IN THE SUPREME COURT OF FLORIDA

NO. 76101

WILLIAM MICHAEL SQUIRES

Petitioner,

v.

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

Respondent.

JUN 4 1990
By DC
Deputy Clerk

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

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

A. JURISDICTION

This is an original action under Fla. R. App. P. 9.100(a). This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents constitutional issues which directly concern the judgment of this Court during the appellate process, and the legality of petitioner's capital conviction and sentence of death. Jurisdiction in this action lies in this Court, **see,** e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein involved the appellate review process. **See** Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); see also Johnson (Paul) 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 petitioner to raise the claims presented in this petition. **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. Wainwrisht, 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. Squires' capital conviction and sentence of death, and of this Court's appellate review. Petitioner'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. Wainwrisht, 175 So. 2d 785 (Fla. 1965); Palmes v. Wainwrisht, 460 So. 2d 362 (Fla. 1984). The petition additionally 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. Wainwrisht, 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. Wainwrisht, supra; Johnson v. Wainwrisht, 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 proper on the basis of the claims herein presented.

B. REQUEST FOR STAY OF EXECUTION

Mr. Squires' petition includes a request that the Court stay his execution (presently scheduled for July 10, 1990). As will be shown, the issues presented are substantial and warrant a stay of execution. This Court has not hesitated in the past to stay executions when warranted to ensure judicious consideration of the issues presented by petitioners litigating during the pendency of a death warrant. **See**, e.g., Riley v. Wainwrisht, 517 So. 2d 656 (Fla. 1987); Copeland v. State (Nos. 69,429 and 69,482, Fla., Oct. 16, 1986); Jones v. State (No. 67,835, Fla., Nov. 4, 1985); see also Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Kennedy v. Wainwrisht, 483 So. 2d 426 (Fla. 1986). Cf. State v. Sireci, 502 So. 2d 1221 (Fla. 1987).

This is Mr. Squires' first and only petition for a writ of habeas corpus. The claims he presents are no less substantial

than those involved in the cases cited above. He therefore respectfully urges that the Court enter an order staying his execution, and, thereafter, that the Court grant habeas corpus relief.

II. GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Petitioner submits that his capital conviction and his sentence of death were obtained and then affirmed during the Court's appellate review process in violation of his rights as guaranteed by the 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.

CLAIM I

THE JURY WAS IMPROPERLY INSTRUCTED ON IMPROPERLY ADMITTED EVIDENCE OF "OTHER CRIMES" AND THIS ERROR UNDERMINED THE RELIABILITY OF THE JURY'S DETERMINATION AS TO GUILT-INNOCENCE AND SENTENCE, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS; THE FAILURE TO FULLY RAISE THIS ISSUE ON DIRECT APPEAL CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL.

The State in the guilt-innocence phase introduced evidence of collateral bad acts under the guise that the evidence rebutted a trait of non-violence elicited by the State in cross-examination of Mr. Squires. This evidence was improperly admitted under Williams v. State, 110 So. 2d 654 (Fla. 1959), for

a number of reasons: any probative value of the collateral crimes was far outweighed by its improper prejudicial impact, Straight v. State, 397 So. 2d 903 (Fla. 1981); the trial court never gave due consideration to the time between the collateral crimes and the current offense, cf. McGough v. State, 302 So. 2d 751 (Fla. 1974); no notice was given to the defense prior to trial that this evidence would be used, in violation of Section 90.404(2)(b), Fla. Stat.; the jury was not instructed whatsoever on how to evaluate this evidence at the time it was presented, or during the jury instructions given at the close of the guilt phase.

This issue was raised on direct appeal, but was not fully considered by this Court. In its opinion on direct appeal, this Court never addressed the trial court's complete failure to instruct the jury on the limited purpose for which the evidence was admitted. Squires v. State, 450 So. 2d 208, 210-11 (Fla. 1984). A proper instruction is required both at the time the "Williams Rule" evidence is admitted and at the close of the evidence.

To the extent that this Court affirmed the admissibility of the "Williams Rule" evidence, petitioner would request that this Court reconsider its ruling. To the extent that this Court failed to address the instructional error, this claim involves fundamental error which undermines the reliability of Mr.

Squires' conviction and sentence of death. This error must be corrected now.

The jury was never told that Mr. Squires was not on trial for the crimes not included in the indictment. This violated the sixth, eighth, and fourteenth amendments. This error further spilled over into the sentencing proceeding. Appellate counsel failed to argue this contention on appeal, and this Court also failed to consider it.

"Williams Rule" error requires a different analysis with regard to its effects in a capital penalty phase:

> . . . . Substantially different issues arise during the penalty phase of a capital trial that require analysis qualitatively different than that applicable to the guilt phase. What is harmless as to one is not necessarily harmless as to the other, particularly in light of the fact that a Williams rule error is presumed to infect the entire proceeding with unfair prejudice. Peek, 488 So.2d at 56; Straight, 397 So.2d at 908.

Castro v. State, 547 So. 2d 111, 115 (Fla. 1989).

Appellate counsel's failings regarding this issue must be addressed, and this issue revisited. This claim involves substantial and prejudicially ineffective assistance of counsel on direct appeal. This issue involved a classic violation of longstanding principles of law. It virtually "leaped out upon even a casual reading of the transcript." Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). No tactical decision can be ascribed to counsel's failure to fully urge this 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. Squires of the appellate reversal to which he was constitutionally entitled. **See** Wilson v. Wainwright, supra, at 464-65. An evidentiary hearing is necessary, and thereafter relief is appropriate. This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Squires' death sentence. Accordingly, habeas corpus relief must be accorded now.

CLAIM II

MR. SQUIRES' SENTENCING JURY WAS NOT INSTRUCTED ON THE "HEINOUS, ATROCIOUS, OR CRUEL'' AGGRAVATING CIRCUMSTANCE, OR THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING CIRCUMSTANCE, AND WAS IMPROPERLY INSTRUCTED ON OTHER AGGRAVATING CIRCUMSTANCES, AND THESE AGGRAVATORS WERE IMPROPERLY ARGUED AND IMPOSED, IN VIOLATION OF MAYNARD V. **CARTWRIGHT HITCHCOCK V [illegible] AN** THE EIGHTH AND FOURTEENTH AMENDMENTS.

