IN THE SUPREME COURT OF FLORIDA

NO. 76,694

SAMUEL RIVERA,

Petitioner,

v.

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

Respondent.

PETITION FOR EXTRAORDINARY RELIEF AND FOR A WRIT OF HABEAS CORPUS

LARRY HELM SPALDING
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INTRODUCTION

This petition for habeas corpus relief is being filed in order to address substantial claims of error under the fifth, sixth, eighth and fourteenth amendments, claims demonstrating that Mr. Rivera was deprived of the effective assistance of counsel on direct appeal and that the proceedings resulting in his capital conviction and death sentence violated fundamental constitutional imperatives. The petition also presents questions that were ruled on on direct appeal but that should now 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).

PROCEDURAL HISTORY

1. On November 6, 1986, Mr. Rivera was arrested in Dade County on charges of First Degree Murder, Armed Robbery of Emilio Miyares, Armed Robbery of Aurora Macias, Attempted Armed Robbery, Armed Burglary, Carrying a Concealed Firearm and Possession of a Firearm.

2. On November 8, 1986, Mr. Rivera was indicted by the Grand Jury, Eleventh Judicial Circuit, Fall Term, Dade County, Florida, for the first degree murder of Emilio Miyares.

3. Mr. Rivera was declared indigent on November 21, 1986, and the Public Defender for the Eleventh Judicial Circuit was

appointed to represent him.

4. A plea of "not guilty" to the charge was entered by Mr. Rivera on December 5, 1986.

5. On December 5, 1986, the trial court, due to a potential conflict of interest, then appointed Ronald Guralnick as Special Assistant Public Defender to represent Mr. Rivera.

6. Trial before the Honorable Martin Greenbaum presiding, was held beginning June 24, 1987. On July 7, 1987, Mr. Rivera was found guilty of first degree murder as well as all other charges filed against him.

7. On July 9, 1987, the jury returned a recommendation of death. The jury vote was seven to five, the slimmest recommendation possible to justify imposition of the death penalty.

8. Mr. Rivera was sentenced to death by Judge Greenbaum on July 14, 1987.

9. Direct appeal was taken to this Court on August 12, 1987.

10. On June 29, 1989, this Court, per curiam, after determining that the murder was not heinous, atrocious and cruel and that the murder was not cold, calculated and premeditated, affirmed Mr. Rivera's conviction and sentence of death. Rivera v. State, 545 So. 2d 864 (1989).

11. Hearing before the Governor and Cabinet on Mr. Rivera's

application for Executive Clemency was held on June 19, 1990.

12. On September 24, 1990, Governor Bob Martinez denied Mr. Rivera's Application for Executive Clemency by signing Mr. Rivera's death warrant. His execution was set for 7:00 a.m. on November 28, 1990.

13. Mr. Rivera's execution was stayed by this Court on October 24, 1990, subsequent to the filing of a Motion for a Stay of Execution and for Appointment of Conflict Counsel.

14. On October 24, 1990, this Court ordered that Mr. Rivera's post-conviction pleadings be filed on or before December 15, 1990.

JURISDICTION TO ENTERTAIN PETITION, AND GRANT HABEAS CORPUS RELIEF

A. JURISDICTION

This is an original action under Fla. R. App. P. 9.100(a). This Court has 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. Rivera'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). When ineffective assistance of counsel on direct appeal is shown, this Honorable Court has consistently deemed habeas corpus appropriate.

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). 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).

Mr. Rivera's petition presents substantial claims demonstrating that he was unlawfully convicted and unlawfully sentenced to death, in violation of fundamental constitutional precepts. The claims are unusual and complex and deserve careful scrutiny. In light of these substantial claims, Mr. Rivera

respectfully urges the Court to "issue such appropriate orders as will do justice." Anglin.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Rivera 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.

ARGUMENT I

THE INTRODUCTION OF A "MISDEMEANOR" AS A PRIOR VIOLENT FELONY AGGRAVATING FACTOR AND THE REPEATED REFERENCES TO THE VICTIM'S OCCUPATIONS SO PERVERTED THE SENTENCING PHASE OF MR. RIVERA'S TRIAL THAT IT RESULTED IN THE TOTALLY ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND FLA. STAT. SEC. 921.141(5)(B). MR. RIVERA RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WHEN COUNSEL FAILED TO ADVOCATE AND LITIGATE THIS ISSUE ZEALOUSLY, IN VIOLATION OF MR. RIVERA'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

In considering whether the death penalty constitutes cruel and unusual punishment in violation of the eighth and fourteenth amendments, Justice Brennan wrote:

> In determining whether a punishment comports with human dignity, we are aided also by a second principle inherent in the Clause--that the State must not arbitrarily inflict a severe punishment. This principle derives from the notion that the State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others. Indeed, the very words "cruel and unusual punishments" imply condemnation of the arbitrary infliction of severe punishments. And, as we now know, the English history of the Clause reveals a particular concern with the establishment of a safeguard against arbitrary punishments. See Granucci, "Nor Cruel and Unusual Punishments Inflicted": The Original Meaning, 57 Calif.L.Rev. 839, 857-60 (1969).

Furman v. Georgia, 408 U.S. 238, 274, 92 S. Ct. 2726, 2744 (1972)(Justice Brennan concurring)(footnote omitted).

When then faced with a challenge to Florida's capital sentencing scheme, the Supreme Court found it passed constitutional muster:

> While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of Furman are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.
>
> The directions given to judges and jury by the Florida statute are sufficiently clear and precise to enable the various aggravating circumstances to be outweighed against the mitigating ones. As a result, the trial court's sentencing discretion is guided and channeled by a system that focuses on the

> circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed.

Gregg v. Georgia, 428 U.S. 242, 96 S. Ct. 2960, 2969 (1976).

Thus, aggravating circumstances specified in the statute are exclusive, and no other circumstances or factors may be used to aggravate a crime for purposes of the imposition of the death penalty. Miller v. State, 373 So. 2d 882 (Fla. 1979).

> This court, in Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977) stated:
>
> > 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.
>
> Strict application of the sentencing statute is necessary because the sentencing authority's discretion must be "guided and channeled" by requiring an examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition. Proffitt v. Florida, 428 U.S. 242, 258, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

Miller v. State, 373 So. 2d at 885. See also Riley v. State, 366 So. 2d 19 (Fla. 1979), and Robinson v. State, 520 So. 2d 1 (Fla. 1988).

Fla. Stat. sec. 921.141(5)(b) (1986) provided:

> 921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.--
>
> (5) AGGRAVATING CIRCUMSTANCES.-- Aggravating circumstances shall be limited to

the following:

> (b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(Emphasis added).

The prior conviction that served as an aggravating factor under Fla. Stat. sec. 921.141(5)(b) in Mr. Rivera's trial is actually a prior misdemeanor conviction, not a felony. This is a per se violation of Florida's capital sentencing scheme and a fundamental constitutional error. It demands that Mr. Rivera's death sentence be vacated and a resentencing granted.

The following statement was taken from the affidavit of Mr. Rafael Aglada-Lopez, Esquire who is representing Mr. Rivera on the April 4, 1984 prior conviction in Ponce, Puerto Rico:

> I, RAFAEL ANGLADA LOPEZ, having been duly sworn or affirmed, do hereby depose and under penalty of perjury state:
>
> 1. I am admitted to the practice of law and in good standing in the Supreme Court of the Commonwealth of Puerto Rico, the United States District Court for the Districts of Puerto Rico and Connecticut, and the United States Court of Appeals for the District of Columbia and the Eleventh Circuits.
>
> 2. My law offices are located at Estudio de Abofados y Notaria, #359 De Diego Street, Rio Piedras, Puerto Rico 00923; P. O. Box 361027 San Juan, Puerto Rico 00936-1027; most of my practice being Criminal Law, both state and federal.
>
> 3. The Office of the Capital

Representative (CCR) has called my attention to the fact that incarcerated inmate Samuel A. Rivera-Martinez was sentenced at his penalty phase to death row due to certain aggravating circumstances, one of them for having been previously convicted in Puerto Rico of a violent felony (aggravated assault upon a police officer). See, Rivera v. State, 545 So. 2d 864 (Fla. 1989).

4. CCR has sent me copies of a complaint ("Denuncia"), captioned Pueblo de Puerto Rico v. Samuel Rivera Martinez c/p Samyelito, No. 84-1250, filed on April 4, 1984, by Police Azant Ramon Ortiz-Santiago II-5735 C.I.C., relating to a complaint for an attempt to aggravated battery against police officer Carlos Irizarry Lugo on or about April 4, 1984, in Ponce, Puerto Rico. I have personally examined the above-captained file, in the Ponce Superior Court.

5. Attention is called to the fact that this complaint was originally filed as a misdemeanor, not a felony count. As the complaint is closely examined, it will be noticed that in the section under the name and address of the arrestee, it reads "Tentativa de Agresion Agravada" ("Attempt to Aggravated Battery"), and next to that there is a blank square for "Grave" ("Felony") and a marked square for "Menos Grave" ("Misdemeanor").

6. On July 12, 1984 Samuel A. Rivera-Martinez was sentenced in Pueblo de Puerto Rico v. Samuel A. Rivera-Martinez, M-84-359 for Attempt of Aggravated Battery and sentenced to three (3) months of imprisonment to be served currently with cases G84-439, G-84-438, G-84-436, M 84-335 and M 84-358, by Superior Judge Gilberto Gierbolini.

7. Article 12 of the Penal Code of Puerto Rico, Section 3044 of Laws of Puerto Rico, Title 33, 33 L.P.R.A. 3044 reads as follows:

Section 3044 Classification of crimes

Crimes are classified in misdemeanors and felonies.

A misdemeanor is a crime punishable by imprisonment in jail for a term not exceeding six months or by a fine not exceeding five hundred dollars or by both penalties, at the discretion of the court. Felony comprises all the other crimes.--Penal Code, 1974, section 12.

8. Article 26 of the Penal Code of Puerto Rico, 33 L.P.R.A. 3121 reads as follows:

Section 3121 Definition of attempt

An attempt shall exist when the person commits acts or makes omissions unequivocally directed to the execution of an offense, which is not consummated through circumstances extraneous to his will.--Penal Code, 2974, section 26.

9. Article 95 of the Penal Code of Puerto Rico, 33 L.P.R.A. 4032(a) reads as follows:

Section 4082 Aggravated battery

Battery shall be considered aggravated and punishable by imprisonment for a term not exceeding six months or a maximum fine of five hundred dollars, or both penalties in the discretion of the court, when committed under any of the following circumstances:

(a) When committed upon a public officer in the discharge of his duties, or as a consequence thereof, if it was known or declared to the offender that the person assaulted was a public officer, or in his presence.

See in general, Title 33, Laws of Puerto Rico Annotated, 1983 Edition, Published by Equity

> Publishing Company, Orford, New Hampshire, 03777. By definition therefore Mr. Rivera never committed a battery upon a police officer. Rather, he was simply charged with an attempt, which means that the actual battery never occurred.
>
> 10. For the above reasons Court documents reviewed and statutes quoted, it is clear that death row sentenced Samuel A. Rivera-Martinez was never even accused, least sentenced of a violent felony count for an aggravated assault upon a police agent, contrary to what is stated in Rivera v. State, 545 So. 2d 864 (Fla. 1984), page 3, fn. 3. To the contrary, said complaint was filed as a misdemeanor, and sentenced as such.

During the penalty phase, the State introduced a certified copy of this misdemeanor conviction from the Commonwealth of Puerto Rico (R. 1967-68). This document was allowed into evidence over defense attorney's objection (R. 1971). The trial court then allowed the document to be translated from Spanish to English again over defense attorney's objection (R. 1980-82). During its closing argument of the penalty phase, the State urged the jury to find the misdemeanor conviction as a statutory aggravating factor (R. 2004-05). The Court then instructed the jury that the misdemeanor conviction may be considered:

> THE COURT: ...The aggravating circumstances that you may consider are limited, to any of the following that are established by the evidence:
>
> The crime for which the defendant is to be sentenced was committed while he was under sentence of imprisonment.

> The defendant has been previously convicted of another capital offense or of a felony involving the use or threat of violence to some person.

(R. 2037)(emphasis added).

The trial judge also considered and relied upon this misdemeanor as an aggravating factor as reflected in the sentencing order (R. 323). This consideration so perverted the sentencing of Samuel Rivera that it resulted in the totally arbitrary and capricious imposition of the death penalty in violation of the Eighth and Fourteenth Amendments of the United States Constitution, as well as Florida's capital sentencing scheme.

