IN THE SUPREME COURT OF FLORIDA

NO. 88321

WILLIAM L. THOMPSON,

Petitioner,

v.

HARRY K. SINGLETARY, JR.,
Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

TERRI L. BACKHUS
Assistant CCR
Florida Bar No. 0946427

OFFICE OF THE CAPITAL COLLATERAL REPRESENTATIVE
Post Office Drawer 5498
Tallahassee, Florida 32314-5498
(904) 487-4376

COUNSEL FOR PETITIONER

INTRODUCTION

Pursuant to Rule 3.851(b)(2), this writ of habeas corpus is filed simultaneously with the initial brief in Mr. Thompson's appeal of the summary denial of his Rule 3.850 motion. Because of Rule 3.851(b)(2) and the circuit court's order, Mr. Thompson is forced to prematurely file his writ of habeas corpus before critical issues have been fully litigated in circuit court.

On December 13, 1995, the circuit court summarily denied Mr. Thompson's Rule 3.850 motion without a hearing. The court erroneously interpreted the procedural history of this case by finding that the instant Rule 3.850 motion was his fifth post-conviction motion. This conclusion is wrong.

On April 14, 1976, Mr. Thompson and co-defendant Rocco James Surace, were charged by indictment by a grand jury of Dade County, Florida with the first degree murder, kidnapping, and involuntary sexual battery of Sally Ivester (R5. 1-2a).[1] Mr. Thompson, after withdrawing a plea of not guilty, plead guilty to these charges (R1. 854). The jury then recommended a sentence of death (R1. 886). The trial court sentenced Mr. Thompson to

---

[1]Citations to the record are as follows: (1) the original appellate record of the original trial and sentencing (R1. __)[Florida Supreme Court case number 50,486]; (2) the second trial and sentencing (R2. __)[Florida Supreme Court case number 55,697]; (3) the record on appeal from the denial of Mr. Thompson's first 3.850 motion to vacate his second trial and sentencing (R3. __)[Florida Supreme Court case number 61,164]; and (4) the record on appeal from Mr. Thompson's second 3.850 motion resulting in a resentencing (R4. _)[Florida Supreme Court case number 70,739 and 70,781]; (5) the record on direct appeal from Mr. Thompson's resentencing (R5. __)[Florida Supreme Court case number 75,499]; and, (6) the record on appeal from the trial court's summary denial of Mr. Thompson's current post-conviction proceedings (PC-R. __), and Supplement to Record on Appeal (Supp.).

death on June 24, 1976 (R1. 887-889). Mr. Thompson was sentenced to life imprisonment on the remaining charges, all to run concurrent to his death sentence (R1. 887).

In support of its sentence of death, the trial court found two aggravating circumstances: (1) the capital felony was committed while both defendants were engaged in involuntary sexual battery and kidnapping; and (2) the capital felony was especially heinous, atrocious, and cruel (R1. 888). The trial court also found two mitigating circumstances: (1) Mr. Thompson did not have a significant history of prior criminal activities; and (2) Mr. Thompson's age of twenty-four (24) years (R1. 888).

On direct appeal, this Court allowed Mr. Thompson to withdraw his plea and remanded the case for a new trial finding that Mr. Thompson's guilty plea was involuntary due to an "honest misunderstanding which contaminated the voluntariness of the pleas." Thompson v. State, 351 So. 2d 701 (Fla. 1977), cert. denied, Thompson v. Florida, 435 U.S. 998 (1978).

On remand, Mr. Thompson was again allowed to plead guilty despite the denial of the assistance of qualified mental health experts (R2. 39-57). The penalty phase jury recommended a sentence of death on September 20, 1978 (R2. 198; 63). Within minutes after the jury's verdict, the trial court imposed a sentence of death on September 20, 1978 (R2. 199; 567-573). Mr. Thompson was sentenced to life imprisonment for the remaining charges, sentences to run concurrent. (Id.).

