76,307

IN THE SUPREME COURT OF FLORIDA

NO. _____

JERRY WHITE,

Petitioner,

v.

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

Respondent.

CONSOLIDATE3 PETITION FOR EXTRAORDINARY RELIEF, FOR A WRIT OF HABEAS CORPUS, REQUEST FOR STAY OF EXECUTION, AND, IF NECESSARY, APPLICATION FOR STAY OF EXECUTION PENDING THE FILING AND DISPOSITION OF A PETITION FOR WRIT OF CERTIORARI IN THE UNITED STATES SUPREME COURT

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INTRODUCTION OF CLAIMS

This petition for habeas corpus relief is being filed in order to address substantial claims of error under the sixth, eighth, and fourteenth amendments, claims demonstrating that Mr. White was deprived of the effective assistance of counsel on the direct appeal, that the proceedings resulting in his conviction and death sentence violated fundamental constitutional imperatives, and that his death sentence is neither fair, reliable, nor individualized. The petition also presents questions that were ruled on on direct appeal but that now must be revisited in order to correct error in the appeal process that denied fundamental constitutional rights. **See** Kennedy v. Wainwright, 483 So. 2d 424, 426 (Fla. 1986). It is respectfully noted at the outset that this Court's disposition on direct appeal was simply wrong in light of the United States Supreme Court's decision in Clemons v. Mississippi, 110 S. Ct. 1441 (1990).

Given the substance of what this petition involves, pursuant to subsections 3(b)(7) and (9) of Article V of the Florida Constitution and Rule 9.030(a)(3) of the Florida Rules of Appellate Procedure, this Court should grant the requested stay of execution, permit full, proper briefing (something that the current circumstances have not allowed), consider the claims, and grant the relief sought in this petition.

PROCEDURAL HISTORY

Mr. White was convicted, sentenced to death, and the conviction and sentence were affirmed on direct appeal. White v. State, 446 So. 2d 1031 (Fla. 1984). A motion pursuant to Fla. R. Crim. P. 3.850 was denied by the circuit court in April, 1987, and this Court affirmed. White v. State, 15 F.L.W. 151 (Fla. March 15, 1990). This Court denied rehearing of that decision on May 24, 1990. On June 12, 1990, Florida Governor Bob Martinez signed a death warrant against Mr. White, whose execution is now scheduled for Tuesday, July 17, 1990.

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 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. White'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).

This Court has long held that "habeas corpus is a high prerogative writ," which "is as old as the common law itself and is an integral part of our own democratic process." Anglin v. Mayo, 88 So. 2d 918, 919 (Fla. 1955). Because it enjoys such great historical stature, the writ of habeas corpus encompasses a broad range of claims for relief:

> The procedure for the granting of this particular writ is not to be circumscribed by hard and fast rules or technicalities which often accompany our consideration of other processes. If it appears to a court of competent jurisdiction that a man is being illegally restrained of his liberty, it is the responsibility of the court to brush aside formal technicalities and issue such appropriate orders as will do justice. In habeas corpus the niceties of the procedure are not anywhere near as important as the determination of the ultimate question as to the legality of the restraint.

Anglin, 88 So. 2d at 919-20. See also Seccia v. Wainwright, 487 So. 2d 1156 (Fla. 1st DCA 1986), relying on Anglin. Thus, this Court has held, "Florida law is well settled that habeas will lie for any unlawful deprivation of a person's liberty." Thomas v. Dugger, 548 So. 2d 230 (Fla. 1989). When a habeas petitioner alleges such a deprivation, the petitioner "has a

right to seek habeas relief," and the Court will "reach the merits of the case.@@ Id. See also State v. Bolyea, 520 So. 2d 562, 564 (Fla. 1988)("habeas relief shall be freely grantable of right to those unlawfully deprived of their liberty in any degree").

This Court has also consistently exercised its authority to correct errors which occurred in the direct appeal process. When this Court is presented with an issue on direct appeal, and its disposition of the issue is shown to be fundamentally erroneous, the Court will not hesitate to correct such errors in habeas corpus proceedings. See Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989).[1] As this Court has explained, the Court will "revisit a matter previously settled by the affirmance," if what is involved is a claim of "error that prejudicially denies fundamental constitutional rights. . . ." Kennedy v. Wainwright, 483 So. 2d 424, 426 (Fla. 1986). Thus, in Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989), in a habeas corpus action, this Court revisited and granted relief on the basis of an issue previously addressed on direct appeal "because all the pertinent facts are contained in the original record on appeal . . ." Id., at 1199, n.2. The

[1]This does not involve a "second" direct appeal, but involves the correction of fundamental error concerning the Court's decision in a direct appeal. See Jackson, supra; see also Downs v. Dugger, 514 So. 2d 1069 (Fla. 1982).

reason relief was granted in Jackson, although the issue involved was previously considered and rejected on direct appeal, was that Booth v. Marvland (which was unavailable to the Court at the time of direct appeal) demonstrated that the previous disposition of the petitioner's claim by this Court was in error. The same holds true in Mr. White's case, as Clemons v. Mississippi demonstrates that the disposition of Mr. White's appeal was also fundamentally erroneous.

Mr. White's petition presents substantial claims demonstrating that he was unlawfully convicted and unlawfully sentenced to death, in violation of fundamental constitutional precepts. These claims require deliberation unhurried by an impending execution and require briefing to more fully elucidate the issues involved.[2] The claims are unusual and complex and deserve careful scrutiny.

In light of these substantial claims, Mr. White respectfully urges the Court to "issue such appropriate orders as will do justice." Anglin.

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[2] Counsel have discussed the claims to the best of their ability under present circumstances. However, as the Court is well aware, counsel's efforts have been strapped by the Governor's recent issuance of numerous death warrants, several involving cases in a successor posture, at the same time that Mr. White's death warrant was pending. Under these circumstance, counsel and Mr. White most respectfully urge that the Court stay Mr. White's execution and allow Mr. White to supplement this petition with additional briefing.

B. REQUEST FOR STAY OF EXECUTION

Mr. White's petition includes a request that the Court stay his execution (presently scheduled for July 17, 1990). As will be shown, the issues presented are substantial and warrant a stay. This Court has not hesitated to stay executions to ensure judicious consideration of issues presented by petitioners litigating during the pendency of a death warrant. See, e.g., Jackson v. Duaaer, 547 So. 2d 1197 (Fla. 1989); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1989). Similarly, the Court has been especially vigilant to the need for procedural fairness in capital proceedings, and has accordingly not hesitated to enter stays of execution in order to assure that capital petitioners are treated fairly in the litigation of claims for relief during the pendency of a death warrant. See Hardwick v. State, Case No. 75,556 (Fla., Mar. 15, 1990); Spaziano v. State, Case No. 75,874 (Fla., Apr. 24, 1990).

The claims Mr. White presents are substantial. We therefore respectfully pray that this Court enter a stay of execution to allow for careful and judicious consideration of his petition.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. White asserts that his capital conviction and 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

TRIAL COUNSEL'S VIOLATION OF HIS DUTY OF LOYALTY TO HIS CAPITAL CLIENT, HIS OBVIOUS RACISM WHILE REPRESENTING THIS BLACK CLIENT, HIS COMPLETE INDIFFERENCE TO HIS CLIENT'S FATE, HIS INTEREST IN PROTECTING HIMSELF RATHER THAN HIS CLIENT, AND HIS GROSSLY IMPROPER, TRAGIC, UNPROFESSIONAL, AND UNETHICAL, PENALTY PHASE ACTIONS LITERALLY CRY OUT FROM THE DIRECT APPEAL RECORD AND DEMAND THAT THIS COURT ISSUE AN ORDER THAT "WILL DO JUSTICE," VACATING MR. WHITE'S UNCONSTITUTIONAL CAPITAL CONVICTION AND DEATH SENTENCE.

This case presents the most egregious denial of the right to the effective assistance of counsel that it is possible to imagine. The flagrant constitutional violations discussed in this claim require that the Court consider this issue at this juncture and grant the relief to which Mr. White is entitled. Although this Court does not normally consider claims involving ineffective assistance of trial counsel in habeas corpus proceedings or on direct appeal, this is the case in which the Court should "brush aside formal technicalities and issue such appropriate orders as will do justice." Anglin v. Mayo, 88 So. 2d 918, 919 (Fla. 1955). Mr. White respectfully urges that the

Court consider and remedy the constitutional violations discussed herein, for a case such as this is precisely why the writ of habeas corpus exists.[3]

This is a case where trial counsel's ineffectiveness literally cries out from the record. Defense counsel's "most basic" duty is "the duty of loyalty." Strickland v. Washington, 466 U.S. 668, 692 (1984).

> The right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client. . . . Undivided allegiance and faithful, devoted service to a client are prized traditions of the American lawyer. It is this kind of service for which the Sixth Amendment makes provision.

Von Moltke v. Gillies, 332 U.S. 708, 725-26 (1948). To satisfy the sixth amendment, counsel must fulfill "the overarching duty to advocate the defendant's cause." Strickland, 466 U.S. at 688 (emphasis added). In this case, these duties were completely ignored, and "the defendant's cause" was abandoned. Rather,

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[3]The facts involved in this claim are all contained in the direct appeal record, and the issue presented herein has never been adequately assessed. In such circumstances, consideration in a habeas corpus proceeding is appropriate. Cf. Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989). Additionally, Mr. White asserts that appellate counsel was prejudicially ineffective in failing to bring this claim to the Court's attention on direct appeal, a failure which resulted in the breakdown of the adversarial process and which deprived Mr. White of the reversal to which he was entitled.

although representing a black client, defense counsel demonstrated profound racism; although representing a client on trial for his life, counsel demonstrated complete indifference to his client's fate, and placed his own interests above those of his client. Trial counsel's lack of professionalism, thoroughly unreasonable actions, and complete lack of advocacy literally "leap[] out" of the record. See Matire V. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). His violation of his duty of loyalty, his racism, and his conflict of interest also "cr[y] out from a reading of the transcript." Douglas v. Wainwriaht, 714 F.2d 1532, 1557 (11th Cir. 1983). The sixth, eighth, and fourteenth amendment violations discussed herein cannot be allowed to stand, or the United States and Florida Constitutions have lost all meaning.

A. TRIAL COUNSEL'S INEFFECTIVENESS, DEMONSTRATION OF RACISM, AND DISLOYALTY TO HIS CLIENT DURING PRETRIAL PROCEEDINGS

During pretrial proceedings, trial counsel's innate inability to function as an advocate for his black client became manifestly clear. The record establishes that counsel was virulently prejudiced against black people and could not possibly truly advocate for a black client. Counsel continuously made gratuitous disparaging remarks regarding black people and about his own client. Counsel also thoroughly belittled his client's

case and possible defenses.

Defense counsel took some depositions pretrial. These depositions are much more remarkable for the statements and attitude expressed by trial counsel than for the information obtained by him. Depositions of several witnesses consist of little more than racist comments and story telling by counsel, with police officers trying to return him to the facts of the case.

For example, while deposing Officer Harrielson, who later testified for the state at trial, counsel first asked if one of the victims was "colored" (R. 1185). When the officer referred to a local liquor store, counsel said, "that's where they pass that little funny powder and all that stuff that they pass back and forth. That's a joke." "And the guy says, I don't know how I got that, I never saw it before. Go ahead." (R. 1194).

When the officer began to discuss one of the witnesses who could identify the defendant, counsel opined:

> Q She's white?
>
> A Yeah.
>
> Q She's black?
>
> A No, she's white.
>
> Q I don't know how they can tell with black people. They all look alike to me.

(R. 1198). The discussion continued, with questions and answers that are unrelated, while counsel continued to make racist

statements:

> A Now, she identified White. She said she saw him on television.
>
> Q Two cases that I don't understand and that is killing and rapes. I never understood half of them yet. The reasons behind them are so -- any rape that I ever had lasted three minutes and I thought they must be Supermen -- those black guys.
>
> A And that's about it. We did go and talk to White at the hospital later on that night.
>
> Q Okay.

(R. **1199).**

When the subject turned to Mr. White having been shot during the offense, counsel made fun of his client's injury and indicated his belief that his client would be convicted:

> Q But he didn't see anything, but he got shot by a black **male and** he didn't say anything else?
>
> A We advised him of his rights.
>
> Q What if he did shoot him?
>
> A He shot himself.
>
> Q Oh, yeah. Wait a minute.
>
> A The best that we can picture, Mr. Moran, is that he stuck the gun inside of his breeches and it went off.
>
> Q He didn't hit his ding-a-ling, did he?
>
> A Be did.

Q He did hit it?

A Yeah.

Q yell, where he's going he won't -- well, anyway, he shot it off. It blew his ego, my God.

(R. 1200-01)(emphasis added). The underlined comment reflects a lack of confidence in counsel's own ability to represent his client and to present a defense that would lead to anything but a prison term. Counsel continued to joke about the injury to his client's penis throughout the remainder of the depositions (See R. 1201)("He shot his pecker off.").

Other comments by Moran demonstrate a racially stereotypical belief about black people and a personal inability to communicate with and assist a black client.

Q Was he on any of that happy juice or funny weed?

A I don't really know. I really can't tell you that now.

Q Can you tell when they're smoking?

A I can't.

Q I can't either.

Q I deal with these people all day long. My first experience in the law business was listening to five or ten black people talking together. I didn't know what they were saying. They were laughing and talking.

A That looks like the store down there (Indicating).

Q I might as well been in Russia. The next group that I didn't understand were the hippies. That was back in '68. They have their own language and five or six -- this was the Griffin (Phonetic) group.

A That was a wadcutter that he shot himself with.

Q They came into my office and they started going through their jive and I didn't know what the hell they were saying.

(R. 1202)(emphasis added).

Counsel continued to joke about his client's injury and to disparage Mr. White:

Q I'm not perverted, but where did he shoot himself in the -- did he shoot it in the...

A (Interposing) Who shot who? Himself?

Q Yeah.

A It looks like he stuck the gun down his pants and it went off. He shot himself in the penis and it went through his leg.

Q Did he shoot his penis off?

A Yeah, he caught part of it. It went through his leg and exited on the floor.

Q It was a great day for White, wasn't it? What else did he do wrong?

(R. 1202-03).

Later in the deposition, counsel told a story about representing "two black boys" (R. 1204). He continued to express more gratuitous racially stereotypical thoughts, which were then

joined in by the Stake witness:

A Well, she was just going to the store and she saw him acting suspicious, so she came back by and got the tag number.

Q Okay.

A Lewis Moore, they call him Fat Pops.

Q Black?

A Fat.

Q Is he black?

A Yeah, he's black and they call him Fat Pops. Lewis Benjamin Moore is his real name.

Q Fat Pop?

A Urn-hum.

Q Pop?

A Yeah, P-0-P.

Q You know that they really don't know each other unless they . . .

A (Interposing) They know them by nicknames.

Q Yeah. Ali. You mean, Aligator? Yeah, oh I know him.

A Oh, yeah, that's how they get around.

Q Ruh?

A That's how they get around.

Q There's Milky and Smokey.

A Buttermilk.

Q Yeah, Buttermilk. See, you tell a jury that, you know.

A Catfish Robinson.

Q Yeah, but you put a guy up on the stand and he gets up there and kind of -- unless you don't know somebody.

(R. 1208-09).

When the officer tried to return to the issues in the case, counsel again launched into an unrelated racist diatribe about black people only being able to understand each other:

A Greg Taylor is another one of your crime scene people. Who is this now? Most of these people might be easy to find. John Garrett.

Q You know, I really think that the colored should be tried by an all colored jury. You know why? Mostly in these areas where they have enemies they've gone to the police and the police are so damn tired of their domestic affairs. So, they finally get a pistol, right?

A Urn-hum.

Q And they walk in the bar, right? And one guy says, his eyes was flashing. And the other guy says, his eyes was darting. To the white people that don't mean a damn thing. To them, I guess, it means that something is going to happen, right?

A Urn-hum.

Q All right.

A Now, this is the breakdown of the money that was found.

Q I don't really mean that, but there

are areas that they just have their own damn ways.

A I know. Okay. You have two twenty dollar bills.

Q Who had that?

(R. 1209). Counsel then opined that it was "fair" that his client shot himself (R. 1210), and the deposition ended.

The afternoon depositions that same day found counsel on the same course, only his racist comments and disparagement of his client's case became more profound. During the deposition of Officer Volkerson, who later testified at trial, counsel ridiculed his client's injury and the prospects for his defense:

Q Did the accused make any statements in your presence?

A 'Yes, he did.

Q What did he say?

A Not towards the crime. He stated...

Q (Interposing) That he was shot in the penis?

A He stated that he was shot, that's right. And also that...

Q (Interposing) See, that's a good defense.

. . . .

BY MR. MORIN:

Q He shot himself and he's black, right?

A Yes.

Q He told the truth.

A I didn't say that he lied to me.