In a similar vein, during its closing argument of the penalty phase, the State urged the jury to consider the nonstatutory aggravating factor that the victim was a police officer:

> [MR. PUROW]: What about the circumstances of the offense? You know there are certain crimes that are pretty terrible, and murder, of course, is the worst, and all murders are bad.
>
> But, you know, when you talk about a police officer -- police officer, their duty is to go and put their necks on the line. Their duty is to run after fleeing felons through shopping malls who are carrying around guns, and try to arrest him.
>
> If anybody else was there, what would they have done? They would have gone in and called the police. They go and get a police officer to help them, but a police officer

cannot do that. A police officer has to take the action himself.

So, because of this situation, it is extra, extra terrible when a police officer dies, and that is why we have --

MR. GURALNICK: Objection, Your Honor. Excuse Me.

Your Honor, I want to enter an objection. I don't know if you heard the last comment about extra special when a police officer dies.

We recognize that is, of course, a bad thing, but that has nothing to do with the aggravating circumstances.

THE COURT: I heard.

MR. GURALNICK: I ask for a curative instruction and move for a mistrial.

THE COURT: Again, the motion for a mistrial is denied.

I am going to again ask you to disregard the last statement of the State's attorney and not to consider it in your deliberations.

(R. 2019-20)(emphasis added). Even though a curative instruction was given, clearly, the damage was done and the jury considered this nonstatutory aggravating factor in their deliberations.

The trial judge also considered and relied upon the nonstatutory aggravating factor that the victim was a police officer. This consideration so perverted the sentencing of Samuel Rivera that it resulted in the totally arbitrary and capricious imposition of the death penalty in violation of the

eighth and fourteenth amendments of the United States Constitution. The following is the statement of the trial judge at Mr. Rivera's sentencing:

> You have killed a police officer. Police officers are a singular group that stand in a different category under different circumstances than anyone else. Everyday those on the police forces must protect all of society, and but for them society would sink into an amoral mass of chaos.
>
> You recognize their responsibilities and their duties. We recognize that anyone who kills a police officer in the line of duty must be and will be prosecuted to the fullest extent of the law.
>
> It is a duty and obligation of this Court to protect those police officers who put their life on the line each and every day, to the best of this Court's ability.
>
> I have no compunction and I have no equivocation in maintaining this obligation, this Court, as well as all of society, to the police throughout, not only this County, but throughout the entire United States --
>
> You must know, without qualification, that if you are going to kill a police officer in the line of duty, you are going to pay the fullest penalty that the law provides.
>
> The law looks for justice. Forgiveness is forgotten.
>
> When you meet your maker on your judgment day, when he peers into your heart and also when he renders your final eternal sentence, only then will he determine whether you are truly repentant and worthy of some type of forgiveness.
>
> I am confident that he will recognize

> that on this day this Court has entered the proper verdict and sentence for the proper reasons.
>
> Mrs. Miyares -- Mrs. Miyares, this Court sympathizes and empathizes with your grief and anguish. I know that your faith in God and the church, with all your friends, with all the outpouring of sympathy from the entire community, you will be able to cope and sustain yourself from really such a needless and unnecessary loss of life.

(R. 2095-96)(emphasis added).

Courts have consistently overturned trial courts' reliance on "nonstatutory aggravating" factors in the context of Florida's explicit statutory scheme. In Barclay v. Florida, 463 U.S. 939 (1983), the Supreme Court reiterated that section 921.141, Fla. Stat. (1987) "requires the sentencer to find at least one valid statutory circumstance before the death penalty may even be considered" and that the statute "does not permit nonstatutory aggravating factors to enter into this weighing process." Barclay, 463 U.S. at 954. When a trial court has considered improper aggravating factors, this Court has insisted on resentencing where mitigating circumstances are also present. Id. at 955, citing, Moody v. State, 418 So. 2d 989, 995 (Fla. 1982); Riley v. State, 366 So. 2d 19, 22 (Fla. 1978); Elledge v. State, 346 So. 2d 998, 1002-03 (Fla. 1977). Even when no mitigating circumstances exist, this Court has refused to apply the harmless error rule to the consideration of nonstatutory aggravating circumstances. Barclay, citing Lewis v. State, 398

So. 2d 432 (Fla. 1981).

Consideration of nonstatutory aggravating factors by trial courts is impermissible. In Grossman v. State, 525 So. 2d 833, 842 (Fla. 1988), for instance, this Court held that a nonstatutory aggravating circumstance (in that case, the impact on the victim's survivors) is not an appropriate foundation on which to base a death sentence. Cf. Grossman. Similarly, in Robinson v. State, 520 So. 2d 1 (Fla. 1988), this Court held that "'absence of remorse should not be weighed either as an aggravating factor nor as an enhancement of an aggravating factor.'" Robinson, 520 So. 2d at p. 6 (emphasis added), quoting Pope v. State, 441 So. 2d 1073, 1078 (Fla. 1983)(emphasis added). Such improper enhancement is precisely what occurred in this case.

In Elledge v. State, 346 So. 2d 998 (Fla. 1977), cited in the United States Supreme Court's Barclay decision, this Court rejected the use of nonstatutory aggravation. Elledge, 346 So. 2d at 1002. The Elledge Court also refused to apply a harmless error analysis, even in the presence of "substantial additional aggravating circumstances." Id. In Purdy v. State, 343 So. 2d 4 (Fla. 1977), this Court held simply that "[t]he specified statutory circumstances are exclusive; no others may be used for that purpose." Purdy, 343 So. 2d at 6. Thus, this Court has consistently been unwilling to endorse the application of

nonstatutory aggravating circumstances whether standing on their own or in support of statutory factors. Finally, this Court in the past has been unwilling to apply the harmless error rule in the context of nonstatutory aggravating circumstances.

To the extent appellate counsel failed to object to the nonstatutory aggravating factor or to discover that this prior conviction was a misdemeanor, defense counsel was ineffective. Mr. Rivera's sentence of death should be vacated.

ARGUMENT II

SAMUEL RIVERA'S JURY AND JUDGE WERE PROVIDED WITH AND RELIED UPON MISINFORMATION OF CONSTITUTIONAL MAGNITUDE IN SENTENCING HIM TO DEATH, IN VIOLATION OF JOHNSON V. MISSISSIPPI, 108 S. CT. 1981 (1988), AND THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

In Johnson v. Mississippi, 108 S. Ct. 1981 (1988), a unanimous United States Supreme Court struck down a sentence of death imposed by the Mississippi state courts because that sentence was predicated, in part, upon a felony conviction which was found to be unconstitutional in subsequent proceedings.[1] The

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[1]Johnson is strikingly similar to Mr. Rivera's case. There, the sentence of death was founded on three aggravating factors,

(footnote continued on following page)

Court ruled that because a sentence of death resulting from a jury's consideration of misinformation of constitutional magnitude, i.e., finding an invalid prior conviction to be an aggravating factor, cannot be tolerated under the Eighth Amendment; the petitioner's request for relief should be granted. As the Supreme Court stated:

> [T]he error here extended beyond the mere invalidation of an aggravating circumstance supported by evidence that was otherwise admissible. Here the jury was allowed to consider evidence that has been revealed to be materially inaccurate.

Johnson, 108 S. Ct. at 1989 (emphasis added). In Mr. Rivera's case, it is also true that the error goes beyond the "mere invalidation" of an aggravating circumstance involving otherwise admissible evidence. Not only has it been found that Mr. Rivera's prior conviction was actually a misdemeanor but it has also been discovered that Mr. Rivera's prior conviction was unconstitutionally obtained. Mr. Rivera's prior conviction was the result of an unconstitutional guilty plea. Mr. Rafael Anglada Lopez, Esquire has filed a motion to vacate the April 4,

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(footnote continued from previous page)

one of which was subsequently shown to be invalid (the prior felony conviction; that the offense was committed to avoid arrest or effect an escape from custody; that the offense was heinous, atrocious and cruel, see Johnson, 108 S. Ct. at 1984 n.1). There is no indication in the Supreme Court's opinion that any mitigation was presented or found in Johnson.

1984 prior Puerto Rico conviction in the proper court (See Motion to Vacate at Appendix 20 and Affidavit of Mr. Lopez at Appendix 19, para. 11). Here, as in Johnson, "materially inaccurate" information was presented, argued to, and relied upon by the jury and judge when sentencing Samuel Rivera to death. See also Smith v. Murray, 106 S. Ct. 2661, 2668 (1986)(sentence of death constitutionally unreliable when misleading or inaccurate information is presented to jury; under such circumstances a petitioner presents a valid claim of a fundamental miscarriage of justice and therefore no procedural bar can be applied). Mr. Rivera's entitlement to relief under Johnson cannot be seriously disputed.

Indeed, in Johnson, the Court did not hesitate to grant the relief sought; notwithstanding the state Attorney General's argument and Mississippi Supreme Court's ruling that their state post-conviction procedures "would become capricious" if during collateral proceedings the state courts "were to vacate a death sentence predicated on a prior felony conviction when such a conviction is [subsequently] set aside." 108 S. Ct. at 1987. Relying on its own settled precedents in this area of the law (precedents also relied upon in the past by this Court) the United States Supreme Court flatly rejected that contended, writing:

A rule that regularly gives a defendant the

> benefit of such post-conviction relief is not even arguably arbitrary or capricious. Cf. United States v. Tucker, 404 U.S. 443, 92 S. Ct. 589, 30 L.Ed.2d 592 (1972); Townsend v. Burke, 334 U.S. 736, 68 S. Ct. 1252, 92 L.Ed. 1690 (1948). To the contrary, especially in the context of capital sentencing, it reduces the risk that such a sentence will be imposed arbitrarily.

Johnson, 108 S. Ct. at 1987 (emphasis added).

The Court, following this reasoning, ruled that the use of a prior conviction which is subsequently shown to be unconstitutional as aggravation in a capital sentencing proceeding rendered the resulting sentence of death arbitrary and capricious, and therefore in violation of the bedrock Eighth Amendment principles referred to above.

Here, the prosecutor urged the jury to consider the prior conviction as aggravation, as rebutting mitigation, and as a critical factor upon which to sentence Mr. Rivera to death. The sentencing court then relied on the prior conviction as an aggravating factor and used it to rebut mitigation. Johnson fits this case like a glove, for the record here reflects the same reliance on unconstitutional misinformation to support a capital petitioner's death sentence as was found in Johnson.

The State made Mr. Rivera's "use of force or violence against another human being" conviction the feature of its sentencing case: in fact, evidence relating to that conviction was the only evidence presented by the State in support of its

finding pursuant to Fla. Stat. sec. 921.141(5)(b) (1989) (R. 1967-82).

Not only did the State make the using of force or violence against another human being conviction the centerpiece of its penalty phase presentation, but the sentencing court then informed the jurors that they may find an aggravating circumstance based on this conviction, instructing them that one of the available aggravating circumstances was that Mr. Rivera has been previously convicted of a felony involving the use or threat of violence to another person (R. 2037). Given such instructions, the jury had little choice but to find and consider this aggravating circumstance.

The prior conviction was central to Mr. Rivera's sentence of death. The conviction was unconstitutionally obtained, and Mr. Rivera's sentence of death -- a death sentence which, as in Johnson, was based in part on that conviction -- is constitutionally invalid: as in Johnson, "[h]ere the jury was allowed to consider evidence that has been revealed to be materially inaccurate." Johnson, 108 S. Ct. at 1989 (emphasis added).

There is fundamental Eighth Amendment error in Mr. Rivera's sentence of death, as the trial court's order demonstrates (R. 323). In Johnson v. Mississippi, the Supreme Court held that the error was prejudicial because the jury was allowed to consider an

aggravating factor which was founded on "materially inaccurate" information. Misinformation of constitutional magnitude was presented to and relied on by the sentencing jury and judge in Mr. Rivera's case as well.

Mr. Rivera's sentence of death is thus constitutionally invalid. The need for a resentencing before a new jury is also demonstrated by this Court's decision in Castro v. State, 547 So. 2d 111 (Fla. 1989). There, this Court found Williams Rule error in the guilt phase of a capital trial. Evidence was improperly admitted that Castro "had tied [a witness] up and threatened to stab him several days prior to killing [the victim]." 547 So. 2d at 114. This Court concluded that the error was harmless as to the guilt phase, but not as to the penalty phase. This Court held the introduction of improper evidence before a sentencing jury concerning the defendant's criminal history, which is precisely what occurred in Mr. Rivera's case, is presumed to be reversible error:

> In sum, the Williams rule error improperly tended to negate the case for mitigation presented by Castro and thus may have influenced the jury in its penalty-phase deliberations. For this reason, we cannot say beyond any reasonable doubt that had the jury not heard McKnight's irrelevant, prejudicial testimony, it might not have determined that a life sentence was appropriate under the circumstances.

Castro, 547 So. 2d at 116.

