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IN THE SUPREME COURT OF FLORIDA

CASE NO. 76769

ROY CLIFTON SWAFFORD,

Petitioner,

v.

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

Respondent.

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

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

A. JURISDICTION

This is an original action under Fla. R. App. P. 9.100(a). This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents constitutional issues which directly concern the judgment of this Court during the appellate process, and the legality of Mr. Swafford's capital convictions and sentences of death. and on direct appeal this Court affirmed the judgment and sentence. Swafford v. State, 524 So. 2d 403 (Fla. 1988). Jurisdiction of 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. Wainwrisht, 474 So. 2d 1163 (Fla. 1985); Bassett v. Wainwrisht, 229 So. 2d 239, 243 (Fla. 1969); ~~see also~~ Johnson v. Wainwright, 498 So. 2d 938 (Fla. 1987); cf. Brown v. Wainwrisht, 392 So. 2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Swafford to raise the claims presented herein.

This Court has consistently maintained an especially vigilant control over capital cases, exercising a special scope of review, **see** Elledge v. State, 346 So. 2d 998, 1002 (Fla.

1977); Wilson v. Wainwrisht, 474 So. 2d at 1165, and has not hesitated in exercising its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital trial and sentencing proceedings. This petition presents substantial constitutional questions which go to the heart of the fundamental fairness and reliability of Mr. Swafford's capital convictions and sentences of death, and of this Court's appellate review.

As discussed herein, the ends of justice call on the Court to grant the relief sought in this case. The petition pleads claims involving fundamental constitutional error. **See** Dallas v. Wainwrisht, 175 So. 2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So. 2d 362 (Fla. 1984). The petition includes claims predicated on significant, fundamental, and retroactive changes in constitutional law. **See,** e.g., Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989); Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987); Tafero v. Wainwrisht, 459 So. 2d 1034, 1035 (Fla. 1984); Edwards v. State, 393 So. 2d 597, 600 n.4 (Fla. 3d DCA), petition denied, 402 So. 2d 613 (Fla. 1981); cf. Witt v. State, 387 So. 2d 922 (Fla. 1980). The petition also involves claims of ineffective assistance of counsel on appeal. **See** Knight v. State, 394 So. 2d 997, 999 (Fla. 1981); Wilson v. Wainwrisht, supra; Johnson v. Wainwrisht, supra. These and other reasons demonstrate that the Court's exercise of its habeas corpus jurisdiction, and of its

authority to correct constitutional errors such as those herein pled, is warranted in this action. As the petition shows, habeas corpus relief would be more than proper on the basis of Mr. Swafford's claims.

Mr. Swafford's claims are presented below. They demonstrate that habeas corpus relief is proper.

B. REQUEST FOR STAY OF EXECUTION

Mr. Swafford's petition includes a request that the Court stay his execution, presently scheduled for Tuesday, November 13, 1990. As will be shown, the issues presented are substantial and warrant a stay of execution. This Court has not hesitated to stay executions when warranted to ensure judicious consideration of the issues presented by petitioners litigating during the pendency of a death warrant. **See** Marek v. Dusser (No. 73,175, Fla. Nov. 8, 1988); Gore v. Dusser (No. 72,202, Fla. April 28, 1988); Riley v. Wainwright (No. 69,563, Fla., Nov. 3, 1986).

The claims presented by Mr. Swafford's petition are no less substantial than those involved in the cases cited above. He therefore respectfully urges that the Court enter an order staying his execution, and, thereafter, that the Court grant habeas corpus relief.

PROCEDURAL HISTORY

The Circuit Court of the Seventh Judicial Circuit, Volusia County, entered the judgment and sentence at issue.

Mr. Swafford was charged by indictment with first-degree murder, sexual battery, and robbery.

Mr. Swafford entered pleas of not guilty.

Trial commenced on October 28, 1985. On November 6, 1985, the jury returned a verdict finding Mr. Swafford guilty of first-degree murder and sexual battery.

The penalty phase was conducted on November 7, 1985. The sentencing jury returned an advisory sentence of death. On November 12, 1985, the trial court imposed a sentence of death.

On direct appeal, the Florida Supreme Court affirmed. Swafford v. State, 533 So. 2d 270 (Fla. 1988), cert. denied, 109 S. Ct. 1578 (1989).