Concern over the severity and finality of the death penalty has mandated that any discretion in imposing the death penalty be narrowly limited. Gress v. Georsia, 428 U.S. 153, 188-89 (1976); Furman v. Georsia, 408 U.S. 238 (1972). Gresq interpreted the mandate of Furman to require that severe limits be imposed due to the uniqueness of the death penalty:

> Because of the uniqueness of the death penalty, Furman held that it could not be imposed under sentencing procedures that created a substantial risk that it would be

inflicted in an arbitrary and capricious manner.

428 U.S. at **189.** Because capital sentencing discretion must be strictly guided and narrowly limited, "aggravating circumstance[s] must genuinely narrow the class of persons eligible for the death penalty." Zant v. Stevens, **462** U.S. **862, 877 (1983).** Thus, aggravating circumstances that are defined and/or imposed too broadly fail to satisfy the eighth and fourteenth amendments.

Mavnard v. Cartwrisht, **108** S. Ct. **1853 (1988),** made it clear that capital sentencers and courts reviewing death sentences must both articulate a narrowing principle of an aggravating circumstance and apply that principle to the specific facts of the case. This is so because **"the** channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." **108** S. Ct. at **1858.** There must be a "principled way to distinguish [the] case, in which the death penalty was imposed, from the many cases in which it was not." Id. at **1859,** quoting Godfrev v. Georgia, **446** U.S. **420, 433 (1980).** The application of a narrowing construction cannot be fulfilled by a mere recitation of the evidence which supports finding the aggravating circumstance; a "narrowing principle to apply to those facts" must be articulated and actually applied. **Id.**

In Mr. Squires' case, the jury was not even instructed on two aggravating circumstances which the prosecutor argued, and

two other aggravating circumstances on which the jury was instructed and which the trial court found were overbroadly applied and failed to narrow the sentencers' discretion to impose death. Mr. Squires was thus sentenced to death in violation of the eighth and fourteenth amendments.

A. HEINOUS, ATROCIOUS OR CRUEL

1. The Jury

During the penalty phase of Mr. Squires' capital trial, the prosecutor argued to the jury that it could consider in aggravation whether the crime was "especially wicked, evil, atrocious or cruel." Thereafter, the trial court instructed the jury:

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence:
>
> The crime for which William M. Squires is to be sentenced was committed while he was under sentence of imprisonment.
>
> The defendant has been previously convicted of a felony involving the use or threat of violence to some person.
>
> The crime of robbery is a felony involving the use of threat of violence to another person.
>
> The crime for which the Defendant is to be sentenced was committed while he was engaged in the commission of the crime of robbery.

(R. 1029). The jury was given absolutely no instruction on the heinous, atrocious or cruel aggravating circumstance. They were not instructed that they could consider it, and they were not instructed as to the limiting constructions placed upon it by this Court. In Cartwrisht v. Maynard, 822 F.2d 1477, 1488 (10th Cir. 1987)(in banc), affirmed 108 S. Ct. 1853 (1988), the jury was given an instruction somewhat defining the heinous, atrocious or cruel aggravating factor, yet the instruction was found constitutionally inadequate. In Maynard v. Cartwrisht, 108 S. Ct. 1853, 1858 (1988), the Supreme Court unanimously held that such an instruction did not "adequately inform juries what they must find to impose the death penalty."

This Court has also applied several limiting constructions to the heinous, atrocious or cruel aggravating factor. E.g., Rhodes v. State, 547 So. 2d 1201 (Fla. 1989)(cannot be based on actions after the death of the victim); Cochran v. State, 547 So. 2d 928, 931 (Fla. 1989)(cannot be based on single gunshot wound); State v. Dixon, 282 So. 2d 1, 9 (Fla. 1973)(aggravator directed only at consciousless or pitiless crime which is unnecessarily torturous to victim). The sentencing jury in Mr. Squires' case, however, was not instructed on any of the limiting constructions applicable to this aggravator, despite the fundamental significance of the jury's sentencing role in a Florida capital sentencing proceeding. **See** Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(in banc), cert. denied, 109 S. Ct. 1353 (1989). In

fact, Mr. Squires' jury was not instructed on this aggravator at all.

However, the prosecutor did urge the jury to impose a sentence of death on the basis of this aggravating factor. The prosecutor read the aggravating circumstance to the jury: "Aggravating circumstance number eight: The crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel." (R. **1023).** Certainly this would not be sufficient under Cartwrisht, even if the judge had included it in his instructions (it was not included).

The jury had absolutely no instruction to inform them "what they must find to impose the death penalty." Maynard v. Cartwrisht, supra. The jury ultimately did recommend a sentence of death. The jury's recommendation is entitled to "great weight." Tedder v. State, **322** So. 2d **908** (Fla. 1975). Because we cannot know that the jury's recommendation was not based on this aggravating circumstance, and because the jury was given no limiting instruction, reliability in the sentence is seriously undermined in this case.

2. The Trial Court

After failing to instruct the jury on the heinous, atrocious or cruel aggravating circumstance, the trial court accepted the jury's recommendation and sentenced Mr. Squires to death (R. 1035). Later, when the sentencing judge filed his written

"sentence", it included heinous, atrocious or cruel as being established (R. **122).** This also was improper.

The trial court cannot rely on aggravating factors not submitted to the jury. It was error for the trial court to find this factor in aggravation after failing to instruct the jury. See Stevens v. State, **552** So. 2d **1082, 1087** (Fla. **1989).** This also undermines reliability in the outcome of the proceedings, in this case the sentence of death.

B. COLD, CALCULATED AND PREMEDITATED

1. The Jury

As with the heinous, atrocious or cruel aggravating circumstance, the prosecutor argued to the jury during the penalty phase that they could find, in aggravation, that the murder was committed in a cold, calculated and premeditated fashion:

> Aggravating circumstance number **9,** ladies and gentlemen: The crime for which the Defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

(R. 1023).

Once again, the trial court failed to provide any instruction whatsoever on this aggravating circumstance (R. **1029).** The jury was certainly not informed of the limiting constructions placed on this aggravator by this Court.

The cold, calculated and premeditated aggravating

circumstance has been applied virtually as a **"catch-all"** aggravating circumstance. Even where this Court has developed principles for applying the (5)(i) circumstance, those principles have not been applied with any consistency whatsoever. More importantly, however, the jury was not instructed in Mr. Squires' case as to what was required to establish this aggravator.

This Court's decisions have recognized that cold, calculated and premeditated requires proof beyond a reasonable doubt of a "careful plan or prearranged **design."** See Mitchell v. State, 527 So. 2d 179, 182 (Fla. 1988)("the cold, calculated and premeditated factor [] require[s] a careful plan or prearranged design."); Jackson v. State, 530 So. 2d 269, 273 (Fla. 1988) (application of aggravating circumstance "error under the principles we recently enunciated in Rogers"). The record in this case does not support this aggravator, when properly limited.