Q Well, my client doesn't lie. I bet that hurt. What else do I want to ask you? Well, you found him, right?

A Right.

Q He was out in the woods and he was in the green car. Some other people saw him get into the green car and the green car was near the store. It sound[s] like a pretty tough case this guy has got here.

(R. 1216-17).

During the deposition of Johnny Walker, who also testified at trial, the witness began describing how Mr. White was running after the offense, and counsel started his racist comments again:

A (Interposing) He was running so fast that I -- I can run and I don't think I could have caught him.

Q Now, see, your ancestors, they haven't been running around in those jungles there for 300 or 400 years clearing those logs with tigers chasing them and all that.

A Nay not have; I couldn't tell you.

Q They're jumping up and down doing that dance, and have some of that kick-a-poo (Phonetic) juice.

A Well, I don't drink so I couldn't tell you.

Q That's why they -- did you ever notice how they shoot a basketball: how high they can jump?

(R. 1232).

Throughout the depositions, counsel repeatedly belittled his client, his client's injury, and his client's possible defenses:

> **Q** You didn't hear any -- you didn't hear anything from my client?
>
> **A** No, unh-unh, no. I was never around when they got him, I was...
>
> Q (Interposing) Shot in the pecker.
>
> **A** Yeah, that's what I heard.
>
> Q That's a good defense, isn't it?
>
> **A** What's that?
>
> Q Well, he's got enough punishment; he shot his ding-ding off.
>
> **A** (Simultaneous Speech) Oh, I don't know. You didn't see those bodies.
>
> Q No, I know. I know. Listen, homicide is -- homicide is a terrible thing. I don't -- I don't enjoy it.

(R. 1339-39).

> **Q** He shot himself in the pecker, right?
>
> **A** Yes, sir, he had. We did not...
>
> Q (Interposing) That's a good defense, isn't it? That's good for two points.
>
> **A** ...-- we did not know he had been shot at the time.
>
> Q Boy, I bet that hurt.

(R. 1372).

Q (Interposing) That gun has come up in this case so many times, I'll tell you.

A You know, at some point he must have put that gun in the front of his pants and had the trigger cocked back...

Q (Interposing) I heard of being excited before, but I never knew anybody in the heat of passion shooting his own pecker, I'll tell you that. Never.

A We don't know how he did that.

Q He just got excited; he got flustered, right?

A He must have done something like that. The...

Q (Interposing) He had it well planned.

A We had talked to several people about two hours after this incident. They had driven by and asked us if we were looking for a black male in a station wagon. And these people had all come up and said this man was driving around the neighborhood.

Q Sunday morning at eleven o'clock, now how in the hell -- everybody's going to church, he's brilliant.

A And this store, you'd never think a small country store like this would have over $20.00.

Q That's the only kind of clients I get. I don't get this simple -- I don't get the ones like Kirkland does. You know, these clear, two day trials; I get these 2,000 witness cases. Well, anyway. Is there somebody in the police department, an expert, that tries to analyze a crime scene and put things together and the psychologists, and all that kind of stuff? Do you have people

doing that?

A We have a psychologist, John Cassady.

Q Oh, God, don't mention him.

A Yeah, I don't know if he got involved in this.

Q (Simultaneous Speech) Don't mention Cassa... I represented that black assistant principal and Cassady was one of the psychologists who examined him up in -- said that he wasn't depressed. And when I saw that principal, boy, he was -- if he wasn't depressed. He was just -- he wasn't even in the room. Does Cassady still have his job?

A Yeah.

Q Still doing well? Enough people out there shooting.....

A (Simultaneous Speech) He's still there.

Q I've never met the man.

Well, anyway, getting back to this thing here.

(R. 1387-88).

A And then me and my brother come out of the shed, walked behind the store and there was a black fellow there. He was kind of moving, kind of running.

Q But he wasn't touching the ground at all?

A Yeah. He -- kinda not -- man, he was just moving.

Q And he -- and he wasn't limping either, was he?

A He didn't look like it. He was trying to poke something in his pocket or whatever.

Q He was afraid he was going to lose his pecker.

A Whatever.

Q He was pulling it -- he was afraid -- gee, maybe we can get it sewed back on because he was -- he shot himself in the ding dong. He's a hell of a robber this guy. If the meat had moved in the meat counter, he'd shot that. You know, the best time to pull a hold up is a Sunday morning when everybody's going to church, do you know that?

A I don't know. I ain't ever tried it.

Q That's the best way to do it. Oh, well.

* * *

Q Well, And he was flying, right? Did it look like a black flash or a dark flash or what?

A Dark flash.

Q Did he run like a guy who just shot himself in the dong?

A I didn't know he was shot.

Q I didn't know you could run if you got shot in the dong.

A I know he was scared and I was too.

Q What was he holding in his pants?

A I don't know what he was holding. I never seen what he was holding.

Q Did he have any money on him or a gun or anything like that?

A I can't say. I didn't honestly see it.

Q Okay. That's all I'm going to ask. Wait a minute. Did I ask that already? Yeah. You saw him run to the shed -- the station wagon, right?

A Yes, sir.

Q Can I give you a word of warning? Don't ever chase a guy that's shot somebody. I've seen -- I saw a guy get blown right away -- I didn't see it, but he'd be alive today if he hadn't run out to the car, you know.

A Guns don't upset me.

Q They don't?

A I've been shot four times.

Q This is a shotgun though and he went out there with a barstool in his hand. I don't think a barstool and a shotgun have any -- I don't think...

A {Interposing) Don't match. Don't match.

Q If I understand it, they can blow you about five feet away, can't they?

A Depending on where you're standing.

Q Yeah. Well, that's what that yacki doc (Phonetic) does, it makes you think you're -- think you can walk on water.

A I would have come in yesterday, but I couldn't even...

(R. 1404-07).

On other occasions, counsel expressed an unwillingness to

conduct a basic factual investigation of the case, and a desire to see it over with. He told the state attorney twice during pretrial, if he would just "shut up the case would get over with" (R. 1248, 1464). He said sarcastically that he "didn't have anything else to do but go look at crime scenes" (R. 1324-25). He said he could not recall answers to questions just asked, and did not know why he had asked several questions (R. 1251-52).

B. COUNSEL DISTANCED HIMSELF FROM HIS CLIENT DURING TRIAL AND EXHIBITED COMPLETE INDIFFERENCE TO AND RESIGNATION REGARDING HIS CLIENT'S FATE

Trial counsel began his questioning of jurors by distancing himself from his client and implying he was only there because he had to be. "Now, being a defense attorney is not always a pleasant job." (R. 81). He exhibited complete indifference to the conduct of jury selection in a capital trial. While the state was able to educate the jury to its theory of the case and familiarize them with the propriety of recommending death, counsel failed in any manner to address the issue. The sum total of his comments invited the jury to be guided by its "conscience," and devalued its role in the process:

> Mr. Moran: I write, but I can't read my own writing. So you'll have to excuse me. I don't know whether to touch the death situation with a twenty-five foot pole. I don't know what your convictions are. I guess if we get that far, you should just follow the law in it. That's about the best

you can do. Let your own conscience be your guide. Y'all agree with that idea?

(R. 87).

Several times during trial, counsel could not even get his client's name straight. Once, he referred to Jerry White as "James White" (R. 231). Another time, he referred to him as "Jerry Walker," and the witness being questioned and the prosecutor corrected him (R. 300-01).

Counsel repeatedly demonstrated his indifference to whether he advocated his client's cause. When a law enforcement witness was referring to a report, counsel complained that he had not seen the report (R. 510). During the ensuing discussion, however, counsel shrugged this off: "One piece of paper isn't going to make or break this case" (R. 511), exhibiting a complete lack of concern about his client's case. Later, counsel attempted to object to the State recalling a witness, but admitted, "I'm not totally up on the rules of evidence" (R. 584). Still later, counsel complained about the State not stipulating to the admission of a report because he just wanted to "get out of here" (R. 739). When a witness could not remember which leg Mr. White had been shot in during the offense, counsel replied, "I don't know either" (R. 763). After objecting to the State's question of a witness as calling for a conclusion, in the presence of the jury, counsel said that the jury should draw conclusions and that the State "hasn't quite proven [its case]

yet" (R. 802).

Counsel's actions were utterly reprehensible and utterly disloyal to his client during the guilt phase. But the worst was yet to come in the penalty phase, where defense counsel became the State's best advocate for the death sentence.

C. THE PENALTY PHASE PROCEEDINGS, DURING WHICH COUNSEL WAS MORE INTERESTED IN DEFENDING HIS OWN REPUTATION THAN IN DEFENDING MR. WHITE, AND THUS OPERATED UNDER A CONFLICT OF INTEREST, AND DURING WHICH COUNSEL DID MORE TO HELP THE STATE'S CASE FOR DEATH THAN HE DID TO HELP MR. WHITE'S CASE FOR LIFE, REVEAL THE TRUE EXTENT OF COUNSEL'S DISLOYALTY TO HIS CLIENT

The penalty phase of trial was first set for April 28, 1982. That morning, defense counsel moved for a continuance, contending he was not prepared to proceed because the State had not provided him with documents relating to Mr. White's record of criminal convictions:

> MR. MORAN: I'd like to make a motion based upon the fact that my man is facing the electric chair, and his past record I received on Monday morning during the trial. We went out of trial last night at 3:30 or thereabouts. Okay? Now if I understand the law correctly, I have a right to go into the past crimes, and to mitigate. In other words, I can come back with any evidence I want to. Of course, it's up to the Court's discretion. The purpose is to indicate there was not really three robberies, but were circumstances involving Mr. White. I haven't had the opportunity to subpoena any witnesses.

(R. 999). Counsel went on to say he had "not had the

opportunity to prepare for the electric chair" (R. 999-1000). The Court indicated counsel should have moved for the records or otherwise attempted to obtain them, then granted the continuance, expressing concern with counsel's preparation:

> THE COURT: All right. Well, I think that's water over the dam at this point. We are talking about whether or not this jury should recommend the imposition of the death sentence.
>
> I don't believe that counsel has fully justified his lack of preparedness in this regard to this Court. But I think it's far too important a matter to hold your feet to the fire when it's, in fact, Mr. White's life that hangs in the balance.
>
> * * *
>
> As I say, I think that this should have been accomplished and could have been accomplished long ago. But at this point it's clear that the matter is too important to go into without allowing you the additional opportunity.

(R. 1002). When counsel began to argue with the Court, Judge Stroker said:

> THE COURT: All I can advise, Mr. Moran, it's your responsibility to get these things, however that may be accomplished. If it requires a court order to get them, whether it should be or not, is not the issue. The issue is whether you obtained them, if they could be obtained, and if it requires a court order, then it requires a court order. But it should have been done long before now.
>
> MR. MORAN: I never copied the numbers off the cases. I never saw them. They were taken away from me. And for my own

protection I want to sav this.

(R. 1003)(emphasis added). Counsel's disloyalty to his client was evident -- "For my own protection . . . ." The Court granted a forty eight hour continuance of the penalty phase.

When Court convened at 10:55 A.M. April 30, 1982, counsel's disloyalty to his client came to the surface in full force. Before the penalty phase began, a lengthy conference between defense counsel, the prosecutor, and the court occurred. The focus of that discussion was defense counsel's concern over the court's remarks about counsel's lack of preparation having been reported in the media:

> MR. MORAN: What I'm saying is I feel there should be a separate hearing on the issues of my attempt to get a permanent record, on the basis that the State Attorney represented that he provided to me this stuff. And the Court ordered him to get this to me, and he never did. And the Court made suggestions or made statements in public that it was my --
>
> THE COURT: You mean in open court.
>
> MR. MORAN: In open court, that it was my duty to carry the burden in obtaining the criminal records, and you actually ordered the State Attorney give them to me prior to the hearing. And the State Attorney did not comply with the Court's oral orders. You know, the reason I couldn't get them is because the machines were broken down. The frustration in trying to get the records was not created by me.
>
> I realize the promises of the State Attorney to carry the burden, under the rules of the Supreme Court, that when I filed a

motion on the 8th of April 1981 for discovery, then he should gather together the evidence and give to me what I'm entitled to. And he made representations in the courtroom that I copied the numbers. Well, I didn't. And so I'm requesting a full hearing on it, on the basis that the open comments in court as far as justification as to what really happened, was prejudicial to myself, my standing in the community as an attorney, and has prejudiced my client.

So I'm requesting a full hearing on that.

As far as to Harrielson getting on the stand, without a copy of the Motion to Suppress, and to show that Harrielson was lying, and no comments were made by the Judge as to me carrying the burden of medical evidence as to whether the man was incapacitated on the issue of voluntariness.

THE COURT: I didn't follow that second part, but I think that's already been ruled upon. As to your request for a hearing, I do not feel a hearing is necessary. I will, however, arant you an opportunity in open court to state your position as to your failure to obtain these, or your inability to obtain these records prior to the trial, if you wish, what efforts you've made, what efforts you did make, and why you feel that it was not your fault, and that you were, in good faith, relying upon the State Attorney to provide these.

* * *

MR. MORAN: But it's late. We're running behind time. And the Court indicated in open court that I had the responsibility, and that basically it was my fault. And I submit that that affects my position in the community. And the Court did not listen to the background as to what caused the problem, and what really transpired.

(R. 1018-21)(emphasis added).

> **MR. MORAN:** Your Honor, when we were in court the other day, we were supposed to have a hearing on the bifurcated issue of determination of guilt. As the Court recalls, prior to trial I requested from the State Attorney that they deliver copies of the criminal records, which is a very important issue on the issue of the electric chair, for me to prepare and to examine those records, and prepare what I could extract from them, to mitigate those charges. I submit that I did not receive those papers until a few days before the beginning of the bifurcated trial, or during the trial. I had to get a court order to get those records, I had to examine them, and I would have to have time to subpoena people if I so choose, to mitigate those circumstances as to those violent crimes.
>
> I'm saying that I did make demands from the State, and I did not know what records they were referring to. I did stipulate they were felonies based upon his representation. I didn't know what felonies they were. Some of them were on microfilm and some of them are in the archives, which requires a court order.
>
> So I submit that I was frustrated by my failure to'put on my obligation, because I'm well aware of the fact that I have a man facing the electric chair.
>
> So I'm submitting the answer that the machine's broke down, when there's five copy machines up there, is just an indication that there was some hesitation about it, for whatever reason I don't know. The State cooperated with me on all other evidence.
>
> I feel that the newspaper and TV embarrassed me as an attorney in the community as to whether I was the type of an attorney who was aware of my duties. As the Judge knows, I've been in this game for

twenty years, and I've dealt with many murder trials, and reversed a couple of them. I've also been very successful in arguing to the Supreme Court against the electric chair for three defendants who were charged with the electric chair. I'm a very trained attorney, and I understand my business. And I can't perform my function unless someone helps me. They have a duty, under the rules, to deliver to me copies of those records. I have tried many times. I've been up in the State Attorney's Office, and this man had those records right in front of him. He never put them in my hand, just flashed them at me.

It's my understanding we're both officers of the court, and there are such things as ethics. I should not have to overpower the Court with needless court orders in which the Court would demand the State to give me those papers. The State has the duty, under Supreme Court rules, to make those available. They were not made available. Had they been I wouldn't be arguing about that today. I certainly would have copied them.

Now due to the fact that I was myself very hurt by the position that I was the one that had the obligation, like I say, I would have had an obligation had I not relied on representations of an officer of the court, which I can rely on. I don't think it's the duty of a defense attorney to overburden the court or overworking themselves to force the State to produce records that should be made available to me. And we stipulated to nine felonies, and I never questioned it, never saw them. Nine felonies. And so I acted in good faith. First of all, I would like to see the felonies before I stipulate to them.

What I'm merely saying is, the State Attorney's interpretation of what I did or did not do, it was a duty on his shoulders to produce. I don't believe the rules of the Supreme Court were made to put a burden on the Defense what the State is required to do

under the law. I made every effort.

Further, Judge Keating was the judge in the case, and you came into the case in the last few months. Now you've got a heavy case load, and you can't move a lot of trials unless someone does their duty.

I just want to say that I'm not going to accept the entire blame because I believe that the blame is usually, if I am charged with it, and the State refused to perform their function, I think the blame also is on the State Attorney's shoulders.

THE COURT: I understand that as of now you have obtained, or at least have been allowed inspection of these public records, and we're ready to proceed.

MR. MORAN: Yes, I did get them eventually.

(R. 1038-41)(emphasis added).

Although a capital penalty phase at which his client's life was at stake was about to begin, defense counsel was worried about his own reputation in the community and his standing as an attorney. And when the penalty phase did begin, counsel's disloyalty and indifference to his client manifested themselves in an incredible display of "doing more harm than good" and paved the way for his client's trip to the electric chair.