Mr. Swafford applied for executive clemency on March 27, 1989. Clemency was denied. A death warrant was signed on September 7, 1990, and Mr. Swafford is presently scheduled to be executed on November 13, 1990.

In the instant motion, references to the transcripts and record of these proceedings will follow the pagination of the Record on Appeal, and will be referred to as "(R. ___)." All other references are self-explanatory or will be otherwise explained.

GROUNDS FOR HABEAS CORPUS RELIEF

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

CLAIM I

APPELLATE COUNSEL WAS UNREASONABLY INEFFECTIVE IN FAILING TO PROVE TO THE COURT THAT MR. SWAFFORD'S "ADMISSION" WAS IN FACT INADMISSIBLE WILLIAMS RULE EVIDENCE.

One alleged statement. One alleged statement made allegedly to one person, one time, without any corroboration, formed the basis for Mr. Swafford's conviction. This one alleged statement was the focal point upon which this Court rested its opinion in Mr. Swafford's direct appeal. Swafford v. State, 533 So. 2d 270 (Fla. 1988). Clearly, but for the failure of appellate counsel to prepare for this crucial point and his failure to note for the court the inappropriate application of the law and cases cited by

the Court in a Motion for Rehearing the Court may very well have recognized the dissenting opinion as the appropriate analysis.

Initially it should be made clear that the **"testimony"** concerning this alleged statement was so inconsistent as to immediately suggest its untrustworthiness. During the proffer the witness testified:

> Yea, he said -- well, I asked him after he said, you know, he's -- I'm pretty sure it was after, if he's, you know, he said he shot them in the head.

(R. 936)(emphasis added).

Before the jury, just a few minutes later the witness testified in total contradiction to his proffer. He stated:

> So, I asked him, I said, man, don't -- you know, don't that bother you. And he said, it does for a while, you know, you just get used to it.
>
> Q. And did you go to any location?
>
> A. Well, we were still riding. So we -- we come up to Kroger's parking lot.

(R. 964)(emphasis added). Within a few minutes the witness related two contradictory stories. In one, he was sure he was told the **"statement"** after the alleged incident, and two, the alleged statement was made before they allegedly got to the Kroger's parking lot. Both contradictory. Both extremely prejudicial. And the State made maximum use of it in closing:

> The statement that the Defendant made to an Ernest Wade Johnson in Nashville two months after the murder of Brenda Rucker to the

effect which made evidence, and this is something you have to decide, when he told Ernest Johnson that you can get over something like that, it doesn't bother you after a while, that could also be considered and accepted, if you wish it, to be a statement that he may have committed that murder or a murder. Direct. Direct. It's as direct as you can get evidence.

(R. 1347)(emphasis added). Or **a** murder. Respectfully, this statement simply cannot be considered non-prejudicial. **See** Swafford v. State, 533 So. 2d 270, 275 (Fla. 1988).

This statement formed the basis not only for conviction but for the establishment of aggravating circumstances as well. This statement cannot be considered to be without extreme prejudice. Extreme prejudice in the literal use of the phrase. Unquestionably, death is termination with extreme prejudice.

How is it that appellate counsel allowed the rationale of the Williams Rule to be convoluted into an **"admission?"** The answer lies in counsel's failure to analyze the cases cited by the Court in support of the preposition that this **"statement"** could be allowed as an **"admission"** rather than inadmissible Williams Rule evidence.

This Court relied upon six cases to support its position that:

[1] An admission of a party-opponent is admissible as an exception to the hearsay evidence rule. Section 90.803(18), Fla. Stat. (1985). In contrast to other hearsay exceptions, admissions are admissible in evidence not because the circumstances

> provide special indicators of the statement's reliability, but because the out-of-court statement of the party is inconsistent with his express or implied position in the litigation. McCormick on Evidence Section 262 (E. Cleary ed. 1984). The admissibility of admissions of a party has been recognized by numerous Florida decisions. E.g., Hunt v. Seaboard Coast Line R.R., 327 So. 2d 193 (Fla. 1976); Roberts **v. State,** 94 Fla. 149 133 So. 726 (1927); Parrish v. State, 90 Fla. 25, 105 S. 130 (1925); Daniels v. State, 57 Fla. 1, 48 So. 747 (1909); Dinter v. Brewer, 420 So. 2d 932 (Fla. 3d DCA 1982); Darty v. State, 161 So. 2d 864 (Fla. 2d DCA), cert. denied, 168 So. 2d 147 (Fla. 1964).