The prior Puerto Rican conviction will be shown to be

unreliable and constitutionally inappropriate as an aggravating factor. This case, as the discussion presented above demonstrates, falls within the analysis of the United States Supreme Court in Johnson v. Mississippi and of this Court in Preston v. State, 564 So. 2d 120 (Fla. 1990). As was explained in Preston:

> Robert Preston was convicted of first-degree murder and sentenced to death. The conviction and sentence were affirmed by this Court in Preston v. State, 444 So. 2d 939 (Fla.1984). The denial of his subsequent motion for postconviction relief was affirmed in Preston v. State, 528 So.2d 896 (Fla.1988). Thereafter, this Court denied Preston's petition for writ of error coram nobis and petition for writ of habeas corpus. Preston v. State, 531 So.2d 154 (Fla.1988), cert. denied, --- U.S. ---, 109 S.Ct. 1356, 103 L.Ed.2d 824 (1989).
>
> Following the issuance of a death warrant, Preston filed another motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850. The trial court summarily denied the motion. Upon consideration of Preston's appeal, this Court stayed his execution.
>
> In his original trial, the jury recommended the sentence of death by a seven-to-five vote. The trial court found four aggravating circumstances: (1) the conviction of a prior felony involving the use or threat of violence to the person; (2) the murder was committed while engaged in the crimes of robbery and kidnapping; (3) the murder was especially heinous, atrocious, or cruel; and (4) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. . . .

The prior felony of violence of which Preston had been convicted was throwing a deadly missile into an occupied vehicle. In 1989 Preston obtained an order on motion for postconviction relief which vacated the deadly missile conviction because of ineffective assistance of trial counsel. This result prompted the filing of another petition for writ of habeas corpus in this Court seeking to vacate Preston's sentence predicated upon the rationale of Johnson v. Mississippi, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988). We denied this petition "without prejudice to raise the same argument by a 3.850 motion in the trial court." Preston v. Dugger, 545 So.2d 1368 (Fla. 1989). . . .

In Johnson v. Mississippi, the defendant had been sentenced to death upon the finding of three aggravating circumstances, one of which was the previous conviction of a felony involving the use of violence. After his sentence was affirmed, the previous violent-felony conviction was set aside. In a collateral attack, the United States Supreme Court vacated the death sentence because it was predicated on the prior violent felony conviction which had been set aside. The Court made the following pertinent observation:

> In this Court the Mississippi Attorney General advances an argument for affirmance that was not relied upon by the State Supreme Court. He argues that the decision of teh Mississippi Supreme Court should be affirmed because when that court conducted its proportionality review of the death sentence on petitioner's initial appeal, it did not mention petitioner's prior conviction in upholding the sentence. Whether it is true, as the Attorney General argues, that even absent evidence of petitioner's prior conviction a death sentence would be

> consistent with Mississippi's prctice in other cases, however, is not a determinative of this case. First, the Mississippi Supreme Court expressly refused to rely on harmless-error analysis in upholding petitioner's sentence, [Johnson v. State] 511 So.2d [1333] at 1388 [(Miss.1987)]; on the facts of this case, that refusal was plainly justified. Second, and more importantly, the error here extended beyond the mere invalidation of an aggravating circumstance supported by evidence that was otherwise admissible. Here the jury was allowed to consider evidence that had been revealed to be materially inaccurate.

108 S.Ct. at 1988-89 (footnotes omitted).

* * *

[T]he state correctly argues that the United States Supreme Court has not precluded a harmless error analysis in a case such as this in which the conviction of a prior violent felony that formed the basis for an aggravating circumstance is later set aside. It is clear, however, that that Court believes such an error is more likely to be harmful because evidence has been admitted which is later "revealed to be materially inaccurate."

In asserting harmless error, the state points to a portion of Preston's trial record which suggests that the judge did not give great weight to the prior violent felony because of its nature. On the other hand, we note that the prosecutor emphasized the importance of the prior violent felony in his closing argument to the jury. In addition, only two of the four aggravating circumstances remain because this Court has previously eliminated the finding that the murder was committed in a cold, calculated, and premeditated manner. Further, there was mitigating evidence introduced at the trial,

> even though no statutory mitigating circumstances were found. Finally, the jury only recommended death by a one-vote margin. Had the jury returned a recommendation of life imprisonment, we cannot be certain whether Preston's ultimate sentence would have been the same. Under the circumstances, we are unable to say that the vacation of Preston's prior violent felony conviction constituted harmless error as related to his death sentence.
>
> Our decision is consistent with Burr v. State, 550 So.2d 444 (Fla. 1989), petition for cert. filed, No. 89-1320 (U.S. Feb. 13, 1990), in which we vacated a death sentence because two of the aggravating factors were partially supported by evidence of a crime of which the defendant was later acquitted. Duest v. Dugger, 555 So.2d 849 (Fla.1990); Bundy v. State, 538 So.2d 445 (Fla.1989); and Daugherty v. State, 533 So.2d 287 (Fla. 1988), are distinguishable because in each of these cases there remained at least one valid prior felony conviction on the defendant's record even though another had been set aside.

Id., 564 So. 2d at 121-23.

Mr. Rivera's sentence of death will be shown to be unreliable. Resentencing is appropriate. We therefore urge that this Honorable Court defer all unfavorable findings concerning the penalty phase of this case until the final disposition of the pending motion to vacate the prior conviction.

To the extent appellate counsel failed to object to the nonstatutory aggravating factor or to discover that this prior conviction was a misdemeanor, defense counsel was ineffective. Mr. Rivera's sentence of death should be vacated.

ARGUMENT III

LACK OF AUTHENTICATION BY ANY WITNESS WITH KNOWLEDGE ALLOWED THE USE OF MISLEADING, IMPROPER AND HIGHLY PREJUDICIAL EVIDENCE BY THE COURT AND JURY TO FIND A NONSTATUTORY AGGRAVATING CIRCUMSTANCE AND TO IMPOSE A SENTENCE OF DEATH IN THIS CASE, RENDERING MR. RIVERA'S SENTENCE ARBITRARY AND CAPRICIOUS AND VIOLATING HIS FIFTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

The State presented evidence of a prior conviction as the basis for an aggravating factor under Fla. Stat. sec. 921.141(5)(b). That prior conviction was a misdemeanor. Even were said conviction a felony, it was improperly presented in that the contents were not authenticated. Over objection of counsel, the court allowed the jury to consider the documents, in spite of the court's recognition that "They speak for themselves, but, the question is how they speak" (R. 1979)(emphasis added).

Appellate counsel failed to raise a claim on the admissibility of the translation of the "Denuncias," the court records from Puerto Rico. However, objections were raised at trial as to the contents of the document:

> MR. PUROW: State's Exhibit 1-A for identification is a certified copy of a charging document and a sentence and conviction.
>
> MR. GURALNICK: I am going to object to the introduction of that.
>
> Are you just having it marked as an exhibit, now?

MR. PUROW: I am introducing it.

MR. GURALNICK: I would object to the introduction of that as an exhibit into this case because it hasn't been properly conducted through the consulate in the country through which it emanates from.

He has a mere certified copy and they usually translate it as well, and --

MR. PUROW: This is from Puerto Rico, not a foreign country. It is part of the United States.

MR. GURALNICK: It is still a document in another language.

THE COURT: Then, we are talking about something else.

The Commonwealth of Puerto Rico is an intrical part of the United States.

MR. GURALNICK: Yes.

THE COURT: And as such, it is afforded the same rights and privileges as any other state. That is as to the document itself.

Now, as to the contents of the document, if there is going to be some type of a translation, which I assume that there will be --

MR. PUROW: Yes, Judge.

THE COURT: Then, you are going to a relevancy of the document, to the accuracy of the translation.

(R. 1968-70)(emphasis added).

[MR. GURALNICK]:

> The State is going to have a translator translate that. We might as well direct ourselves to that issue right now.
>
> That is not usually how it is done.
>
> . . .
>
> THE COURT: Mr. Guralnick, please. Address yourself to the legal aspects and not to rhetoric. I am not really concerned what other Judges do and I am not concerned except if it is the District Court of Appeals in the Third District, or the Supreme Court of Florida or the Supreme Court of the United States.
>
> Tell me what is the legal basis for your objection, not anything else.
>
> MR. GURALNICK: Simply that the legal basis for the objection is not to the authenticity, as Your Honor indicated -- is it certified -- but as to the fashion in which it is going to be translated. That is not the way it is done.
>
> THE COURT: Overrule the objection.

(R. 1970-71)(emphasis added).

Mr. Rivera wishes to point out that nowhere in the record was the spanish translator qualified as to ability, training or expertise. More important to this particular claim, while the translator may have been able to translate the written word, no evidence was given that he was qualified to explain what the documents meant. The translator was not an expert, nor even qualified as familiar with the substantive or procedural laws of

Puerto Rico:

THE COURT: Swear the interpreter.

[Whereupon, the interpreter is sworn.]

Whereupon --

SERGIO BALL

the witness herein, after having been first duly sworn, testified upon his oath as follows:

DIRECT EXAMINATION BY MR. PUROW:

Q. State your name and official capacity.

A. Sergio Ball; Official Court Interpreter.

Q. Mr. Ball, have you had an occasion to review this document and write out, for your purposes, an English translation?

A. Yes, I have.

Q. Does this document state where it is from?

A. Yes, it does.

Q. Where is that?

A. From Puerto Rico, the Commonwealth of Puerto Rico.

Q. Page 2 is entitled "Denuncia".

What would that be?

A. That would be the charging document or information.

MR. GURALNICK: Your Honor, before

we go any further, I would like to interrupt for a moment, if you please.

At this point, I would enter another objection as to relevancy. I am looking, now, at the "Denuncia", which is the Complaint, and the sheet attached, which is for the sentencing.

They are different case numbers.

(R. 1970-73)(emphasis added).

MR. PUROW: If Mr. Guralnick would like me to do it -- I was attempting to do it so only this conviction and this information comes into evidence pertaining to the aggravating factors.

(R. 1973-74)(emphasis added).

[Whereupon, the following colloguy was held sidebar out of the hearing of the jury:]

MR. GURALNICK: Judge, if I may, for the record, he doesn't have anybody from their Court to say that this case number is related to this case number and if he doesn't have that, then that shouldn't be introduced.

THE COURT: Do you mind if I read the instrument first?

(R. 1974)(emphasis added). The court was unable to give guidance as to translation, meaning or relevance and admitted that it was only able to assume facts about the documents -- important facts, such as whether the documents were even related, since the document numbers did not match:

THE COURT: The numbers -- of course, I am just assuming, because I really don't know as a matter of actual legal knowledge, but, I would assume that the

Complaint has its own number in the same manner that an arrest form has its arrest form number; but, when a Complaint is filed in Court, we change the number. The number now becomes different.

MR. GURALNICK: Judge, if I may, you just indicated that is a part of the United States and we follow the same procedures.

An Information -- a Complaint, which is what this is, that is filed, and in our Court it has the same case number as any other file in the case, including the sentence.

THE COURT: I understand that. I am just saying, the arrest form, which is more what this is --

MR. GURALNICK: Malcolm, you are not saying this is the arrest form. You are saying that is the Complaint -- "Denuncia" -- correct?

(R. 1975-76)(emphasis added).

The discussion of the records between the court, the State and the defense attorney at times resembled a comedy, as if a human life were not involved. The discussion revealed that the attorneys and the trial court were not even sure what the documents were that were being introduced into evidence:

THE COURT: Do you have a Puerto Rican custodian here?

MR. PUROW: No, sir.

THE COURT: You have nobody from Puerto Rico here?

MR. PUROW: This is a certified document, Judge.

THE COURT: Do you know what this is? This is an arrest warrant.

MR. PUROW: It is an information.

THE COURT: I think it is an arrest warrant according to this -- it could be.

MR. GURALNICK: It is not, Judge. It is a Complaint.

THE COURT: That is what they say, but I am wondering, really, if it isn't an arrest warrant -- in other words, they take the warrant and merge it all into one.

MR. PUROW: That may be.

MR. GURALNICK: Wouldn't they have to show that, Judge?

(R. 1976-77)(emphasis added).

MR. GURALNICK: The point is, Judge, that we are not supposed to guess these things. He is supposed to have somebody here to verify that, and he doesn't.

THE COURT: Well, the alternative is for him to put a police officer on and go through each one and tell what it is.

MR. GURALNICK: To do what?

THE COURT: That is the satisfactory resolution.

MR. GURALNICK: You said to put on the police officer to do what?

THE COURT: He might be able to interpret and know what these things are. If he does, they speak for themselves.

MR. PUROW: These are self-authenticating documents, Judge.

THE COURT: They speak for themselves, but, the question is how they speak.