Because the jury was not properly instructed on this aggravating circumstance, it had no principled way to apply this aggravating factor. The jury was left with the open-ended discretion found to be invalid in Furman v. Georgia, 408 U.S. 238 (1972), and Mavnard v. Cartwright, supra. Reliability in the sentence is once again undermined.

2. The Trial Court

The trial court also found this aggravating circumstance, cold, calculated and premeditated, in its **"Sentence"** which was entered after Mr. Squires was sentenced to death (R. 123). This was also improper and undermines confidence in the sentence of death.

C. PRIOR CONVICTION

Florida's capital sentencing statute provides for an aggravating circumstance if **"[t]he** defendant was previous1 convicted of another capital felony or of a felony involving the use or threat of violence to a person." Fla. Stat. sec. 921.141(5)(b). This Court has articulated several limitations on the application of this aggravating circumstance. First, the court has interpreted section 921.141(5)(b) to refer to **"life-**threatening crimes." Lewis v. State, 398 So. 2d 432, 438 (Fla. 1981). Additionally, the court has held that a conviction is necessary before criminal activity can be considered as an aggravating circumstance. **See** Provence v. State, 337 So. 2d 783, 786 (Fla. 1976); Spaziano v. State, 393 So. 2d 1119, 1122-23 (Fla. 1981); Garron v. State, 528 So. 2d 353, 360 (Fla. 1988). Finally, the Court has also held that it is "improper to aggravate for a prior conviction of a violent felony when the underlying felony is part of the single criminal episode against the single victim of the murder for which the defendant is being

sentenced." Perry v. State, 522 So. 2d 817, 820 (Fla. 1988); Lamb v. State, 532 So. 2d 1051, 1052-53 (Fla. 1988); Patterson v. State, 513 So. 2d 1257, 1263 (Fla. 1987); Wasko v. State, 505 So. 2d 1314, 1317-18 (Fla. 1987). The jury was informed of none of these limitations on this aggravating circumstance.

The prosecutor introduced no evidence whatsoever during the penalty phase. **As** to this aggravating circumstance he relied solely on Mr. Squires' own testimony. The jury was then simply instructed:

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence:
>
> * * *
>
> The defendant has been previously convicted of a felony involving the use or threat of violence to some person.
>
> The crime of robbery is a felony involving the use or threat of violence to another person.
>
> The crime for which the Defendant is to be sentenced was committed while he was engaged in the commission of the crime of robbery.

(R. 1029).

The jury was not instructed on any of the limiting constructions imposed by this Court. On the basis of these instructions, the jury could have applied this aggravator on the basis of the robbery of the victim in this case. This would clearly be improper under this Court's caselaw, since the

underlying felony was a part of a single criminal episode against a single victim of murder. Perrv, supra; Lamb, supra; Patterson, supra; Wasko, supra.

There can be no doubt that based on these cases, the sentencing court erred in finding and this Court clearly erred in affirming this particular aggravating circumstance on Mr. Squires' direct appeal. Habeas corpus relief is proper.

D. UNDER SENTENCE OF IMPRISONMENT

The jury was also provided with no limiting construction to the under sentence of imprisonment aggravating factor. Because no evidence was presented by the State on this aggravating circumstance, the jury could have been confused as to when this circumstance applies. Once again confidence in the sentence is undermined.

E. CONCLUSION

This issue involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Squires' death sentence and renders it unreliable. **See** Penrv v. Lynaugh, supra. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings, **see** Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error. This claim also involves new caselaw

which establishes Mr. Squires' entitlement to relief. Appellate counsel's failure to urge this issue on direct appeal also constitutes prejudicially deficient assistance of counsel. Habeas corpus relief is proper.

CLAIM III

MR. SQUIRES' SENTENCE OF DEATH RESTS ON THE UNCONSTITUTIONAL APPLICATION OF AGGRAVATING CIRCUMSTANCES AND IS THEREFORE FUNDAMENTALLY UNRELIABLE AND UNFAIR, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The prosecutor presented no evidence during the penalty phase of Mr. Squires' capital trial. He did, however, argue to the jury that they could vote for a sentence of death on the basis of two aggravating circumstances: 1) under sentence of imprisonment, and 2) previous conviction of a violent felony (R. 1021). The prosecutor's only factual basis for arguing these aggravating circumstances was "Mr. Squires' own mouth" (Id.). No certified judgments and sentences were entered into evidence. Following that argument, a majority of the jury voted for a sentence of death (R. 108).

After sentencing Mr. Squires to death immediately upon return of the jury recommendation, the trial judge later entered his written sentence which detailed the aggravating circumstances found. Under sentence of imprisonment and prior conviction of a felony were two among five aggravating circumstances found by the trial court. This written sentence reveals that the judge too

relied solely on Mr. Squires' testimony in finding these aggravators:

AGGRAVATING CIRCUMSTANCES

A. THE CAPITAL FELONY WAS COMMITTED BY A PERSON UNDER SENTENCE OF IMPRISONMENT.

FACT:

The evidence in the record by way of defendant's own testimony clearly reveals that on September 2, 1980, and September 3, 1980, the day victim Jesse Albritton was reported missing and the day he was later found murdered, respectively, that the defendant on those dates was an escapee from the Florida State Prison System after having been sentenced earlier to serve three consecutive life sentences.

CONCLUSION:

The capital felony was committed by a person under sentence of imprisonment.

B. THE DEFENDANT WAS PREVIOUSLY CONVICTED OF ANOTHER CAPITAL FELONY OR OF A FELONY INVOLVING THE USE OR THREAT OF VIOLENCE TO THE PERSON.

FACT:

The evidence in the record by way of defendant's own testimony demonstrates that the defendant had been convicted of three life felonies and was serving three consecutive life sentences for those offenses prior to Jesse Albritton's murder.

CONCLUSION:

The defendant has been previously convicted of felonies involving the use or threat of violence to the person.

(R. 117-18)(emphasis added).

This is flatly improper. In fact, this Court on direct appeal stated that it was proper for the trial court to discount the mitigating circumstance that the defendant's participation was relatively minor because it came from Mr. Squires' own mouth. Squires v. State. 450 So. 2d 208, 211-12 (Fla. 1984). Quoting from the trial court's sentencing order, this Court added its own emphasis as noted:

> **CONCLUSION:**
>
> Evidence based solely on the Defendant's own testimony supports the contention that the defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor. (emphasis added).