In support of its death sentence, the trial court found two aggravating circumstances: (1) the capital felony was committed during the course of a felony; and, (2) heinous, atrocious, or cruel (R2. 567-573). The trial court also found two statutory mitigating

circumstances: Mr. Thompson's age of twenty-six (26) years at the time of sentencing; and, (2) no significant history of prior criminal activity (R2. 567-573). Mr. Thompson's guilty plea and death sentence were affirmed on direct appeal by this Court. Thompson v. State, 389 So. 2d 197 (Fla. 1980), cert. denied, Thompson v. Florida, 435 U.S. 998 (1978). It is this Court's 1980 opinion affirming Mr. Thompson's guilty plea that is the subject, in part, of this writ of habeas corpus.

Mr. Thompson filed his first Fla. R. Crim. P. 3.850 motion, which was denied by the trial court and affirmed by this Court. Thompson v. State, 410 So. 2d 500 (Fla. 1982). After the denial of his 3.850 motion, Mr. Thompson sought habeas corpus relief in federal court. The United States District Court and the Eleventh Circuit Court of Appeals denied Mr. Thompson relief. Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986), cert. denied, 481 U.S. 1042 (1987).

Mr. Thompson filed a second 3.850 motion and his first state habeas corpus petition, asserting the failure of the sentencing judge to allow presentation and jury consideration of nonstatutory mitigating circumstances in the penalty phase pursuant to Hitchcock v. Dugger. The trial court denied relief, but this Court reversed under the authority of Hitchcock v. Dugger, 481 U.S. 393 (1987), and remanded for resentencing. Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987), cert. denied, 485 U.S. 960 (1988).

Following a resentencing, Mr. Thompson's jury recommended a death sentence by a vote of seven to five (7 to 5) on June 6, 1989 (R5. 553-554). The trial court followed the jury's recommendation and imposed a sentence of death on August 25, 1989. Mr.

Thompson received life sentences for the remaining counts of the indictment, to run consecutive to each other (R5. 755-757).

In support of its death sentence, the trial court found the following aggravating circumstances, the crime was: (1) committed during the course of a felony; (2) committed for financial gain; (3) especially heinous, atrocious, or cruel; (4) committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification (R5. 758-771). Although two other trial judges had found two mitigating circumstances, the trial court found no statutory or non-statutory mitigating circumstances. (R5. 778-771).

Mr. Thompson's death sentence from his resentencing was affirmed on direct appeal by this Court. Thompson v. State, 619 So. 2d 261 (Fla. 1993). The United States Supreme Court denied a writ of certiorari on November 8, 1993. Thompson v. Florida, 114 S. Ct. 445 (1993).

On June 5, 1995, Mr. Thompson filed his first motion for postconviction relief pursuant to Fla. R. Crim. P. 3.850 following this Court's affirmance of his resentencing (PC-R. 1-122). Mr. Thompson initiated his Rule 3.850 motion five months before he was statutorily obligated to file so that he could invoke the court's jurisdiction for public records requests and to comply with the Governor's schedule to avoid the signing of a warrant. On November 8, 1995, Mr. Thompson timely filed an Amended Motion to Vacate Judgments of Conviction and Sentences with Special Request for Leave to Amend on his Fla. R. Crim. P. 3.850 two (2) year date (PC-R. 113-294). Two months later, on December 13, 1995, the trial court summarily denied Mr. Thompson's Rule 3.850 Motion by entering an Order

Dismissing Fifth Motion for Post Conviction Relief (PC-R. 295-296).[2] No hearings of any kind had been conducted before the circuit court.

Mr. Thompson filed a Notice of Appeal on January 10, 1996 challenging the trial court's summary denial of his Rule 3.850 Motion (PC-R. 297-298). Mr. Thompson's initial brief in that matter is due on June 25, 1996. Pursuant to Fla. R. Crim. P. 3.851(b)(2), Mr. Thompson is forced to prematurely file this state habeas corpus with his initial brief in the appeal of the circuit court's summary denial. Critical issues have yet to be resolved by the trial court.

