IN THE SUPREME COURT OF FLORIDA

NO. 77,708

WILLIAM H. KELLEY,

Petitioner,

v.

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

Respondent.

PETITION FOR EXTRAORDINARY RELIEF
AND FOR A WRIT OF HABEAS CORPUS

BILLY H. NOLAS
Fla. Bar No. 806812

JULIE D. NAYLOR
Fla. Bar No. 794351

Post Office Box 7237
Tallahassee, FL 32314-7237
(904) 668-5612
(Local Counsel)

BARRY P. WILSON
Zalkind & Sheketoff
65 A Atlantic Avenue
Boston, MA 02110-3799
(617) 742-6020
(Counsel for Petitioner)

LARRY HELM SPALDING
Capital Collateral
Representative
Fla. Bar No. 125540
1533 South Monroe St.
Tallahassee, FL 32301
(904) 487-4376
(Of Counsel)

PRELIMINARY STATEMENT

Mr. Kelley presents to this Honorable Court the instant habeas corpus petition in order for the Court to review certain significant claims involved in this case, including the claim of ineffective assistance of counsel on direct appeal, and in order for the Court to consider errors in the disposition of this case on direct appeal.

By his petition, Mr. Kelley respectfully requests that this Honorable Court review the proceedings resulting in his capital conviction and sentence of death, and that on the basis of the reasons discussed herein, the Court grant Mr. Kelley the habeas corpus relief to which he is entitled. Petitioner also respectfully requests that this Honorable Court grant expedited review of these proceedings, and render an expedited decision in this case.

This petition is divided into two sections, each of which contains subsections. In section A, Petitioner discusses the claim of ineffective assistance of counsel on direct appeal. In section B, Petitioner discusses certain claims of error which were presented on direct appeal, but which involve fundamental errors which the Court should revisit and correct in these proceedings. A conclusion incorporating Petitioner's prayer for relief follows thereafter.

Citations in this petition follow the pagination of the record on direct appeal, which is cited as "T. ___" with the appropriate page number following thereafter. Where citation to the Rule 3.850 record on appeal is necessary, the transcript of

the 3.850 proceedings is cited as "H.T. ___", the exhibits are cited by their exhibit entry number and/or letter (e.g., "Ex. ___"), and the appendices to the 3.850 motion are cited as "App. ___". All other references are self-explanatory or otherwise explained.

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

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 address the legality of Mr. Kelley's capital conviction and sentence of death. The conviction and death sentence were affirmed by this Court on direct appeal. Kelley v. State, 486 So. 2d 578 (Fla. 1986). Rule 3.850 relief was subsequently denied by the trial court and this Court. See Kelley v. State, No. 73,088, ___ So. 2d ___ (Fla. 1990). Jurisdiction in this action lies in this Court, see, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the constitutional issues addressed herein involve the appellate review process. See Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); see also Johnson v. Wainwright, 498 So. 2d 938 (Fla. 1987); cf. Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Kelley to raise the claims presented herein.

This Court has exercised a special scope of review in

capital cases, see Elledge v. State, 346 So. 2d 998, 1002 (Fla. 1977); Wilson v. Wainwright, 474 So. 2d at 1165, and has not hesitated in exercising its jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital trial and sentencing proceedings. This petition presents substantial constitutional issues addressing the fundamental fairness and reliability of Mr. Kelley's capital conviction and death sentence, and of this Court's appellate review. The claims presented by this petition are of the type traditionally considered by this Court pursuant to its habeas corpus jurisdiction. This Court has the power to do justice. As shown below, the ends of justice counsel the granting of the relief sought in this case, as the Court has done in other capital cases in the past. The petition pleads claims involving fundamental constitutional error. See Dallas v. Wainwright, 175 So. 2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So. 2d 362 (Fla. 1984). The petition includes claims predicated on significant, fundamental, and retroactive changes in constitutional law. See, e.g., Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987); Tafero v. Wainwright, 459 So. 2d 1034, 1035 (Fla. 1984); Edwards v. State, 393 So. 2d 597, 600 n. 4 (Fla. 3d DCA), petition denied, 402 So. 2d 613 (Fla. 1981); cf. Witt v. State, 387 So. 2d 922 (Fla. 1980). The petition involves claims of ineffective assistance of counsel on direct appeal. Wilson; Johnson. 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.