Id.

It was no less improper for the trial court to instruct the jury on these aggravating factors and to find them himself, in light of the State's failure to offer any proof. Aggravating factors must be proven beyond a reasonable doubt.

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

Moreover, the claim is now properly brought pursuant to the Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. This issue involved a classic violation of longstanding principles of Florida law. **See** Pait v. State, 112 So. 2d 380 (Fla. 1959). It virtually "leaped out upon even a casual reading of transcript." Matire v. Wainwriaht, 811 F.2d 1430, 1438 (11th Cir. 1987). This clear claim of per se error required no elaborate presentation -- counsel only had to direct this Court to the issue. The Court would have done the rest, based on long-settled Florida and federal constitutional standards.

No tactical decision can be ascribed to counsel's failure to urge the claim. **No** procedural bar precluded review of this issue. **See** Johnson v. Wainwriaht, 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. Squires of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra. Accordingly, habeas relief must be accorded now.

CLAIM IV

THE SENTENCING COURT ERRED BY FAILING TO PROPERLY AND TIMELY WEIGH AGGRAVATING AND MITIGATING CIRCUMSTANCES, CONTRARY TO MR. SQUIRES' FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

At the close of the penalty phase, which was conducted on March **5, 1982,** the jury recommended a sentence of death (R. **1032).** The judge then recited that the jury had convicted Mr. Squires of first degree murder, and stated **"I** am going to accept the recommendation of the jury in this matter. I am going to impose the death penalty upon you, sir, at this time, and you will be remanded to the division of corrections for carrying out that **verdict."** (R. **1035).** No findings of fact were included in this recitation. It was not until March **16, 1982,** that the court entered a written sentence with factual findings supporting the imposition of the death penalty (R. **117-26).** This was clearly not the contemporaneous and independent weighing by the court that the applicable statutory and constitutional standards require.

Written findings of fact in support of a death sentence are required. Fla. Stat. sec. **921.141 (1989);** see also Van Roval v. State, **497** So. 2d **625** (Fla. **1986).** Florida law requires the sentencing court to orally state specific reasons for the imposition of the death penalty on the record. The sentencing court failed to properly state its specific reasons justifying the death sentence on the record. Grossman v. State, **525** So. **2d**

833 (1988); Patterson v. State, 513 So. 2d 1257 (Fla. 1987); Van Roval v. State, 497 So. 2d 625 (Fla. 1986); State v. **Dixon**, 283 So. 2d 1 (Fla. 1973).

The sentencing court also failed to prepare the sentencing order prior to the oral pronouncement of sentence for filing concurrent with the oral sentencing, as required by the law. See Muehleman v. State, 503 So. 2d 310, 317 (Fla.), cert. denied, 108 S. Ct. 39 (1987); Grossman v. State, 525 So. 2d 833 (1988); Patterson v. State, 513 So. 2d 1257 (Fla. 1987); Van Roval v. State, 497 So. 2d 625 (Fla. 1986); State v. Dixon, 283 So. 2d 1 (Fla. 1973). The after-the-fact entry of a sentencing order is legally improper. In this case, the sentencing occurred immediately after the jury was excused from the penalty phase. No findings of fact were prepared at that time. In fact, the record reflects that no contemporaneous independent weighing of aggravating and mitigating circumstances whatsoever was afforded by the sentencing judge. The court made no mention of aggravating or mitigating factors until some two weeks later when the written order was prepared.

Since the sentencing procedures in this case did not properly comport with this Court's requirements regarding the procedures to be employed when a sentencing order is prepared and when oral pronouncement of sentence is made in a capital sentencing proceeding, see Grossman, supra; Rhodes v. State, 547 So. 2d 1201 (Fla. 1989), Mr. Squires' sentence of death is

improper. **A** life sentence should be imposed. Mr. Squires accordingly moves this Honorable Court to vacate the sentence of death and impose a life sentence with no opportunity of parole for twenty-five years pursuant to Fla. Stat. sec. 921.141(3)(b).

This issue was not raised on appeal despite the fact that it plainly appears on the record. This cannot be the result of a tactic or strategy. Appellate counsel was ineffective, to Mr. Squires' substantial prejudice. Habeas corpus relief is proper.

CLAIM V

MR. SQUIRES' SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS AND THE SENTENCING COURT'S OWN CONSTRUCTION SHIFTED THE BURDEN TO MR. SQUIRES TO PROVE THAT DEATH WAS INAPPROPRIATE.

At the penalty phase of Mr. Squires' capital trial, prosecutorial argument and judicial instructions informed the jury that death was the appropriate sentence unless "mitigating circumstances exist to outweigh any aggravating circumstances" (R. 1495, 1711-12, 1726).

In his argument to the jury during the penalty phase, the prosecutor informed them:

> You will be instructed by the Court that this evidence when considered with the evidence already heard is presented in order that you might determine, first, whether sufficient aggravating circumstances exist that would justify the imposition of the death penalty and, second, whether there are

> mitigating circumstances sufficient to outweigh the aggravating circumstances.

(R. 1020).

The Court then did instruct the jury that

> it is your duty to follow the law that will now be given you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

(R. 1028). The trial court further instructed the jury:

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

(R. 1029).

Such shifting of the burden to the defendant conflicts with the principles of Mullanev v. Wilbur, 421 U.S. 684 (1975), and State v. Dixon, 283 So. 2d 1 (Fla. 1973). As set forth in Dixon, a capital sentencing jury is required to consider whether the State has proven that **"the** aggravating circumstances outweighed the mitigating **circumstances."** That straightforward standard was never applied in this case.

Such shifting of the burden to the defendant to prove that life is the appropriate sentence violates the eighth and fourteenth amendments, as the Court of Appeals for the Ninth Circuit recently held in Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(in banc). Mr. Squires' capital sentencing proceeding

was fundamentally unfair and unreliable. The jury's ability to fully assess the mitigation was restrained by this construction, and the sentence thus violates Penrv v. Lvnaush, 109 S. Ct. 1935 (1989), Lockett v. Ohio, 438 U.S. 586 (1978), and Mills v. Maryland, 108 S. Ct. 1860 (1988).

The focus of a jury instruction claim is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant **evidence."** Bovde v. California, 58 U.S.L.W. 4301, 4304 (March 5, 1990). Here there is more than a reasonable likelihood that based on the instructions, the jury believed that Mr. Squires had the ultimate burden to prove that life was appropriate. The application of a presumption of death flatly violates bedrock eighth amendment principles. **See** Jackson v. Dugger, 837 F.2d 1469, 1474 (11th Cir. 1988), cert. denied, 108 S. Ct. 2005 (1988).