533 So. 2d at 274.

These six cases, two of which are civil and not controlled by the Williams Rule, and four of which are inapposite to the factual situation in Mr. Swafford's case, should have been read by counsel and reargued by counsel. But they were not. Indeed, the Court's opinion itself, specifically footnote four demonstrates the Court's inconsistent application of the very cases it relied upon in drawing its conclusion. In that footnote the Court cancels three criminal cases it relied upon to support its position by citing an inapplicable civil case decided in 1976: Hunt v. Seaboard Coast Line, 327 So. 2d 193 (Fla. 1976). In Hunt the Court stated:

> [4-6] We would also observe, alternatively, that the challenged testimony was admissible as an admission by a party-opponent. McCormick, supra, Section 267, page 641. The "modern view," as discussed therein, would seem to favor admission of the subject remarks under this exception to the

> hearsay rule. Of course, based on this premise, the testimony would be admissible to show the truth of the engineer's statements and not for the limited purpose of showing bias. Florida courts have consistently admitted into evidence statements **by** employees concerning matters arising from the course of their employment under the doctrine of admissions. Myrick v. Lloyd, 158 Fla. 47, 27 So. 2d 615 (1946); Montgomery Ward & Co. v. Rosenquist, 112 So. 2d 885 (2d DCA Fla. 1959); Gordon v. Hotel Seville, 105 So. 2d 175 (3d DCA Fla. 1950), cert. denied 109 So. 2d 767 (Fla. 1959). It is important to note that such statements are admissible because they are the admissions of a party-opponent or adverse party and not because they are declarations against interest. The differences between these two well-recognized exceptions to the hearsay rule are: an admission is made by a party to the litigation, while a declaration against interest is made by a non-party; an admission comes into evidence despite the presence at trial of its author, while the general hearsay rule concerning unavailability of the declarant applies in the case of declarations against interest. The statement sought to be introduced as an admission need not have been consciously against the interest of its maker at the time it occurred, while the declarant in the case of the other hearsay exception must have been aware of a risk of harm to his own interest at the time he spoke. **See** McCormick, supra, Section 276; 5 Wigmore, Evidence Section 1475.

Id. at 195-196 (Emphasis added).

The use of civil evidentiary law, that is, i.e., to consider a defendant in a criminal prosecution to be a **"party-opponent"** or an "adverse party" in a civil matter rather than a defendant in a criminal prosecution is to mix apples with oranges to reach a

view, as aptly noted in the dissenting opinion, quite foreign to Florida jurisprudence and an egregiously inappropriate vehicle to escape the overriding, more important and more applicable law -- that of the Williams Rule. To allow the Court to be so side-tracked was directly due to the malfeasance of appellate counsel for Mr. Swafford.

The application of civil evidentiary analysis notwithstanding, the Court's criminal cases miss the mark and each will be considered in turn.

In addition to Hunt, the Court next relied upon Roberts, supra, Parrish, supra, and Daniels, supra. A quick look at the dates of those cases Roberts **(1927)**, Parrish **(1925)** and Daniels **(1909)** should have alerted counsel to the fact that these cases predated the Williams Rule. Williams v. State, 110 So. 2d **654** (Fla.), cert. denied, 361 U.S. **847 (1959).** The Williams Rule has become black letter law in Florida and its mandate cannot be escaped by calling inadmissible Williams Rule evidence **"admissions,"** nor can it be skirted by implementing civil evidentiary concepts as a means to jump criminal evidentiary checks and safeguards not present in civil evidentiary law.

Additionally, there are the other patent problems with the authority relied on by the Court. In Roberts the statement appears to have been a spontaneous statement, rather than an admission. As noted in the opinion:

> A few minutes after the shooting the defendant was arrested.

Id. at 728. The statement was made moments after the shooting. In Mr. Swafford's case the alleged statement was allegedly made months after the crime was committed, not seconds. Moreover, the Court therein was concerned with procedural default in the form of a defense failure to move to strike the statement from the record.

The statements in Parrish and Daniels are more readily concerned with confessions, more readily analyzed under Miranda and Bruton than **"admissions."** Parrish relies on Daniels and Daniels is a pre-Miranda Miranda decision.