(R. 1978-79)(emphasis added). The court is correct under Fla. Stat. sec. 90.092, that the documents may be self-authenticating as to it being a document from Puerto Rico, pertaining to a Samuel Rivera. However, the court by its own words has shown that the document does not meet the requirements of authentication or identification under Fla. Stat. sec. 90.901:

> Authentication or identification of evidence is required as a condition precedent to its admissibility. The requirements of this section are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(Emphasis added).[2] In this case there was, for example, no

---

[2]Nor does the testimony and document meet the requirements and illustration of Federal Rules of Evidence,

> **Rule 901. Requirement of Authentication or Identification**
>
> **(a) General provision.** The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.
>
> **(b) Illustration.** By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(footnote continued on next page)

evidence presented that the documents presented conclusively pertained to the Defendant. Except for one of the Denuncias there is no social security number found on the Denuncias and there was likewise no testimony presented that the Defendant was the same person charged, convicted, and sentenced subsequent thereto:

The objection was to the authentication of the translation of a document from a foreign language to English. Where the translation of the foreign language is not properly authenticated or proven, it cannot be admitted, even to show interest in land. Alexander v. Bess, 167 So. 533, 123 Fla. 713 (1936). The ultimate issue at stake in the instant case is a human life, which surely requires at least as much authentication as an interest in property.

However, above the objection of the defense counsel, the court allowed the "document to speak for itself." This even though neither the court, nor the officers of the court were sure what the document said.

(footnote continued from previous page)

> **(1) Testimony of witness with knowledge.** Testimony that a matter is what it is claimed to be.

(Emphasis added).

THE COURT: I am going to let the document speak for itself. I am going to allow it to be introduced -- to be translated, I mean, and the jury can give it its weight as they see fit.

MR. GURALNICK: My objection is noted for the record.

THE COURT: I am going to overrule the objection.

[Whereupon, the sidebar conference was concluded.]

THE COURT: Are you ready, now?

The objection is overruled.

Mr. Guralnick, do you wish to make an exception to the record?

MR. GURALNICK: Yes, I do so.

(R. 1980)(emphasis added).

Thus the document was entered into evidence for consideration by the jury. It was represented by the State as a felony conviction. However, the following is the only testimony given by the State that the charges in question may or may not have been a felony conviction:

Q. [By Mr. Purow] Let me refer you to the first page of this document and without having you go through the entire document, basically is this a sentence and conviction for that charge?

A. Yes, it is.

Q. And was, in fact, the -- did the defendant, I believe, plead guilty and receive a sentence for this charge?

A. Yes, he did.

Q. Thank you.

(R. 1992)(emphasis added).

Thus ends the testimony. There was no testimony regarding the admissibility of this prior conviction, or its status as a felony or a misdemeanor. Nevertheless, this misdemeanor conviction was used to support an aggravating circumstance: Fla. Stat. sec. 921.141(5)(b) -- "The defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person."

There was absolutely no testimony that this charge was a capital felony, or even a felony. This is because the charge and conviction were for a misdemeanor. Mr. Rivera was sentenced to three (3) months incarceration on that conviction. Fla. Stat. sec. 775.08(1) gives guidance to the laws of Florida, defining a felony. A felony is therein described as being a criminal offense punishable with a minimum sentence which exceeds one year. Therefore, under Florida law the Puerto Rican offense would still be considered a misdemeanor. Yet, neither the length of the sentence served, nor the maximum possible sentence were placed into evidence.

Furthermore, there was insufficient information in the "Denuncia" introduced into evidence to prove that it was this particular Samuel Rivera that was "convicted." There was neither

fingerprint identification, nor even a social security number on the "Denuncia" with which to link it to Mr. Rivera. But it was presented to the jury, to "speak for itself," in the words of the court (R. 1980).

This was basic error which should have been raised on direct appeal. Objections were properly raised, the error was obvious, the "statutory aggravation" had been found. It was not tactics but ineffectiveness of appellate counsel which prevented this issue from being brought before this Honorable Court.

The improper introduction of evidence, the finding of what is in fact a nonstatutory aggravating circumstance based on said unreliable evidence, and the fact that the finding was based on evidence which was false and misleading cannot be harmless error. This aggravating factor is invalid and should be declared so. The evidence and testimony at trial concerning it were neither fair nor just, rendering the proceedings a "corruption of the truth-seeking function of the trial process." United States v. Agurs, 427 U.S. 97, 103-04 and n.8 (1976). Justice requires that the present sentence be vacated and that Mr. Rivera be granted a new sentencing proceeding.

ARGUMENT IV

MR. RIVERA'S RIGHTS TO PRESENT A DEFENSE AND TO CONFRONT THE WITNESSES AGAINST HIM WERE DENIED WHEN THE COURT (1) PROHIBITED CROSS EXAMINATION OF A STATE'S WITNESS AS TO POSSIBLE STEROID USE BY THE VICTIM, AND (2) DESPITE CONTINUING OBJECTIONS REGARDING CONVERSATIONS OVERHEARD ON THE POLICE RADIOS NOT ONLY ALLOWED SUCH TESTIMONY, BUT ALLOWED A TAPE AND TRANSCRIPT OF THE CONVERSATIONS TO BE PUT BEFORE THE JURY. THIS CONSTITUTED A VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS, POINTER V. TEXAS, 380 U.S. 403 (1965), AND SPECHT V. PATTERSON, 386 U.S. 605 (1967).

The defendant's rights to present a defense and to confront and cross examine the witnesses against him are fundamental safeguards "essential to a fair trial in a criminal prosecution." Pointer v. Texas, 380 U.S. 403, 404 (1965). Mr. Rivera was denied his rights to present a defense and to confront and cross examine the witnesses against him when trial counsel was precluded from cross examination of Dr. Valerie Rao, M.D., the Medical examiner for Dade County, as to whether or not the victim was tested for steroids. This line of questioning was pertinent to the claim of self defense, as steroid usage often tends to make users overly aggressive.

(MR. GURALNICK)

Q Did you check for all drugs?

A Drugs of abuse were checked, yes.

Q Does that included steroids?

A I don't believe so, but I am not

sure.

Q So am I correct in saying that you don't have any answer as to whether or not (sic) there were any steroids in the body at the time?

A I am not aware of there being any showing of the presence of steroids.

Q Okay, so your answer is, you don't know?

A Right, I don't know.

Q Is that correct?

A That's correct.

Q And isn't it true that steroids can cause personality alterations?

MR. PUROW: Judge, I'm going to object because I don't know what steroids has to do with this case. There is no evidence of any steroid activity.

THE COURT: Sustained, go ahead.

MR. GURALNICK: Judge, I would state that I don't think that there is any difference, and I believed that I am examining a witness, and I should be allowed to question that witness on cross examination.

THE COURT: You may ask this witness questions as to her disposition of the body and her examination of the body.

As to whether or not (sic), as I understand it, that the body were any (sic) --

MR. GURALNICK: Any steroids in the body.

THE COURT: -- any drugs in the

body, yes, it was screened for drugs, she said, yes, and then she was asked as to whether it was screened for steroids, and she said, I don't believe so.

MR. GURALNICK: Yes, Judge.

THE WITNESS: I am not aware of that it would pick up steroids because we're not screening for that.

THE COURT: Sustain the objection.

BY MR. GURALNICK:

Q In your profession, Doctor, are you familiar with steroids?

A Yes.

Q Okay, can you tell us what effect it has on the body?

MR. PUROW: Again, Judge, objection, there's no evidence of steroids.

THE COURT: At this point I'm going to sustain the objection. The objection will be sustained at this time.

. . .

RECROSS EXAMINATION

BY MR. GURALNICK:

Q You're saying that it wasn't positive, you don't know whether there were steroids in his system or not (sic), right?

MR. PUROW: I'm going to object, Judge.

THE WITNESS: Well, to me it is not a common drug of abuse.

Q (By Mr. Guralnick) So you did not test for it.

A In all probability, it's not screened but I don't know for sure.

(R. 1361-64)(emphasis added).

The second denial of confrontation occurred on the issue of introduction into evidence of a police dispatch tape. Throughout the trial, testimony was given by police officers as to what they heard over their radios. This was strictly hearsay and was objected to as such by counsel, including a continuing objection to this particular form of hearsay.

Q (By Mr. Purow) You went into the Builders Square building, Officer. What happened at that point, sir?

A At that point I went into the store, and with the radio, something was coming over the radio as I went into the store, but at that point I couldn't make it out.

The transmissions don't work as well as when you are outside.

But I heard a 315.

Q All right, Officer, what's a 315?

A Officer needs assistance, emergency basis.

MR. GURALNICK: Objection, Your Honor, hearsay. It's another person's conversation; it's classified as hearsay.

THE COURT: Overruled.

. . .

A I guess I was running eastbound towards the exit.

> The radio came on a second time. It said: "Officer shot; officer down".

Testimony of Officer Quintela (R. 1225-28)(emphasis added).

Officer Quintela quotes the radio -- "It said," which is hearsay. Defense counsel cannot cross examine the radio. More important, what "it" said is highly prejudicial. Thus an objection is entered:

> MR. GURALNICK: If I may, your Honor, so that I don't have to keep jumping up and interrupting, may I have a continuing objection to what's coming over the radio?
>
> THE COURT: Same ruling.
>
> Objection overruled.

(R. 1228)(emphasis added).

The allowing of blatant, inflammatory hearsay one piece at a time is unfair, but what was allowed before the jury in Mr. Rivera's trial was massive hearsay in the form of tape recorded hearsay, complete with a transcript of the hearsay. The admission of the tape into evidence did not accord the defendant any opportunity to rebut any hearsay statements heard on it.

Furthermore, not only did the tape contain hearsay, but the speakers were frequently identified as "unknown," and the contents were clearly inflammatory and prejudicial, with no probative value to the issues of the trial. The following starts with the State's direct examination and testimony of Detective Rudy Toth:

Q What is it?

A It's a cassette recording of the Master copy of the radio transmission at the time that Officer Felix Quintela took the signal, the dispatch signal, until the time of the apprehension of the gentleman in the blue suit.

Q All right, is everything that goes over the dispatch recorded?

A Yes, sir.

. . .

MR. GURALNICK: Your Honor, I have entered an objection, an objection as to the chain of custody with regard to this item, and I will just renew my motion at this time.

MR. PUROW: Judge, we had a prior stipulation as to the authenticity of that particular item.

MR. GURALNICK: Judge, that doesn't make it admissible.

MR. PUROW: Then what's the purpose of having a stipulation, Judge.

THE COURT: At this point I overrule the objection.

It will be admitted.

(R. 1390-91).

As noted previously, defense counsel entered a continuing objection to hearsay concerning all radio messages (R. 1228). The only stipulation was that the item was an authentic recording of the dispatch signal.

The State presented evidence as to what the various codes

on the tape meant, including code "315" which prompted the following exchange:

> Q Let me ask you this; it's the last thing that we hear Officer Miyares say on the tape.
>
> He says, "315".
>
> Q What is a 315?
>
> A 315 signal refers to an officer who needs assistance, who requires assistance.
>
> When you place a 3 in front of it, that means that the officer needs emergency assistance.
>
> Q Does that have any special significance when this goes out?
>
> A It's the most important call in police work.
>
> Q Is this something that goes out frequently?
>
> A No, sir, it does not.
>
> Q Why is that?
>
> MR. GURALNICK: Objection, your Honor, immaterial and irrelevant.
>
> THE COURT: Overruled.
>
> THE WITNESS: Most officers are hesitant to call a 315 because it refers that the officer cannot handle the situation, or in the case that you need some back-ups.

(R. 1397-98)(emphasis added).

This Honorable Court recently held that allowing a tape recorded statement of a victim was improper in the sentencing

phase because it effectively "denied (the defendant the) fundamental right of confronting and cross-examining a witness against him." Rhodes v. State, 547 So. 2d 1201, 1204 (Fla. 1989).

Over the continuing objection to radio messages and to the content of the tape, it was published to the jury, and because much of the tape was "unreadable" the State provided a transcript for the jury.

> MR. PUROW: If I may, Judge, what I would like to do is to publish the tape to the jurors.
>
> We have the transcript of the tape. We have it all typed out. And we have this set up; we have it set up.
>
> THE COURT: Fine, there's been a stipulation to it?
>
> MR. GURALNICK: Yes, Judge, I took a look at it, and it's okay.

(R. 1400).

Mr. Rivera states that defense counsel's stipulation to the authenticity of these items showed ineffectiveness:

> MR. PUROW: Judge, what I would like to do is to publish the tape.
>
> I have copies for each of the jurors to read along with us as we listen to the tape.
>
> THE COURT: Fine, we can do that.
>
> (Thereupon, the transcripts were submitted to each juror, after which the following proceedings were had:)

. . .