First, "defense" counsel presented "evidence". After two family members and one friend testified briefly, defense counsel presented two witnesses who had been State's witnesses in the guilt phase. The sole purpose of these witnesses' testimony was rehashing some guilt phase issues. But it got much, much worse.

,After testimony was concluded, defense counsel introduced Defense Exhibits 1, 2, and 3 into evidence. These exhibits were judgments and sentences showing that Mr. White had four felony convictions for nonviolent offenses, in addition to the prior violent felony convictions which the State had already introduced. The "relevance" of this supposedly "mitigating" evidence would come out during defense counsel's closing argument (See infra). Then, defense counsel introduced Defense Exhibits 4 and 5. Exhibit 4 was the autopsy report on the victim. Exhibit 5 was a medical report detailing the injuries and quadriplegia suffered by the store proprietor, Mr. Alexander. These were introduced as defense exhibits. Mr. White's death sentence was virtually assured.

Defense counsel's closing argument sealed Mr. White's fate. The argument speaks for itself:

> The other things is, all during the trial I kept hearing about nine felonies, nine felonies, nine felonies. Now in mitigation, they were not all violent felonies. And the State has stipulated that I could put in evidence these other three: and actually they were small forgeries, small amounts of money, but they were not violent.
>
> Now as to State Exhibit C, which is aggravated assault, he never intended to have effectuated any harm to the person, but he knew he was trying to escape from jail, and no intention to kill him, no intention of bodily harm.
>
> So we have no record of any past history

of a killing by Jerry White. You know, he had many opportunities to do it.

Even though there are eyewitnesses in all these cases, you read the documents and find out that in all these other felonies he received five years, including the one on assault with intent to commit first degree murder, which is Exhibit B of the State. If you read in there, you'll find that he was only found guilty of aggravated assault, which is a third degree felony, five years.

So all in all, you have to assume that if he had committed serious crimes of violence. that he would not have received three years, five years, and five years. He would have been put away a long time ago. You've got to consider these factors.

(R. 1083-84)(emphasis added).

What I'm saying is, this man never killed anybody before. Never did. The five felonies, there were three people, same transaction, three men involved. They only gave him five years on that. The other cases are aggravated assault, and that was five years again. Evidently the State does not consider this man to be a dangerous man or he would not have been treated so lightly.

Why is that so important? Well, he goes on to his intent in the store. Is he a killer? Does he intend to us a gun? On all these violent crimes, he never shot anybody.

. . . .

Now you don't have to believe our side if You don't want to, but you have to consider it because there was testimony to that extent.

Now in your advisory sentence you can be overruled by the Judge, and the Judge can issue a judgment of life sentence without parole for twenty-five years, or thirty. Therefore, he's thirty-two years of age, and

that would put him back on the street at the age of fifty-seven. By that time, I submit to you, your violent nature will have mellowed by age. That's sufficient punishment, under the circumstances, and you should bring back a recommendation of life, not the electric chair.

* * *

And here's a man facing the electric chair under those circumstances, whereas a life sentence is a more suitable recommendation, that he be put away and never see the streets for over twenty-five years or more. That would make him an old man.

The other thing is, you should take into consideration the testimony that he blacks out when he drinks. That's not justification, in fact, but merely goes to intent. I'm not suggesting that the blackout or he was crazy is justification, but I've got to follow the law. And mitigation says that you've got to take into consideration whether the defendant was under the influence of extreme mental or emotional disturbance, and also if the defendant acted under extreme duress or substantial domination.

Extreme duress, with a bullet hole in the penis and the leg, and severe pain, and all that.

I'm not justifying what happened in the back room. We don't know what happened in the back room. But we've never gotten all the bullets so we could count, could add up how many bullets were in the gun. Maybe he knew the gun was empty when he pulled the trigger against Tehani, as anyone would do, because he only wanted to get out of there.

The Judge is going to give you a list of instructions. It's going to be your function to sort all the mitigating circumstances from the case, all mitigating circumstances from the prior crimes, and balance them with the

aggravating circumstances, and weigh them, and come out with your best judgment as to what Jerry White is entitled to.

I submit to you a life sentence would clear the problem, because he will be removed from the streets for a long time, and never be a danaer again; or, the State asks for the death of Jerry White. You have the power to advise the Judge that. Or would you be satisfied with a life sentence, and remove him from society, from any further danaer to society.

I submit the life is the more reasonable and fair punishment. I don't think to take Jerry White's life would solve anything. Of course, Your Power is to advise the Court what you think he should get.

I submit if you look at all the factors, all the cases, and say did this man ever shoot anybody before, or did he ever kill anybody before, or what was the circumstances, why was his sentence reduced, why did the State of Florida reduce it, then I submit to you -- of course, we don't know this, but the charges were reduced; he did get only three years for each armed robbery.

So there's no evidence of a cold, calculated and premeditated manner.

We don't have all the evidence of what happened in the back room. You have to ask yourselves, why were so many things hidden there? Why do we have nine felonies? Why do they keep hollering back of the head, back of the head, back of the head, when it's not true? You know, we're supposed to be truthful, you know, I think. I think we're supposed to be truthful. And I really believe that. I don't think you're supposed to mislead the jury. You know what I'm trying to get at.

They had the fingerprint man here. I backed away from that when he started to run

away with ne, and I sat down. It's almost impossible to chase a person who doesn't even recognize the question or understand it, and what you're trying to say. You're not supposed to hide anything, really. This is not a game of hide and seek. They want to take this man's life on a circumstantial case. There were no eyewitnesses.

Think seriously about that wadding in the window, why it was thrown away, really. I'll tell you what I think. They wanted to count. They wanted three bullets to show you that it was a .38 caliber gun, and therefore there must be six bullets in it, so when he pulled the trigger on Tehani he intended to kill him, right? But they didn't show you physical evidence of the bullet count. And we didn't see any extra shells, which would prove what the intent of my client was that day.

Intoxicated; car was broken down: there was evidence of that. And you can believe what you want to believe, you know. It's your judgment. But I believe you should weigh all the evidence.

You told Jerry White that you believe Jerry White killed somebody else. That's what we're here for. You should give Jerry White a life sentence and let the man live his life out of society. And if you want to kill him, go ahead. Go ahead, if you think you have that power. Maybe you can take life. Fine. An eye for an eye and a tooth for a tooth. I never let anybody step on the Bible. I thought it was left up to God. We don't give life; God gives us life. And we're not God. We shouldn't take lives. We shouldn't take a man's life because he took somebody else's life. I thought it was in the Bible that God was supposed to do all that. But if you think you want to kill him, then go ahead. Go ahead.

Really, where is all the evidence? We have people lying here. Why are they lying?

If you believe the Walker brothers, the father took that bullet out, and you believe that the son took it out, do you believe they threw it away? Didn't the police examine that room? They knew they had two bodies. Where are they? Where did they go? And one bullet remained in the body of Alexander, over here (indicating). Where are the other waddings? Where are the shells? Only one shell was in front of the counter. There was an argument between White and Alexander. That's the only thing that was found, as far as I can tell.

So I'm asking you that your conscience be satisfied and give this man life. How can your conscience be satisfied to give him death? That's the question. And it's your judgment.

There's some corroboration of our position in this case. There is. And you have to reach a determination what happened in that back room. I'll never know. I'll never know. It's all circumstantial. And my man's testimony was equally important as the case for the State. There's too much covered up in this case, too much misleading, too much nine felonies, nine felonies, nine felonies, hammering. You didn't even know what the felonies were, did you? That's inflamed you. You see all these gruesome pictures and forget about where the wounds are. You know, any man that did that is sure guilty. Isn't it terrible? Look at those colored pictures. Aren't they terrible? Nine felonies. Boy, he must be a bad one. No one ever told you that three of them were check writing and no one was ever killed.

And don't forget -- I don't know whether it's mitigating -- but the man should not drink. He should never drink. And he really don't know what he does when he drinks. And that could be mitigating. Or, you could say he deserves what he gets. That doesn't necessarily mean that he committed that murder in the back room.

> There are mitigating circumstances. And I hope that you can bring back a recommendation of life, and let God decide for the rest of his life. Don't take the man's life. We're not back in the old days before we were civilized -- an eye for an eye and a tooth for a tooth, cut off your hands if you rob, and all that. And don't assume that your first judgment might not have been totally correct, because you have to do it on what you've got. And what you got I don't think was enough. But you thought it was. And if you thought it was, that's fine. I'd sure like to know where those bullets are.
>
> And three hundred and eighty dollars. I'm tired of trying to guess about this thing. I still don't know. If you put sixty-four one-dollar bills in the cash register, you see how high that stack is. I don't know how many one-dollar bills. Ridiculous. Preposterous. Preposterous. You couldn't close the drawer, right?
>
> Life, that's good enough. Good enough. Thank you.

(R. 1088-96)(emphasis added).

Were it not for the fact that Mr. White's life was at stake, defense counsel's closing argument would be laughable. As it was, however, it made a farce and mockery of the basic principles of advocacy and rendered Mr. White's right to the effective assistance of counsel an illusion. Mr. White would have been better off with no counsel than he was with counsel who told the jury that Mr. White had never killed before, although "he had many opportunities to do it." Mr. White would have been better off with no counsel then he was with counsel who told the jury,

"On all these violent crimes, he never killed anybody." Mr. White would have been better off with no counsel than he was counsel who told the jury that if Mr. White served a twenty-five year sentence, his "violent nature will have mellowed by age." Mr. White would have been better off with no counsel than he was with counsel who told the jury that the possibility that Mr. White was intoxicated was "not justification." Mr. White would have been better off with no counsel than he was with counsel who apologized for bring up intoxication, "but I've got to follow the law." Mr. White would have been better off with no counsel than he was with counsel who said a life sentence was sufficient because Mr. White would "never be a danger again." Mr. White would have been better off with no counsel than he was with counsel who told the jury, "I don't know whether (drinking is] mitigating." Mr. White would have been better off with no counsel than he was with counsel who told the jury, "Life is good enough."

Here, defense counsel emphasized to the capital sentencers that Mr. White had a lengthy criminal record and emphasized (through argument and through Exhibits 4 and 5) the facts of the offense and the suffering of Mr. Alexander. Defense counsel also virtually conceded that no mitigation existed, going so far as to apologize for bringing up the subject of intoxication. Here, as in King v. Strickland, 714 F.2d 1481 (11th Cir. 1983):

> [C]ounsel here did not merely neglect to present available mitigating evidence. He made a closing argument that may have done more harm than good. In his argument, the main thrust of which was that the defendant if given life would be secured in prison for many years, King's attorney unnecessarily stressed the horror of the crime and counsel's status as an appointed representative:
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> * * *
>
> In effect, counsel separated himself from his client, conveying to the jury that he had reluctantly represented a defendant who had committed a reprehensible crime. "[R]eminding a jury that the undertaking is not by choice, but in service to the public, effectively stacks the odds against the accused." Goodwin v. Balkcom, 684 F.2d at 806, cert. denied, --- U.S. ---, 103 S.Ct. 1798, 76 L.Ed.2d 364 (1983). Rather than attempting to humanize King, counsel in his closing argument stressed the inhumanity of the crime.

King, 714 F.2d at 1491. Here also, as in Douslas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983):

> The most egregious examples of ineffectiveness do not always arise because of what counsel did **not** do, but from what he **did** do--or say. Apparently failing to appreciate that the trial judge was the ultimate sentencer, counsel repeatedly emphasized to the judge, during the conference in chambers and out of the hearing of the jury, that not only did counsel have no evidence to proffer at that time but that apparently there was no mitigating evidence that could be produced in Douglas' case. He explicitly volunteered that appellant had "not been a good boy" and therefore no purpose would be served by his mother testifying, He highlighted before the judge that all he could argue to the jury was that

> Douglas' was a human life because there was no other evidence.
>
> Counsel's ineffectiveness cries out from a reading of the transcript.
>
> * * *
>
> Even if we assume for these purposes that there was no mitigating evidence that could have been produced, a vital difference exists between not producing any mitigating evidence and emphasizing to the ultimate sentencer that the defendant is a bad person or that there is no mitigating evidence. This situation can be analogized to one where instead of simply not putting a defendant with a criminal record on the stand, defense counsel in closing argument says: "You may have noticed the defendant did not testify in his own behalf. That is because he has a significant prior record of convictions and we did not want the prosecutor to cross-examine him about them." Similarly, the instant case is analogous to one where the state presents its evidence the defense presents none, but, rather than maintaining silence or arguing to the jury about reasonable doubt, defense counsel states: "You may have noticed we did not present any evidence for the defense. That was because I couldn't find any."

Douglas, 714 F.2d at 1557 (emphasis in original)(footnotes omitted).[4] See also Osborn v. Shillinger, 861 F.2d 612, 628-29 (10th Cir. 1988).

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[4] In Douslas, the Eleventh Circuit granted relief on a claim of ineffective assistance of counsel solely on the basis of the direct appeal record -- no evidentiary hearing was necessary or conducted. In Matire, as well, relief was granted because ineffective assistance was plain from the record.

D. CONCLUSION

Defense counsel's disloyalty, conflict, and gross ineffectiveness "cr[y] out from a reading of the transcript." Douglas. Mr. White was denied even the semblance of advocacy and professionally responsible representation. Counsel abandoned his duty of loyalty to his client and "acted with reckless disregard for his client's best interests." Osborn, 861 F.2d at 629. Mr. White was deprived of the assistance of counsel, United States v. Cronic, 466 U.S. 648 (1984), for the proceedings resulting in his capital conviction and death sentence completely "los[t their] character as a confrontation between adversaries." Cronic, 466 U.S. at 657. Mr. White was also denied the effective assistance of counsel, for there can be no doubt, on the basis of the direct appeal record alone, that counsel's actions were unreasonable, that his performance was deficient, and that confidence in the outcome of the proceedings is undermined. These deprivations of fundamental constitutional rights should now be remedied. Appellate counsel should have presented these plain errors for this Honorable Court's consideration, and improperly failed to do so. The errors were and are clear and fundamental in nature. It is precisely errors such as this that the Court's Writ of Habeas Corpus (an equitable remedy) was intended to correct.

CLAIM II

MR. WHITE WAS EFFECTIVELY DENIED HIS RIGHT TO A MEANINGFUL DIRECT APPEAL BY TRIAL COUNSEL'S UNREASONABLE FAILURES TO PRESERVE MERITORIOUS ISSUES FOR APPELLATE REVIEW AND BY APPELLATE COUNSEL'S UNREASONABLE FAILURE TO URGE TRIAL COUNSEL'S BLATANT INEFFECTIVENESS AS REQUIRING CONSIDERATION OF THESE MERITORIOUS ISSUES, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

This claim is entirely based upon the record which was before this Court during Mr. White's direct appeal.[5] That record compellingly demonstrates that Mr. White was effectively denied his right to a meaningful review of his capital conviction and death sentence because trial counsel failed to preserve numerous and substantial errors for appellate review. Indeed, this Court's direct opinion itself tellingly makes the point: of the errors occurring at Mr. White's trial which appellate counsel attempted to present for the Court's review, the Court refused to address approximately twelve of those issues because trial counsel had either failed to object and/or, incredibly, assented to the error. See White V. State, 446 So. 2d 1031 (Fla. 1984). In fact, regarding one of the issues which

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[5] That is, although this claim alleges ineffective assistance of trial counsel, as well as appellate counsel, the claim involves no nonrecord facts such as are involved, for example, when a capital defendant alleges that trial counsel was ineffective for failing to present certain witnesses' testimony at the penalty phase. By contrast, this issue literally cries out from the face of the record and requires consideration in these proceedings.

appellate counsel raised, this court and the State agreed that error had occurred at trial, but because there was no objection at trial, the error was not considered on direct appeal. White, 446 So. 2d at 1034. Regarding another issue, the Court also found error, but, again, because no objection had been made at trial, refused to consider the issue. Id. at 1036.

Because trial counsel's failed to preserve error for review and because appellate counsel then failed to urge any basis upon which this Court could review these errors absent objection (for example, that they involved fundamental error or that trial counsel was ineffective), Mr. White's direct appeal was little more than a formality. The United State Supreme Court has upheld the Florida capital sentencing scheme in part because "any risk" that the scheme might result in the arbitrary or capricious imposition of a death sentence "is minimized by Florida's appellate review system." Proffitt v. Florida, 428 U.S. 242, 253 (1976). However, the safeguard provided by that review is meaningless when this Court is provided with no basis for reviewing substantial trial error. Without an adversarial testing both at trial and on direct appeal, there can be no "meaningful appellate review." Proffitt, 428 U.S. at 251. In Mr. White's case, no adversarial testing occurred at any stage, and his capital conviction and death sentence are wholly unreliable.

Several of the substantial errors which were not reviewed on

direct appeal because of trial and appellate counsel's unreasonable omissions are discussed below. That discussion demonstrates that trial and appellate counsel's performances were deficient and that those deficiencies severely prejudiced Mr. White.