In particular, the record on appeal in this case is incomplete. Either appellate counsel or the trial court failed to ensure that a full and complete record on appeal was prepared for this Court's review. Consequently, major portions of Mr. Thompson's trial are missing. No pre-trial conferences, suppression hearings, evidentiary hearing or instruction conferences were transcribed prior to the start of trial except for one hearing. It is obvious at the beginning of trial that prior proceedings had occurred. Now, Mr. Thompson is placed in the position of attempting to argue his case without the benefit of a complete record. Appellate counsel and the trial court had a duty to ensure that the Court had accurate information on which to base its opinion. It did not.

---

[2] The circuit court's December 13, 1995 Order dismissing Mr. Thompson's Rule 3.850 motion because it was his "fifth" post-conviction motion is plain error without support in law or fact. Mr. Thompson is currently litigating his first Rule 3.850 motion following his 1989 resentencing. Three post-conviction motions have been filed in the tortured history of this case. The denial of the first post-conviction motion was affirmed by this Court. A second Rule 3.850 motion was filed pursuant to Hitchcock v. Dugger. This Court granted Mr. Thompson relief pursuant to Hitchcock v. Dugger, 481 U.S. 393 (1987), and remanded for resentencing. Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987), cert. denied, 485 U.S. 960 (1988).

This Court has recognized that the problems of an incomplete record require a preventative rule making it mandatory that the trial court hold a conference with counsel to ensure that a complete record has been prepared. See, In re: Amendments to Florida Rules of Judicial Administration Regarding Death Cases, 21 Fla. L. Weekly S168 (Apr. 19, 1996).

The circuit court failed to conduct a hearing of any kind. No public records or a Huff hearing was allowed on Mr. Thompson's motion. Had the trial court conducted a hearing, it would have learned that this is not Mr. Thompson's fifth post-conviction motion. This was error. Ventura v. State, 21 Fla. L. Weekly S15 (Fla. Jan. 11, 1996), revised 21 Fla. L. Weekly S190 (Fla. Apr. 25, 1996); Walton v. Dugger, 634 So. 2d 1059 (Fla. 1993).

It is obvious that the court did not read the first few pages of Mr. Thompson's Rule 3.850 motion. In the procedural history on page 6, Mr. Thompson plainly sets out the history of this case. Even though it has a tortured path, the procedural history goes step by step through the legal events surrounding this case. Even if the court missed the procedural history, the claims raised in the Rule 3.850 motion could not have been "conclusively refuted by the record." The Chapter 119 claim and the incomplete record on appeal claims themselves involve issues not reflected in the record. See, Lemon v. State, 498 So. 2d 923 (Fla. 1986).

Further, the circuit court erred in saying that the motion was not under oath. The post-conviction record belies that suggestion. (PC-R. 295)

The court's order also states that all of the issues in Mr. Thompson's Rule 3.850 had been previously addressed. Since this is Mr. Thompson's first Rule 3.850 motion from the 1989 resentencing, it is impossible for those issues to have been previously addressed. Mr.

Thompson requests that this case be remanded back to the trial court with instructions to read the record and the motions filed in this case.

Thereafter, Mr. Thompson should be allowed to bring another writ of habeas corpus before this Court at the proper time. In an abundance of caution, Mr. Thompson submits the following writ of habeas corpus to preserve the compelling issues in this case.

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla. R. App. P. 9.100(a). See Art. 1, Sec. 13, Fla. Const. 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. Thompson's sentence of death, including this Court's review of whether Mr. Thompson's judge and jury acted with procedural rectitude in applying section 921.141, Fla. Stat., and relevant state and federal law. Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981).

Jurisdiction in this action lies in this Court, see, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Thompson's direct appeal. See Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); cf. Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Thompson to raise the claims presented herein. See, e.g., Way v. Dugger, 568 So. 2d 1263 (Fla. 1990); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); Wilson.

This Court has the inherent power to do justice. Justice requires this Court to grant the relief sought in this case, as the Court has done in similar 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 Court's exercise of its habeas corpus jurisdiction, and its authority to correct constitutional errors, is warranted in this action. As the petition shows, habeas corpus relief would be more than proper on the basis of Mr. Thompson's claims.