As most recently stated by the United States Supreme Court:

> Death is not automatically imposed upon conviction for certain types of murders. It is imposed only after a determination that the aggravating circumstances outweigh the mitigating circumstances present in the particular crime committed by the particular defendant, or that there are no such mitigating circumstances. This is sufficient under Lockett and Penrv.

Blvstone v. Pennsylvania, 58 U.S.L.W. 4274, 4275 (February 28, 1990)(emphasis added). The instruction in Mr. Squires' case **("it** is your duty to . . . render to the Court an advisory sentence

based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist") does not meet the standard set by Blvstone.

In being instructed that mitigation must outweigh aggravation before it could recommend life, the jury was effectively told that once aggravating circumstances were established, it need not fully consider mitigating circumstances unless those mitigating circumstances outweighed the aggravating circumstances. Thus the jury was constrained in its consideration of the mitigating evidence, Hitchcock v. Duaaer, 107 S. Ct. 1821 (1987), and from evaluating the "totality of the circumstances," Dixon, supra, in determining the appropriate penalty. The jury was not allowed to make a "reasoned moral response" to the issues at sentencing or to "fully" consider mitigation. Penrv v. Lvnauah, supra. This error "perverted" the jury's deliberations concerning the ultimate question of whether Mr. Squires should live or die. Smith v. Murrav, 106 S. Ct. 2661, 2668 (1986). Under Smith v. Murray, no procedural bars may be applied to such an issue.

Moreover, appellate counsel failed to raise this issue on direct appeal, and thus rendered prejudicially deficient assistance of counsel. In Aranao v. State, 411 So. 2d 172, 174 (1982), this Court held that a capital sentencing jury must be

> told 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 only be given if the state showed the aggravating circumstances outweighed the mitigating circumstances.

Accord, State v. Dixon, 283 So. 2d 1 (Fla. 1973). This Court has, in fact, held that shifting the burden to the defendant to establish that the mitigating circumstances outweigh the aggravating circumstances would conflict with the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), as well as with Dixon, Arango, supra. Thus, Mr. Squires was sentenced to death in violation of Florida law in effect at the time of his trial and direct appeal. Appellate counsel was prejudicially ineffective. Habeas corpus relief is proper.

CLAIM VI

WILLIAM MICHAEL SQUIRES WAS DEPRIVED OF HIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS BECAUSE HE WAS NOT PROVIDED WITH EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL.

The appellate level right to counsel also comprehends the sixth amendment right to effective assistance of counsel. Evitts v. Lucey, 105 S. Ct. 830 (1985). Appellate counsel must function as "an active advocate," Anders v. California, 386 U.S. 738, 744, 745 (1967), providing his client the "expert professional . . .

assistance . . . necessary in a system governed by complex laws and rules and procedures. . . ." Lucey, 105 S. Ct. at 835 n.6.

Even a single, isolated error on the part of counsel may be sufficient to establish that the defendant was denied effective assistance, Kimmelman v. Morrison, 106 S. Ct. 2574, 2588 (1986); United States v. Cronic, 466 U.S. 648, 657 n.20 (1984); see also Johnson (Paul) v. Wainwright, 498 So. 2d 938 (Fla. 1987), notwithstanding the fact that in other aspects counsel's performance may have been **"effective".** Washinston v. Watkins, 655 F.2d 1346, 1355 (5th Cir.), reh. denied with **opinion,** 662 F.2d 1116 (1981).

Moreover, as the Florida Supreme Court has explained, that Court's "independent review" of the record in capital cases neither can cure nor undo the harm caused by an appellate attorney's deficiencies:

> It is true that we have imposed upon ourselves the duty to independently examine each death penalty case. However, we will be the first to agree that our judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate. It is the unique role 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 deviations from due process. Advocacy is an art, not a science. We cannot, in hindsight, precisely measure the impact of counsel's failure to urge his client's best claims. Nor can we predict the outcome of a new appeal at which petitioner will receive adequate representation. We are convinced,

> as a final result of examination of the original record and appeal and of petitioner's present prayer for relief, that our <u>confidence</u> in the correctness and fairness of the result has been undermined.

<u>Wilson v. Wainwright</u>, 474 So. 2d 1162, 1165 (Fla. 1985). **"The** <u>basic</u> requirement of due **process,"** therefore, **"is** that **a** defendant be represented in court, <u>at every level</u>, by an advocate who represents his client zealously within the bounds of the law." <u>Id</u>. at 1164 (emphasis supplied).

Appellate counsel here completely failed to act as an advocate for his client. **As** in <u>Matire v. Wainwrisht</u>, 811 F.2d 1430, 1438 (11th Cir. 1987), the issues presented in this petition: 1) "leaped out" on even a casual reading of the record; 2) involved <u>per se</u> reversible error; and 3) were incomprehensibly ignored. Counsel ineffectively and through ignorance of the facts and law simply failed to urge them on direct appeal. As in <u>Matire</u>, Mr. Squires is entitled to relief. The "adversarial testing process" failed during Mr. Squires' direct appeal -- because counsel failed. <u>Matire</u> at 1438, <u>citing Strickland v. Washinston</u>, 466 U.S. 668, 690 (1984). An evidentiary hearing is required on this issue.

When Mr. Squires appealed his judgment and sentence to the Florida Supreme Court on direct review, the transcript did not include numerous conferences held between the court and counsel for the State and for the defense during the trial. These bench conferences apparently include objections by defense counsel, and

argument on the objections. However, the only reference in the transcript is "(A Bench Conference was held off the record.)" (R. 350; 401; 439; 444; 482; 506; 658; 675; 701; 771; 773; 903; 1019). In addition, all strikes of the venire, whether peremptory or for cause, are omitted from the transcript (For example, R. 375; 408; 386). Also, the penalty phase instruction conference was not reported. Mr. Squires' appellate counsel was not his trial counsel, and so did not have firsthand knowledge of what transpired at trial.