A. THE ADMISSION OF EXTENSIVE EVIDENCE REGARDING THE ROBBERY VICTIM'S INJURIES AND PROSECUTORIAL ARGUMENT ON THAT EVIDENCE DEPRIVED MR. WHITE OF A FAIR AND RELIABLE DETERMINATION OF GUILT AND OF A FAIR, RELIABLE, AND INDIVIDUALIZED DETERMINATION OF THE APPROPRIATE SENTENCE, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Mr. White was tried for two offenses: first-degree murder of James Melson and robbery of Alex Alexander. During the offense, both Melson and Alexander were shot, but Alexander survived. Mr. White was not charged with any offense involving the injuries Alexander sustained.

Despite this, the prosecutor opened his presentation of the case to the jury by relating the wholly irrelevant and inflammatory fact that "Mr. Alexander did not die ***as*** a result of that injury, but is permanently crippled and is a quadraplegic at this time and will not testify at this trial. He is not capable of testifying. He is on a respirator in Tampa" (R. 216). Later in the trial, the State put Mr. Alexander's doctor on the stand and elicited graphic testimony about the extent of these injuries:

By Dr. Shea:

...And as I examined him neurologically, which means I tested his nerves, tested his sensation and his motor power, he was what we call a C-3 quadriplegic, which means his sensation, testing with a light touch, by touching and with pin prick and various other testing, the sensation ended about his lower neck. He had no sensation to any testing below his neck.

He was also paralyzed in his arms and his legs. They were flaccid. He could not voluntarily move his legs.

And he also obviously had no control of his bowels and no control of his bladder, and the examination in this area demonstrated that he was anesthetic or had no sensation in his rectum.

Q. Just to clarify, Doctor, from the neck down there was no sensation in his body?

A. That's correct. He was anesthetic.

Q. Can you tell us whether this condition is permanent or whether he is expected to recover?

A. Yes, I can.

Q. Would you please tell us?

A. I believe that he is a permanent C-3 quadriplegic. His paralysis is permanent, and there is no likelihood of any change.

Q. Does he have any assistance at this point?

A. Yes, yes.

Q. What kind of assistance would that be?

A. Mr. Alexander is what we call a .

respiratory dependent quad, quadriplegic meaning all four extremities are paralyzed. Respiratory dependent means that he has difficulty breathing.

When one is injured at this level, at the C-3 level, there are no nerves innervating any muscles of respiration except perhaps the C-3 segment. The diaphragm, which is the muscle between the chest and the abdomen, is the important bellws muscle which moves air in and out of the chest. That's innervated by the third, fourth and fifth segments of the spinal cord. So he may have a little bit of C-3 left running, but he does not have enough to breathe.

So, therefore, he is respiratory dependent, which means he had to have a tracheotomy performed, a hole cut in his throat for a tube to be put into his windpipe. And he has had to be assisted in respiration with a respirator, a machine that breathes for him.

When he left us on April 14th of 1981, approximately a year ago, he had a tracheotomy tube in place and was respirator dependent. And I would presume that he continues to be somewhat dependent regarding his respiratory system. He is unable to move. Therefore, he is totally dependent for all nursing care -- turning, positioning, dressing.

He has also what is called a neurogenic bladder, paralyzed bladder. He cannot void, pass water on his own. So, therefore, he has to have a catheter in place at all times to keep his bladder drained.

He also has a neurogenic bowel, which means that his bowels are paralyzed. He does not know when his rectum is full of stool and is unable to pass it even if he did know it. So, therefore, he is dependent for a bowel program, which is a relatively sophisticated nursing program requiring the proper diet,

stool softeners and a regular bowel program by inserting suppositories into the rectum and a nursing technique to evacuate the bowel on a regular basis to avoid bowel obstruction.

Q. Doctor, in your opinion would he be able to live without the assistance of the tubes and breathing machines?

A. No.

(R. 642-5).

During closing argument at the guilt phase, the State reminded the jury that "Mr. Alexander was shot, which caused him to be paralyzed" (R. 916). Defense counsel did not object to the doctor's lengthy and painfully inflammatory testimony, or to the State's arguments. The testimony was irrelevant, as the State admitted during Mr. White's direct appeal. White v. State, 446 So. 2d 1031, 1034 (Fla. 1985). Mr. White was not charged with an offense requiring evidence of the extent of injuries suffered by Alexander. This Court found the testimony did not warrant reversal in light of the absence of an objection. Counsel knew of the facts relating to the testimony well before trial began, but filed no motion in limine, because, as he told the trial court, he "used to file a motion in limine", but was now "getting too old for those things" (R. 534).

Defense counsel's failure to object or to otherwise move to exclude the testimony or preserve the issue for appeal resulted in the presentation of highly inflammatory and irrelevant

evidence and argument to the jury for consideration both at the guilt and penalty phases. Although trial counsel's ineffectiveness regarding this issue literally "leaped out" of the record, Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987), and although trial counsel's inaction could only have resulted from ignorance and/or a complete dereliction of his responsibilities to his capital client, appellate counsel did not raise trial counsel's ineffectiveness before this Court. Neither did appellate counsel present any argument that the admission of this evidence and the State's arguments on the evidence constituted fundamental error or any argument regarding the impact of this error at the penalty phase (See Initial Brief of appellant, pp. 33-35). In its brief on direct appeal, the State conceded that the evidence and the prosecutor's arguments were irrelevant (Answer Brief of Appellee, p. 17), but argued that since there had been no objection at trial, absent fundamental error, the issue was not preserved for review (Id.). In his reply brief, appellate counsel presented no argument on this issue (See Reply Brief of Appellant).

There can be no doubt that the testimony and argument regarding Mr. Alexander's injuries was inflammatory and intended to arouse the emotions and passions of the jurors. That was its only possible effect -- it was utterly irrelevant to any issue at trial. In such circumstances, the admission of the testimony

amounted to a denial of due process and should have been considered on direct appeal. At the very least, "the interests of justice," State v. Smith, 521 So. 2d 106, 108 (Fla. 1988), require that the error now be assessed and corrected.

The impact of this testimony and argument on the jury's and judge's decision to impose death cannot be ignored. That it had an impact is clear: at oral sentencing the trial judge informed Mr. White that one reason the judge was imposing death was because "you gravely and permanently injured Mr. Alexander" (R. 2095); in his written findings, the judge again referred to "the wounded and paralyzed body of the shopkeeper [Mr. Alexander]" (R. 1994). In penalty phase closing argument, the prosecutor urged the jury to recommend death because "he shot not only James Melson, but Alex Alexander in the head or neck" (R. 1077), and urged the jury to "remember" the testimony of Dr. Shea, Mr. Alexander's doctor (Id.). The prosecutor also argued that the "cold, calculated, and premeditated" aggravating circumstance (which this Court struck on direct appeal) applied because "both of those men were marched into the back room, and . . . the defendant did shoot those two men to death. You can consider the evidence also, the shooting of Mr. Alexander" (R. 1079)(emphasis added).

The eighth amendment requires that "any decision to impose the death sentence be, and appear to be, based on reason rather

than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 358 (1977). Thus, the capital sentencing decision may not be based upon "factors that are constitutionally impermissible or totally irrelevant to the sentencing process." Zant v. Stephens, 462 U.S. 862, 885 (1983). This issue is analogous to the kind of eighth amendment violation prohibited by Booth v. Maryland, 107 S. Ct. 2529 (1987), and South Carolina v. Gathers, 109 S. Ct. 2207 (1989). Although the State's evidence and argument did not concern the victim of the homicide, the evidence and argument could only serve to "divert the jury's attention away from the defendant's background and record, and the circumstances of the crime." Booth, 107 S. Ct. at 2533-34.

This case certainly involves what precedents from the federal circuits have long condemned. Accordingly, in Vela v. Estelle, 708 F.2d 954 (5th Cir. 1983), where the State introduced testimony at a capital sentencing regarding the murder victim's good qualities and defense counsel was found to be ineffective for failing to object to the introduction of this testimony, the Court explained:

> Vela was thrice prejudiced. First, defense counsel allowed the prejudicial evidence on Brown's good character to be introduced. Second, by failing to object to it and ask for a curative instruction, counsel allowed the jury to consider it as it if had been material, probative evidence, relevant to the issue of Vela's sentence. Third, defense counsel's failure to object waived the issue for consideration on direct

appeal. We have no difficulty concluding that counsel's ineffectiveness "resulted in actual and substantial disadvantage to the cause of [Vela's] defense." Strickland, 693 F.2d at 1262. Indeed, given the extremely prejudicial effect of this testimony, we fail to see how anyone could conclude otherwise. Faced with the task of assessing Vela's punishment, the jury was informed that the man he had killed was kind, inoffensive, a star athlete, an usher in his church, a member of its choir, a social worker with under-privileged children of all races, a college student holding down two jobs while he attended classes and played on the championship football team, and the father of a three-year-old child. The truth of these statements is, of course, not in issue; he point is that they are irrelevant to the severity of Vela's sentence, and should not have been considered by the jury.

Harmless Error

The State has failed to carry its burden of showing that the admission of this testimony was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). It is not enough to say that since the jury could have assessed a life sentence without having heard the prejudicial testimony, the admission of this testimony was harmless. The State dropped a skunk into the jury box. Defense counsel made no serious effort to either identify it as a skunk, have it removed, or have the jury instructed to disregard its presence. We cannot in reason conclude that the jury did not consider this inadmissible, improper, highly prejudicial testimony in determining Vela's sentence. The sentencing process consists of weighing mitigating and aggravating factors, and making adjustments in the severity of the sentence consistent with this calculus. Each item of testimony has an incremental effect; large segments of highly prejudicial, inadmissible testimony have a considerable

> effect, skewing the calculus and invalidating the result reached.

Vela, 708 F.2d at 966 (emphasis added). Likewise, in Mr. White's case, the factors discussed in the sentencing order and urged by the prosecutor's evidence and arguments were "irrelevant" and "should not have been considered." See also Haves v. Lockhart, 881 F.2d 1451 (8th Cir. 1989)(Granting habeas corpus relief, after remand for further consideration in light of South Carolina v. Gathers, precisely because of this reason); Rushing v. Butler, 868 F.2d 800, 802-04 (5th Cir. 1989)(granting writ of habeas corpus because impermissible victim impact considerations infected the sentencing determination). Also as in Vela, the interjection of these impermissible factors into the sentencing decision was prejudicial -- no one "could conclude otherwise."[6]

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[6]The constitutional improprieties at issue here are also analogous to the situations presented in several of the Eleventh Circuit's decisions regarding prosecutorial misconduct in penalty phase closing arguments. Here, as in Potts v. Zant, 734 F.2d 526, 536 (11th Cir. 1984), because of the impermissible considerations in the trial court's sentencing order and the prosecutor's argument and evidence, the judge and jury "failed to give [their] decision the independent and unprejudicial consideration the law requires." Here, as in Wilson v. Kemp, 777 F.2d 621, 626 (11th Cir. 1985), the prosecutor's argument and evidence "tend[ed] to mislead the jury about the proper scope of its deliberations." In such circumstances, "[w]hen core Eighth Amendment concerns are substantially impinged upon . . . confidence in the [judge's and] jury's decision will be undermined," id. at 627, because consideration of such errors in capital cases "must be guided by [a] concern for reliability."

(footnote continued on next page)

The factors upon which the judge relied and which the prosecutor argued had no bearing upon an individualized and reliable determination of the appropriate penalty for Mr. White. Rather, the considerations discussed in the court's sentencing order and argued by the prosecutor served only to inject "factors that are constitutionally impermissible or totally irrelevant to the sentencing process," Stephens, 462 U.S. at 885, into the court's and jury's penalty deliberations. The proceedings were contaminated with irrelevant, inflammatory, and prejudicial considerations. The judge relied on precisely such factors. As a result, Mr. White's capital conviction is unfair and unreliable, and his death sentence is neither reliable nor individualized.

(footnote continued from previous page)

Id. See also Moore v. Kemp, 809 F.2d 702, 747-50 (11th Cir. 1987)(in banc)(Johnson, J., concurring in part and dissenting in part); cf. Newlon v. Armontrout, 885 F.2d 1328, 1338 (8th Cir. 1989), quoting Coleman v. Brown, 802 F.2d 1227, 1239 (10th Cir. 1986) ("'[a] decision on the propriety of a closing argument must look to the Eighth Amendment's command that a death sentence be based on a complete assessment of the defendant's individual circumstances . . . and the Fourteenth Amendment's guarantee that no one be deprived of life without due process of law'" [citations omitted]).

B. ALLOWING THE PROSECUTOR'S CHART OF AGGRAVATING AND MITIGATING CIRCUMSTANCES, ON WHICH THE PROSECUTOR HAD CHECKED AND UNDERLINED THE AGGRAVATING CIRCUMSTANCES THAT HE ARGUED WERE APPLICABLE, INTO THE JURY ROOM DURING THE JURY'S PENALTY PHASE DELIBERATIONS DEPRIVED MR. WHITE OF A FAIR, RELIABLE, AND INDIVIDUALIZED CAPITAL SENTENCING DETERMINATION, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

During penalty phase argument, the prosecutor had a prepared chart of aggravating and mitigating factors which he used before the jury for demonstrative purposes **(R. 1072).** On this chart, the prosecutor made various checks and underlinings showing the aggravating circumstances which he argued the jury should find (R. 1075, **1076, 1106).** The chart with its checks and underlining was allowed into the jury room during the jury's deliberations **(R. 1105-1106).** This is tantamount to allowing the prosecutor's arguments, in writing, to be placed in the jury's hands, and is an unbelievable exercise in unilateral, undue influence. Coupled with the improper manner in which the jury was instructed regarding aggravation (**see** Section **C,** infra), the chart created a situation in which the jury had no free will and was virtually compelled to return a recommendation of the death penalty.

On direct appeal, this Court held that allowing the chart into the jury room was error, but declined to reverse because trial counsel had acquiesced to that procedure:

> With the agreement of defense counsel, this chart was allowed to go into the jury room. Appellant's argument that such a chart

> was an improper item for submission to the jury during its deliberations under Florida Rule of Criminal Procedure 3.400 is correct. However, appellate cannot at trial create the very situation of which he now complains and expect this Court to remand for resentencing on that basis.

White, 446 So. 2d at 1036 (emphasis added).

Again, trial counsel's ineffectiveness literally "leaps out" of the record. Matire. The prosecutor's chart showed the jury that, according to the prosecutor, five aggravating circumstances applied, while no mitigating circumstances applied. Allowing such a chart into the jury room is the antithesis of advocacy and could only be the result of ignorance or utter indifference to Mr. White's fate. This is ineffective assistance, see Kimmelman v. Morrison, 477 U.S. 365 (1986); Nero v. Blackburn, 597 F.2d 991 (5th Cir. 1979),[7] which should have been argued by appellate counsel. Trial counsel failed, appellate counsel failed, and Mr. White was deprived not only of a fair and reliable determination of the penalty at trial, but also of a meaningful review of this egregious, fundamental error.

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[7] Trial counsel's outrageous conduct even extended to getting Mr. White to agree on the record to allowing to chart in the jury room (R. 1105). This does not make counsel's actions any less ineffective. Mr. White, of course, relied upon defense counsel to know the law and to make proper decisions. The Eighth Circuit recently discussed a very similar situation in Chambers v. Armontrout, No. 88-2383 (8th Cir. July 5, 1990)(in banc). There,

(footnote continued on next page)

C. THE TRIAL COURT'S INSTRUCTIONS ON AGGRAVATING CIRCUMSTANCES, IN WHICH THE COURT LISTED ALL OF THE AGGRAVATING FACTORS BUT DIRECTED THE JURY NOT TO CONSIDER CERTAIN OF THOSE FACTORS, EFFECTIVELY INFORMED THE JURY WHICH FACTORS APPLIED, AND DEPRIVED MR. WHITE OF HIS RIGHTS TO A RECOMMENDATION BY THE JURY AND TO A FAIR, RELIABLE, AND INDIVIDUALIZED CAPITAL SENTENCING DETERMINATION, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

At the penalty phase, the judge instructed the jury:

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence:
>
> First, the crime for which Jerry White is to be sentenced was committed while he was under sentence of imprisonment. There has been no evidence presented that Jerry White was under sentence of imprisonment on the

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(footnote continued from previous page)

defense counsel had failed to interview or call a witness who could have provided testimony supporting the defense theory of self-defense, and at trial, the defendant had signed a statement agreeing with defense counsel's decision not to call the witness. The Eighth Circuit held that trial counsel was ineffective, explaining:

> [The] statement indicates only that a defendant with an eighth grade education, relying on information provided by [defense counsel], agreed with [defense counsel's] decision not to call [the witness]. Whether or not Chanbers agreed with the decision not to call [the witness] does not make that decision any more reasonable.