With regard to ineffective assistance of appellate counsel, the challenged acts and omissions of Mr. Kelley's counsel occurred before this Court. This Court therefore has jurisdiction to entertain the claims, and, as will be shown, to grant habeas corpus relief. This Court and other Florida courts have consistently recognized that the writ should issue where the constitutional right of appeal is thwarted on crucial and dispositive points due to the omissions or ineffectiveness of counsel. See, Wilson v. Wainwright; Beggett v. Wainwright, 229 So. 2d 239, 242 (Fla. 1969); Ross v. State, 287 So. 2d 372, 374-75 (Fla. 2d DCA 1973); Davis v. State, 276 So. 2d 846, 849 (Fla. 2d DCA 1973), affirmed, 290 So. 2d 30 (Fla. 1974). Cf. Matire v. Wainwright, 811 F.2d 1430 (11th Cir. 1987). The proper means of securing a hearing on such issues in this Court is a petition for writ of habeas corpus. Powell v. State, 216 So. 2d 446, 447-48 (Fla. 1968). With respect to the ineffective assistance of counsel claims, Mr. Kelley demonstrates herein that the inadequate performance of his appellate counsel was prejudicial, warranting habeas corpus relief.

REQUEST FOR ORAL ARGUMENT

Petitioner, through counsel, respectfully urges that this Honorable Court allow, on an expedited schedule, oral argument to be conducted. The issues presented by this petition are significant as a matter of law, while this Court's resolution of the questions involved in this case is obviously a matter of great importance to Mr. Kelley and his counsel. We respectfully

submit, therefore, that oral argument would be appropriate in this action in order for the parties to fully air, and for the Court to properly consider, the significant issues which this action involves.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Petitioner 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. Mr. Kelley's case involves substantial and fundamental error. The granting of habeas corpus relief is relief is appropriate.

(A)

PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL ON THE DIRECT APPEAL OF HIS CAPITAL CONVICTION AND SENTENCE OF DEATH, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

The law involved in this Court's review of claims of ineffective assistance of counsel on appeal is known to this Court. As this Court discussed in Wilson and Johnson, and as the Eleventh Circuit discussed in Matire (these precedents are cited and discussed in the Jurisdictional statement of this petition, supra), a claim of ineffective assistance of counsel on direct appeal requires that the petition identify the errors, omissions, and acts of the appellate attorney which demonstrate deficient

performance. Here, this standard is met by appellate counsel's failures to present to this Court the significant constitutional claims discussed immediately below. In order to prevail, a petitioner must also demonstrate prejudice. Here, the prejudice to Mr. Kelley involves this Court's failure (because of counsels' failures) to consider important claims for relief regarding which a reasonable probability exists that a new trial and/or sentencing would have been granted had counsel presented and the Court reviewed those issues. Mr. Kelley makes the requisite showing herein; a renewed appeal is therefore appropriate in order for this Court to afford Petitioner consideration of the important claims which, due to the ineffectiveness of appellate counsel, were not considered on direct appeal.

(I)

MR. KELLEY WAS DENIED DUE PROCESS OF LAW, AND HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND UNDER ARTICLE ONE, SECTION NINE OF THE FLORIDA CONSTITUTION BY THE PROSECUTOR'S IMPROPER CLOSING ARGUMENT.

In the Rule 3.850 proceeding recently reviewed by this Court, Mr. Kelley argued that this claim could not have been raised on direct appeal because the facts demonstrating the impropriety of the prosecutor's argument only came to light during the post-conviction proceedings (e.g., after Mr. Kelley obtained disclosure of public records (See Fla. Stat. section 119, et seq.)). Mr. Kelley further argued that the claim was of fundamental constitutional importance, and that 3.850 relief was warranted. This Court disagreed on the procedural question, holding that the claim should have been raised on direct appeal.

Kelley, slip op. at 3 ("Kelley also contends that his rights were violated by an improper closing argument. This [is] a claim which should have been raised on appeal.")

Petitioner reasserts herein that this claim is one of fundamental constitutional error, warranting the granting of a new trial. Given this Court's holding that the claim should have been presented on direct appeal, and given the fundamental nature of the error, Petitioner respectfully submits that the propriety of relief on his claim of ineffective assistance of appellate counsel is manifest.

William Kelley was denied the most rudimentary fair trial rights when the prosecutor intentionally urged the jury to reach conclusions of fact that he, the prosecutor, knew to be untrue. This misconduct worked a fraud upon the jury and the trial court.

Here, the trial prosecutor misstated facts in his closing argument regarding three critical issues. The first issue concerned the inability of the State's witness, Kaye Carter, to identify Mr. Kelley. The prosecutor emphasized that Mrs. Carter could not be expected to ". . . come into court seventeen and a half years later after the person has changed his appearance and identify him. It's extremely difficult to do that" (T.866). The prosecutor then re-emphasized this point:

> [m]aybe if they [Mrs. Carter and another witness] knew at the time, if somebody back in '66 had come up to them and said, make sure you know what this guy looks like because in 1984 you are going to have to go to court and identify him, maybe they would have made a greater effort to remember him.

(T. 867).

