still exercise its reasoned judgment in deciding whether the death penalty should be imposed. The standard for our review of death sentences where the jury has recommended life was enunciated in Tedder v. State, supra, as follows:
>
> > In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.
>
> 322 So. 2d at 910. In LeDuc v. State, 365 So. 2d 149 (Fla. 1978), this Court considered the standard of review of a death sentence where the jury recommends death and stated:
>
> The primary standard for our review of

> death sentences is that the recommended sentence of a jury should not be disturbed if all relevant data was considered, unless there appear strong reasons to believe that reasonable persons could not agree with the recommendation. On the record placed before the jury in this case, a recommended sentence of death was certainly reasonable. Indeed, the only data on which a life recommendation could have been made would have had to be grounded on the nonevidentiary recommendation of the prosecutor and the emotional plea of defense counsel.
>
> Id. at 151. Since it appears that the trial court did not make an independent judgment whether the death sentence should be imposed, we remand to the trial court to reconsider its sentence in light of this opinion.

Ross v. State, 386 So. 2d 1197-98.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Chandler's death sentence. Relief is therefore now proper.

CLAIM XI

> MR. CHANDLER'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BECAUSE NO RELIABLE TRANSCRIPT OF HIS CAPITAL TRIAL EXISTS, RELIABLE APPELLATE REVIEW WAS AND IS NOT POSSIBLE, THERE IS NO WAY TO ENSURE THAT THAT WHICH OCCURRED IN THE TRIAL COURT WAS OR CAN BE REVIEWED ON APPEAL, AND THE JUDGMENT AND SENTENCE MUST BE VACATED.
>
> Reversible error can turn on a phrase. Did it occur here? We cannot be certain.

Johnson v. State, 442 So. 2d 193, 198 (Fla. 1983)(Shaw, J., dissenting).

...The due process constitutional right to receive trial transcripts for use at the appellate level was acknowledged by the Supreme Court in Griffin v. Illinois, 351 U.S. 212 (1956). The existence of an accurate trial transcript is crucial for adequate appellate review. Id. at 119. The sixth amendment also mandates a complete transcript. In Hardy v. United States, 375 U.S. 277 (1964), Mr. Justice Goldberg, in his concurring opinion, wrote that since the function of appellate counsel is to be an effective advocate for the client, counsel must be equipped with "the most basic and fundamental tool of his profession . . . the complete trial transcript . . . anything short of a complete transcript is incompatible with effective appellate advocacy." Hardy at 288.

Complete and effective appellate advocacy requires a complete trial record, a trial record not missing portions of the voir dire, a trial record not shot through with such tape transcription limitations and errors as to be incomprehensible, a trial record not missing bench conferences, and a record that accurately reflects what occurred. The United States Supreme Court in Entsminger v. Iowa, 386 U.S. 748 (1967), held that appellants are entitled to a complete and accurate record. Lower courts rely upon Entsminger. The concurring opinion in Commonwealth v. Bricker, 487 A.2d 346 (Pa. 1985), citing Entsminger, condemned the trial court's failure to record and

transcribe the sidebar conferences so that appellate review could obtain an accurate picture of the trial proceedings. In Commonwealth v. Shields, 383 A.2d 844 (Pa. 1978), the Supreme Court of Pennsylvania reversed a second-degree murder and statutory rape conviction solely because a tape of the prosecutor's closing argument became lost in the mail. "[I]n order to assure that a defendant's right to appeal will not be an empty, illusory right . . . a full transcript must be furnished." The court went on to say that meaningful appellate review is otherwise impossible.

Entsminger was cited in Evitts v. Lucey, 105 S. Ct. 830 (1985), in which the Court reiterated that effective appellate review begins with giving an appellant the advocate, and the tools necessary to do an effective job.

Finally, in Gardner v. Florida, 430 U.S. 349 (1977), where the defendant was not allowed to view a confidential presentence report, the Court held that even if it was proper to withhold the report at trial, it had to be part of the record for appeal. The record must disclose considerations which motivated the imposition of the death sentence. "Without full disclosure of the basis for the death sentence, the Florida capital sentencing procedure would be subject to defects . . ." under Furman v. Georgia, 408 U.S. at 361.

The issue is the adequacy for appellate purposes of a trial

record about which profound reliability questions are raised -- whether Mr. Chandler should be made to suffer the ultimate sentence of death where he did not have the benefit of a constitutionally guaranteed review of a bona fide record of the trial proceedings. Fla. Const. art. V, sec. 3(b)(1). See Delap v. State, 350 So. 2d 462, 463 (Fla. 1977).