MR. PUROW: Fine.

Is everyone ready to proceed?

THE JURORS: Yes.

MR. ROSENBERG: Fine, if everyone would just put their head sets on, your head sets (sic) on so that you can listen, listen (sic) to the transmission, the actual transmission and read along with the transcript, (sic) I think that everyone can understand it.

Are we all ready?

THE JURORS: Yes.

(Thereupon, a tape of the following transcript was played for the jurors, as they followed along with a typed-up transcript.)

(R. 1404).

The transcript of the hearsay which was furnished the jurors fills the next thirteen pages of the trial transcript (R. 1405-1421).

Examples of the inflammatory hearsay comments follow:

QUINTELA:	Okay, 61, is in pursuit of a white male dressed all in white. Small guy about 5-5, 5-6, about 130, dressed all in white inside the ah, Builders Square Building.
DISPATCHER:	QSL, 3234.
MIYARES:	1831, 3-15.
DISPATCHER:	1831, 3-15.

SUAREZ: 34, QSM the last.

DISPATCHER: 315 to Builders Square.

(R. 1408)(emphasis added).

Code 315 which was previously discussed herein, refers to "officer needs assistance" (R. 1397-98).

SUAREZ: QSM. 3234 there's a man supposedly with a gun in the Mall, 3-15.

DISPATCHER: (Alert Tone) any unit that can clear reference 3-15.

SUAREZ: 3234

HILL: 1841, from 12 and 49.

UNKNOWN: (Unreadable)

DISPATCHER: 3234

UNKNOWN VOICE: Policeman shot down at Palm Springs Mall.

SUAREZ: 3234, there is officer down in the Mall
(Unreadable)

UNKNOWN VOICE: Officer shot down.

DISPATCHER: 3-30, Officer down in the Mall.

(R. 1409)(emphasis added)

Not only can Mr. Rivera not cross examine the tape recording, but he is faced with unknown witnesses whom he likewise cannot cross examine.

DE JESUS: He's running behind the house. "17" 45 - 46 Street, Subject running behind the house.

DISPATCHER:	(Alert tone)
DE JESUS:	"Report", "report."
DISPATCHER:	QSL, 3-15 area of East 6 -45, Subject wearing white pants.
DE JESUS:	Running in the alley, "report, report," shots fired" (sic) shots fired."
DISPATCHER:	Advising shots fired.
UNKNOWN:	QTH.
DISPATCHER:	Southbound in the alley, East 6 and 45.
GIL:	QSL, I'm arriving.
DE JESUS:	45, East 5, and East 6 Avenue.
DISPATCHER:	Between East 5 and 6 Avenue.
DE JESUS:	Shots fired, shots fired.
DISPATCHER:	There have been shots fired the areas of East 5 and 6 Avenue on 45.
DE JESUS:	Subject is wearing white top, white pants.

(R> 1411)(emphasis added).

There is no doubt that this tape is exciting, inflammatory and prejudicial. There are repeated references to shots fired, but Mr. Rivera has no way to cross examine and determine who fired the shots.

> MR. PUROW: Fine, Judge, that ends the transcript.
>
> THE COURT: Collect the transcript and make a proper record.

(Thereupon, the transcripts were collected form the jurors, and the head sets were retrieved, after which the following proceedings were had at 4:40 o'clock p.m.)

(R. 1422).

Mr. Rivera argues that there is clearly error in the introduction of the dispatch tape.

> While hearsay evidence may be admissible in penalty phase proceedings, such evidence is admissible only if the defendant is accorded a fair opportunity to rebut any hearsay statements. Section 921.141(1), Fla. Stat. (1985).
>
> . . .
>
> In Engle v. State, 438 So. 2d 803, 814 (Fla. 1983), cert. denied, 465 U.S. 1074, 104 S. Ct. 1430, 79 L.Ed.2d 753 (1984a), we stated:
>
> > The sixth amendment right of an accused to confront the witnesses against him is a fundamental right which is made obligatory on the states by the due process of law clause of the fourteenth amendment of the United States Constitution. Pointer v. Texas, 3809 U.S. 400, 85 S. Ct. 1065, 13 L.Ed.2d 923 (1965). The primary interest secured by, and the major reason underlying the confrontation clause, is the right of cross-examination. Pointer v. Texas. This right of confrontation protected by cross-examination is a right that has been applied to the sentencing process. Specht v. Patterson, [386 U.S. 605, 87 S. Ct. 1209, 18 L.Ed.2d 326 (1967)].

Rhodes, id. at 1204.

A criminal defendant's right to cross-examination of

witnesses is one of the basic guarantees of a fair trial protected by the confrontation clause:

> Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner had traditionally been allowed to impeach, i.e., discredit, the witness.

Davis v. Alaska, 415 U.S. 315, 317 (1972).

The scope of cross-examination may not be limited to prohibit inquiry into areas that tend to discredit the witness:

> A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is "always relevant as discrediting the witness and affecting the weight of his testimony." 3A J. Wigmore, Evidence Section 940, p. 775 (Chadbourn rev. 1970). We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. Greene v. McElroy, 360 U.S. 474, 496, 79 S. Ct. 1400, 3 L.Ed.2d 1377 (1959).

Davis, supra at 316-17 (footnote omitted).

A limitation on the right to reveal a witness' bias for testifying impermissibly prevents the jury from properly

assessing the witness' testimony and prevents the defendant from developing the facts which would allow the jury to weigh the testimony properly . In Davis v. Alaska, supra, the Supreme Court found that a confrontation clause violation had occurred when the defendant was prevented from asking the witness questions that would reveal possible bias. In holding that the State's interest in protecting juvenile offenders did not override the defendant's right to inquire into bias or interest the court stated:

> In the instant case, defense counsel sought to show the existence of possible bias and prejudice of Green, causing him to make a faulty initial identification of petitioner, which in turn could have affected his later in-court identification of petitioner.
>
> We cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it. But we do conclude that the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Green's testimony which provided "a crucial link in the proof . . . of petitioner's act." Douglas v. Alabama, 380 U.S. at 419, 85 S. Ct. at 1077. The accuracy and truthfulness of Green's testimony were key elements in the State's case against petitioner. The claim of bias which the defense sought to develop was admissible to afford a basis for an inference of undue pressure because of Green's vulnerable status as a probationer, cf. Alford v. United States, 282 U.S. 687, 51 S. Ct. 218, 75 L.Ed. 624 (1931), as well as of Green's possible concern that he might be a suspect in the investigation.

> We cannot accept the Alaska Supreme Court's conclusion that the cross-examination that was permitted defense counsel was adequate to develop the issue of bias properly to the jury. While counsel was permitted to ask Green whether he was biased, counsel was unable to make a record from which to argue why Green might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial. On the basis of the limited cross-examination that was permitted, the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness or, as the prosecutor's objection put it, a "rehash" of prior cross-examination. On these facts it seems clear to us that to make any such inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. Petitioner was thus denied the right of effective cross-examination which "'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.' Brookhart v. Janis, 384 U.S. 1, 3, 86 S. Ct. 1245, 1246, 16 L.Ed.2d 314." Smith v. Illinois, 390 U.S. 129, 131, 88 S. Ct. 748, 750, 19 L.Ed.2d 956 (1968).

Id. at 318-19 (footnote omitted)(emphasis added).

Objections were raised on these claims at trial. Appellate counsel failed to recognize and raise these issues on direct appeal and was therefore ineffective. These are proper claims, based on Florida Statutory and U.S. Constitutional grounds and as such worthy of review by this Honorable Court. Mr. Rivera asks that, based on these claims and the prejudice which is involved,

that this Court find this not to be harmless error, and vacate his sentence.

ARGUMENT V

SAMUEL RIVERA'S CAPITAL CONVICTION AND DEATH SENTENCE, RESULTING FROM PROCEEDINGS WHICH DID NOT PROVIDE FOR A UNANIMOUS, OR EVEN MAJORITY, VOTE BY THE JURY AS TO WHETHER THE PETITIONER WAS GUILTY OF PREMEDITATED OR FELONY MURDER, VIOLATES THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Rivera's case involves important constitutional questions concerning the propriety of his capital conviction and death sentence which are strikingly similar to those upon which the United States Supreme Court has recently granted certiorari review in Schad v. Arizona, No. 90-5551, 48 Crim. L. 3040 (Oct. 24, 1990). The question therein presented is whether, when the prosecution proceeds on alternative felony/ premeditated murder theories in a capital case, the Constitution is violated by a trial court's failure to inform the jury (e.g., through instructions) that it must reach unanimity, or at least a 7-vote majority, as to one of the theories. This case presents a classic example of this situation. Petitioner submits that the jury was not reliably instructed, in violation of the sixth, eighth and fourteenth amendments. He also respectfully submits that a hold in abeyance of these proceedings is appropriate herein pending the Supreme Court's resolution in Schad. See

Fleming v. Kemp, 794 F.2d 1478, 1484 (11th Cir. 1986)("[T]he Supreme Court has granted [review] to determine [a question related to petitioner's case.] Prudence dictates that the rush to execution should await the Supreme Court's guidance on this critical issue."); Autry v. Estelle, 464 U.S. 1301, 1303 (1983) (White, Circuit Justice). This claim of fundamental constitutional error warrants this Honorable Court's review.

In Florida, the "usual form" of indictment for first-degree murder under Fla. Stat. sec. 782.04 (1976), is to "charg[e] murder . . . committed with a premeditated design to effect the death of the victim." Barton v. State, 193 So. 2d 618, 624 (Fla. 2d DCA 1968). When a defendant is charged with a killing through premeditated design, he is also charged with felony murder, and the jury can return a verdict of first-degree murder on either theory. Blake v. State, 156 So. 2d 511 (Fla. 1963); Hill v. State, 133 So. 2d 68 (Fla. 1961); Larry v. State, 104 So. 2d 352 (Fla. 1958).

Mr. Rivera was charged with first-degree murder in the "usual form": murder "from a premeditated design to effect the death of" the victim. The Indictment read:

> SAMUEL RIVERA and ALBERTO RIVERA, unlawfully and from a premeditated design to effect the death of a human being, or while engaged in the perpetration of, or in an attempt to perpetrate Robbery and/or Burglary, kill EMILIO MIYARES, a human being by shooting EMILIO MIYARES, with a firearm, to-wit: A pistol, in violation of Florida

Statutes 782.04(1), to the evil example of all others in like cases offending and against the peace and dignity of the State of Florida.

(R. 1). Fla. Stat. sec. 782.04(1) (1986), provided:

782.04 Murder
(1)(a) The unlawful killing of a human being:
1. When perpetrated from a premeditated design to effect the death of the person killed or any human being; or
2. When committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any:
a. Trafficking offense prohibited by s. 893.135(1),
b. Arson,
c. Sexual battery.
d. Robbery,
e. Burglary,
f. Kidnapping,
g. Escape,
h. Aggravated child abuse,
i. Aircraft piracy, or
j. Unlawful throwing, placing, or discharging of a destructive device or bomb; or
3. Which resulted from the unlawful distribution of opium or any synthetic or natural salt, compound, derivative, or preparation of opium by a person 18 year of age or older, when such drug is proven to be the proximate cause of death of the user, is murder in the first degree and constitutes a capital felony, punishable as provided in s. 775.082.
(b) In all cases under this section, the procedure set forth in sec. 921.141 shall be followed in order to determine sentence of death or life imprisonment.

Mr. Rivera was thus indicted under two, alternative, theories of first-degree murder. The State then proceeded on both premeditated and felony murder theories.

In its closing argument, the prosecution argued that it had proven guilt under either the premeditation or felony murder theories. The prosecutor argued:

> Now, we come to Count I. Count I is first degree murder. What is first degree murder?
>
> First degree murder is premeditated murder. What does premeditated murder mean?
>
> It doesn't mean that you have to plan it a week in advance. It doesn't mean you have to plan it five minutes in advance.
>
> The law -- the Judge will tell you the law about premeditated murder.
>
> The amount of premeditation required for first degree murder is the amount of time it takes for somebody to decided to consciously kill, in their brain -- can be a second -- and when the defendant gets up over Officer Miyares, gets the gun, shoots him -- shoots him again, and shoots him again, he intended to kill Officer Miyares. There is no question about that -- three times -- he shoots him right through the heart.
>
> He intended to kill this man while he is on his knees with his hands up.
>
> But, there is another kind of first degree murder. It is called felony first degree murder, and either one of these is first degree murder. They are equal, and when you go through the verdict forms, either one of these apply to the verdict form that say first degree murder.
>
> Well, what is felony first degree murder?
>
> Well, the law sets aside certain felonies that are so violent that if you kill somebody during the course of these felonies,

automatically you are guilty of first degree murder.