These remarks deceived the jury into believing that Mrs. Carter could not identify Mr. Kelley because of the seventeen year time-lapse. However, the prosecutor was aware of a March 18, 1967, investigation report by Officer Trulock which expressly noted that during the original investigation, Mrs. Carter was shown a photograph of William Kelley but could not positively identify Mr. Kelley as the person she saw at the Daytona Inn and that she stated that although the photograph "looks something like" the man at the Inn, "she is sure" that the person at the Inn was older (Ex. V; App. 58-59). The report also stated the person she saw was approximately 6" shorter than Mr. Kelley (Id.; H.T. 78-79, 145-149, 203, 206). This report was not disclosed by the prosecutor although defense counsel requested all exculpatory evidence (H.T. 78, 145-49). Thus, in argument, the prosecutor affirmatively urged the jury to find that the seventeen year hiatus caused Mrs. Carter to forget what Mr. Kelley's face looked like. The prosecutor knew this to be false. He knew Mrs. Carter could not effectuate an identification of Mr. Kelley when shown his photograph seventeen years previously, in March, 1967. Because the exculpatory evidence was not disclosed by the prosecutor, defense counsel were prevented from cross-examining the witness on this point and later prevented from objecting to the deceptive half-truth presented during closing argument.

The second intentional misstatement made by the prosecution concerned Mr. Kelley's knowledge of the Von Maxcy murder, based on statements he made to the arresting FBI agent. The prosecutor argued to the jury that Mr. Kelley's knowledge was derived from

personal knowledge rather than from another source, such as the news media:

> Apparently, Mr. Kunstler wants you to believe that Mr. Kelley was giving out this information based on things he read in a newspaper. But remember, this was not 1966 and 1967, this was 1983 in Tampa, Florida. Anything that came out in Boston would have come out seventeen or eighteen years ago.

(T. 877).

The prosecutor knew that what he stated to the jury was completely untrue. He had personal knowledge that in December, 1981, at least one greater Boston newspaper had published stories concerning Mr. Kelley's alleged involvement in the Maxcy murder. He spoke to a Massachusetts reporter, James Harrington, of the Brockton Enterprise who told of the articles he wrote concerning Mr. Kelley (December 16 telephone message to Hardy Pickard, Ex. DD; App. 60; testimony of James Harrington, H.T. 179-88). James Harrington, in addition, sent copies of his articles and photographs to the trial prosecutor (H.T. 183). Thus, again, the prosecutor argued based on facts he knew were false. Trial counsel were unaware of the prosecutor's misstatement of fact because they were not in possession of the telephone message slip which showed that the prosecutor had indeed been alerted that the news media, in 1981, were covering the alleged connection of William Kelley to the Maxcy murder (H.T. 70-72, 77), and covering it in Massachusetts. Thus, counsel could not object to the prosecutor's closing, nor could they have presented evidence on the matter. This misstatement, in conjunction with the other misstatements, amounted to prosecutorial misconduct that unfairly

prejudiced Mr. Kelley and denied him a fair trial.

Third, the prosecutor told the jury that John Sweet did not have to testify against Mr. Kelley in order to receive immunity in Massachusetts (T.863). However, the jury was never apprised of the full amount of leniency John Sweet received for his testimony. He was rewarded for his testimony by grants of immunity for numerous crimes in two States -- Florida and Massachusetts. Surely, the jury would have considered whether the extent of the reward biased Sweet's testimony: the jury here posed an express question to the court, during its deliberations, concerning Sweet's immunity.

As noted by the circuit court, trial defense counsel cross-examined Sweet extensively regarding the crimes for which Sweet received immunity in Massachusetts (App. 61-62). However, any impact that cross-examination might have had on the jury was obliterated when the prosecutor argued:

> He already had his immunity from Massachusetts on loan sharking, whatever that long list of things were. He didn't have to give them Kelley to get immunity. That came up later after he went to Massachusetts and thirty investigators or however many he said were questioning him about all sorts of crimes in Massachusetts.

(T. 863). In fact, Sweet did not "give them Kelley" later. Rather, he was questioned in Massachusetts by both Massachusetts and Florida law enforcement officers (see Ex. S-2, p. 2; App. 51). At that early questioning, he agreed to testify against Mr. Kelley (Ex. S-2, p. 3; App. 52). Furthermore, Florida and Massachusetts law enforcement authorities met together on at least two occasions, first in Florida, then in Massachusetts (Ex.

S-2; App. 50-53). The prosecutor's remarks clearly confused the jurors, as evidenced by their question to the court regarding whether Sweet had anything to gain by his testimony in the Maxcy case (T. 925). The prosecutor knew the facts he presented/argued to be inaccurate. And although in its closing argument the defense attempted to argue that the immunity grants were related, the defense did not have the documents or information to support the argument (see H.T. 85-86; 88-89, 160; 291-95; 356-57). The State had this evidence and did not disclose it.