The remaining two cases do not support the Court's analysis either. Dinter v. Brewer, supra, a Third District Court of Appeal opinion is a creditor's case against a corporate officer wherein the hearsay rule was in dispute. The precise issue in Dinter was whether depositions came within the exception to the hearsay rule. In Darty, supra, which incidentally, relies on Parrish, the State introduced a statement made by the defendant "the day immediately following the **shooting."** Id. at 869. The Court therein stated that the "admission against interest**...**moreover, was cumulative" to a statement made to another witness who was on the "scene of the shooting immediately after it **occurred."** Id. at ***870.*** .cp5

As the Court stated:

> This testimony tended to show the defendant's state of mind and, as part of the res gestae, it was admissible.

Id. at 871.

The so-called **"admission"** in Mr. Swafford's case does not lend itself to a res gestae analysis. Darty is misplaced in any analysis of the instant case as are the preceding five cases noted by the Court.

In Mr. Swafford's case the State wanted its cake to remain whole while it gobbled up the **"admission"** and spit it out as Williams Rule evidence. When the State told the jury that Mr. Swafford was guilty of "this murder or **a** murder" it tried to have its cake and eat it. If it's this murder, it's an **"admission."** If it's **a** murder that Mr. Swafford should be executed for then it's Williams Rule. Through convolution the State argued alternative theories of admissibility and the trial court used both theories to justify admissibility. This simply cannot be done.

In addition, this Court should take particular note of the impact of the alleged **"admission"** on the establishment of not less than three aggravating circumstances. These agravating circumstances could not have been established without taking the **"admission"** into consideration.

No tactical decision can be ascribed to counsel's failure to urge the claim. **No** procedural bar precluded review of this issue. **See** Johnson v. Wainwright, supra, 498 So. 2d 938. However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Swafford of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra. Accordingly, habeas relief must be accorded now.

In Kennedy v. Wainwright, 483 So. 2d 424, 426 (Fla. 1986), the Court held that **"only** in the case of error that prejudicially denies fundamental constitutional **rights,"** the court **"will** revisit a matter previously settled." Mr. Swafford's case falls squarely within the Kennedy standard. As shown herein, his claim of ineffective assistance of counsel at the penalty phase plainly involves a case of error that prejudicially denied Mr. Swafford fundamental constitutional rights -- the eighth and fourteenth amendment rights, and the corresponding Florida constitutional rights, to an individualized, reliable, and constitutional capital sentencing determination. This Court should accordingly grant a stay of execution and thereafter the writ should issue.

CLAIM II

THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THE CRIME OF SEXUAL BATTERY AND APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE ON DIRECT APPEAL AND IN FAILING TO VIGOROUSLY CHALLENGE AND CORRECT NON-FACTUAL REPRESENTATIONS MADE BY THE DATE DURING ORAL ARGUMENT IN VIOLATION OF MR. SWAFFORD'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

> JUSTICE MC DONALD: There wasn't any question that she had been sexually molested?
>
> COUNSEL FOR THE STATE: No, Your Honor, no question at all.
>
> JUSTICE MC DONALD: This was the first case that I've noticed that since I've been sitting on the Court the past seven years where you have a sexual battery and the person is clothed again...homicide has immediately followed the unclothing...I've never seen this before, I'm not saying it doesn't happen.
>
> COUNSEL FOR THE STATE: Very unusual I agree.
>
> (Oral argument video tape Swafford v. State No. 68,009 at 3289-3319).

The State did not prove the crime of sexual battery at Mr. Swafford's trial beyond a reasonable doubt.

Under the Florida sexual battery statute, Fla. Stat. sec. 794.011 (1989), the State must prove oral, anal or vaginal penetration by, or union with, the sexual organ of another by any other object beyond a reasonable doubt.

Here, the evidence taken in a light the most favorable to the State established only that the victim had engaged in sexual relations. There was absolutely no evidence of intact spermazoa.

Likewise there was no serology evidence establishing that either the victim's husband or Mr. Swafford was a secretor for the simple reason that the State had failed to perform any tests of the acid phosphate within the victim's vagina in a attempt to determine the blood type of the acid phosphate found. There was simply no evidence as to the blood type of the acid phosphate contributor. Furthermore, the State never adduced any testimony from the victim's husband as to the last time the couple engaged in sexual intercourse or for that matter whether or not such sexual relations between the couple encompassed anal sex. Given this complete failure of proof of the State's case the presence of acid phosphate alone fails to negate and is entirely consistent with consentual sexual relations between the victim and her husband. Furthermore, abrasions of the anal orifice where no acid phosphate was detected is once again consistent with consentual sexual relations in addition to numerous other interpretations and etiology other than sexual battery.