The United States Supreme Court has held:

> A court-appointed counsel who represents the indigent on appeal gets at public expense, as a minimum, the transcript which is relevant to the points of error assigned. Coppedge v. United States, supra, 369 U.S. at 446, 82 S.Ct. at 921-922, 8 L.Ed.2d 21; Inaram v. United States, supra. But when, as here, new counsel represents the indigent on appeal, how can he faithfully discharge the obligation which the court has placed on him unless he can read the entire transcript?
>
> * * *
>
> We see no escape from the conclusion that either where the requirements of a nonfrivolous appeal prescribed by Coppedge v. United States, supra, are met, or where such a showing is sought to be made, and where counsel on appeal was not counsel at the trial, the requirements placed on him by Ellis v. United States, supra, will often make it seem necessary to him to obtain an entire transcript.
>
> We conclude that this counsel's duty cannot be discharged unless he has a transcript of the testimony and evidence presented by the defendant and also the court's charge to the jury, as well as the

testimony and evidence presented by the prosecution.

Hardv v. United States, 375 U.S. 277, 279-80, 282 (1964).

An indigent capital defendant is undeniably entitled to the effective assistance of counsel during his appeal of right to the state supreme court. Evitts v. Lucev, 469 U.S. 387 (1985). In United States v. Cronic, 466 U.S. 648 (1984), the United States Supreme Court explained that the purpose of the right to effective counsel was to assure a fair adversarial testing.

> Thus, the adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an **advocate."** Anders v. California, 386 U.S. 738, 743, 87 S.Ct. 1396, 1399, 18 L.Ed.2d 493 (1967). The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted--even if defense counsel may have made demonstrable errors--the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional suarantee is violated. As Judge Wyzanski has written: **"While** a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to **gladiators."** United State ex. re. Williams v. Twomey, 510 F.2d 634, 640 (CA7), cert. denied sub nom. Sielaff v. Williams, 423 U.S. 876, 96 S.Ct. 148, 46 L.Ed.2d 109 (1975).

466 U.S. at 656-57 (footnotes omitted)(emphasis added).

The Court noted that, despite counsel's best efforts, there may be circumstances where counsel could not insure a fair

adversarial testing, and thus where counsel's performance is rendered ineffective:

> Most obvious, of course, is the complete denial of counsel. The presumption that counsel's assistance is essential required us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial. Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. No specific showing of prejudice was required in Davis v. Alaska, 415 U.S. 308, 94 S.Ct 1105, 39 L.Ed.2d 347 (1974), because the petitioner had been "denied the right of effective cross-examination" which "'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.'" Id., at 318, 94 S.Ct., at 1111 (citing Smith v. Illinois, 390 U.S. 129, 131, 88 S.Ct. 748, 749, 19 L.Ed.2d 956 (1968), and Brookhart v. Janis, 384 U.S. 1, 3, 86 S.Ct. 1245, 1246, 16 L.Ed.2d 314 (1966).
>
> Circumstances of that magnitude may be present on some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.

446 U.S. at 659-60 (footnotes omitted)(emphasis added).

Here, counsel was not provided with a transcript of the objections and arguments made by counsel, nor the instruction conferences, nor portions of voir dire, and thus could not discover and litigate errors contained therein. The "denial of

access to the transcript is 'incompatible with effective appellate advocacy.'" Byrd v. Wainwright, 722 F.2d 716, 719 (11th Cir. 1984). There was no adversarial testing here. As to the resulting ineffectiveness, under Cronic, no prejudice need be shown.

In the past this Court has held that the remedy for this situation is to relinquish jurisdiction to the trial court to attempt to reconstruct the record, and to hold an evidentiary hearing on the accuracy of the transcript. Johnson v. State, 442 So. 2d 193, 195 (Fla. 1983). If, after a full and fair inquiry, the record can be reconstructed, then a new appeal, such as the one allowed in Johnson, supra, would be proper. If the record cannot be reconstructed, the Court may have "no alternative but to [grant] . . . a new trial of the cause." Delap v. State, 350 So. 2d 462, 463 (Fla. 1977).

With the record on appeal in this case, it is impossible to determine what transpired at the unreported bench conferences. Consequently, a remand for reconstruction of the record, if possible, is proper, and thereafter a new appeal, or in the alternative, a remand for a new trial would be proper.

Appellate counsel was rendered ineffective by the lack of a complete transcript. Counsel also was ineffective for failing to request, at the time of direct appeal, that the case be sent back to the trial court for reconstruction. In addition, counsel was ineffective for failing to raise a number of other issues, raised

herein, even though they were apparent from the transcript as produced in the record on appeal, as more fully set out herein. This Court has never failed to correct errors which undermine confidence in the fairness and correctness of a capital trial and sentencing proceedings. As shown, habeas corpus relief would be more than proper on the basis of the claims presented herein.

CLAIM VII

MR. SQUIRES' DEATH SENTENCE RESTS UPON AN UNCONSTITUTIONAL AUTOMATIC AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF MAYNARD V. CARTWRIGHT, LOWENFIELD V. PHELPS, HITCHCOCK V. DUGGER, AND THE EIGHTH AMENDMENT.

Mr. Squires was prosecuted on the dual theory of felony murder, and premeditated murder. The State argued that the victim was killed in the course of a felony. The jury received instructions on premeditated and felony murder, and returned a general verdict of guilt on first-degree murder.

If felony murder was the basis of Mr. Squires' conviction, then the subsequent death sentence is unlawful. Cf. Stromberg v. California, 283 U.S. 359 (1931). This is because the death penalty in this case was predicated upon an unreliable automatic finding of a statutory aggravating circumstance -- the felony murder finding that formed the basis for conviction. Automatic death penalties upon conviction of first-degree murder violate the eighth and fourteenth amendments, as was stated by the United States Supreme Court in Sumner v. Shuman, 107 S. Ct. 2716 (1987).

In this case, felony murder was found as a statutory aggravating circumstance. The trial court found that the murder was committed while the defendant was engaged in the commission of a robbery and a kidnaping **(R. 119).** The sentencing jury was instructed and the judge believed that it was entitled automatically to return a death sentence upon its finding of guilt of first degree (felony) murder because the underlying felony justified a death sentence. Everv felony-murder would involve, by necessity, the finding of a statutory aggravating circumstance, a fact which, under the particulars of Florida's statute, violates the eighth amendment: an automatic aggravating circumstance is created which does not narrow ("[A]n aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty . . . ." Zant v. Stershens, **462** U.S. **862, 876 (1983)). "[L]imiting []** the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." Mavnard v. Cartwright, **108** S. Ct. **1853, 1858 (1988).** In short, if Mr. Squires was convicted for felony murder, he then faced statutory aggravation for felony murder. This is too circular a system to meaningfully differentiate between who should live and who should die, and it violates the eighth and fourteenth amendments.