The A.B.A. Standards for Criminal Justice 3-5.8 (2d ed. 1980) provide that "[i]t is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to inferences it may draw." Prosecutorial misconduct of this type denies the accused a fair trial. When this happens, a new trial must be awarded. Berger v. United States, 295 U.S. 78 (1935); United States v. Brown, 451 F.2d 1231 (5th Cir. 1971). This happened here.

In Berger, the Supreme Court explained that improper suggestions, insinuations, and also assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none. Id. These methods are forbidden to a prosecutor. See United States v. Rodriguez, 765 F.2d 1546 (11th Cir. 1985). In the present case, the prosector's remarks in closing argument could not be considered to result from prosecutorial overzealousness, but rather from a desire to mislead the jury. Overzealousness implies the prosecutor acted in good faith, whereas here, the prosecutor had affirmative

knowledge that what he told the jury was in fact untrue.

Where a prosecuting attorney has knowingly indulged in such improper argument to the jury, the resulting conviction must be reversed if there is any chance of prejudice to the accused. McCall v. State, 163 So.2d 38 (Fla. 1935). Here, the prosecutor's improper argument seriously prejudiced Mr. Kelley and cannot be considered harmless. The jury's questions during deliberations, inter alia, tellingly speak to the harm arising from the error, as does the fact that the jury deliberated for serveral hours, could not reach a verdict of guilt, and did not reach a verdict until the trial court provided an "Allen charge." See Kelley v. State, 486 So.2d 578, 584 (Fla. 1986). In Whitfield v. State, 479 So. 2d 208 (Fla.4th DCA 1985), the court dealt with the harmless error rule when deciding a case involving an improper closing argument by a prosecutor. The Whitfield court explained that once error has been shown, the State must prove that the error was harmless beyond a reasonable doubt. Id. at 217. This this showing cannot be made by the State in this case.

This Court has in fact held that post-conviction relief is warranted where the State suppresses evidence and uses the suppression to its advantage in closing argument. Arango v. State, 497 So. 2d 1161, 1162 (Fla. 1986). The trial prosecutor in Mr. Kelley's case failed to inform the defense of 1) Kaye Carter's non-identification of Mr. Kelley seventeen years ago; 2) his telephone conversation with the Brockton Enterprise newspaper reporter and the articles about Mr. Kelley sent by the reporter

to the trial prosecutor; and 3) the nexus between John Sweet's immunity in Massachusetts and his cooperation in the Maxcy case, specifically relating to the joint meetings held in Massachusetts. He then used the defense's ignorance of these facts to the State's advantage in closing argument. In a similar situation involving a prosecutor's efforts to convince a jury to make factual findings that the prosecutor personally knew were not accurate, the Sixth Circuit held harmless error to be inapplicable:

> In the circumstances, we find this line of argument to be foul play. As he was making the argument, the prosecutor well knew that evidence did exist to corroborate [the defendant's] story...the prosecutor told the jury that it should convict because of the absence of evidence he knew existed. We have no choice but to assume that the jury was persuaded by the prosecutor's remarks and convicted for that reason.

United States v. Toney, 599 F.2d 787, 790-91 (6th Cir. 1979).[1]

Finally, in considering the prejudicial effects of prosecutorial misconduct, the reviewing Court must consider the strength of the government's case. Here the government's case

---

[1] In fact, the harmless error standard has been surpassed for less egregious misstatements. Where a prosecutor personally commended a government agent for doing a "good job" and praised him for the danger he risked, when there was no evidence of danger, the court held this to go beyond harmless error in United States v. Brown, 451 F.2d 1231 (5th Cir. 1971). See id. at 1236 ("However, it is contended by the United States that this was harmless error and it should be overlooked. This court has passed too many times on this kind of comment by prosecutors to permit it to continue by allowing it to be brushed under the rug under the harmless error doctrine."). If comments on the heroism of a government agent, which are absolutely irrelevant to the issue of a defendant's guilt, are beyond harmless error, then the prosecutor's intentional misstatement of probative facts here certainly cannot be deemed harmless: the prosecutor's misstatements related to central factual issues which the jury had to resolve at this trial.

was extremely weak. The crucial witness for the State (Sweet) was himself convicted of Maxcy's murder at trial; the conviction was overturned on appeal; and the witness testified for the State because immunity was given to him. In addition, Mr. Kelley's first trial resulted in a deadlocked jury, while in the second trial the jury deliberated at length and could not reach a verdict after voting three times. As in the first trial, the jury in the second trial returned questions about whether the key witness, Sweet, received immunity. Indeed, there is no question that the jury here was confused by the prosecutor's (mis)statement that Sweet did not have to "give them Kelley to get immunity," and that the Massachusetts authorities questioned Sweet only about crimes in Massachusetts (see T. 863). The jurors' questions to the court show that the impact of the cross-examination of Sweet regarding the Massachusetts immunity was undermined by the prosecutor's misconduct during closing argument.