The State produced slim evidence that Mr. Swafford perpetrated oral, anal or vaginal penetration by, or union with, the sexual organ of the victim by any other object. In fact, the medical examiner, Dr. Botting, testified that no sperm was found

(R. 780). That the victim's rectum had "superficial lacerations" while the victim's vagina **"did** not show any evidence of abrasions or lacerations or trauma." (R. 768). The State also failed to produce any evidence of the presence of acid phosphate on the victim's skin, undergarments or clothes. Furthermore, there was no evidence in the record as to how long acid phosphate, as a component of seminal fluid, could be detected.

Trial counsel at the conclusion of both the State's case and defense's case moved for a judgment of acquittal on the sexual battery count based on this failure of proof. (R. 1252; 1319). The motions were denied by the trial court. The jury returned a verdict of guilty.

The significance of the sexual battery conviction became evident during the penalty phase proceeding. Having been acquitted on the robbery count, the State was required to rely exclusively on the sexual battery count to sustain its burden with respect to the **"in** the commission **of"** aggravating factor pursuant to Fla. Stat. 921.141(5)(d) (1980). The State also sought to parlay the sexual battery conviction into supporting the heinous, atrocious and cruel aggravating factor pursuant to Fla. Stat. 921.141(5)(h) (1989). An argument ultimately found persuasive by this Court. Swafford v. State, 533 So. 2d 270, 277 (Fla. 1988). In short, at least two of the five aggravating factors were tied to this conviction.

The issue was not only properly preserved and ripe for appellate review, but, fit squarely into at least two of the four issues appellate counsel raised on Mr. Swafford's behalf. **See** Initial Brief of Appellant at p. **19** (Williams Rule) and p. **31** (attack on HAC aggravating factor). All counsel merely had to do was to point the issue out and this Court would have done the rest.[1]

Inexcusably, counsel dropped the ball and as a result Mr. Swafford lost a double edged line of attack on the Williams Rule issue (victim's abducted for purposes of sexual battery) and aggravating factors 5(h) and 5(d).

No tactical decision can be ascribed to counsel's failure to urge the claim. **No** procedural bar precluded review of this issue. **See** Johnson v. Wainwright, supra, **498** So. 2d **938.** However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Swafford of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, supra, **474** So. 2d at **1164-65;** Matire, supra.

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[1]Indeed as the foregoing exchange between the Court and counsel for the State demonstrates at least one member of the Court brought the issue up **sua** sponte.

In addition, appellate counsel was ineffective in failing to correct the State's numerous non-factual representations to the Court that there was **"no** question" of sexual molestation. Clearly there was. Counsel on rebuttal failed to point out that no pubic hair evidence linking Mr. Swafford to this crime existed. Just as no serology evidence existed.[2] Counsel's omissions in this regard were no less prejudicial. Furthermore, appellate counsel was ineffective in failing to correct appellee counsel's assertion that Paul Seiler, a key defense witness, never repudiated his earlier statement concerning the BOLO description. Not only did appellate counsel fail to correct appellee counsel's erroneous assertion, but agreed with counsel for the State that Mr. Seiler never repudiated his prior statement. Clearly Mr. Seiler's testimony repudiates his earlier statements concerning the BOLO description.

> MR. CASS [DEFENSE COUNSEL]: The question is whether or not the items that I'm asking you about, for example, age, weight, height, color of hair and so forth, whether or not any of that was suggested to you by Sgt. Bushdid or these descriptions that you gave came from your recollection[?]

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[2]**Further** the medical examiner, contrary to the State's representation to this Court, never testified that the victim's anus was hemorrhaging only that the anus was superficially lacerated and had blood on it. A fact not surprising considering that the victim had bled to death and was found in a pool of her blood.

> MR. SEILER: **As** far as I know, none of it was suggested.
>
> Q. None of **it** was? For example, light brown eyes.
>
> **A.** I don't believe I ever said that.
>
> Q. It says so.
>
> **A.** I really don't know what color eyes he **had**.
>
> Q. You're saying that now, but do you know whether or not -- whether or not that was told to Sgt. Bushdid?
>
> **A.** They, more or less, wanted to know what color eyes he had, and I would think about it and come up with something close as I could think about, but I really can't describe him.