The United States Supreme Court recently addressed a similar challenge in Lowenfield v. Phelrss, 108 S. Ct. **546 (1988).** The

discussion in Lowenfield illustrates that, if narrowing occurs either in the conviction stage (as in Louisiana and Texas) **or** at the sentencing phase (as in Florida and Georgia), then the statute may satisfy the eighth amendment as written. However, as applied, the operation of Florida law in this case did not provide constitutionally adequate narrowing at either phase, because conviction **and** aggravation were predicated upon a non-legitimate narrower -- felony-murder.

The conviction-narrower state schemes require something more than felony-murder at guilt-innocence. Louisiana requires intent to kill. Texas requires intentional and knowing murders. This narrows. Here, however, Florida allows a first-degree murder conviction based upon a finding that does not legitimately narrow -- felony murder. Mr. Squires' conviction and sentence required only a finding that he committed a felony during which a killing occurred, and no finding of intent was necessary.

This issue was raised on direct appeal, and rejected by this Court. Sauires v. State, 450 So. 2d 208, 212 (Fla. 1984). In that opinion, this Court stated that it has consistently rejected this argument and that the United States Supreme Court's recent ruling in Enmund v. Florida, 458 U.S. 782 (1982), had no impact on that ruling. This Court went on to say, in addressing another issue, that "the record supports the conclusion that Squires committed premeditated murder." Sauires, 450 So. 2d at 213.

"To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined by the trial **court."** Cole v. Arkansas, **333** U.S. **196, 202 (1948).** The principle that an appellate court cannot utilize a basis for review of a conviction different from that which was litigated and determined by the trial court applies with equal force to the penalty phase of a capital proceeding. **See** Presnell v. Georgia, **439** U.S. **14, 18 (1978).** It is not sufficient to say that the jury found premeditation, as the jury's verdict was a general one and did not distinguish between premeditated and felony murder. The sentence in this case was predicated upon an improper aggravator factor.

This claim involves fundamental constitutional errors and recent changes in the law, and therefore should be addressed on the merits at this juncture. For these reasons, the Court should vacate Mr. Squires' unconstitutional sentence of death. Accordingly, habeas relief must be accorded now.

CLAIM VIII

MR. SQUIRES' SENTENCING JURY WAS REPEATEDLY MISLED BY INSTRUCTIONS AND ARGUMENTS WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED THEIR SENSE OF RESPONSIBILITY FOR SENTENCING, CONTRARY TO CALDWELL V. MISSISSIPPI, 105 S. CT. 2633 (1985), AND IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. MR. SQUIRES RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO PROPERLY LITIGATE THIS ISSUE.

Despite the critical importance of the jury's role at sentencing, **see** Tedder v. State, 322 So. 2d 908 (Fla. 1975), Mr. Squires' jury was repeatedly told by the prosecutor and by the judge himself that their role was minor, that the judge was not obligated to follow their recommendation, and that it was the judge's responsibility, not theirs, to sentence. The jury was told, beginning with voir dire, that their function during the penalty phase was nothing more than to make a recommendation to the judge and that the ultimate responsibility rested with the Court (R. 347). In the instructions during the guilt phase, this theme was repeated to the jury by the trial judge: **"The** penalty is for the Court to decide. You are not responsible for the penalty in any way because of your **verdict."** (R. 1012).

At the start of the penalty phase, the prosecutor told the jury that their job was merely

> to determine what your recommendation to this Court will be, and recall that it will only be a recommendation. Judge Leon has the ultimate responsibility as to what punishment will be imposed. You will make to the judge what is known as an advisory sentence.

(R. 1020).

The trial court virtually repeated this admonition in his instructions during the penalty phase.

> THE COURT: Ladies and gentlemen of the jury. It is now your duty to advise the Court as to what punishment should be imposed upon the defendant for his crime of murder in the first degree. As you have been told, final decision as to what punishment shall be imposed is the responsibility of the Judge. However, it is your duty to follow the law that will now be given to you by the Court and render to the Court an advisory sentence . . . .

(R. 1028). The jury's sentence was repeatedly referred to as advisory, or a recommendation (R. 1024; 1030; 1031; 1032).

These comments and instructions derogated the jury's sentencing role, contrary to the eighth amendment, by diminishing their "awesome sense of responsibility" for sentencing. See Caldwell v. Mississippi, 472 U.S. 32, 105 S. Ct. 2633 (1985). The trial court never told the jury that a recommendation of life was entitled to "great weight" and could only be overturned by a sentencing judge if "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975).

Petitioner acknowledges that this Court has held that Caldwell is inapplicable in Florida. See Kins v. Dugger, 15 F.L.W. 11 (Fla. Jan. 4, 1990). Mr. Squires respectfully urges that the Court reconsider that view, and vacate his eighth amendment violative sentence of death.

Appellate counsel's failure to argue this issue constitutes prejudicially deficient performance. This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Squires' death sentence. Appellate counsel simply failed. Habeas corpus relief is proper.

CLAIM IX

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

The sentencers at Mr. Squires' trial were instructed by the court that feelings of mercy or sympathy could play no part in their deliberations as to Mr. Squires' ultimate fate. The court indicated that the case must not be decided because the jury felt sorry for anyone (R. 1014), and that sympathy was to play no part in the jury's deliberations (R. 1015).

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

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

The United States Supreme Court also recently held in a case declared to be retroactive on its face that a capital sentencer must make a "reasoned moral response to the defendant's background, character, and crime." Penrv v. Lynaugh, 109 S. Ct. 2934, 2947 (1989). A capital defendant should not be executed where the process runs the "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." 109 S. Ct. at 2952. In Mr. Squires' case, however, the trial judge believed that Florida law precluded considerations of sympathy and mercy, as indicated by his instructions to the jury. However, this Court has described the Florida capital sentencing statute as contemplating the exercise of mercy. **See** Alvord v. State, 322 So. 2d 533, 540 (Fla. 1975). The net result in this case is the unacceptable risk that the jury's recommendation of death and the court's sentence were the

product of their belief that feelings of compassion, sympathy, and mercy towards the defendant were not to be considered in determining its verdict. The resulting sentence is therefore unreliable in Mr. Squires' case.