Although the jury finally reached a verdict of guilt, the government's case against Mr. Kelley here was far from overwhelming. Considering the weakness of the State's case, the prosecutor's improper arguments substantially prejudiced Mr. Kelley. A new trial should be ordered, one which comports with due process.

(II)

MR. KELLEY WAS DENIED HIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS WHEN, AT A RECESS DURING THE DEFENSE'S CROSS-EXAMINATION, THE PROSECUTOR IMPROPERLY SHOWED TO AND DISCUSSED WITH AN IMPORTANT WITNESS RECORDS WHICH DEFENSE COUNSEL WAS USING TO IMPEACH THAT WITNESS

This claim was also presented in the Rule 3.850 proceeding which this Court recently reviewed, and, as was ruled with regard to the previous claim, in its opinion this Court ruled that this claim "should have been raised on appeal." Kelley, slip op. at 3. This Court further ruled that "[t]he basis for Kelley's claim is contained in the trial record." Id. This being the case, counsels' failure to urge this significant issue on direct appeal should not but be deemed ineffective assistance.

Abe Namia, an investigator employed by Sweet's attorney prior to Sweet's trial, testified for the State at the Kelley trial. (T. 766). The purpose of his testimony was to corroborate Sweet's claim that Mr. Kelley was involved in the offense. During cross- examination, Namia told defense counsel that Namia's reports contained information which John Sweet gave to Namia (T. 774; 795). In actuality, there was no record of any interview between Namia and Sweet (T. 809). At this point the judge called a recess. Defense counsel requested that the prosecutor not talk with Mr. Namia during this recess in the midst of cross-examination. The judge stated: "You are implying something of the State Attorney?" (T. 798). After the recess the prosecutor stated that Namia recognized the reports (T. 799). The reports had been shown to him by the prosecutor during the

recess, and the prosecutor and the witness had discussed them.

"The prosecutor has a duty to be fair, honorable and just." Boatwright v. State, 452 So. 2d 666, 667 (Fla.4th DCA 1984). His or her "trial tactics and trial strategy...must reflect a scrupulous adherence to the highest of professional conduct." Martin v. State, 411 So. 2d 987, 990 (Fla.4th DCA 1982). "In interviews with witnesses...[the prosecutor]' must exercise the utmost care and caution to extract and not to inject information, and by all means to resist the temptation to influence or bias the testimony of the witnesses.'" Lee v. State, 324 So. 2d 694, 698 (Fla. 1st DCA 1976)(citing Mathews, 44 So. 2d at 669)).

By showing Namia the reports at issue, after the Judge noted that this was improper, the prosecutor "injected information" and "influenced the testimony of the witness", Lee, by preparing Namia for the defense's use of the reports to impeach him. The prosecutor, upon returning from the recess, stated that Namia did not know whether the reports were complete or whether there were additional reports, but that Namia represented that "they do not reflect his interview with John Sweet" (T. 799). Thus, Namia had time to compose an explanation to the discrepancy between his testimony and the reports themselves. Neither the defense attorneys nor the court were present during the off-the-record exchange between the prosecutor and Namia.

Namia's credibility was important in that his testimony was admitted to rebut an inference of recent fabrication or improper motives in the testimony of the prosecution's key witness, Sweet. Kelley, 486 So. 2d at 582. Therefore, absent the prosecutor's

interview and preparation of the witness, Namia might have appeared not credible, thus further implying that Sweet was lying. This shadow on Sweet's credibility might have produced quite a different result. Cf. State v. Williams, 478 So. 2d 412, 413 (Fla. 3d DCA 1985)(affirming trial court's granting of new trial where prosecutor's misconduct deprived defendant of testimony that might have produced a different result). In any event, it is axiomatic that a party may not prepare a witness during the opposition's cross-examination. This occurred in this case and tainted Mr. Kelley's trial with error. Relief is proper.

(III)

IN SENTENCING MR. KELLEY TO DEATH, THE TRIAL COURT RELIED, AND THE JURY WAS ASKED TO RELY, ON A REMOTE OFFENSE TO FIND AS AN AGGRAVATING FACTOR THAT MR. KELLEY HAD BEEN PREVIOUSLY CONVICTED OF A VIOLENT OFFENSE, AND THE APPLICATION OF THIS AGGRAVATOR IN THIS CASE, A CASE IN WHICH THERE WAS MITIGATION, VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS, FLA. STAT. SECTION 921.141, AND THE CONSTITUTION OF FLORIDA

Mr. Kelley's offense was aggravated on the basis of a 25 year old (at the time of the trial court proceedings in this case) robbery conviction which occurred when Petitioner was 17 years old (See T. 972; see also T. 968, 971, 943, 951, 955, 956, 966). Defense counsel objected to the use of this remote offense to support aggravation (T. 943, 955). Nevertheless, the jury was asked to find (by the prosecutor) and the trial court then found that Petitioner had a "prior conviction of a violent felony", exclusively relying on the 25 year old offense (see Fla. Stat.