(R. 1278)(emphasis added).

. . .

> Q. How about brown hair with a reddish tint?
>
> **A.** That one, I think I was thinking out loud. I really don't know what color hair he **had**.

(R. 1277)(emphasis added).

Unmistakably counsel's appellate advocacy on Mr. Swafford's behalf was deficient. No tactical decision can be ascribed to counsel's failure to correct these patent misstatements. **See** Johnson v. Wainwright, supra, **498** So. 2d 938. However, counsel's failure, a failure which could not but have been based upon ignorance of the law, and the record on appeal deprived Mr. Swafford of the appellate reversal to which he was

constitutionally entitled. **See** Wilson v. Wainwright, supra, **474** So. 2d at **1164-1165;** Matire, supra. Accordingly, habeas relief must be accorded now.

CLAIM III

MR. SWAFFORD'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. SWAFFORD'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS, BOOTH V MARYLAND, SOUTH CAROLINA V. GATHERS, AND JACKSON V. DUGGER. MR. SWAFFORD RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO ZEALOUSLY ADVOCATE AND LITIGATE THIS ISSUE IN VIOLATION OF MR. SWAFFORD'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Here the State's use of victim impact was multilayered. Not only did the State introduce evidence on the impact of the crime against Brenda Rucker and her family, but victim impact evidence from Mr. Swafford's Panama City offense. The temptation to provoke unbridled and unprincipled emotional response from Mr. Swafford's judge and jury proved irresistible to the State. The State Attorney's opportunity to unleash these emotions at Mr. Swafford's trial came at several stages of the proceedings. Clearly, the testimony and argument was manipulated to elicit maximum emotional impact.

Heath Milner, the 15 year old son of the victim in Mr. Swafford's unconstitutional Panama City conviction of burglary with assault was called to testify concerning the incident, and at the sentencing phase to present nothing more than bald victim impact evidence. There was simply no relevant purpose for the Heath Milner's testimony at penalty phase other than to inflame the sentencer with the tramatized testimony of a 15 year old boy who watched his father being shot repeatedly, as the following demonstrates:

> We, meaning **my family** and housekeeper and **her** daushter was on the beach that afternoon, Saturday afternoon. We was -- we finished swimming, whatever, and we was coming up from the beach back to the motorhome, and **Dad** saw somebody coming in -- coming out of the front door of his camper, and he went up on ahead and got in the camper.

(R. 1435)(Emphasis added).

. . .

> Q Let me take you back before that.
>
> A All right.
>
> Q Did the shotgun ever go off?
>
> A It did.
>
> Q Where were you standing when it did?
>
> A Too close.
>
> Q Did it so off near YOU?

A Yes, it did, about <u>three feet from me</u>. It hit the side of the camper wall.

(R. 1436) (Emphasis added).

. . .

Q Who shot whom?

A The <u>dark complected fellow [Mr. Swafford] sitting right there shot Dad</u>.

Q Where?

A In the <u>upper lip left of his nose</u>, and <u>**it** came out the back of his neck</u>.

Q Did you hear any other shots after that one?

A That's when I jumped out and I did. There was one more shot. Of couse, I was getting away, and I heard the other shot, and <u>**it** went into Dad's hip</u>.

(R. 1439) (Emphasis added).

The State continued its litany of victim impact evidence by calling L. Warren Milner, the actual victim in Mr. Swafford's prior conviction of burglary with assault:

<u>MY wife by then was screamins outside for the police and this and that and the other, and Heath had come up in the motorhome **by** then</u>.

When I turned back around, <u>Swafford there, he had gotten a shotgun out of the closet of the motorhome</u>.

(R. 1443) (Emphasis added).

. . .

This all happened very quickly. But, almost immediately the yellow-haired man grabbed me from behind and hte gun, and the

shotgun, and then Mr. Swafford also grabbed the gun, and I had to wrestle that shotgun away from both of them, which I succeedded in doing but in the meantime it went off. One of them managed to pull the trigger, and it went off and tore a hole in the side of the trailer.

Of couse, I was -- I wasn't sure some of those pellets didn't hit Heath. Of couse, the gun bolt was open, and I told them, both of them, that they had better get out of there, just get out before somebody got hurt seriously.