Slip op at 11-12. Here, also, Mr. White's reliance on and agreement with defense counsel "does not make [the decision to allow the chart into the jury room] any more reasonable."

date in question, and the Court directs you that you shall not consider that factor.

Second, that the defendant has previously been convicted of another capital offense or of a felony involving the use or threat of violence to some person. The Court advises you that the crimes of armed robbery and aggravated assault are felonies involving the use or threat of violence to another person.

Third, the defendant, in committing the crime for which he is to be sentenced, knowingly created a great risk of death to many persons.

Fourth, the crime for which the defendant is to be sentenced was committed while he was in the commission of or an attempt to commit armed robbery.

Fifth, the crime for which the defendant is to be sentenced was committed for the purpose of avoiding or prevepting a lawful arrest or effecting an escape from custody.

Sixth, the crime for which the defendant is to be sentenced was committed for financial gain.

Seventh, the crime for which the defendant is to be sentenced was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws. There has been no evidence presented concerning this factor, and the Court directs you that you shall not consider that factor.

Eight. The crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel. The Court finds that under

> controlling law in this State there is not sufficient evidence to support that aggravating factor, and the Court directs that you shall not consider it.
>
> If you find that the aggravating circumstances do not justify the death penalty, then your advisory sentence should be one of life imprisonment without possibility of parole for twenty-five years.
>
> MR. BLANKNER: If it please the Court, may we approach the bench?
>
> THE COURT: Yes, you may.
>
> (Whereupon, a conference was had at the bench, out of the hearing of the Court Reporter.)
>
> THE COURT: There is one additional aggravatiny factor that I omitted, and that is:
>
> Mine. 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. 1097-99)(emphasis added).

In "direct[ing]" the jury not to consider certain aggravating factors, the court also directed the jury that the remaining factors were applicable and were supported by the evidence. Trial counsel made no objection, and thus this Court refused to consider this issue on direct appeal. White, 446 So. 2d at 1036. Again, appellate counsel failed to raise trial counsel's ineffectiveness.

The procedure followed by the trial court was contrary to

the standard jury instructions, which direct the judge to "give only those aggravating circumstances for which evidence has been presented." This procedure also violated fundamental principles of due process, and usurped the jury's central role in Florida's capital sentencing scheme. In recommending a sentence, the jury determines if any aggravating circumstances apply, and then weighs the aggravating factors against mitigation. Here, the trial court told the jurors which aggravating factors applied, thus leaving the jury with no decision to make. It is settled that "a trial judge is prohibited from . . . directing the jury to come forward [with a particular verdict] . . . regardless of how overwhelming the evidence may point in that direction." Rose v. Clark, 106 S. Ct. 3101, 3106 (1986), citing United States v. Martin Linen Supply Co., 430 U.S. 564, 572-73 (1977). The trial court here wholly relieved the State of its burden to establish aggravating circumstances; this is classic fundamental error.

Issues regarding error in jury instructions are analyzed according to "what a reasonable juror could have understood the charge as meaning." Francis v. Franklin, 105 S. Ct. 1965, 1972 (1985); Mills v. Maryland, 108 S. Ct. 1860 (1988). If a reasonable juror could have understood the instructions at issue here as informing the jury that certain aggravating factors were established, the instructions do not comport with due process, or with the eighth amendment.

This fundamental constitutional impropriety is precisely what happened here, for there can be no doubt that reasonable jurors would understand the instruction at issue as informing them that aggravating factors had been established. In this regard it is noteworthy that standard instructions on the State's duty to prove its case beyond a reasonable doubt are not sufficient to cure the error produced by an instruction such as the one herein at issue. See Franklin, 105 S. Ct. at 1973-74. Likewise, language elsewhere in the instructions that "merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." Id. at 1975. If a "reasonable possibility of an unconstitutional understanding exists," id. at 1976, n.8, the resulting verdict must be set aside. Id.; see also Mills. Nothing in the trial court's other instructions in this case in any way explained, corrected, or cured the infirm instructions.

Trial counsel's inaction allowed the court to instruct the jury that certain aggravating circumstances had been established, and thereby to direct a verdict of death. Such an omission could only result from sheer ignorance. The court's instructions deprived Mr. White of his right to a recommendation made by the jury, precluded the jury from making a reliable and individualized decision, and violated the eighth and fourteenth amendments. Appellate counsel's failure to bring trial counsel's

ineffectiveness to this Court's attention on direct appeal deprived Mr. White of the reversal to which he was entitled.

D. THE STATE'S EXHIBITS AT THE PENALTY PHASE CONTAINED INADMISSIBLE, IRRELEVANT, AND INFLAMMATORY INFORMATION, AND THEIR ADMISSION DEPRIVED MR. WHITE OF HIS RIGHT TO A FAIR, RELIABLE, AND INDIVIDUALIZED CAPITAL SENTENCING DETERMINATION, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

At the penalty phase, the State introduced three exhibits to establish the "previous conviction involving violence" aggravating circumstance (**see** R. 1048-51). While these exhibits contained judgments and sentences for prior offenses, they also contained the informations filed in those cases. Thus, the jury was provided with evidence regarding prior charges, not just convictions, and regarding charges and convictions which were not felonies and did not involve violence.

This evidence was clearly inadmissible, and, just as clearly, was inflammatory and prejudicial. State's Exhibit 2, for example, showed that Mr. White was originally charged with assault with intent to commit first degree murder, but the conviction was for a lesser offense of aggravated assault. During closing argument, the prosecutor pointed out to the jury that "[t]he original charge was assault with intent to commit first degree murder" and urged the jurors to read the information (R. 1074). At the time of Mr. White's trial, it was well-established that the "prior conviction" aggravating factor

referred only to convictions, not to charges: "the language of [the statute] excludes the possibility of considering mere arrests or accusations as factors in aggravation." Provence v. State, 337 So. 2d 783, 786 (Fla. 1976); see also Spaziano v. State, 393 So. 2d 1119, 1122-23 (Fla. 1981); Garron v. State, 528 So. 2d 353, 360 (Fla. 1988). In addition to being inadmissible under the statute, information contained in State's Exhibit 2, indicating an offense of which Mr. White was not convicted, provided the jury with misinformation of constitutional magnitude to support aggravation. See Johnson v. Mississippi, 108 S. Ct. 1981 (1988).

State's Exhibit 3 contains an information listing two charges of escape, one charge of aggravated assault, and two charges of auto larceny. Mr. White was convicted of one misdemeanor escape charge and of aggravated assault. Obviously, a misdemeanor does not satisfy the statutory language. In addition to not being convictions, the escape and larceny charges are also not within the ambit of the "prior conviction" aggravator, which "refers to life-threatening crimes." Lewis v. State, 398 So. 2d 432, 438 (Fla. 1981). Lewis specifically held that escape and larceny do not fit this definition. Id. Thus, Exhibit 3 also provided the jury with misinformation of constitutional magnitude. Johnson.

Trial counsel did not object to the admission of these

exhibits, and this Court refused to address this issue on direct appeal. White, 446 So. 2d at 1036. Trial counsel's actions could only have resulted from ignorance or indifference, as Provence and Lewis were clearly the law at the time of Mr. White's trial. Again, appellate counsel failed to bring trial counsel's blatant errors to this Court's attention on direct appeal. Mr. White was deprived of his right to a fair, reliable, and individualized capital sentencing determination, and was deprived of the appellate reversal to which he was entitled.

E. IMPROPER PROSECUTORIAL ARGUMENT AT THE PENALTY PHASE INJECTED IRRELEVANT AND INFLAMMATORY CONSIDERATIONS INTO THE JURY'S DELIBERATIONS, MISREPRESENTED THE LAW, AND MISREPRESENTED THE EVIDENCE, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

During closing argument at the penalty phase, the prosecutor repeatedly argued matters that were not legitimate considerations and that could not provide a basis for any of the statutory aggravating factors. These arguments injected inflammatory and prejudicial matters into the jury's deliberations, and materially misled the jury regarding the matters which were proper for its consideration.

The prosecutor repeatedly referred to Mr. White's encounter with the Tehanis in the store immediately after the incident as evidence establishing aggravation. For example, regarding the "cold, calculated, and premeditated" aggravating factor, the

prosecutor argued:

> You have convicted the defendant of armed robbery and murder, and I suggest the evidence clearly shows that it was committed in a cold and calculated manner, execution style, that both of those men were marched into the back room, and that the defendant did shoot those two men to death.
>
> You can consider the evidence also, the shooting of Mr. Alexander, as well as the gun being pointed at Pamela Tehani and her father, Henry Tehani, and the trigger being pulled on the gun twice on them. That shows how cold and calculated this crime was. I suggest to you the defendant planned it to the extent that he went in with a loaded revolver in his pants for the purpose of committing armed robbery, and he went in without a mask, and he had no intention whatsoever of having any eyewitnesses testify against him....

(R. 1079) (emphasis added).

Regarding the "avoiding arrest" aggravating factor, the prosecutor argued:

> And also Pamela Tehani came into the store with her father, both being ordered into the freezer next to that back room. The defendant never threatened by word, saying, if you don't go in that room I'm going to shoot you, but asked them to go into that back room several times, and he pulled the trigger on that gun, not only once, but twice. I suggest to you that is showing again that his intention was to have no eyewitnesses, so that he could not be arrested for this charge of armed robbery. So that would be a third aggravating factor.

(R. 1077) (emphasis added).

These arguments were wholly improper and misled the jury

regarding the matters which were proper to consider. The capital sentencing statute provides: "[t]he capital felony was committed for the purpose of avoiding or preventing a lawful arrest, Fla. Stat. sec. 921.141(5)(e)(emphasis added); "[t]he capital felony was . . . committed in a cold, calculated, and premeditated manner." Fla. Stat. sec. 921.141(5)(i) (emphasis added). The language of the statute contemplates that these factors apply when the capital felony itself exhibits these characteristics. Indeed, this Court has held that the "avoiding arrest" factor cannot be based upon events occurring after the homicide victim's death. See, e.g., Herzog v. State, 439 So. 2d 1372, 1379 (Fla. 1983); Menendez v. State, 368 So. 2d 1278, 1282 (Fla. 1979); Riley v. State, 366 So. 2d 19, 22 (Fla. 1978).

In support of the "cold, calculated" factor, the prosecutor also made arguments on which there was no evidence: "I suggest the evidence clearly shows that it was committed in a cold and calculated manner, execution style, that both of those men were marched into the back room, and that the defendant did shoot those two men to death" (R. 1079)(emphasis added). There was absolutely no evidence of any "march".

The prosecutor also argued nonstatutory aggravating factors. In referring to State's Exhibit 2, the prosecutor argued that the original charge against Mr. White in that case was assault with intent to commit first degree murder (R. 1074). Regarding

State's Exhibit 3, the prosecutor urged the jury to look at the "Information containing several different charges" (id). These arguments were utterly improper because only prior convictions can be considered (see Section D, supra). The prosecutor also argued that if Mr. White received a life sentence, "You can consider the likelihood of whether or not he would come out of prison and therefore be back. So I ask you to consider that as well" (R. 1081). Finally, the State made a "this is your community" argument (R. 1082), appealing to the jury's prejudice and sympathy.

These arguments violated due process and the eighth amendment. The prosecutor's arguments demonstrate plainly that Mr. White's death sentence was based upon "factors that are constitutionally impermissible or totally irrelevant to the sentencing process," Zant v. Stephens, 462 U.S. 862, 885 (1983), and upon "caprice or emotion," Gardner, rather than upon a reasoned, individualized or particularized assessment of the appropriate penalty. Here, as in Potts v. Zant, 734 F.2d 526, 536 (11th Cir. 1984), because of the impermissible considerations permeating the prosecutor's argument, the judge and jury "failed to give [their] decision the independent and unprejudiced consideration the law requires." Here, as in Wilson v. Kemp, 777 F.2d 621, 626 (11th Cir. 1985), the prosecutor's argument "tend[ed] to mislead the jury about the proper scope of its

deliberations." In such circumstances, "[w]hen core Eighth Amendment concerns are substantially impinged upon . . . confidence in the jury's decision will be undermined," id. at 627, because consideration of such errors in capital cases "must be guided by [a] concern for reliability." Id. See also Moore v. Kemp, 809 F.2d 702, 747-50 (11th Cir. 1987)(in banc)(Johnson, J., concurring in part and dissenting in part): Newlon v. Armontrout, 885 F.2d 1328, 1338 (8th Cir. 1989), quoting Coleman v. Brown, 802 F.2d 1227, 1239 (10th Cir. 1986)("'[a] decision on the propriety of a closing argument must look to the Eighth Amendment's command that a death sentence be based on a complete assessment of the defendant's individual circumstances . . . and the Fourteenth Amendment's guarantee that no one be deprived of life without due process of law'")(citations omitted).

A sentence of death cannot stand when it results from prosecutorial comments or judicial instructions which *may* mislead the jury into imposing a sentence of death, see Wilson v. Kemp, 777 F.2d at 626, and a defendant must not be sentenced to die by a jury which may have "failed to give its decision the independent and unprejudiced consideration the law requires." Wilson, 777 F.2d at 621, quoting Potts v. Zant, 734 F.2d 526, 536 (11th Cir. 1984): see also Drake v. Kemp. In short, a sentencing proceeding is flatly unreliable when the jurors are misled as to their role in the sentencing proceeding, as to the matters which

are proper for their consideration, or as to the procedure which they must follow in making their determination of what is the proper sentence under the circumstances.

During all of the prosecutor's improper arguments, defense counsel voiced not one objection. As a result, on direct appeal, this Court refused to consider the issue. White, **446** So. 2d at **1036**. Again, trial counsel failed to point out trial counsel's ineptitude. Mr. White was deprived of his right to a fair, reliable, and individualized capital sentencing determination, and to the appellate reversal which would have occurred had this issue been properly preserved.

F. THE PROSECUTOR'S ARGUMENTS AT THE GUILT PHASE WERE PERMEATED WITH IMPROPER, IRRELEVANT, INFLAMMATORY, AND PREJUDICIAL MATTERS, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

A number of highly improper comments were made by the prosecutor during his guilt phase arguments. These arguments infected the proceedings with irrelevant, inflammatory, prejudicial and misleading matters. As a result, Mr. White's capital conviction and sentence of death violate the sixth, eighth, and fourteenth amendments.

During closing arguments the prosecutor repeatedly referred to Mr. White as a "nine-time convicted felon." While it is proper to use prior convictions to impeach the credibility of a

defendant (sec. 90.610, Fla. Stat. (1981)), that was not the prosecutor's intent. In the context in which this phrase was used, the intent was to prove a substantive point. This is clear by a simple reading of the transcript:

> Why did the defendant bring that gun out? I suggest to you the defendant--and I ask you to keep this in mind--a nine-time convicted felon--not once, not twice, not three times, not four times, not five times, not six times, not seven times, not eight times, but nine times-- a nine-time convicted felon goes into a country grocery store with a loaded .38 caliber revolver. And he knew it was loaded, he knew it was ready to be used, because it was used.

(R. 923)(emphasis added).

And again, in concluding the argument the prosecutor stated:

> Beyond evesy reasonable doubt, ladies and gentlemen, the defendant went into that store, a nine-time convicted felon, and cleared that cash register, he marched those two men to the back room, and shot them in the head, so he would have no eyewitnesses. Beyond every reasonable doubt.

(R. 932)(emphasis added).

The prosecutor's argument was that because Mr. White had been convicted nine times for felonies, it was likely that he did plan and carry out the robbery and murder. In other words, the prior felonies were used as an indication of his propensity to commit felonies and to establish that he committed this offense.

It is improper to use prior convictions to show bad character or propensity to commit crime. Goodman v. State, 336

So. 2d 1264 (Fla. 4th DCA 1976). The prosecutor here went far beyond the permitted use of the prior convictions.

The prosecutor also improperly argued that Mr. White should die because one of the victim was crippled. During both his opening statement and closing argument, the prosecutor brought to the jury's attention the serious medical plight of Mr. Alexander. In his opening statement, the prosecutor said:

> Mr. Alexander did not die as a result of that injury, but he is permanently crippled and is a quadriplegic at this time and will not testify in this trial. He is not capable of testifying. He is on a respirator in Tampa.

(R. 216).

The prosecutor also referred to Mr. Alexander's condition again in closing argument and also noted that he was a "community citizen" (R. 916, 918). The prosecutor's argument was clearly an attempt to argue that Mr. Alexander's condition and character were reasons that Mr. White should die. Cf. Booth v. Maryland, 107 S. Ct. 2529 (1987); South Carolina v. Gathers, 109 S. t. 2207 (1989).

Mr. Alexander's medical condition and character were irrelevant; hence, the concerted efforts of the prosecutor to inflame the jury with this fact was highly improper and prejudicial. The obvious intent was to arouse empathy and sympathy from the jury. Such appeals are improper. See Vela v. Estelle, 708 F.2d 954 (5th Cir. 1983); Wilson v. Kemp, 777 F.2d

621 (11th Cir. 1985); Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985)(in banc).