921.141(5)(b)), the only prior violent offense reflected by Mr. Kelley's record.

As trial counsel argued, the use of this remote offense in aggravation cannot be deemed to comport with due process. The eighth amendment requires that aggravating factors be properly channeled and narrowed, and that they not be given constructions which undermine the capital defendant's rights to an individualized and reliable capital sentencing determination. See Zant v. Stephens, 462 U.S. 862 (1983); Maynard v. Cartwright, 108 S.Ct. 1853 (1983); Godfrey v. Georgia, 446 U.S. 420 (1980); inter alia. Reliance on such a remote (25 year old) conviction, when no other violent felonies are reflected in the accused's record, to find aggravation falls short of these principles, and cannot be squared with the defendant's right to a reliable capital sentencing determination. Appellate counsel should have presented this claim for the Court's consideration, and rendered inadequate assistance in failing to do so. Relief is appropriate. Mr. Kelley further respectfully urges that the Court grant relief because of the fundamental constitutional error addressed herein.

(IV)

THE PENALTY PHASE JURY INSTRUCTIONS AND THE SENTENCING COURT'S CONSTRUCTION SHIFTED THE BURDEN TO MR. KELLEY TO PROVE THAT DEATH WAS NOT APPROPRIATE, LIMITED FULL CONSIDERATION OF MITIGATING CIRCUMSTANCES TO THOSE WHICH OUTWEIGHED AGGRAVATING CIRCUMSTANCES, AND WERE CONTRARY TO THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

The jury in this case was instructed that death was the proper sentence once aggravation was proved, unless and until the defense presented enough in mitigation to overcome the aggravation. This standard -- one provided to the jury in the sentencing instructions and then expressly employed by the sentenced judge, see also Ziegler v. Dugger, 524 So. 2d 419, 420 (Fla. 1988)("Unless there is something in the record to suggest to the contrary, it may be presumed that the judge's perception of the law coincided with the manner in which the jury was instructed") -- shifted the burden to Mr. Kelley to prove that death was not appropriate, and restrained the full consideration of mitigating evidence, in violation of the sixth, eighth and fourteenth amendments.

The instructions and the trial judge's application of this standard appear, inter alia, at T. 978, 1001-02. A presumption of death such as that employed here was never intended for presentation to a Florida capital jury at sentencing. See Jackson v. Dugger, 837 F.2d 1469, 1473 (11th Cir. 1988). The instructions shifted to the defendant the burden of proving that life was the appropriate sentence, and violated the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), the eighth and

fourteenth amendments, Lockett v. Ohio, 438 U.S. 586 (1978), and Mills v. Maryland, 108 S. Ct. 1860 (1988). The burden of proof was shifted to Mr. Kelley on the central sentencing issue of whether he should live or die. This unconstitutional burden-shifting violated Mr. Kelley's due process and eighth amendment rights. The effect of the instruction was to limit the consideration of mitigating factors to only those that outweighed the aggravating factors.

The focus of a jury instruction claim is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." Boyde v. California, 58 U.S.L.W. 4301, 4304 (March 5, 1990). Here more than such a reasonable likelihood exists. Proper consideration of mitigation was inhibited, for only the mitigation that outweighed the aggravation could be given full consideration and "effect." Penry v. Lynaugh, 109 S.Ct. 2934 (1989). Mr. Kelley's resulting death sentence is fundamentally unreliable. Relief is appropriate.

Petitioner acknowledges that this Court has ruled adversely to this claim in the past, but submits that defense counsel in a capital case nevertheless has the responsibility of preserving the issue by presenting it on appeal. In due regard to this Court's previous rulings that this claim does not establish constitutional error, Petitioner respectfully urges herein that this Honorable Court reconsider, and grant habeas corpus relief because of the significant eighth amendment errors addressed by

this claim.

(B)

CLAIMS PRESENTED ON DIRECT APPEAL WHICH PETITIONER URGES THAT THE COURT RECONSIDER, ON THE BASIS OF RECENTLY ISSUED PRECEDENT

(I)

THE DEATH PENALTY STATUTE, ENACTED AFTER THE CHARGED OFFENSE WAS COMMITTED, WAS IMPROPERLY APPLIED RETROACTIVELY IN VIOLATION OF ARTICLE I, SECTION 10 OF THE UNITED STATES CONSTITUTION, AND THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

On direct appeal, Petitioner argued that the application of the current death penalty statute to Mr. Kelley (who was indicted in 1981) for an offense occuurring in 1966, before the new statute had been enacted or even contemplated, violated the prohibition of the provision against the ex post facto application of laws and Mr. Kelley's federal and state constitutional rights. See generally, initial direct appeal brief of appellant, section VII. The issue had been preserved at the trial level (see, e.g., T. 999). This Court found this "contention [among others] . . . to be without merit." Kelley, 486 So.2d at 585.