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

CLAIM X

THE JURY INSTRUCTION THAT A VERDICT OF LIFE MUST BE MADE BY A MAJORITY OF THE JURY WAS ERRONEOUS AND MATERIALLY MISLED THE JURY AS TO ITS ROLE AT SENTENCING AND CREATED THE RISK THAT DEATH WAS IMPOSED DESPITE FACTORS CALLING FOR LIFE, CONTRARY TO THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The jury in Mr. Squires' capital trial was erroneously instructed on the vote necessary to recommend a sentence of death or life. As decisions of this Court have made clear, the law of Florida is not that a majority vote is necessary for the recommendation of a life sentence: rather, a six-six vote, in addition to a seven-five or greater majority vote, is sufficient

for the recommendation of life. Rose v. State, 425 So. 2d 521 (Fla. 1982); Harich v. State, 437 So. 2d 1082 (Fla. 1983). However, in these proceedings the jury was erroneously informed that, even to recommend a life sentence, its verdict must be by a majority vote (R. 1024; 1031).

These erroneous instructions are the type of misleading information condemned by Caldwell v. Mississippi, 105 S. Ct. 2633 (1985), in that they "create a misleading picture of the jury's role." Caldwell, at 2646 (O'Connor, J., concurring). As in Caldwell, the instructions here undermined the reliability of the sentencing determination, for they created the risk that the death sentence was imposed in spite of factors calling for a less severe punishment, in violation of the requirements of the eighth amendment, and resulted in an unreliable sentencing proceeding in violation of Mills v. Maryland, 108 S. Ct. 1860 (1988). It is respectfully submitted that this is fundamental error and that habeas corpus relief is warranted.

CLAIM XI

MR. SQUIRES' RIGHTS TO A FUNDAMENTALLY FAIR AND RELIABLE CAPITAL TRIAL AND SENTENCING DETERMINATION WERE VIOLATED WHEN THE STATE URGED THAT HE BE CONVICTED AND SENTENCED TO DEATH ON THE BASIS OF VICTIM IMPACT AND OTHER IMPERMISSIBLE FACTORS, IN VIOLATION OF BOOTH V. MARYLAND, SOUTH CAROLINA V. GATHERS, AND THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Impermissible victim impact evidence and argument were introduced at Mr. Squires' capital trial in violation of Booth v.

Maryland, 482 U.S. 496, 107 S. Ct. 2529 (1987), and South Carolina v. Gathers, 109 S. Ct. 2207 (1989). During the guilt phase of the proceedings, the victim's mother testified. The prosecutor introduced her testimony by saying, "Q. Good afternoon Mrs. Austin. I know this is difficult for you . . ." (R. 450-51).

During the mother's testimony, the prosecutor was forced to ask, "MR. BENITO: Are you all right, Mrs. Austin? Could we take a brief recess, Judge?" (R. 454). At the conclusion of the recess, defense counsel and the prosecutor had reached a stipulation as to the remainder of Mrs. Austin's testimony (R. 456) and she was not brought back to the witness stand.

The prosecutor also made impermissible victim impact arguments to the jury. During the guilt phase closing arguments, the prosecutor argued that the jury should convict Mr. Squires because of how Mr. Albritton suffered, and because he was a young man:

> When you blow that smoke screen away, ladies and gentlemen, you know what you see? Ladies and gentlemen you see Jesse Albritton. You see Jesse Albritton lying on the ground with a shotgun wound in the shoulder. You see Jesse Albritton's face thwarted with pain and the shotgun blast to the shoulder. Then the smoke clears even farther. You see this man's face and then you see this man's hand and in this man's hand you see a .38. As the smoke completely clears away, ladies and gentlemen, you see this man place that .38 against Jesse Albritton's head. You see him pull the trigger four times. Jesse Albritton was a big man, he was a strong man. He was a

young man, but that man never gave him a chance. He never gave him a chance.

This proceeding here today is giving Jesse Albritton another chance, a chance for justice, ladies and gentlemen and that justice will come in the form of three verdicts:

Verdict number one will be guilty as charged of armed robbery.

Verdict number two guilty as charged of kidnapping.

Verdict number three guilty as charged of first degree murder. That is Jesse Albritton's justice.

(R. 979-80). The prosecutor also argued, "The evidence has also shown beyond and to the exclusion of every reasonable doubt, ladies and gentlemen, that Jesse Albritton spent the last horrifying moments <u>of his young life</u> with this man, William Michael Squires" (R. 930) (emphasis added).

This case involves <u>Booth</u> and <u>Gathers</u> error. Under <u>Jackson v. Dusser</u>, 547 So. 2d 1197 (Fla. 1989), <u>Booth</u> is a retroactive change in law, which makes this issue cognizable in these post-conviction proceedings. Appellate counsel's failure to present the claim on direct appeal was prejudicially deficient performance, supported by no tactic or strategy. This claim involves fundamental error.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Squires' death sentence and renders it unreliable. **See** <u>Penry v. Lynaugh</u>, <u>supra</u>. This Court has not hesitated in the past to exercise its

inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings, see Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error.

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

No tactical decision can be ascribed to counsel's failure to urge the claim. **No** procedural bar precluded review of this issue. **See** Johnson v. Wainwright, supra, 498 So. 2d 938. However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Squires 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.

CONCLUSION AND RELIEF SOUGHT

The claims presented herein involve ineffective assistance of counsel, fundamental error and significant changes in the law. Because the foregoing claims present substantial constitutional questions which go to the heart of the fundamental fairness and reliability of Mr. Squires' capital conviction and sentence of death, and of this Court's appellate review, they should be determined on their merits. At this time, a stay of execution, and a remand to an appropriate trial level tribunal for the requisite findings on contested evidentiary issues of fact -- including inter alia appellate counsel's deficient performance -- should be ordered. The relief sought herein should be granted.

WHEREFORE, William Michael Squires, through counsel, respectfully urges that the Court issue its writ of habeas corpus and vacate his unconstitutional conviction and sentence of death. He also prays that the Court stay his execution on the basis of, and in order to fully determine, the significant claims herein presented. Since this action also presents questions of fact, Mr. Squires urges that the Court relinquish jurisdiction to the trial court, or assign the case to an appropriate authority, for the resolution of the evidentiary factual questions attendant to his claims, including inter alia, questions regarding counsel's deficient performance and prejudice.

Mr. Squires urges that the Court grant him habeas corpus relief, or alternatively, a new appeal, for all the reasons set

forth herein, and that the Court grant all other and further relief which the Court may deem just and proper.

Respectfully submitted,

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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 Candance Sunderland, Assistant Attorney General, Department of Legal Affairs, Park Trammel Building, Eighth Floor, 1313 Tampa Street, Tampa, Florida 33602, this 4th day of June, 1990.

Billy H. Nolas by SK
Attorney