The State also misrepresented the definition of premeditation. During voir dire examination the prosecutor on numerous occasions asked the jury to consider a definition of premeditation. He repeatedly suggested that the definition of premeditation is "killing after consciously deciding to do so" (R. 49-52, 150-153). While this phrase is found in the standard jury instruction, it is merely a part of the instruction (Florida Standard Jury Instructions In Criminal Cases, Second Edition, p. 63). The standard definition is much more complete and detailed.

The prosecutor failed to indicate to the jury that the definition was more involved. He intentionally left the jury with the impression that his statement was complete. In fact, after giving his shortened definition, he said it was "very simple" (R. 49, 150). The truth is that the premeditation definition is much more detailed and complex.

The prosecutor did not stop with this. He then proceeded to give the following improper hypothetical situation:

> Let's assume you're driving in an automobile. Okay. Let's assume both of you are driving in an automobile, and you are driving down Magnolia. And you drive up to, let's say, Colonial Drive. And you are hitting most of the lights, and you are going through, and they are just turning green, from red to green so that you can go through them. And you get up to Colonial Drive, and it's not in sync with the rest of the lights.

> And as you're about fifty yards or so away, you see the green light turn yellow, and you determine to go ahead and go through the light regardless of whether or not you are going to make it before it turns red. (R. 51).

The prosecutor then repeated these hypothetical facts (R. 152).

Further, during closing statements the prosecutor informed the jury that premeditation can be formed in an "instant" (R. 915). The obvious result of this effort was to mislead the jury with an erroneous and incomplete understanding of the definition of premeditation.

The jury was led to equate premeditation with intent. This is incorrect. See Barnhill v. State, 48 So. 258 (Fla. 1908), Miller v. State, 77 So. 669 (Fla. 1918) and Polk v. State, 179 So. 2d 236 (Fla. 2nd DCA 1965). The intent must be fully formed and must have been in mind long enough for reflection. See McCutchen v. State, 36 So. 2d 152 (Fla. 1957), Weaver v. State, 220 So. 2d 53 (Fla. 2nd DCA 1969) and Florida Standard Jury Instructions In Criminal Cases, supra.

In closing argument the prosecutor said that the Appellant asked for change for a one-hundred dollar bill to see if enough money existed and said that this was a ruse which was "done all the time" (R. 924). This was an improper comment on a matter which was not presented in evidence. As stated in Frenette v. State, 29 So. 2d 869, 870 (Fla. 1947):

> A prosecuting attorney should always confine his arguments to facts which are established by the record or which may be reasonably inferred from the facts established, and when he goes beyond that range he takes the chance that he may thereby cause the necessity of the reversal of a favorable judgment.

The prosecutor also used evidence of collateral crimes not charged to urge a finding of guilt:

> I suggest to you he intended to kill Mr. Tehani and his daughter Pamela Tehani, just as he intended to kill James Melson, did kill James Melson, and intended to kill Mr. Alexander....(R. 927).

As he did with Mr. White's prior convictions, the prosecutor used properly admitted evidence to argue improper conclusions. The argument involved statements of collateral crimes not charged. The only way other crimes can be argued is by prior convictions or by similar fact evidence (Williams Rule evidence) as provided for in sec. 90.404(2), Fla. Stat. (1981). Since no effort was made to introduce this evidence under the statutory procedures for similar fact evidence, it was improper to argue the evidence in this fashion.

Finally, during the testimony of one of the witnesses, the prosecutor sought to introduce a "mug shot" of Mr. White. Trial counsel objected to the introduction until it was stipulated that the prosecutor would inform the jury that the "mug shot" was taken in conjunction with the current case (R. 670-671). Pursuant to this agreement, the prosecutor made the stipulated

disclosure but then went beyond the agreement and stated:

> ...after the indictment was brought down by the grand jurors. (R. 671).

There was absolutely no relevancy to this statement. The only reason to so inform the jury would be to bring to their attention that some other jury had ruled on the case. The obvious effect of this would be to make the jury trying the case reluctant to overrule the decision of grand jury. The remark was highly prejudicial and unwarranted. In Giamo v. State, 245 So. 2d 117 (Fla. 3rd DCA 1971) the prosecutor made comments concerning the fact that the grand jury had returned an indictment. The court said that the remarks were improper but reversal was not indicated because the trial court promptly instructed the jury to disregard the comments. In the case at bar no such instruction was given and the improper comment remained for the jury's consideration.

Taken individually and together, the improper comments of the prosecutor deprived Mr. White of his right to a fundamentally fair and reliable guilt-innocence and sentencing determination. Trial counsel was ineffective for failure to object. Appellate counsel was ineffective for failing to present trial counsel's ineffectiveness to this Court, for trial counsel's unreasonable and prejudicial omissions are evident from the face of the record. Relief is required.

G. THE JURY WAS NOT INSTRUCTED ON ALL LESSER INCLUDED OFFENSES, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

During the instructions to the jury the lower court did not instruct the jury on the lesser included offenses of attempted first degree murder and third degree murder (R. 968-970).

As to the crimes which are divided into degrees, this Court has held:

> If an accused is charged with the highest degree of such a crime, the court should charge the jury on all lesser degrees. In this category it is immaterial whether the indictment specifically charges the lesser degrees or whether there is any evidence of a crime of such degree.

Brown v. State, 206 So.2d 377, 381 (Fla. 1968). This Court gave the specific example of the homicide statute as being a crime divided into degrees. Since the case at bar involves a homicide, it was error to omit one of the degrees -- third degree murder. Sec. 782.04(4), Fla. Stat. (1981).

Brown, supra, also establishes that if an attempt to commit a crime constitutes an offense under Florida law, an instruction on attempt must be given to the jury. The judge in the instant case failed to give such an instruction.

The lower court also failed, under the robbery count, to give all of the lesser included offenses of robbery with a weapon and strongarm robbery (R. 975-979). See sec. 812.13, Fla. Stat. (1981). The statute establishes degrees of robbery, thus

invoking the rule of Brown, supra, which requires instructing on the lessers.

In addition, although the trial court followed the standard instruction in defining felony murder, it erred in doing so. Florida Standard Jury Instruction in Criminal Cases, Second Edition, page 64, includes killing while escaping from the immediate scene of the crime. The court so instructed the jury (R. 967). The statute only provides for the felony murder occurring during the actual perpetration or the attempt to perpetrate the crime and says nothing about "escaping". Sec. 782.04(1)(a), Fla. Stat. (1981). Thus, the standard instruction has no basis in law and it was improper to give this portion of the instruction.

The facts in Mr. White's case were consistent with the lesser offenses. Mr. White testified in his own behalf at the guilt/innocence phase of the trial. He stated that he stopped at the store where the killings occurred entirely by happenchance. Since his car was overheating, he stopped at his cousin's house to put water in it (R. 815-820). The car went a short distance and stalled again. This time he backed it off on the wrong side of the road, leaving the passenger door open, and started walking back to his cousin's house (R. 822). This account was verified at trial by testimony that the car was backed off on the wrong side of the road, with the passenger door open and the hood up

(R. 437). The car was known to have a problem with overheating (R. ___). On the way to his cousin's house, he decided to stop at a store to get a beer. He was carrying several hundred dollar bills and a gun (R. **823).** This was corroborated by testimony that Mr. White was in possession of a large sum of money (R. **655, 789, 798).** Mr. White then stated that the owner agreed to change five hundred dollar bills if he would pay $5 for groceries for each one (R. **823).** Mr. White agreed to this arrangment but the store proprietor kept one of the hundred dollar bills and only gave him change for **$400** (R. **824).** Mr. White testified he had no intent to rob the proprietor, which is corroborated by the fact the victim was found to have **$1,300** in his pocket (R. **544).** Mr. White testified he had been drinking the night before and shortly before the offense (R. **881).** This is corroborated by testimony of witnesses that he appeared drunk or on dope (R. **856).** Mr. White testified that he only shot the victims when the customer lunged at him (R. **825-27).** All of these facts support a theory of third degree murder which is the appropriate charge for a person who kills in the commission of a felony as opposed to a premeditated plan to murder.

All of these facts were of record. Trial counsel ineffectively failed to request the lesser included offenses, failed to object when they were not given, and appellate counsel was ineffective for not raising trial counsel's ineffectiveness

as a matter of record. Due to this ineffectiveness of trial counsel and appellate counsel, this Court was not given the opportunity to address the issue on direct appeal. White, 446 So. 2d at 1035.

The facts are such that a reasonable jury could have found Mr. White guilty of a lesser offense. The court was required to properly instruct the jury as to lesser included offenses. Brown, supra. They were not so instructed due to ineffective assistance of trial counsel. Appellate counsel unreasonably failed to raise the ineffectiveness of trial counsel issue, which was apparent in the record.

The eighth amendment requires that a verdict in a capital case be reliable:

> While we have never held that a defendant is entitled to a lesser included offense instruction as a matter of due process, the nearly universal acceptance of the rule in both state and federal courts establishes the value to the defendant of this procedural safeguard. That safeguard would seem to be especially important in a case such as this. For when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense--but leaves some doubt with respect to an element that would justify conviction of a capital offense--the failure to give the jury the "third option" of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction.
>
> Such a risk cannot be tolerated in a case in which the defendant's life is at stake.

Beck v. Alabama, 100 S. Ct. 2382, 2389 (1980)(emphasis added). In Beck the court required the giving of lesser included offenses:

> In the federal courts, it has long been "beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater." Keeble v. United States, supra, at 208, 93 S.Ct., at 1997.

100 S. Ct. at 2389.

Further, failure to properly instruct a jury cannot be corrected by subsequent judicial proceedings:

> The State's second argument is that, even if a defendant is erroneously convicted, the fact that the judge has the ultimate sentencing power will ensure that he is not improperly sentenced to death. Again, we are not persuaded that sentencing by the judge compensates for the risk that the jury may return an improper verdict because of the unavailability of a "third option."
>
> If a fully instructed jury would find the defendant guilty only of a lesser, noncapital offense, the judge would not have the opportunity to impose the death sentence. Moreover, it is manifest that the jury's verdict must have a tendency to motivate the judge to impose the same sentence that the jury did. Indeed, according to statistics submitted by the State's Attorney General, it is fair to infer that the jury verdict will ordinarily be followed by the judge even though he must hold a separate hearing in aggravation and mitigation before he imposes sentence. Under these circumstances, we are unwilling to presume that a post-trial hearing will always correct whatever mistakes

have occurred in the performance of the jury's factfinding function.

100 S. Ct. at 2393-94.

Mr. White's jury never knew that the law provided a verdict that fit the circumstances of his case. They were never given the option to consider the verdict. The verdict in this capital case is unreliable and violates due process and the eighth amendment. Relief should be granted.

H. CONCLUSION

Because of trial counsel's unreasonable omissions, numerous substantial errors were not preserved for direct appeal. This is ineffective assistance of counsel. Kimmelman v. Morrison; Nero v. Blackburn. Because of appellate counsel's omissions, this Court was not provided with a basis for reviewing these substantial errors. Mr. White's direct appeal was thus rendered a mere formality, and he never received the meaningful direct appeal to which he was entitled. The Court's Writ should issue. Mr. White should be afforded a new trial and/or a proper appeal.

CLAIM III

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

The United States Supreme Court's recent decision in Clemons v. Mississippi, **110** S. Ct. **1441 (1990),** concerning the striking of aggravating circumstances on direct appeal requires that this Court revisit its disposition of Mr. White's direct appeal. As in Clemons, Mr. White's death sentence violates the eighth and fourteenth amendments "[b]ecause we cannot be sure which course was followed", Clemons, **110** S. Ct. at **1451,** by this Court on direct appeal and because the mandate of Clemons was not met.

On direct appeal, this Court struck the "pecuniary gain" aggravating factor ***as*** constituting improper **"doubling"** with another aggravating factor, and struck the "cold, calculated, and premeditated" aggravating factor as not having been established beyond a reasonable doubt. White v. State, **446** So. 2d **1031, 1037** (Fla. **1984).** The Court held that only two aggravating factors had been properly applied: that the defendant had a previous conviction of a felony involving violence and that the homicide

occurred during the commission of a robbery. Id. The Court then held:

> When there are one or more valid aggravating factors which support a death sentence, in the absence of any mitigating factor(s) which might override the aggravating factors, death is presumed to be the appropriate penalty. White v. State, 403 So. 2d 331 (Fla. 1981), cert. denied, --U.S. --, 103 S. Ct. 3571, 77 L.Ed.2d 1412 (1983); State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S. Ct. 1950, 40 L.Ed.2d 295 (1974). Id.

In Clemons, the United States Supreme Court held that the "[f]ederal Constitution does not prevent a state appellate court from upholding a death sentence that is based in part on an invalid or improperly defined aggravating circumstance", 110 S. Ct. at 1444, either by 1) reweighing of the aggravating and mitigating evidence or by 2) harmless error review. The Court also held that an appellate court's employment of a "presumption" of death (a ruling that the error is harmless simply because other aggravators remain) violates the eighth amendment. Yet such an inappropriate disposition is precisely what this Honorable Court did on direct appeal in Mr. White's case.

The Clemons court vacated the judgment and remanded to the state courts because "[i]t is unclear whether the Mississippi Supreme Court correctly employed either of these methods." Clemons, 110 S. Ct. at 1444. As in Clemons, Mr. White's death sentence must be vacated because of the failure of this Court to

employ a constitutionally acceptable standard of review upon the striking of two improper aggravating circumstances.

A. REWEIGHING AFTER STRIKING IMPROPER AGGRAVATING CIRCUMSTANCES

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

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

Clemons, 110 S. Ct. at 1446. However, the Court made it abundantly clear that such "reweighing" was proper only if such were allowed by the state's own laws:

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

Id.

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

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

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

2) to insure "relative proportionality among death sentences which have been approved statewide." Brown v. Wainwriaht, 392 So. 2d 1327, 1331 (Fla. 1981), cert. denied, 454 U.S. 1000 (1981).

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

Id. at 1331.

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

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

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

Hudson v. State, 538 So. 2d 829, 831 (Fla. 1989)(citations omitted); Freeman V. State, 15 F.L.W. 330, 331 (Fla. 1990).

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

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

> jury 'might' have imposed the same sentence in the absence of the recidivist statute. [Hicks, 477 U.S.], at 346.

Clemons, 110 S. Ct. at 1447. Capital defendants in Florida have, by virtue of state law, and this Court's construction of that law, a liberty interest in having the trial jury and judge impose capital punishment. Petitioner respectfully submits that this Court's opinion on direct appeal in Mr. White's case also involved the "frail conjecture" condemned in Hicks and Clemons.

B. REWEIGHING AFTER APPLYING PROPER LIMITING CONSTRUCTION

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

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

Clemons, 110 S. Ct. at 1449. However, the Court concluded that it was unclear which weighing function was undertaken by the Mississippi high court, and thus reversed.

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

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

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

C. HARMLESS ERROR BEYOND A REASONABLE DOUBT

Lastly, Clemons held that a sentence of death could be salvaged upon the striking of improper aggravating circumstances

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

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

Clemons, 110 S. Ct. at 1450. In fact, the Supreme Court cited Satterwhite v. Texas, 486 U.S. 249 (1988), for the proposition that a state appellate court could apply a standard of eighth amendment harmlessness review. Satterwhite plainly held that such a standard can only be applied on the basis of a finding of harmlessness beyond any reasonable doubt. This standard, however, was expressly not applied by this Court on direct appeal in Mr. White's case. The Clemons opinion noted that the test of harmless error must be one of harmlessness beyond a reasonable doubt: "Although [Mississippi] applied the proper 'beyond a reasonable doubt' standard, see Chapman v. California, 386 U.S. 18, 24 (1967) . . . ." Id. Chapman, of course, is the classic articulation of the harmlessness beyond a reasonable doubt standard.

In Mr. White's case, that standard was simply not applied on direct appeal -- it was never even mentioned. Indeed, in this case the Court applied a "presumption" of death because there

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

> When there are one or more valid aggravating factors which support a death sentence, in the absence of any mitigating factor(s) which might override the aggravating factors, death is presumed to be the appropriate penalty.

White, 446 So. 2d at 1037 (emphasis added).

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

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

Clemons, 110 S. Ct. at 1451. The result should be the same here, and Mr. White should be allowed a new appeal during which these issues can be properly briefed and considered in light of

Clemons.

D. AUTOMATIC RULE OF AFFIRMANCE

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

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

Clemons, 110 S. Ct. at 1450. As the Clemons court noted, an "automatic" rule of affirmance upon the striking of improper aggravators when there are other aggravators does not "give defendants the individualized treatment" that the eighth amendment requires. But that is what the Court did here, "presum[ing]" death to be appropriate because other aggravators remained. White, 446 So. 2d at 1037. Given the holding of Clemons, reconsideration at this juncture is as appropriate here as it was when this Court revisited its prior disposition in Ms. Jackson's direct appeal in light of Booth v. Maryland. See Jackson v. Dusser, supra.