If you commit a robbery, if you commit a burglary and you kill somebody, somebody dies, it is automatically first degree murder.

Even if you are doing a robbery and point a gun at somebody and a person has a heart attack and dies, that is first degree murder.

What do we have here?

We have -- oh, also, the flight from a felony. If you kill somebody while you are fleeing from a felony, that is also first degree murder.

So, what do we have here?

First of all, what is the defendant doing at the time he encounters the police officers? He is leaving this burglary, this attempted robbery that he has done, and when he shoots the officer he is in the process of committing an armed robbery on the officer. He is stealing the officer's gun, and he is automatically guilty of first degree murder -- no premeditation required for that. You do a robbery -- somebody dies -- first degree murder.

So, you have premeditated first degree murder, and you have felony first degree murder.

(R. 1807-10)(emphasis added).

The trial court then instructed the jury that first degree murder could be proven by either proof of premeditation, or proof of a killing in the course of perpetrating an enumerated felony. Specifically, the instructions read to the jury included the

following:

There are two ways in which a person may be convicted of First Degree Murder. One is known as Premeditated Murder and the other is known as Felony Murder.

Before you can find the defendant guilty of First Degree Premeditated Murder the State must prove the following three elements beyond a reasonable doubt:

1. Emilio Miyares is dead.

2. The death was caused by the criminal act or agency of the defendant.

3. There was a premeditated killing of Emilio Miyares.

"Killing with premeditation" is killing after consciously deciding to do so. The decision must be present in the mind at the time of the killing.

The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing.

The question of premeditation is a question of fact to be determined by you from the evidence. It will be sufficient proof of premeditation if the circumstances of the killing and the conduct of the accused convince you beyond a reasonable doubt of the existence of premeditation at the time of the killing.

If a person has a premeditated design to kill one person and in attempting to kill that person actually kills another person, the killing is premeditated.

Before you can find a defendant guilty

> of First Degree Felony Murder, the State must prove the following elements beyond a reasonable doubt:
>
> 1. Emilio Miyares is dead.
>
> 2. [a] The death occurred as a consequence of or while the defendant was engaged in the commission of or an attempt to commit Robbery and/or Burglary, or;
>
> [b] The death occurred as a consequence of and while the defendant, or an accomplice, was escaping from the immediate scene of a Robbery and/or Burglary.
>
> 3. Samuel Rivera was the person who actually killed Emilio Miyares.
>
> In order to convict of First Degree Felony Murder, it is not necessary for the State to prove that the defendant had a premeditated design or intent to kill.

(R. 1891-93).

As to their verdict, the jurors were never told or instructed that they must reach a unanimous verdict as to either premeditated or felony murder. In other words, the jury was only told that it must be unanimous as to "guilty" or "not guilty," and as to the degree of each crime, but never told that unanimity or a majority was needed as to either of the State's two theories of first degree murder:

> A separate crime is charged in each Count of the Indictment, and while they have been tried together, each crime and the evidence applicable to it must be considered separately and a separate verdict returned as to each.
>
> A finding of guilty or not guilty as to

> one crime must not affect your verdict as to the other crimes charged.
>
> Only one verdict may be returned as to each crime charged. The verdict must be unanimous; that is, all of you must agree to the same verdict.

(R. 1918-19).

The guilty verdict returned by the jury did not specify whether the jury found Mr. Rivera guilty of premeditated murder or felony murder or whether there was any agreement in the jury between the two. The jury simply recited:

> THE COURT: Please hand the forms to the Clerk.
>
> The Clerk will publish the verdict.
>
> THE CLERK:
>
> "In the Circuit Court of the Eleventh Judicial Circuit of Florida, in and for Dade County. Case No. 86-33032A. The State of Florida v. Samuel Rivera. "Verdict: We, the jury, at Miami, Dade County, Florida, this 7th day of July A.D., 1987, find the defendant, Samuel Rivera, as to First Degree Murder as charged in Count I of the Indictment, guilty.

(R. 1937-38).

Thus, Mr. Rivera was prosecuted under both of the alternative theories of first degree murder. Within the confines of the evidence presented, the prosecutor argued that the jury could find guilt under either theory. A general guilty verdict was returned.

Federal courts have long held that the jury must reach

unanimity on the facts in issue, to convict a defendant. The federal court of appeals considered this issue in United States v. Gipson, 553 F.2d 453 (5th Cir. 1977). Using the United States Supreme Court's opinion in In re Winship, 397 U.S. 358 (1970), for guidance, the Gipson court reasoned that "[t]he unanimous jury requirement 'impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.'" Gipson, 553 F.2d at 457, quoting In re Winship, 397 U.S. at 364. The court went on to say that "[r]equiring the vote of twelve jurors to convict a defendant does little to insure that his right to a unanimous verdict is protected unless this prerequisite of jury consensus as to the defendant's course of action is also required." Gipson, 553 F.2d at 458.

Other courts, both federal and state, have found the reasoning of Gipson persuasive. See, e.g., United States v. Beros, 833 F.2d 455 (3rd Cir. 1987)("persuaded by the analysis and rationale" of Gipson, the court held that "[w]hen the government chooses to prosecute under an indictment advancing multiple theories, it must prove beyond a reasonable doubt at least one of the theories to the satisfaction of the entire jury."); United States v. Payseno, 782 F.2d 832 (9th Cir. 1986) (general unanimity instruction is not sufficient when different theories of guilt are presented to jury, citing Gipson); State v. Boots, 308 Or. 371, 380 P.2d 725 (1989)(citing Gipson for

authority in reversing defendant's capital murder conviction); Probst v. State, 547 A.2d 114 (Del. 1988)(holding "[t]he Sixth Amendment to the United States Constitution requires that there be a conviction by a jury that is unanimous as to the defendant's specific illegal action," citing Beros); State v. Flynn, 14 Conn. App. 10, 539 A.2d 1005, cert. denied, 109 S. Ct. 226 (1988) (Connecticut has adopted "holding and rationale" of Gipson); State v. Johnson, 46 Ohio St. 3d 96, 545 N.E. 636 (1989), cert. denied 110 S. Ct. 1504 (1990)(quoting Gipson approvingly); and People v. Olsson, 56 Mich. App. 500, 244 N.W.2d 691 (1974) (defendant could not be convicted of first degree murder when alternative theories of premeditated murder and felony murder were presented to the jury and it was unclear whether jury agreed unanimously to either theory).

Recently, in Sheppard v. Rees, 909 F.2d 1234, 1237-38 (9th Cir. 1990), the Ninth Circuit reversed a first-degree murder conviction, stating:

> Where two theories of culpability are submitted to the jury, . . . it is impossible to tell which theory of culpability the jury followed in reaching a general verdict. See Mills v. United States, 164 U.S. 644, 646 (1987); Givens v. Housewright, 786 F.2d 1378, 1381 (9th Cir. 1986).

Requiring juror unanimity on a single theory of first degree murder is necessary to effectuate the reasonable doubt standard enunciated in In re Winship. It begs the question to say that

premeditated and felony murder are merely different methods of performing the same act. There are significant differences between a premeditated murder and a murder that occurs during the commission of another felony. Indeed, the only common element of the two crimes is that someone died. Without jury agreement as to what specific acts a defendant performed, the reasonable doubt standard is emasculated.

The way Mr. Rivera's case was tried clearly permits a criminal defendant to be convicted when only six, or possibly less, of the jurors agree as to what specific acts the defendant committed. Given the various possibilities, Mr. Rivera could have been convicted -- and sentenced to death -- when less than a majority of jurors agreed as to what specific acts he committed.

In non-capital cases, the United States Supreme Court has held that although the sixth amendment requires a unanimous verdict in federal criminal trials, it does not in state criminal trials. Johnson v. Louisiana, 406 U.S. 356 (1972); Apodaca v. Oregon, 406 U.S. 404 (1972). In reaching this conclusion, the Court specifically pointed out that in both Louisiana and Oregon, a defendant in a capital case would be entitled to a unanimous verdict. Johnson, 406 U.S. at 357 n.1; Apodaca, 406 U.S. at 406 n.1.

However, the Court has never held that a less than unanimous verdict is constitutional in a capital case. Rather, it has held

that capital cases require a heightened degree of reliability in the verdict. See, e.g. Beck v. Alabama, 447 U.S. 625, 638 (1980). Jury unanimity is essential to the heightened degree of reliability required in capital cases.

Even if Johnson and Apodaca were applied to capital cases, the result here cannot stand. "While unanimity is not required, neither does it appear that a simple majority will satisfy the sixth and fourteenth amendments. Especially when serious crimes are being tried . . . it appears that a 'substantial majority' of the jury must vote to convict for a conviction to be obtained." United States Ex Rel Williams v. DeRoberts, 538 F. Supp. 899 (N.D. Ill. 1982), rev'd on other grounds, 715 F.2d 1174 (7th Cir. 1984), cert. denied, 464 U.S. 1072 (1984)(reviewing a state conviction on habeas corpus) (citations omitted)(emphasis added). See Burch v. Louisiana, 441 U.S. 130 (1979); see also Brown v. Louisiana, 447 U.S. 323, 331 (1980)("[T]here do exist size and unanimity limits that cannot be transgressed if the essence of the jury trial is to maintained."). Johnson approved a 9-3 verdict, but expressed no opinion as to a lesser majority. Justice Blackmun, concurring, expressly stated his view that a 7-5 verdict would not pass constitutional muster. Johnson, 406 U.S. at 366 (Blackmun, J., concurring).

In Mr. Rivera's case, Florida strayed much further from jury unanimity than Apodaca and Johnson allow. Unlike the nine-juror

consensus in Johnson, the six person "consensus" on which Mr. Rivera could have been convicted simply does not ensure the degree of verdict reliability that the sixth and eighth amendments demand. The prosecutor argued both theories of first degree murder. The trial court instructed the jury on both theories of first degree murder, but provided only one verdict form for the jury to return their judgment as to the charge. Under these circumstances, it is impossible to know whether every essential element of either premeditated murder or felony murder was proven against Mr. Rivera. In re Winship, 397 U.S. at 361. Our criminal justice system has always required more than mere jury agreement that a defendant is an evildoer or that a person committed something repugnant for a conviction to withstand constitutional scrutiny. See, e.g. Lanzetta v. New Jersey, 306 U.S. 451 (1939)(statute criminalizing being a "gangster" violates due process). The verdict in Mr. Rivera's case does not realize this standard.

The United States Supreme Court has granted certiorari on this exact claim in Schad v. Arizona, No. 90-5551, 48 Crim. L. 3040 (Oct. 24, 1990). Accordingly, a hold in abeyance of these proceedings is appropriate. The United States Supreme Court will soon rule on this most fundamental and critical claim. That holding will likely be quite relevant to this Court's resolution. Relief pursuant to Beck v. Alabama, 447 U.S. 625 (1980), and the

novel fundamental eighth and fourteenth amendment questions that this case presents is also appropriate at this juncture.

ARGUMENT VI

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE OBJECTION TO THE FINDING OF TWO AGGRAVATING FACTORS BASED ON THE SAME ESSENTIAL FEATURE OF THE CAPITAL FELONY AND FURTHERMORE RELIEF MUST BE GRANTED BECAUSE SUCH IMPROPER "DOUBLING" IS FUNDAMENTAL ERROR.

Appellate counsel was ineffective for failing to raise the fact that two aggravating circumstances were based on a single aspect of the offense. This Court has consistently held that the "doubling" of aggravating circumstances is flatly improper. See Provence v. State, 337 So. 2d 783, 786 (Fla. 1976); Clark v. State, 379 So. 2d 97, 104 (Fla. 1980); Welty v. State, 402 So. 2d 1139 (Fla. 1981). This issue involves fundamental error. No contemporaneous objection rule can be applied, nor is any applicable in this sentence based claim.

In the sentencing hearing of July 14, 1987, the court stated the following:

> Florida Statute 921.141(5)(e)-Whether the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
>
> Finding
>
> The attempted robbery and burglary of the Dollar General Store was the initial

> purpose of the defendant fleeing from the police officer. Subsequently when the office apprehended the defendant and placed him in his custody by physically attempting to restrain the defendant from fleeing, the defendant shot the police officer. His purpose of committing the capital felony was solely for the purpose of avoiding or preventing a lawful arrest and/or effecting an escape from custody.
>
> . . . .
>
> Florida Statute 921.141(5)(g)-Whether the capital felony was committed to disrupt or hindered any lawful exercise of any lawful government function or the enforcement of laws.
>
> Finding
>
> There was evidence that the capital felony was committed to disrupt the lawful exercise of the police officer and the enforcement of laws. The police officer specifically tried to avoid the confrontation that developed. The witnesses for the defense stating categorically that the police officer was trying to "calm the defendant down"-witness number two said that "he was too nice to the defendant". All the witnesses without exception have identified the instigator of the incident as the defendant and that the police officer was trying to restrain the defendant in a proper and applicable manner.