This Court's death sentence review process involves at least two functions:

> First, we determine if the jury and judge acted with procedural rectitude in applying section 921.141 and our case law. This type of review is illustrated in Elledge v. State, 346 So. 2d 998 (Fla. 1977), where we remanded for resentencing because the procedure was flawed -- in that case a nonstatutory aggravating circumstance was considered.
>
> The second aspect of our review process is to ensure relative proportionality among death sentences which have been approved statewide. After we have concluded that the judge and the jury have acted with procedural regularity, we compare the case under review with all past cases to determine whether or not the punishment is too great. In those cases where we find death to be comparatively inappropriate, we have reduced the sentence to life imprisonment.

Brown v. Wainwright, 392 So. 2d 1327, 1331 (Fla. 1981). This Court has emphasized that "[t]o satisfactorily perform our responsibility we must be able to discern from the record that the trial judge fulfilled that responsibility" of acting with procedural rectitude. Lucas v. State, 417 So. 2d 250 (Fla.

1982).

The record is incomplete in a way which prevented this Court from conducting meaningful appellate review. A new appeal must be allowed. This result is constitutionally required:

> Since the State must administer its capital sentencing procedures with an even hand, see Proffitt v. Florida, 428 U.S. at 250-58, 96 S.Ct. at 2966-67, it is important that the record on appeal disclose to the reviewing court the considerations which motivated the death sentence in every case in which it is imposed.
>
> . . . .
>
> In this particular case, the only explanation for the lack of disclosure is the failure of defense counsel to request access to the full report. That failure cannot justify the submission of a less complete record to the reviewing court than the record on which the trial judge based his decision to sentence petitioner to death.

Gardner v. Florida, 430 U.S. 349, 361 (1977)(emphasis added).

By statute, this Court is required to review all death penalty cases. The review occurs "after certification by the sentencing court of the entire record. . . ." Fla. Stat. sec. 921.141(4). In furtherance of this statutory mandate, this Court has issued administrative orders requiring "the appropriate chief judge to monitor the preparation of the complete record for timely filing in this Court."

The record in this case is incomplete, inaccurate, unreliable and wrong. Confidence in the record is undermined.

Mr. Chandler was denied due process, a reliable appellate process, effective assistance of counsel on appeal, a meaningful and trustworthy review of his conviction and sentence of death, and his statutory and constitutional rights to review of his sentence by the highest court in the State upon a complete and accurate record, in violation of the sixth, eighth and fourteenth amendments. A new appeal should now be granted.

Alternatively, petitioner, pursuant to Fla. R. App. P. 9.200(f)(2) would move the Court to order the reporter to conduct a more through examination of the original tapes with state of the art audio technology to determine what portion if any of the over 100 "inaudible" designations or similar comments by the reporter can actually be transcribed. And that the clerk of the court, pursuant to Fla. R. App. P. 9.200(d)(i), furnish a consecutively paginated transcript, and one which is otherwise in compliance with 9.200(d).

CONCLUSION AND RELIEF REQUESTED

WHEREFORE, Petitioner, through counsel, respectfully urges that the Court issue its Writ of habeas corpus and vacate his unconstitutional capital conviction and sentence of death. Since this a Petitioner urges that the Court relinquish jurisdiction to the trial court, or assign the case to an appropriate authority, for

the resolution of the evidentiary factual questions attendant to his claims, including inter alia, questions regarding counsel's deficient performance and prejudice. Finally petitioner pursuant to Fla. R. App. P. 9.200(f)(1)(3) would request the court order the reporter of the resentencing proceeding to further examine the original tapes and to take what other action necessary to prepare a more complete transcription of this proceeding can be make, and that the clerk of the Circuit Court be ordered to supply a record inconformity with Fla. R. App. P. 9.200(d).

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

Respectfully submitted,

LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. 0125540

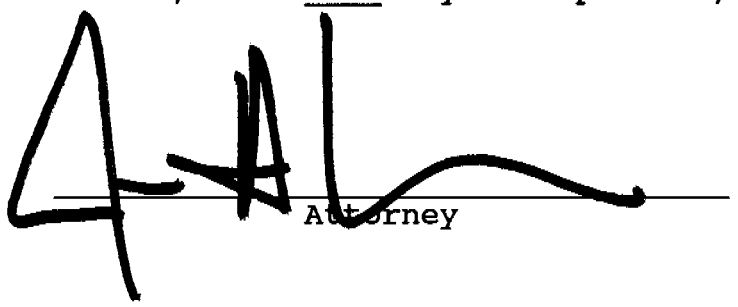
JEROME H. NICKERSON
Assistant CCR
Florida Bar No. 0829609

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

By: _____
Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail, first class, postage prepaid, to Celia A. Terenzio, Assistant Attorney General, Department of Legal Affairs, 111 Georgia Avenue, Room 204, West Palm Beach, Florida 33401, this 24TH day of September, 1990.



Attorney