Further, the judgment of the Mississippi Supreme Court was vacated in Clemons because that court's opinion was virtually

silent as to the particulars of the mitigating evidence presented by the defendant to the jury. Clemons, 110 S. Ct. at **1450**. In Mr. White's case, after striking two aggrevating factors, the Court did not discuss the mitigation before the judge and jury, thus making it unclear that "the court fully heeded [the United States Supreme Court's] cases emphasizing the importance of the sentencer's consideration of a defendant's mitigating evidence." Clemons, id. at **4399**.

On Mr. White's direct appeal, the Court did the one thing specifically held impermissible in Clemons: it automatically affirmed because "death is presumed." White, **446** So. 2d at 1037. Such an affirmance of a death sentence should not be allowed to go uncorrected and the matter should now be revisited. See Kennedy, **483** So. 2d at **426**. See also Jackson v. Dugger, supra.

E. CONCLUSION

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

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

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

In light of Clemons, and given Florida's penalty scheme, the failure of this Coure on direct appeal to remand for resentencing deprived Mr. White of his rights to due process and equal

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

CLAIM IV

AFTER STRIKING TWO AGGRAVATING CIRCUMSTANCES ON DIRECT APPEAL AS HAVING BEEN IMPROPERLY APPLIED, THIS COURT DID NOT CONSIDER THAT, ALTHOUGH THE JURY PLAYS A CENTRAL ROLE IN FLORIDA'S CAPITAL SENTENCING SCHEME, MR. WHITE'S JURY WAS NOT INSTRUCTED UPON THE VERY PRINCIPLES WHICH LED THIS COURT TO STRIKE TWO OF FOUR AGGRAVATING CIRCUMSTANCES AND THUS THAT THE JURY INSTRUCTIONS ON AGGRAVATING CIRCUMSTANCES RESULTED IN THE OVERBROAD AND NON-DISCRETION CHANNELING APPLICATION OF AGGRAVATING FACTORS, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

On direct appeal, this Court struck two of the four aggravating circumstances which the trial court had found in sentencing Mr. White to death. White v. State, 446 So. 2d 1031, 1037 (Fla. 1984). Specifically, the Court held:

Appellant correctly asserts that the trial court erroneously doubted two aggravating factors by finding that appellant committed the murder both while in the commission of a robbery and for pecuniary gain. Francois v. State, 407 So. 2d 885, 891 (Fla. 1981), cert. denied, 458 U.S. 1122, 102 S. Ct. 3511, 73 L.Ed.2d 1384 (1982). The finding embraces but one aggravating factor.

The trial court also found that the killing was cold, calculated, and premeditated. We do not find evidence in the record before us to support a finding beyond a reasonable doubt that there was the kind of heightened premeditation and cold calculation that would permit thin factor to be part of the weighing process. Cf. Cannadv v. State, 427 So.2d 723 (Fla. 1983)(defendant stole money from Ramada Inn, kidnapped a night auditor, drove him to a wooded area and shot him; defendant said he had not meant to shoot the victim -- factor not found): Middleton v. State, 426 So. 2d 548 (Fla. 1982)(defendant confessed that he sat with a shotgun in his hands looking at the victim as she slept and thinking about killing her -- factor not found); Bolender v. State, 422 So. 2d 833 (Fla. 1982), cert. denied, __ U.S. ___, 103 S. Ct. 2111, 77 L.Ed.2d 315 (1983) (defendant held the victims at gunpoint and ordered them to strip, then beat and tortured them during the evening before killing them -- factor found); Mann v. State, 420 So. 2d 578 (Fla. 1982)(ten-year-old girl abducted and suffered several cuts and stab wounds and a fractured skull -- factor not found); Jent v. State, 408 So. 2d 1024 (Fla. 1981), cert. denied, 457 U.S. 111, 102 S. Ct. 2916, 73 L.Ed.2d 1322 (1982) (defendant beat woman, transported her in a car trunk to a house where four men raped her, put her back in the trunk and took her to a game preserve where the defendant and another poured gasoline on her and set her on fire while alive -- factor blended into one with the heinous, atrocious, and cruel factor); Combs v. State, 403 So. 2d 418 (Fla.

1981), cert. denied, 456 U.S. 984, 102 S. Ct. 2258, 72 L.Ed.2d 862 (1982)(defendant first sold cocaine to the victims, then, saying he was leading them to a party, led them instead to a wooded area and held a gun on them, demanded the cocaine, and then shot them -- factor found).

Id. Appellate counsel had argued that these two aggravating factors were improperly applied, that the prosecutor made improper arguments on aggravating factors to the jury, that the jury was not properly instructed regarding aggravating circumstances, and that the aggravating circumstances in Florida's capital sentencing statute were vague and overbroad (See Initial Brief of Appellant, pp. 10-12, 17-19, 23-25). This Court, however, did not consider the impact of the improper aggravating circumstances upon the jury's recommendation and the resulting unreliability of that recommendation.

Although this Court found that the "pecuniary gain" and "during commission of a robbery" aggravating factors had been improperly **"doubled,"** Mr. White's jury was never instructed that such **"doubling"** was impermissible. Although this Court found that the "heightened premeditation" required to establish the "cold, calculated and premeditated" aggravating circumstance had not been proven beyond a reasonable doubt, Mr. White's jury was never instructed on this limiting construction of that factor -- that is, while the jury was instructed that aggravating factors had to be proved beyond a reasonable doubt, the jury was never

instructed regarding what had to be proven beyond a reasonable doubt to establish the "cold, calculated, and premeditated" factor. Thus, although error occurred in sentencing Mr. White to death, the effect of that error upon the jury's recommendation has not been evaluated.

Under Florida's capital sentencing scheme, the "jury's recommendation is an integral part of the death sentencing process." Riley v. Wainwright, 517 So. 2d 656, 657 (Fla. 1987), citing, Lamadline v. State, 303 So. 2d 17, 20 (Fla. 1974)(jury recommendation can be "critical factor" in determining whether or not death penalty should be imposed). A jury's recommendation of life may not be overridden if there is a "reasonable basis" for that recommendation. See, e.g., Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1989); Ferry v. State, 507 So. 2d 1373 (Fla. 1987). As a result of the jury's central role, "[i]f the jury's recommendation, upon which the judge must rely, results from an unconstitutional procedure, then the entire sentencing process necessarily is tainted by that procedure." Riley, 517 So. 2d at 659. Thus, this Court has not hesitated to reverse death sentences and remand for resentencing before a jury when the original jury was improperly instructed regarding mitigation, see, e.g., Mikenas v. Dugger, 519 So. 2d 601 (Fla. 1988); Floyd v. State, 497 So. 2d 1211 (Fla. 1986), when the jury was presented with improper evidence, see, e.g., Preston v. State,

___ So. 2d ___ (Fla. 1990); Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989); Dougan v. State, 470 So. 2d 697 (Fla. 1985), or when the jury was subjected to improper prosecutorial argument. See, e.g., Jackson, supra; Teffeteller v. State, 439 So. 2d 840 (Fla. 1983).

A Florida capital jury's function at sentencing is to "consider and weigh all assravating and mitigating **circumstances."** Floyd v. State, 497 So. 2d 1211, 1215 (Fla. 1986)(emphasis added). See also Valle v. State, 502 So. 2d 1225, 1226 (Fla. 1987)("It is the jury's task to weigh the aggravating and mitigating evidence"). The jury's judgment is entitled to deference not only regarding mitigation (i.e., the "reasonable basis"), but also regarding aggravation. See Hallman v. State, 560 So. 2d 223, 227 (Fla. 1990)(reversing override of jury's life recommendation because, inter alia, "the jury may well have decided that, although four aggravating factors were proved, some were entitled to little weight"); cf. Ferry v. State, 507 So. 2d 1373 (Fla. 1987)(override reversed irrespective of trial judge's finding of five aggravating circumstances); Hawkins v. State, 436 So. 2d 44 (Fla. 1983)(same). The jury's consideration of aggravating factors is thus an essential component of the jury's sentencing decision.

The properly guided consideration of the aggravating factors which the jury is to balance against mitigating factors is

necessary to ensure that the jury's recommendation is reliable. If the jury's recommendation is unreliable, any resulting death sentence is unreliable. Riley. This Court has established limiting constructions of the aggravating circumstances listed in Florida's capital sentencing statute, including those which this Court struck in Mr. White's direct appeal. Under Florida law, aggravating circumstances "must be proven beyond a reasonable doubt." Hamilton v. State, 547 So. 2d 630, 633 (Fla. 1989); State v. Dixon, 283 So. 2d 1 (Fla. 1973). Mr. White's jury was so instructed. Florida law also establishes that limiting constructions of aggravating circumstances are "elements" of the (of the) aggravating circumstances and that "the state must prove [the] element[s] beyond a reasonable doubt." Banda v. State, 536 So. 2d 221, 224 (Fla. 1988). For example, regarding the "cold, calculated, and premeditated" aggravating circumstance, "in the sentencing hearing the state will have to prove beyond a reasonable doubt the elements of the premeditation aggravating factor." Jent v. State, 408 So. 2d 1024, 1032 (Fla. 1989).

This Court has also established a rule prohibiting the "doubling" of separate aggravating circumstances which are founded upon the same aspect of the defendant's crime. See Provence v. State, 337 So. 2d 783 (Fla. 1976). As with the limiting constructions of aggravating circumstances, the prohibition against "doubling" aggravating circumstances is

intended to narrow and guide capital sentencers' discretion to impose death. See, e.g., Provence, 337 So. 2d at 786 (disapproving application of both "pecuniary gain" and "occurring during a robbery" aggravating circumstances because "one who commits a capital crime in the course of a robbery will always begin with two aggravating circumstances against him while those who commit such a crime in the course of any other enumerated felony will not be similarly disadvantaged").

In Mr. White's case, the jury was not instructed on the "heightened premeditation" limiting construction of the "cold, calculated, and premeditated" aggravating circumstance,[8] and was not instructed that applying both the "pecuniary gain" and "occurring during a robbery" factors was prohibited.[9] Thus, the

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[8] In fact, the prosecutor argued a much broader construction of this factor than even the statutory language alone permits. The statute provides that this factor applies when "the capital felony . . . was committed in a cold, calculated, and premeditated manner. . . ." Fla. Stat. sec. 921.141(50(i)(emphasis added). Clearly, the manner of the commission of the homicide itself is the sole basis for applying this factor. However, the state argued that Mr. White's actions toward persons in the store other than the homicide victim (actions for which Mr. White was not even charged with a crime) established this factor (See R. 1079).

[9] Indeed, the manner in which the jury was instructed would have led the jurors to believe that both of these factors should be applied. The court instructed the jury on all of the aggravating factors listed in the statute, but also told the jurors that certain of these factors had not been established (R. 1097-99). The clear implication to the jury was that those factors which the court did not say had not been established should be applied.

penalty phase instructions "fail[ed] adequately to inform [Mr. White's] jur[y] what [it] must find to impose the death penalty." Maynard v. Cartwright, 108 S. Ct. 1853, 1858 (1988). In Florida, the jury's pivotal role in the capital sentencing process requires its sentencing discretion to be channeled and limited. The failure to provide Mr. White's sentencing jury with the proper channeling and limiting instructions violated the eighth amendment principle discussed in Maynard v. Cartwright, and deprived Mr. White of his right to a reliable jury recommendation.

In Maynard v. Cartwright, the Supreme Court held "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, Godfrey v. Georgia, 446 U.S. 420, 433 (1980). Although Cartwright was specifically concerned with Oklahoma's application of the "heinous, atrocious, or cruel" aggravating circumstance, the principles discussed in Cartwright are applicable to other aggravating circumstances. In Mr. White's case, the jury was not instructed as to the limitations placed upon the application of aggravating circumstances. The

failure to so instruct left the jury free to ignore those "elements," and left no principled way to distinguish Mr. White's case from a case in which the state-approved and required limitations were applied and death, as a result, was not imposed. The jury was left with open-ended discretion found to be invalid in Furman V. Georgia, 408 U.S. 238 (1972), and Maynard v. Cartwright.

Mr. White's jury recommended death, and under the applicable law, the judge was bound to follow the recommendation. A Florida sentencing judge cannot simply ignore a jury recommendation of death -- such a recommendation is binding. See LeDuc v. State, 365 So. 2d 149, 151 (Fla. 1978); Stone v. State, 378 So. 2d 765, 773 (Fla. 1980); Chambers v. State, 339 So. 2d 204, 208-09 (Fla. 1976)(England, J., concurring). A jury recommendation of death in Florida is to be accorded deference, LeDuc, supra, as is a recommendation of life. Hall, supra.

> 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.

LeDuc, 365 So. 2d at 151 (emphasis added), citing Tedder v.

State, 322 So. 2d 908 (Fla. 1975).

In Stone v. State, supra, this Court discussed a challenge to a death sentence imposed after a jury death recommendation. The appellant grounded his challenge on a similar case, Swan v. State, 332 So. 2d 485 (Fla. 1975), in which the Florida Supreme Court had reversed the death sentence. In affirming Stone's sentence, the Court pointed out the critical difference between Stone's case and Swan's:

> Swan's jury recommended mercy while Stone's recommended death and the jury recommendation is entitled- to sreat weight. Tedder v. State, 322 So.2d 557 (Fla. 1975).

Stone, 378 So. 2d at 773 (emphasis added). As is obvious, Tedder is the standard cited by this Court as applicable to a jury's death verdict as well as a life verdict. Whether it be death or life, a Florida sentencing jury's verdict must be given deference. Thus, Mr. White had the right to proper jury instructions under Cartwright.

Under Florida law, a capital defendant is entitled to "an advisory opinion" from his sentencing jury. Floyd, 497 So. 2d at 1216. That right includes the right to have the jury accurately and correctly instructed. Where the jury receives inaccurate instructions regarding the mitigating circumstances it must consider, this Court requires a resentencing before another jury unless there is no reasonable basis in the record for a life

recommendation. Hall, supra. In other words, if the record contains mitigation which would insulate a life recommendation from an override, then it is not the appellate court's role to substitute its judgment for the jury's. The eighth amendment requires no less.

In Mr. White's case, there was evidence in the record upon which the jury could reasonably have based a life recommendation. Several State witnesses testified that Mr. White appeared to be intoxicated immediately before and after the offense (R. **433, 460, 469, 473),** and that he had been drinking throughout the night before the offense (R. **661-62).** Mr. White still appeared disoriented, confused, and under the influence of alcohol several hours after the offense (R. **681).** Mr. White's uncle testified that Mr. White blanks out and loses time and memory when he drinks (R. 1053). Mr. White's mother testified that Mr. White did not know his natural father and that his stepfather died violently when Mr. White was about **12** years old **(R.** 1055).

In Florida, the jury is entitled to determine the weight of the aggravating circumstances and the mitigating circumstances after proper instructions have been given. **A** Florida jury determines the balance of aggravation and mitigation, and whether to recommend life or death. If the jury recommends life, that recommendation must be followed if there is a reasonable basis, i.e., evidence in mitigation, upon which a life sentence could

rest. Instructional error cannot be harmless where there was evidence in mitigation upon which a properly instructed jury could have premised a life recommendation. The jury must then be allowed to balance the statutorily defined aggravating circumstances and the evidence in mitigation and make a sentencing recommendation. Here, since mitigation existed in the record, the error cannot be found to be harmless.

CLAIM V

THE EIGHTH AMENDMENT WAS VIOLATED BY THE SENTENCING COURT'S REFUSAL TO FIND THE MITIGATING CIRCUMSTANCES CLEARLY SET OUT IN THE RECORD AND FUNDAMENTAL ERROR HAS BEEN SHOWN, WARRANTING THE ISSUANCE OF THE WRIT.

Pursuant to the eighth and fourteenth amendments, a state's capital sentencing scheme must establish appropriate standards to channel the sentencing authority's discretion, thereby "eliminating total arbitrariness and capriciousness" in the imposition of the death penalty. Proffitt v. Florida, 428 U.S. 1242 (1976). On review of a death sentence the record should be reviewed to determine whether there is support for the sentencing court's finding that certain mitigating circumstances are not present. Magwood v. Smith, 791 F.2d 1438, 1449 (11th Cir. 1986). Where that finding is clearly erroneous the defendant "is entitled to resentencing." Id. at 1450.

The sentencing judge in Mr. White's case found no mitigating circumstances (R. 1995). Finding four[10] aggravating circumstances the court imposed death (R. 1996). The court's conclusion that no mitigating circumstances were present, however, is belied by the record. Several nonstatutory mitigating circumstances were reflected in the record.