Well, Mr. Swafford kept yelling profanity that he was --

Q Tell us what he was saying, sir, as best you can recall. I know it's a traumatic experience for you, but as best you can recall, what was Mr. Swafford telling you, the owner or the custodian of that motorhome that he was ripping off. Tell us what he was telling you.

A He yelled for his friend to get him his gun and that he was going to teach this mother fucking son of a bitch a lesson.

Q And did he?

A Well, here again, it happened so quickly because when I turned back around to face them he had a thirty-eight pointed right at me as close as five feet or less an started popping away with that thirty-eight right in my face before I had a chance to do anything.

The first slus went in here and tore out this jaw. (Witness indicating.) **It** tore my tongue out, tore my throat out, severed this carotid artery on this side and came out the back of the neck.

The force of the bullet knocked me out the door, and the second shot him me in

the hip. We learned later that it went -- it shattered one of the bones in the **hip** and then glanced off of the second bone and came out this side, (Witness indicating.) barely missing the genital organs.

Q And was this in the view of your wife and children?

A **Yes.**

Q And did your wife come to help you and assist you to save your life?

A **As** I fell out of the motorhome in the sand there I knew there wasn't -- I didn't -- I couldn't figure out a way that I could stay alive because I couldn't breathe. I was drowning in my own blood. But this **guy,** Swafford, came out the door waving that thirty-eight around and I thought sure he was going to shoot again at me or my wife or Heath. You know, he stood there waving that gun for a little bit and then went back in the motorhome out of **my** view. By then I was totally preoccupied with trying to stay alive.

(R. 1443-45)(emphasis added).

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

> You heard the testimony of Mr. Milner today that this Defendant in cold blood called him some names, shot him in his own mobile home throush the face and in front of his son and his wife outside. Not only did he shoot him through the face five feet away, as the man was going through his own trailer he shot him again through the buttocks.

(R. 1466-67) (emphasis added).

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

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

discretion to impose the death penalty must be "suitably directed and limited so as to minimize the risks of wholly arbitrary and capricious **action."** Greaa 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);** Eddinqs 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. Swafford'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. Jackson is procedurally and factually indistinguishable from the instant case, and directs Mr. Swafford to present the instant Booth claim to this Court in seeking Rule 3.850 relief. Jackson, 547 So. 2d at 1200 n.2. As in Jackson, defense counsel for Mr. Swafford objected during portions of the State's repeated introduction of victim impact evidence. Compare Jackson v. State, 498 So. 2d 406, 411 (Fla. 1986), with Jackson v. Dusser, 547 So. 2d 1197 (Fla. 1989). Accordingly, no bars apply. Jackson is a change of law to which Mr. Swafford having properly preserved the issue at trial is now entitled to relief. However, Mr. Swafford respectfully submits that should a procedural bar be fund to exist the application of such a bar is the direct result of unreasonable omissions of appellate counsel.

Booth was decided on June **15, 1987.** Mr. Swafford's direct appeal was decided on September **29, 1988.** Reasonable attorney performance would dictate that capital appellate counsel be aware of capital cases pending before the United States Supreme Court particularly when such cases present an indistinguishable factual and procedural posture. Here, however, counsel filed no request for additional briefing or notice of supplemental authority.

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

No tactical decision can be ascribed to counsel's failure to urge the claim. **No** procedural bar precluded review of this issue. **See** Johnson v. Wainwright, supra, **498** So. 2d **938.** However, counsel's failue, a failure which caould not but have been based upon ignorance of the law, deprived Mr. Swafford of the appellate reveral to which he was constitutionally entitled. See Wilson v. Wainwright, supra, **474** So. 2d at **1164-65;** Matire, supra.

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

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

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

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

CLAIM IV

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

A capital sentencing jury must be:

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

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

reasons set forth below, that the Court grant him the relief to which he can show entitlement.

Shifting the burden to the defendant to establish that mitigating circumstances outweigh aggravating circumstances conflicts with the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), and Dixon, for such instructions unconstitutionally shift to the defendant the burden with regard to the ultimate question of whether he should live or die. In so instructing a capital sentencing jury, a court injects misleading and irrelevant factors into the sentencing determination, thus violating Caldwell v. Mississippi, 472 U.S. 320 (1985); Hitchcock v. Dusser, 107 S. Ct. 1821 (1987); Maynard v. Cartwright, 108 S. Ct. 1853 (1988). Mr. Swafford's jury was unconstitutionally instructed, as the record makes abundantly clear (See R. 1482-83). This claim is now properly before this Court, and Habeas relief would be more than proper.