(R. 2081-83).

The finding of both aggravating circumstances was improper and was addressed at the trial so explicitly, that for appellate counsel to not raise this claim is per se ineffectiveness.

The State pointed out in closing argument after identifying both the "avoiding and preventing a lawful arrest" circumstance,

Fla. Stat. sec. 921.141(5)(e) and the "to hinder the enforcement of Laws" circumstance, Fla. Stat. sec. 921.141(5)(g):

> But, let me point out that because the last one, I told you about, and this one are so similar, you can't count those as two. You can count either one of those as one.

(R. 2008)(emphasis added).

The defense counsel in discussing the two circumstances, stated:

> [Y]ou can only consider one of them, because they are duplicitious.
>
> . . .
>
> [T]hey are not both aggravating circumstances.

(R. 2033-34)(emphasis added).

The court was also specific in its instructions to the jury:

> [These two considerations] shall be considered by you individually. If, however, you find both applicable, you shall only consider one of them in your determination as an aggravating circumstance.

(R. 2039)(emphasis added).

Despite all the instructions, the jury and the court not only considered both circumstances, they found both circumstances. Despite the notice given within the transcript, and knowledge of the law, apellate counsel failed to raise this important claim on direct appeal.

There can be no doubt that the court considered and found

both aggravating circumstances. In addition to the specific rendering in the Record at 2081-83, noted above, the court repeated its findings and stated it weighed each of them in this case:

> The Court further finds that each of the aggravating circumstances under Subsections "b" through "i" standing alone outweigh all the mitigating circumstances in this case combined.

(R. 2090)(emphasis added).

There can be no doubt as to the validity of this claim.

> [The] application of both the factors of committed to avoid lawful arrest and committed to disrupt or hinder law enforcement constitutes impermissible "doubling," i.e., finding two aggravating circumstances based on a single aspect of the offense. We agree. This Court has repeatedly held that application of both of these aggravating factors is error where they are based on the same essential feature of the capital felony.

Bello v. State, 547 So. 2d 914, 917 (Fla. 1989)(emphasis added). See, e.g., Jackson v. State, 498 So. 2d 406 (Fla. 1986), cert. denied, 483 U.S. 1010, 107 S. Ct. 3241, 97 L.Ed.2d 746 (1987); Thomas v. State, 456 So. 2d 454 (Fla. 1984).

That these two factors are based on the same essential factor and that the finding of both is fundamental error is so obvious, it practically jumps from the transcript in its need to be corrected. Yet, appellate counsel failed to recognize and

raise this claim on direct appeal.[3]

This is a claim which would have removed an invalid aggravating circumstance. That the doubled claim was error, and prejudicial, especially in light of this Court's decision in Bello. Accordingly, Mr. Rivera is entitled to a resentencing proceeding.

ARGUMENT VII

MR. RIVERA'S DEATH SENTENCE RESTS UPON AN UNCONSTITUTIONAL AUTOMATIC AGGRAVATING CIRCUMSTANCE AND MR. RIVERA RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO ADVOCATE AND LITIGATE THIS ISSUE IN VIOLATION OF MR. RIVERA'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The State presented alternative theories of premeditated and felony murder at Mr. Rivera's trial. See Fla. Stat. sec. 782.04. See also Lightbourne v. State, 438 So. 2d 380, 384 (Fla. 1983). The prosecutor argued both theories, with emphasis on felony murder, and the court instructed on both. A general verdict was returned.

Because felony murder could have been the basis of Mr. Rivera's conviction, the subsequent death sentence is unlawful.

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[3]Appellate counsel may have relied on the written sentencing order, signed July 22, 1987, in which this fundamental error is omitted; if so, counsel is ineffective for failure to note said written order did not accurately reflect the record.

See Mills v. Maryland, 108 S. Ct. 1860 (1988)(If two possible grounds for verdict are presented and one of the two is legally insufficient, jury verdict must be set aside on basis of uncertainty; this analysis holds special significance in eighth amendment contexts), citing, Yates v. United States, 354 U.S. 298, 312 (1957), and Stromberg v. California, 283 U.S. 359 (1931). This is so because the death penalty in this case was predicated on an unreliable automatic finding of a statutory aggravating circumstance -- the felony murder finding that formed the basis for conviction.

Sumner v. Shuman, 107 S. Ct. 2716 (1987), held that automatic death penalties upon conviction of first degree murder violate the eighth and fourteenth amendments. Here, the same felony supporting the felony murder conviction was found as a statutory aggravating circumstance. Under this construction, every felony murder would automatically qualify for a sentence of death. However, the United States Supreme Court has held that "an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty. . . . " Zant v. Stephens, 462 U.S. 862, 876 (1983).

Most recently, the Supreme Court addressed a similar challenge in Lowenfield v. Phelps, 108 S. Ct. 546 (1988). In Lowenfield, the petitioner was convicted of first degree murder under a Louisiana statute which required that he have "a specific

intent to kill or inflict great bodily harm upon more than one person." Id. at 547. This was also the same aggravating circumstance used to sentence him to death.

> To pass constitutional muster, a capital-sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1983); cf. Gregg v. Georgia, 428 U.S. 153 (1976).
>
> . . . .
>
> The use of "aggravating circumstances," is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion. We see no reason why this narrowing function may not be performed by jury findings at either the sentencing phase of the trial or the guilt phase. Our opinion in Jurek v. Texas, 428 U.S. 262 (1976), establishes this point.
>
> . . . .
>
> It seems clear to us from this discussion that the narrowing function required for a regime of capital punishment may be provided in either of these two ways: The legislature may itself narrow the definition of capital offenses, as Texas and Louisiana have done, so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase.

Id. at 548 (emphasis added).

The operation of Florida law in this case did not provide

constitutionally adequate narrowing at either phase, because conviction and aggravation were both predicated upon a non-legitimate narrowing factor -- felony murder.

Lowenfield represents a significant change in eighth amendment jurisprudence. It was unavailable in Mr. Rivera's earlier proceedings. To the extent that appellate counsel failed to advocate this issue counsel was ineffective. Strickland v. Washington, 466 U.S. 668 (1984). Accordingly, Mr. Rivera was denied his sixth and eighth amendment rights to effective counsel. Mr. Rivera's sentence of death should be vacated.

ARGUMENT VIII

MR. RIVERA'S DEATH SENTENCE RESTS UPON AN UNCONSTITUTIONAL AUTOMATIC AGGRAVATING CIRCUMSTANCE.

The State presented alternative theories of premeditated and felony murder at Mr. Rivera's trial. See Fla. Stat. sec. 782.04. See also Lightbourne v. State, 438 So. 2d 380, 384 (Fla. 1983). The prosecutor argued both theories, with emphasis on felony murder, and the court instructed on both. A general verdict was returned.

Because felony murder could have been the basis of Mr. Rivera's conviction, the subsequent death sentence is unlawful. See Mills v. Maryland, 108 S. Ct. 1860 (1988)(If two possible grounds for verdict are presented and one of the two is legally

insufficient, jury verdict must be set aside on basis of uncertainty; this analysis holds special significance in eighth amendment contexts), citing, Yates v. United States, 354 U.S. 298, 312 (1957), and Stromberg v. California, 283 U.S. 359 (1931). This is so because the death penalty in this case was predicated on an unreliable automatic finding of a statutory aggravating circumstance -- the felony murder finding that formed the basis for conviction.

Sumner v. Shuman, 107 S. Ct. 2716 (1987), held that automatic death penalties upon conviction of first degree murder violate the eighth and fourteenth amendments. Here, the same felony supporting the felony murder conviction was found as a statutory aggravating circumstance. Under this construction, every felony murder would automatically qualify for a sentence of death. However, the Supreme Court has held that "an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty. . . . " Zant v. Stephens, 462 U.S. 862, 876 (1983).

Most recently, the United States Supreme Court addressed a similar challenge in Lowenfield v. Phelps, 108 S. Ct. 546 (1988). In Lowenfield, the petitioner was convicted of first degree murder under a Louisiana statute which required that he have "a specific intent to kill or inflict great bodily harm upon more than one person." Id. at 547. This was also the same

aggravating circumstance used to sentence him to death.

> To pass constitutional muster, a capital-sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1983); cf. Gregg v. Georgia, 428 U.S. 153 (1976).
>
> . . . .
>
> The use of "aggravating circumstances," is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion. We see no reason why this narrowing function may not be performed by jury findings at either the sentencing phase of the trial or the guilt phase. Our opinion in Jurek v. Texas, 428 U.S. 262 (1976), establishes this point.
>
> . . . .
>
> It seems clear to us from this discussion that the narrowing function required for a regime of capital punishment may be provided in either of these two ways: The legislature may itself narrow the definition of capital offenses, as Texas and Louisiana have done, so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase.

Id. at 548 (emphasis added).

The operation of Florida law in this case did not provide constitutionally adequate narrowing at either phase, because conviction and aggravation were both predicated upon a non-

legitimate narrowing factor -- felony murder.

Lowenfield and Mills represent a significant change in eighth amendment jurisprudence. They were unavailable in Mr. Rivera's earlier proceedings. Relief is therefore warranted under this Petition.

ARGUMENT IX

THE TRIAL COURT'S ERROR IN DISMISSING CERTAIN JURORS FOR CAUSE DEPRIVED MR. RIVERA OF HIS RIGHTS IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND WITHERSPOON V. ILLINOIS.

The following comments are those of prospective juror Mr. Noel Hernandez:

> THE COURT: Do you have any philosophical, religious, or moral, or conscientious scruples that are against the imposition of a death penalty in a proper case?
>
> MR. HERNANDEZ: No, sir, I do not.
>
> THE COURT: Fine, thank you very much.

(R. 522)(emphasis added).

> MR. PUROW: Mr. Hernandez, what are your feelings on the death penalty?
>
> MR. HERNANDEZ: I think that we do not have to get into an emotional reaction, but under certain circumstances it is, yes, it is necessary.
>
> MR. PUROW: So you are saying that under the right circumstances you could make the recommendation of the death penalty?

MR. HERNANDEZ: Yes, sir.

MR. PUROW: So what you are saying--

MR. HERNANDEZ: Not in this particular case, not in this particular case because as of right now I really do not know what has happened. I really do not know what is appropriate.

But in this case, maybe, maybe in this case it will not be necessary. I don't know what has happened here.

RM. [sic] PUROW: All right, sir. I think that what you are saying is that since you don't know the facts you are not able to make a decision now--

MR. HERNANDEZ: Exactly.

(R. 674-75)(emphasis added). This is the sum total of Mr. Hernandez's comments concerning the death penalty. No other disqualifying matters were brought to the Court's attention. Yet, Mr. Hernandez was stricken for cause (R. 749).

This Court was faced with an identical case in Chandler v. State, 492 So. 2d 171 (1983):

> Both these venirewomen stated unequivocally that their feelings toward capital punishment would not affect their ability to return a verdict of guilty, if such a verdict were warranted by the evidence. As for the penalty phase, it is not enough that a prospective juror "might go towards" life imprisonment rather than death. It is not enough that he or she "probably would lean towards life rather than death, if [the aggravating and mitigating circumstances] were equal."

Chandler v. State, 492 So. 2d at 174 (1983)(emphasis

added)(footnotes omitted).

The argument that since the state had used a few peremptory challenges available to it, the challenged members of the venire would have been excused peremptorily had the trial court refused to grant cause challenges has no merit. The decision in Davis v. Georgia, 429 U.S. 129, 97 S. Ct. 399, 50 L.Ed.2d 339 (1976), compels this Court to conclude that the dismissals for cause complained of by Mr. Rivera cannot be sanctioned as "harmless error," regardless of whether the state at trial could have peremptorily challenged the same jurors. In reversing the state court decision the majority opinion of the United States Supreme Court stated flatly:

> Unless a venireman is "irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the court of proceedings," he cannot be excluded; if a venireman is improperly excluded even though not so committed, any subsequently imposed death penalty cannot stand.

Id. at 123, 97 S. Ct. at 400 (citations omitted)(emphasis supplied).

The Fifth Circuit Court of Appeals has addressed itself to the very situation faced in the case before us. In Burns v. Estelle, 592 F.2d 1297 (5th Cir. 1979), the fifth circuit summarized Witherspoon and its progeny, including Davis, as providing, inter alia:

> 2. No jury from which even one person has been excused on broader Witherspoon-type grounds . . . may impose a death penalty or sit in a case where it may be imposed, regardless of whether an available peremptory challenge might have reached him.