After the 1986 issuance of this Court's direct appeal opinion, the United States Supreme Court issued Miller v. Florida, 107 S.Ct. 2446 (1987), a precedent which alters the ex post facto analysis previously applied by this Court and which provides a new validity to this claim. In light of Miller, this Court's and the United States Supreme Court's pre-Miller ex post facto analyses (e.g., in cases such as Dobbert) no longer hold

up. Relief in this cause, we respectfully submit, is appropriate.

The offense in this case occurred in October of 1966. At the time of the offense, the Florida capital sentencing statute provided for the imposition of a death sentence after conviction of a capital felony, but the jury was allowed broad discretion in its verdict to include a recommendation of mercy. Fla. Stat. Ann. section 775.082 (1971). The statutory aggravating circumstances in the present death penalty statute did not exist at that time, as the present death penalty statute was not enacted until 1973. Mr. Kelley contends that the application of the 1973 statute to an offense which he was alleged to have committed in 1966 constitutes an ex post facto application, in violation of Article I, Section 10 of the United States Constitution, of the fifth, sixth, eighth, and fourteenth amendments, of due process and of equal protection of law.

While Dobbert v. Florida, 432 U.S. 282 (1977), addressed this issue, later caselaw raises questions about the viability of Dobbert's holding. Under the Supreme Court's post-Dobbert jurisprudence, the Dobbert holding no longer holds up. In Miller v. Florida, 107 S.Ct. 2446 (1987), the Supreme Court set out the test for determining whether a statute is ex post facto. See also Weaver v. Graham, 450 U.S. 24 (1981). Under the resulting new analysis, it is now clear that sec. 821.141 operated as an ex post facto law in Mr. Kelley's case. For example, the substantive rights and protections afforded to a capital defendant under the 1966 capital sentencing statute's broad

discretion allowing the jury to reach a verdict of mercy were denied to Mr. Kelley. But the harm did not stop there.

A law is retrospective if it "appl[ies] to events occurring before its enactment." Weaver v. Graham, 450 U.S. at 29. The relevant "event" in this instance was the crime which was alleged to have occurred prior to the legislatively enacted sec. 921.141 at issue in this case. As the Miller court explained, retrospectivity concerns address whether a new statutory provision changes the "legal consequences of acts completed before its effective date." Miller v. Florida, 107 S.Ct. at 2451 (citations omitted). The relevant "legal consequences" include the effect of legislative changes on an individual's potential punishment for the crime of which he or she has been convicted. See Miller v. Florida, 107 S.Ct. at 2451.

In a similar case concerning the retroactive application of the "cold, calculated, premeditated" aggravator, which was added to sec. 921.141 in 1979, to a defendant whose offense occurred before that circumstance was enacted, a United States District Court judge ruled that under Miller the application of an aggravating factor to a capital defendant which had not been included in the statute at the time of the offense violated the ex post facto clause. See Stano v. Dugger, No. 88-425-Div.-Or.-19 (M.D. Fla. May 18, 1988)(Fawsett, J.), slip. op. at 37-40. In Mr. Kelley's case, the issue does not encompass an aggravator but all aggravators and involves the very death penalty statute itself. In light of Miller, Dobbert no longer holds up, and Petitioner respectfully requests that this Court squarely address

this issue of law.

In addressing issues of retrospectivity, a court must examine the challenged provision to determine whether it operates to the disadvantage of a defendant, as the Miller decision clearly requires. See Miller v. Florida, 107 S.Ct. at 2452. In Miller, the Supreme Court examined both the purpose for the enactment of the challenged provision and the change that the challenged provision brought to the prior statute to determine whether the new provision operated to the disadvantage of Mr. Miller. In applying that analysis to the challenged provision at issue here, it is clear that the new provision is more onerous than the prior law because it works a substantial disadvantage to the capital defendant.

When the Legislature enacted the new death penalty law, it expressly intended to create statutory aggravating factors, and it expressly intended to curtail the jury's broad authority to reach a verdict of mercy. At a hearing, should the Court allow one, Petitioner can establish that mercy was consistently exercised by juries in Florida in cases involving capital defendants under the previous statute -- indeed, in cases strikingly similar to Mr. Kelley's. The new statute curtailed that exercise. Moreover, the legislature curtailed the discretion afforded to juries to impose life under the prior statute through its use of judicial sentencing. Aggravating factors were intended, in a sense, to provide notice of the type of conduct which will result in a sentence of death. Mr. Kelley was given no such notice: the aggravators did not exist

previously.