At the penalty phase of trial, prosecutorial argument and judicial instructions informed Mr. Swafford's jury that death was the appropriate sentence unless "mitigating circumstances exist to outweigh any aggravating circumstances." Such instructions, which shift to the defendant the burden of proving that life is the appropriate sentence, violate the eighth and fourteenth amendments, as the Court of Appeals for the Ninth Circuit recently held in Adamson v. Ricketts, 865 F.2d 1011 (9th Cir.

1988)(in banc). This claim involves a "perversion" of the jury's deliberations concerning the ultimate question of whether Mr. Swafford should live or die. **See** Smith v. Murray, 106 S. Ct. 2661, 2668 (1986). No bars apply under such circumstances. **Id.**

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

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

Adamson, supra; Swafford, supra. The unconstitutional presumption inhibited the jury's ability to "fully" assess mitigation, in violation of Penry v. Lynaugh, 109 S. Ct. 2935 (1989), a decision which was declared, on its face, to apply retroactively to cases on collateral review.

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

This error cannot be deemed harmless. In Mills v. Maryland, 108 S. Ct. 1860 (1988), the court concluded that, in the capital sentencing context, the Constitution requires resentencing unless a reviewing court can rule out the possibility that the jury's verdict rested on an improper ground. Mills, 108 S. Ct. at 1866-

67. Under Hitchcock, Florida juries must be instructed in accord with the eighth amendment principles. The constitutionally mandated standard demonstrates that relief is warranted in Mr. Swafford's case.

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

The effects feared in Adamson and Mills are precisely the effects resulting from the burden-shifting instruction given in Mr. Swafford's case. In being instructed that mitigating circumstances must outweigh aggravating circumstances before it could recommend life, the jury was effectively told that once aggravating circumstances were established, it need not consider mitigating circumstances unless those mitigating circumstances outweighed the aggravating circumstances. This jury was thus constrained in its consideration of mitigating evidence,

Hitchcock, 107 S. Ct. 1821 (1987), and from evaluating the "totality of the circumstances," Dixon v. State, 283 So. 2d 1, 10 (Fla. 1973), in determining the appropriate penalty. The jury was not allowed to make a "reasoned moral response" to the issues at Mr. Swafford's sentencing or to "fully" consider mitigation. Penry v. Lynaugh, 109 S.Ct. 2935 (1989). There is a "substantial possibility" that this understanding of the jury instructions resulted in a death recommendation despite factors calling for life. Mills, supra. The death sentence in this case is in direct conflict with Adamson, Mills, and Penry, supra. This error "perverted" the jury's deliberations concerning the ultimate question of whether Mr. Swafford should live or die. Smith v. Murray, 106 S. Ct. at 2668.

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. Swafford'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." Washinston 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. Swafford is entitled to relief. See also Wilson v. Wainwriaht, supra; Johnson v. Wainwright, supra. The "adversarial testing process" failed during Mr. Swafford'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. Swafford must show: (1) deficient performance, and (2) prejudice. Matire, 811 F.2d at 1435; Wilson, supra. As the foregoing discussion illustrates, he has.

WHEREFORE, Roy Swafford, 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. Swafford 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. Swafford 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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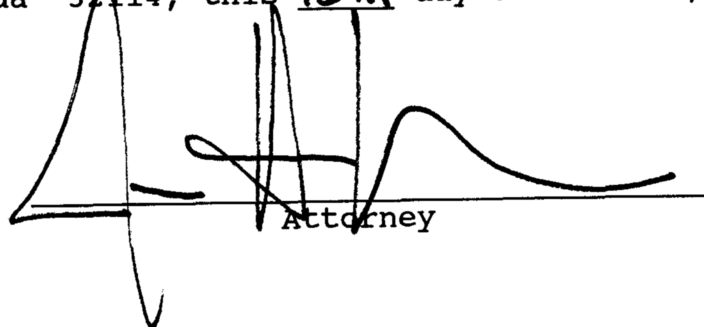
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by (U.S. MAIL) (HAND DELIVERY) to Barbara Davis, Assistant Attorney General, 210 North Palmetto Avenue, Daytona Beach, Florida 32114, this 15TH day of October, 1990.



Attorney