Id. at 1300. See also Moore v. Estelle, 670 F.2d 56 (5th Cir. 1982).

To the extent appellate counsel failed to object to the nonstatutory aggravating factor or to discover that this prior conviction was a misdemeanor, defense counsel was ineffective. Mr. Rivera's sentence of death should be vacated.

ARGUMENT X

MR. RIVERA'S JUDGE AND JURY AT HIS TRIAL CONSIDERED AND RELIED ON THE VICTIM'S PERSONAL CHARACTERISTICS AND THE IMPACT OF THE OFFENSE ON THE VICTIM'S FAMILY IN VIOLATION OF MR. RIVERA'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS, BOOTH V MARYLAND, SOUTH CAROLINA V. GATHERS, AND JACKSON V. DUGGER. MR. RIVERA RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN APPELLATE COUNSEL FAILED TO ZEALOUSLY ADVOCATE AND LITIGATE THIS ISSUE IN VIOLATION OF MR. RIVERA'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

The following claim is based on the fact that Booth v. Maryland, 482 U.S. 496, 107 S. Ct. 2529 (1987), was decided just nine (9) days prior to Mr. Rivera's trial. To the extent that it had not yet been published and disseminated and was not common knowledge, it was new law and thus appropriate for consideration

in this Petition. To the extent that it had been decided nine (9) days prior to Mr. Rivera's trial and counsel did not raise objections based on Booth, counsel was ineffective.

To the extent that counsel did in fact object at the beginning of trial to the presence of the officers, appellate counsel was ineffective for failing to raise this claim on direct appeal.

The trial judge considered and relied on the victim's personal characteristics and the impact of the offense on the victim's family in violation of Samuel Rivera's eighth and fourteenth amendment rights. The following is the trial court's statement when Mr. Rivera was sentenced:

> [The Court]: You have killed a police officer. Police officers are a singular group that stand in a different category under different circumstances than anyone else. Everyday those on the police forces must protect all of society, and but for them society would sink into an amoral mass of chaos.
>
> You recognize their responsibilities and their duties. We recognize that anyone who kills a police officer in the line of duty must be and will be prosecuted to the fullest extent of the law.
>
> It is a duty and obligation of this Court to protect those police officers who put their life on the line each and every day, to the best of this Court's ability.
>
> I have no compunction and I have no equivocation in maintaining this obligation, this Court, as well as all of society, to the

police throughout, not only this County, but throughout the entire United States --

You must know, without qualification, that if you are going to kill a police officer in the line of duty, you are going to pay the fullest penalty that the law provides.

The law looks for justice. Forgiveness is forgotten.

When you meet your maker on your judgment day, when he peers into your heart and also when he renders your final eternal sentence, only then will he determine whether you are truly repentant and worthy of some type of forgiveness.

I am confident that he will recognize that on this day this Court has entered the proper verdict and sentence for the proper reasons.

Mrs. Miyares -- Mrs. Miyares, this Court sympathizes and empathizes with your grief and anguish. I know that your faith in God and the church, with all your friends, with all the outpouring of sympathy from the entire community, you will be able to cope and sustain yourself from really such a needless and unnecessary loss of life.

I just want to express my personal feelings in this matter.

(R. 2095-96)(emphasis added).

The highly visible presence of uniformed and plain clothed police officers during the guilt and penalty phase of Mr. Rivera's trial in the presence of the jury served as a constant reminder that the victim was a police officer. During Mr. Rivera's trial, police officers occupied one-half or more of the

spectator seats in the courtroom. The court's comments are indicative of the family status of all police officers -- "a singular group that stand in a different category under different circumstances than anyone else" (R. 2095).

At the start of Mr. Rivera's trial, four uniformed Hialeah Police Officers and numerous officers in civilian clothes were seated en masse in the courtroom. The state attorney suggested that the officers could break up into "five or six little groups" (R. 970-71)(emphasis added) which, assuming a "group" is more than one person, indicates a presence of ten or twelve officers at the minimum, and perhaps 18 or more assuming "groups" of three persons.

That the police presence was excessive is shown by the fact that this was a "very small courtroom," having only twenty four seats (R. 1936). Therefore, with the addition of the normal "corrections officers" present, one-half to three quarters of the courtroom was occupied by police officers.

Counsel for Mr. Rivera properly objected to the presence of the officers at the beginning of the trial:

> Thereupon, the following proceedings were had:
>
> MR. GURALNICK: Judge, before we start, I would like to bring it to the Court's attention about the vast number, the great number of individuals, the police officers in this courtroom who are from the City of Hialeah Police Department.

> I am going to object, your Honor. I think that it's highly prejudicial to this Defendant to have these officers in uniform sitting here in front of the jury during the trial.

(R. 968)(emphasis added).

In addition to the vast number of police officers present in the courtroom, the State introduced improper victim impact statements in its closing remarks. Though an objection was raised and a curative instruction offered, there was still prejudice. The room was full of police officers, even more so than it had been throughout the trial -- so full that extra "corrections officers" had been brought in to protect the defendant.

> But, you know, when you talk about a police officer -- police officer, their duty is to go and put their necks on the line. Their duty is to run after fleeing felons through shopping malls who are carrying around guns, and try to arrest him.
>
> If anybody else was there, what would they have done? They would have gone in and called the police. They go and get a police officer to help them, but a police officer cannot do that. A police officer has to take the action himself.
>
> So, because of this situation, it is extra, extra terrible when a police officer dies, and that is why we have --
>
> MR. GURALNICK: Objection, Your Honor. Excuse Me.
>
> Your Honor, I want to enter an objection. I don't know if you heard the last comment about extra special when a

police officer dies.

We recognize that is, of course, a bad thing, but that has nothing to do with the aggravating circumstances.

THE COURT: I heard.

MR. GURALNICK: I ask for a curative instruction and move for a mistrial.

THE COURT: Again, the motion for a mistrial is denied.

I am going to again ask you to disregard the last statement of the State's attorney and not to consider it in your deliberations.

(R. 2019-20)(emphasis added).

Since the court may have been swayed as shown by its comments (R. 2095-96), it is reasonable to believe that the jury was actually intimidated -- all these officers were the victim's friends and co-workers -- an extended family. Even the State had noted a possible problem:

Your Honor, I can understand your Honor's concern and to some extent I can agree because of the close proximity of the public area, the spectators' area to the jury box.

I think that we can work this out. I don't think that there is going to be any problem

I think that the officers are going to be going in and out, and I think that we can make some arrangements.

(R. 968)(emphasis added).

In Booth v. Maryland, 482 U.S. 496, 107 S. Ct. 2529 (1987),

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

The Booth and Gathers courts found the consideration of evidence and argument involving matters such as those relied on by the judge and jury here to be constitutionally impermissible, as such matters violated the well established principle that the discretion to impose the death penalty must be "suitably directed

and limited so as to minimize the risks of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. 153, 189 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.); see also California v. Ramos, 463 U.S. 992, 999 (1983). The Booth court ruled that the sentencer was required to provide, and the defendant had the right to receive, an "individualized determination" based upon the "character of the individual and the circumstances of the crime." Booth v. Maryland, supra; see also Zant v. Stephens, 462 U.S. 862, 879 (1983); Eddings v. Oklahoma, 455 U.S. 104, 112 (1982). Here, however, the judge and jury justified the death sentence through an individualized consideration of the victim's personal characteristics and impact of the crime on their family.

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

Here, the proceedings violated Booth and Gathers, thus calling into question the reliability of Mr. Rivera's penalty phase. The State's evidence and argument was a deliberate effort

to invoke "an unguided emotional response" in violation of the eighth amendment. Penry v. Lynaugh, 109 S. Ct. 2934, 2952 (1989).

Florida law also recognizes the constitutionally unacceptable risk that a jury may impose a sentence of death in an arbitrary and capricious manner when exposed to victim impact evidence. In Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989), this Court held that the principles of Booth are to be given full effect in Florida capital sentencing proceedings.

The same outcome is dictated by this Court's decision in Scull v. State, 533 So. 2d 1137 (Fla. 1988), where the court, again relying on Booth, noted that a trial court's consideration of victim impact statements from family members contained within a presentence investigation as evidence of aggravating circumstances constitutes capital sentencing error.

Mr. Rivera was sentenced to death on the basis of the constitutionally impermissible "victim impact" evidence and argument which the Supreme Court condemned in Booth and Gathers. The Booth court concluded that "the presence or absence of emotional distress of the victim's family, or the victim's personal characteristics are not proper sentencing considerations in a capital case." Booth, 107 S. Ct. at 2535 (emphasis added). These are the very same impermissible considerations urged on (and urged to a far more extensive degree) and relied upon by the

jury and judge in Mr. Rivera's case. Here, as in Booth, the victim impact consideration serve[d] no other purpose than to inflame the judge and jury and divert them from deciding the case on the relevant evidence concerning the crime and the defendant. Id. Since a decision to impose the death penalty must "be, and appear to be, based on reason rather than caprice or emotion," Gardner v. Florida, 430 U.S. 349, 358 (1977)(opinion of Stevens, J.), such efforts to fan the flames are "inconsistent with the reasoned decision making" required in a capital case. Booth, 107 S. Ct. at 2536. The decision to impose death must be a "reasoned moral response." Penry, 109 S. Ct. at 2952. The sentencer must be properly guided and must be presented with the evidence which would justify a sentence of less than death.

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

of death because of impermissible considerations, Booth, 107 S. Ct. at 2534, habeas corpus relief is appropriate.

CONCLUSION AND RELIEF SOUGHT

The claims discussed above raised matters of fundamental error and/or are predicated upon 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. Rivera's capital conviction and sentence of death, and of this Court's appellate review, they should be determined on their merits. The relief sought herein should be granted.

Many of the claims set out above involve, inter alia, ineffective assistance of appellate counsel, as well as fundamental error. The appellate level right to counsel also comprehends the sixth amendment right to effective assistance of counsel. Evitts v. Lucey, 105 S. Ct. 830 (1985). Appellate counsel must function as "an active advocate," Anders v. California, 386 U.S. 738, 744, 745 (1967), providing his client the expert professional . . . assistance . . . necessary in a system governed by complex laws and rules and procedures. . . ." Lucey, 105 S. Ct. at 835 n.6.

Even a single, isolated error on the part of counsel may be sufficient to establish that the defendant was denied effective

assistance, Kimmelman v. Morrison, 106 S. Ct. 2574, 2588 (1986); United States v. Cronic, 466 U.S. 648, 657 n.20 (1984)); Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1970); see also Johnson (Paul) v. Wainwright, 498 So. 2d 938 (Fla. 1987), notwithstanding the fact that in other aspects counsel's performance may have been "effective." Washington v. Watkins, 655 F.2d 1346, 1355 (5th Cir.), reh. denied with opinion, 662 F.2d 1116 (1981).

Moreover, as this Court has explained, the Court's "independent review" of the record in capital cases neither can cure nor undo the harm caused by an appellate attorney's deficiencies. Wilson v. Wainwright, 474 So. 2d 1162, 1165 (Fla. 1985). "The basic requirement of due process," therefore, "is that a defendant be represented in court, at every level, by an advocate who represents his client zealously within the bounds of the law." Id. at 1164 (emphasis supplied).

Appellate counsel here failed to act as an advocate for his client. As in Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987), there simply was no reason here for counsel to fail to urge them on direct appeal. As in Matire, Mr. Rivera is entitled to relief. See also Wilson v. Wainwright, supra; Johnson v. Wainwright, supra. The "adversarial testing process" failed during Mr. Rivera's direct appeal -- because counsel failed. Matire at 1438, citing Strickland v. Washington, 466 U.S. 668, 690 (1984).

To prevail on his claim of ineffective assistance of appellate counsel, Mr. Rivera must show: (1) deficient performance, and (2) prejudice. Matire, 811 F.2d at 1435; Wilson, supra. As the foregoing discussion illustrates, he has.

WHEREFORE, Samuel Rivera, through counsel, respectfully urges that the Court issue its writ of habeas corpus and vacate his unconstitutional conviction and sentence of death. Since this action also presents question of fact, Mr. Rivera urges that the Court relinquish jurisdiction to the trial court, or assign the case to an appropriate authority, for the resolution of the evidentiary factual questions attendant to his claims, including, inter alia, questions regarding counsel's deficient performance and prejudice.

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

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by first class, U.S. Mail, postage prepaid to Fariba Komeily, Assistant Attorney General, Ruth Bryan Owen Rhode Building, Dade County Regional Service Center, 401 NW Second Avenue, Suite 921N, Miami, Florida 33128, this 17th day of December, 1990.

Larry H. Spalding /ehw
Attorney