The State did not contest the record mitigating evidence however, the court not only refused to find this mitigation but failed to even consider it:

> The advisory jury is entitled to consider any other mitigating circumstance found in the evidence or the Defendant's character. The court has also searched the record and has found that none exist. The Defendant is single with no children to support. He has a limited employment background and, in fact, admitted to the sale or delivery of controlled substances shortly before the murder. He has shown no remorse for his actions.

(R. 1995).

The trial record is replete with evidence from the State's witnesses of Mr. White's advanced state of intoxication at the time of the offense. A customer who observed Mr. White immediately before the shooting stated that "his eyes looked funny like he might have been drunk" (R. 433). Another customer

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[10]Two of the four agravating circumstances were struck on direct appeal.

thought that Mr. White was "on dope," observed that he hadn't shaved in a couple of days, and saw him almost fall as he was running away (R. **459, 462, 473).** When Mr. White was arrested his clothes were hanging around in the bushes and money was scattered around on the ground (R. **527).** The court also heard evidence that Mr. White's blood alcohol was **.174** milligrams (far above the legal limit for intoxication) almost four hours later at the hospital and that he appeared unresponsive to voice commands (R. **852, 856, 858, 869).**

At the penalty phase, Mr. White's uncle testified to a long standing alcohol problem which caused memory loss, time loss and blackouts (R. **1053).** His mother described how the family was deserted by Mr. White's natural father and his stepfather was killed when he was a young boy (R. **1055).** She described him as quiet and a good boy who would take the blame for other people **(R. 1055).** His uncle also told the judge and jury that Mr. White worked with him remodeling houses (R. **1053).** His mother told how he was sent to Marianna Boys School and that when he came back he was very different and that he never finished high school (R. **1055).** Mr. White's girlfriend testified that he was on medication for a heart condition (R. **1058).**

The trial court acknowledged the evidence of intoxication but refused to consider it as nonstatutory mitigation:

(f) Althoush there was evidence that the

> Defendant had been drinking alcoholic beveraaes before the crime there is no evidence that he was substantially impaired in his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

(R. 1995)(emphasis added). The court also refused to consider the other mitigating evidence of blackouts, lack of a father, heart condition, early incarceration and lack of education.

The Court's refusal to consider mitigating evidence which the Court itself acknowledged as established by the evidence is clearly error. A court cannot acknowledge the presence of mitigating evidence And then refuse to weigh it:

> As this case demonstrates, our state courts continue to experience difficulty in uniformly addressing mitigating circumstances under section 921.141(3), Florida Statutes 91985), which requires "specific written findings of fact based upon [aggravating and mitigating] circumstances." Federal caselaw additionally states that
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> > [j]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence. . . . The sentencer, and the [appellate court], may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration
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> Eddings V. Oklahoma, 455 U.S. 104, 114-15 (1982)(emphasis and footnote omitted). We provide the following guidelines to clarify the issue.
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> When addressing mitigating circumstances, the sentencing court must

> expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature. See Rosers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988). The court must find as a mitisatins circumstance each proposed factor that has been reasonably established by the evidence and is mitisatins in nature. "A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established." Fla. Std. Jury Instr. (Crim.) at 81. The court next must weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance. Althoush the relative weisht given each mitisatins factor is within the province of the sentencins court, a mitisatins factor once found cannot be dismissed as having no weisht. To be sustained, the trial court's final decision in the weighing process must be supported by "sufficient competent evidence in the record." Brown V. Wainwright, 392 So.2d 1327, 1331 (Fla. 1981). Hopefully, use of these guildelines will promote the uniform application of mitigating circumstances in reaching the individualized decision required by law.

Campbell v. State, 15 F.L.W. 5342, 5343-44 (Fla. 1990)(emphasis added). Here the trial court refused to even consider, much less find, the mitigating factors not only established by the record, but also actually recognized by the trial court.

Under Eddings, Magwood, and Campbell, the sentencing court's refusal to accept and find the plain mitigating circumstances

involved in this case was fundamental error. Mitigating circumstances that are clear from the record must be recognized or else the sentencing is constitutionally suspect. How can the required balancing occur when the "ultimate" sentencer has failed to consider obvious mitigating circumstances? This issue was raised and rejected on direct appeal. White, 446 So.2d at 1036. In light of Campbell, it should be reconsidered, the factors should be recognized, and relief should be granted. Fundamental error has been shown, and the Writ should issue.

CLAIM VI

THE PENALTY PHASE JURY INSTRUCTIONS AND PROSECUTORIAL ARGUMENT SHIFTED THE BURDEN TO MR. WHITE TO PROVE THAT DEATH WAS NOT APPROPRIATE, LIMITED FULL CONSIDERATION OF MITIGATING CIRCUMSTANCES, TO THOSE WHICH OUTWEIGHED AGGRAVATING CIRCUMSTANCES, AND VIOLATED STATE LAW IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

The jury in this case was instructed that death was the proper sentence once aggravation was proved, unless and until the defense presented enough in mitigation to overcome the aggravation. This standard -- one provided to the jury in the sentencing instructions and then apparently employed by the sentenced judge, see Ziegler v. Dusser, 524 So. 2d 419, 420 (Fla. 1988)("Unless there is something in the record to suggest to the contrary, it may be presumed that the judge's perception of the

law coincided with the manner in which the jury was instructed.") -- shifted the burden to Mr. White to prove that death was not appropriate, in violation of the fifth, sixth, eighth and fourteenth amendments, and Florida law.

Mr. White's sentencing jury was instructed at the outset of the sentencing process:

> The State and the defense may now present evidence relative to the nature of the crime and the character of the defendant. You are instructed that this evidence, when considered with the evidence you have 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, if any. At the conclusion of the taking of the evidence and after argument of counsel, you will be instructed on the factors in aggravation and mitigation that you may consider.

(R. 1044).

After the presentation of evidence, the State's closing argument emphasized this burden shifting:

> And the Court will tell you that in making that recommendation you must determine there are aggravating factors. After you make that determination, you are then to consider the facts of the case and the evidence that was presented at the Hearing this morning, by the Defense or by the State, and determine if the mitigating factors, if there are sufficient mitigating factors to outweigh the aggravating factors. If you find that the mitigating factors outweigh the aggravating circumstances, then the Court will instruct you that your recommendation to the Court is

for life imprisonment.

(R. 1072-73).

> But I suggest to you that you are legally entitled, and by law can recommend to the Court that the defendant be sentenced to death in this case because of the weight of the aggravating factors in this case, that there is no mitigating factor that outweighs those aggravating factors.

(R. 1082).

After closing arguments, the court further instructed the jury and further solidified the erroneous burden shifting notion:

> As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge. However, it is your duty to follow the law that will now be given to 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. 1096-97). And later:

> 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. **1099).** Such a presumption, however, was never intended for presentation to a Florida capital jury. See Jackson v. Dugger, **837** F.2d **1469, 1473** (11th Cir. **1988).** To apply it before a jury is to eviscerate the requirement that a capital sentencing decision be individualized and reliable. But that is where the

presumption was applied in this case.

Such instructions, which shift to the defendant the burden of proving that life is the appropriate sentence, violate the principles of Mullanev v. Wilbur, **421** U.S. **684 (1975).** The instructions in Mr. White's case violated the eighth and fourteenth amendments, Mullanev v. Wilbur, **421** U.S. **684 (1975),** Lockett v. Ohio, **438** U.S. **586 (1978),** and Mills **v.** Maryland, **108** S. Ct. **1860 (1988).** The burden of proof was shifted to Mr. White on the central sentencing issue of whether he should live or die. This unconstitutional burden-shifting violated Mr. White's due process and eighth amendment rights. See Mullanev, supra. See also Sandstrom **v.** Montana, **442** U.S. **510 (1979);** Jackson v. Duqqer, **837 F.2d 1469 (11th** Cir. **1988).**

Moreover, the application of that unconstitutional standard at the sentencing phase violated Mr. White'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. The instructions as given plainly shifted to Mr. White the burden to prove that he should receive a life sentence. But **"presumptive"** death sentences have been long condemned. See Woodson v. North Carolina, **428** U.S. **280 (1976);**

Sumner v. Shuman, 107 S. Ct. 2716 (1987).[11]

This burden-shifting standard was also contrary to settled Florida precedent. In Aranao v. State, 411 So. 2d 172, 174 (Fla. 1982), this Court held that a capital sentencing jury must

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[11] The Constitution simply does not permit presumptive death sentences and does not permit requiring the defendant to establish that mitigation outweighs aggravation, i.e., to establish that life is the appropriate sentence. Due process and the eighth amendment require the State to establish that death is the appropriate sentence, i.e., that aggravation outweighs mitigation. If any presumption is to be employed in capital sentencing, that presumption should be the same as is employed in every other setting where liberty, property, or life are at stake -- that the defendant is presumed innocent (of the sentence in this case) until the State establishes otherwise. The procedure employed to sentence Mr. White to death presumed death appropriate once *any* aggravating factor was established, and thus rendered the case in mitigation of sentence a nullity. Cf. Penry v. Lynaugh, 109 S. Ct. 2934, 2951 (1989).

Presumptive death sentences are unconstitutional because "the fundamental respect for humanity underlying the Eighth Amendment requires that the defendant be able to present any relevant mitigating evidence that could justify a [sentence less than death]." Shuman, supra, 107 S. Ct. at 2727. A capital defendant must be allowed to present any evidence regarding his or her character and background and the circumstances of the offense which calls for a sentence less than death, Lockett v. Ohio, 438 U.S. 586 (1978), and a capital sentencer must be able to "full[y] consider[]" and "give effect to" that evidence. Penry v. Lynaugh, 109 S. Ct. 2934, 2951 (1989); Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); Eddings v. Oklahoma, 455 U.S. 104 (1982).

However, in instructing that the mitigating circumstances must outweigh aggravating circumstances before the jurors could impose life, the judge effectively told the jury 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 statutory and nonstatutory mitigating evidence. Hitchcock; Penry, supra.

be

> told that %he 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). Thus, Mr. White was sentenced to death in violation of Florida law in effect at the time of his trial and direct appeal.

Moreover, under Florida's standards, a jury's decision to recommend life does not require that the jury conclude that the mitigating circumstances outweighed the aggravating. In fact, a jury recommendation of life may not be overridden if there is a "reasonable basis" for that recommendation, regardless of the number of aggravating circumstances, and regardless of whether the mitigation **"outweighs"** the aggravation. See, e.g., Ferry v. State, 507 So. 2d 1373 (Fla. 1987)(override reversed irrespective of presence of five aggravating circumstances); Hawkins v. State, 436 So. 2d 44 (Fla. 1983)(same). The instructions here were thus not an accurate statement of Florida law. They violated the eighth amendment.

The presumption applied in Mr. White's case effectively barred the jury from considering the mitigation that was present before it. This flies in the face of eighth amendment jurisprudence. See Hitchcock v. Dugger, 107 S. Ct. 1821 (1987);

Lockett v. Ohio, 438 U.S. 586 (1978). The eighth amendment requires an individualized assessment of the appropriateness of the death penalty. Lockett. Petitioner was denied an individualized and reliable capital sentencing determination because only the mitigation which outweighed the aggravation was to be given "full" consideration.

It is not sufficient that a capital defendant be allowed to introduce evidence in support of mitigating circumstances: "[t]he sentencer must also be able to consider and give effect to that evidence in imposing sentence." Penry, supra, 109 S. Ct. at 2951. The jury here, however, was repeatedly instructed that death was presumptively the proper penalty unless the mitigation outweighed the aggravation. Under Florida law, however, a capital sentencing jury can impose life whenever the mitigation provides a "reasonable basis" for determining that a sentence of less than death is warranted. Hall v. State, 541 So. 2d 1125 (Fla. 1989). Thus, the jury here could have imposed life, but could not but have thought themselves precluded from doing so by the presumption placed upon Petitioner.

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." Boyde 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. White had the ultimate burden to prove that life was appropriate. Thus, proper consideration of mitigation was inhibited, for only the mitigation that outweighed the aggravation could be given full consideration and "effect." See Penry v. Lynaugh, supra. 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 reiterated 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 Lockstt and Penry.

Blystone v. Pennsylvania, 58 U.S.L.W. 4274, 4275 (February 28, 1990)(emphasis added). The instruction in Mr. White's case ("it will then be your duty to determine whether or not mitigating circumstances exist to outweigh the aggravating circumstances") does not meet the standard set by Blystone.[13]

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[13]The Florida Supreme Court has produced considerable case law concerning the import of instructional error to a jury

(footnote continued on next page)

These errors undermined the reliability of the jury's sentencing determination and inhibited the jury from properly assessing mitigation. Mr. White's death sentence is unreliable. Habeas corpus relief is appropriate.

CLAIM VII

UNAUTHORIZED PERSONS PARTICIPATED IN THE GRAND JURY PROCEEDINGS, THEREBY DENYING MR. WHITE DUE PROCESS OF LAW AND EQUAL PROTECTION, IN THAT HIS INDICTMENT WAS OBTAINED IN A MANNER VIOLATIVE OF THE FLORIDA AND UNITED STATES CONSTITUTIONS.

Twenty-three persons were empaneled to sit on Mr. White's Grand Jury, contrary to Florida Statutes section 905.01(1) (1987), which provides: "The Grand Jury shall consist of not less than 15 nor more than 18 persons. . ."

(footnote continued from previous page)

regarding the mitigation it may consider and balance against the aggravating circumstances. This case law demonstrates that instructional error before a Florida sentencing jury renders the resulting death sentence fundamentally unreliable. See Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987). See also Mikenas v. Dugger, 519 So. 2d 601 (Fla. 1988); Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1989)("It is of no significance that the trial judge stated that he would have imposed the death penalty in any event. The proper standard is whether a jury recommending life imprisonment would have a reasonable basis for the recommendation."). In Mr. White's case the jury received no guidance as to the proper standard applicable to their evaluation of the evidence -- whether ehere existed a "reasonable basis" for reaching a verdict of life. Hall, supra. In Florida, the jury's pivotal role in the capital sentencing process requires its sentencing discretion to be channeled and limited through accurate instructions.

As selected, the panel in Mr. White's case was illegal since it permitted unauthorized persons to be present during the jury deliberations and to actually vote and take part in those deliberations. Fla. Stat. 905.17 (1987) clearly states: "No person shall be present at the sessions of the grand jury except the witness under examination, the state attorney and his assistant state attorneys, designated assistants as provided in section 27.18, the court reporter or stenographer, and the interpreter." Clearly any individuals other than those named are unauthorized to be present and any "juror" selected after the 18th juror is unauthorized.

It was ineffective for appellate counsel to fail to raise this issue on direct appeal since the issue was addressed by trial counsel. Trial counsel filed the following motion:

MOTION TO DISMISS INDICTMENT

> Defendant, JERRY WHITE, by and through his undersigned legal counsel, moves this Honorable Court for an Order to Dismiss Indictment on the following grounds:
>
> 1. That on April 7, 1981 the Grand Jury indicted the Defendant, JERRY WHITE, for Murder in the First Degree and Armed Robbery.
>
> 2. That the Grand Jury panel consisted of twenty-three (23) members.
>
> 3. That Florida Statute 905.01(1) states:
>
> "The grand jury shall consist

of not less than 15 nor more than 18 persons."

4. That the Indictment of the accused in in violation of the above-cited Statute and consequently the twenty-three (23) member panel was illegally comprised and as a result it lacked the power and authority to act as a Grand Jury.

WHEREFORE, the Defendant moves this Court for an Order to Dismiss the Indictment for the above-stated reasons.

(R. 1855).

The consequences of the political practice of using over the maximum number of 18 jurors are that the jury is "packed," and the State more easily facilitates indictments by needing a lesser percentage of juror votes to indict. A vote of twelve is necessary to obtain an indictment by the grand jury. When the jury consists of the minimum required number, fifteen, this means that 80% of the panel must vote in favor of the indictment. When the maximum number of jurors allowed, eighteen, is present, then agreement among 65% of them is required for indictment.

In Mr. White's case, use of twenty-three jurors meant that only 52% of them had to be in agreement for an indictment to be handed down. This substantially prejudiced Mr. White by diminishing the constitutional protections to which he is entitled.

This issue involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. White's

conviction and death sentence. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings, **see** Wilson V. Wainwright, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error. Trial counsel raised the issue. It was a matter of record at the time of Mr. White's direct appeal. Appellate counsel was prejudicially ineffective for failing to raise the issue on direct appeal. Mr. White is entitled to the relief he seeks.

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. White's 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, Jerry White, 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.

Mr. White 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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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 Richard Martell, Assistant Attorney General, Department of Legal Affairs, Magnolia Park Courtyard, 111-29 North Magnolia Drive, Tallahassee, Florida 32301, this 12th day of July, 1990.

Dail Anderson 7/90
Attorney