The change which the new law brought to the capital sentencing scheme operates to the disadvantage of a capital defendant such as Mr. Kelley. It provided for aggravating factors instead of broad mercy. Further, the jury here was instructed that it should not consider mercy in recommending a life sentence. Under the law in effect at the time of the offense in this case, however, the jury would have been able to impose an unreviewable sentence of life solely on the basis of mercy. Under Miller, application of the new death penalty statute to this case was constitutional error. This case is in fact quite an appropriate one for this Court to come to grips with this issue. The offense happened long before the trial and a great deal of evidence had been distroyed. This Court struggled with the latter issue on direct appeal. Kelley, 486 So.2d at 581-82. Such practical concerns, we submit, should also go into the ex post facto analysis applicable to this case.

In Miller, 107 S.Ct at 2452, the Supreme Court altered the prior standard and held that the defendant need not "definitively [show] that he would have gotten a lesser sentence." Similar to the Miller defendant, Mr. Kelley was subjected to the probability of a more enhanced sentence because of the new law, and was deprived of the jury's inherent power to reach a mercy verdict under the old statute. The old statute was, in fact, found to be unconstitutional and the sentences of death of those sentenced under it were commuted. In this instance the more severe sentence for Mr. Kelley was death instead of life. Mr. Kelley

was therefore "substantially disadvantaged" by a retrospective law.

The third part of the Miller analysis requires examination of Fla. Stat. sec. 921.141 to determine whether it alters a substantial right. Miller v. Florida, 107 S.Ct at 2452. It did, for example, by creating aggravators which did not exist before, and by altering the right to mercy.

For the foregoing reasons, the law as applied to Mr. Kelley is ex post facto, and his sentence of death is therefore invalid. Miller v. Florida. Under the Miller court's analysis, Petitioner is entitled to relief, and the issue should be revisited.

(II)

THE APPLICATION OF AGGRAVATING FACTORS

On direct appeal, Petitioner's counsel argued that the "cold, calculated" and "pecuniary gain" aggravators were improperly and overboradly employed. Petitioner respectfully submits that Maynard v. Cartwright, 108 S.Ct. 1853 (1988), should affect the analysis employed on such issues at the time of the direct appeal herein, and that relief on these claims at this juncture is therefore appropriate.

The construction afforded in the jury instructions and judicial sentencing order applying these aggravators in this case violated Maynard v. Cartwright, 108 S.Ct. 1853 (1988), and the sixth, eighth, and fourteenth amendments. We acknowledge that this Court has rejected similar claims in the past. We respectfully submit, however, that those rulings are in error, given Cartwright's history and holding, and request that the

Court reconsider. Here, the jury received instructions which were inadequate under Cartwright, the prosecutor's argument was an invitation to overbroad application, while at sentencing the judge simply concluded that the aggravators applied to the offense on the basis of the same overbroad construction. No limiting constructions were included in the instructions or applied by the trial judge in his review. Indeed, as Petitioner further argued on direct appeal, the underlying predicates employed on these two aggravators by the trial court were the same -- a matter raising serious concerns about overbreadth and doubling. In light of Cartwright, the constructions employed in Mr. Kelley's case were overbroad and constitutionally incorrect, and relief is appropriate.

CONCLUSION

Petitioner respectfully urges that the Court issue its writ of habeas corpus and grant him a new appeal in order to afford him the opportunity to present those claims which appellate counsel ineffectively failed to present. Petitioner additionally prays that the Court vacate his capital conviction and death sentence. With regard to any issues of fact attendant to this action, Petitioner respectfully requests that the Court grant an evidentiary hearing.

WHEREFORE, Petitioner, through counsel, respectfully urges that the Court grant habeas corpus relief.

Respectfully submitted,

BILLY H. NOLAS
Fla. Bar No. 806812

JULIE D. NAYLOR
Fla. Bar No. 794351

Post Office Box 7237
Tallahassee, FL 323114-7237
(904) 668-5612
(Local Counsel)

BARRY P. WILSON
Zalkind & Sheketoff

65 A Atlantic Avenue
Boston MA 02110-3799
(617) 742-6020

(Counsel for Petitioner)

By: Julie D. Naylor for all counsel of record

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by HAND DELIVERY/United States Mail, first class, postage prepaid, to Robert Krauss, Assistant Attorney General, Westwood Building, Seventh Floor, 2002 North Lois Avenue, Tampa, Florida, 33607; Robert Brochin, General Counsel, Office of the Governor, Tallahassee, Florida 32301, this 8 day of April, 1991.

Julie D. Naylor
Attorney