GROUNDS FOR HABEAS CORPUS RELIEF

Mr. Thompson's capital conviction and sentence of death were obtained and then affirmed during this 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.

PRELIMINARY STATEMENT

This is Mr. Thompson's second habeas corpus petition in this Court. The first petition was filed subsequent to Mr. Thompson's second trial. However, this Court granted Hitchcock relief and remanded the case for resentencing. This is the first habeas corpus petition from that resentencing. Art. I, Sec. 13 of the Florida Constitution provides, "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Eighth and Fourteenth Amendments to the United States Constitution, claims demonstrating that Mr. Thompson was deprived of his right to a fair, reliable, and individualized sentencing

proceeding and that the proceedings resulting in his conviction and death sentence violated fundamental constitutional imperatives.

PROCEDURAL HISTORY[3]

On April 14, 1976, Mr. Thompson and co-defendant Rocco James Surace, were charged by indictment by a grand jury of Dade County, Florida with the first degree murder, kidnapping, and involuntary sexual battery of Sally Ivester (R5. 1-2a). Mr. Thompson plead guilty to these charges (R1. 854).

The jury then recommended a sentence of death (R1. 886). The trial court sentenced Mr. Thompson to death on June 24, 1976 (R1. 887-889). In addition, Mr. Thompson was sentenced to life imprisonment on the remaining charges, all to run concurrent to his death sentence (R1. 887).

In support of its sentence of death, the trial court found two aggravating circumstances: (1) the capital felony was committed while both defendants were engaged in involuntary sexual battery and kidnapping; and (2) the capital felony was especially heinous, atrocious, and cruel (R1. 888).

The trial court also found two mitigating circumstances: (1) Mr. Thompson did not have a significant history of prior criminal activities; and (2) Mr. Thompson's age of twenty-four (24) years (R1. 888).

---

[3]This is a verbatim recitation of the procedural history included in Mr. Thompson's Amended Motion to Vacate Judgments of Conviction and Sentence. Had the Court read this procedural history it would have learned that this is not Mr. Thompson's fifth Rule 3.850 motion but his first arising from the 1989 resentencing.

On direct appeal, the Florida Supreme Court allowed Mr. Thompson to withdraw his plea and remanded the case for a new trial because Mr. Thompson was prejudiced by an "honest misunderstanding which contaminated the voluntariness of the pleas." Thompson v. State, 351 So. 2d 701 (Fla. 1977), cert. denied, Thompson v. State, 435 U.S. 998 (1978).

After remand, Mr. Thompson pleaded guilty to the charges against him (R2. 39-57). The penalty phase jury recommended a sentence of death on September 20, 1978 (R2. 198; 63).

Within minutes after the jury's verdict, the trial court imposed a sentence of death on September 20, 1978 (R2. 199; 567-573). Mr. Thompson was sentenced to life imprisonment for the remaining charges, sentences to run concurrent. (Id.).

In support of its death sentence, the trial court found two aggravating circumstances: (1) the capital felony was committed during the course of a felony; and, (2) heinous, atrocious, or cruel (R2. 567-573).

Significantly, the trial court also found two statutory mitigating circumstances: Mr. Thompson's age of twenty-six (26) years at the time of sentencing; and, (2) no significant history of prior criminal activity (R2. 567-573). Mr. Thompson's guilty plea and death sentence were affirmed on direct appeal to the Florida Supreme Court. Thompson v. State, 389 So. 2d 197 (Fla. 1980), cert. denied, Thompson v. Florida, 435 U.S. 998 (1978).

Mr. Thompson then filed a Florida Rule of Criminal Procedure 3.850 motion, which was denied by the trial court and affirmed by the Florida Supreme Court. Thompson v. State, 410 So. 2d 500 (Fla. 1982).

After the denial of his 3.850 motion, Mr. Thompson sought federal habeas corpus relief. Both the United States District Court and the Eleventh Circuit Court of Appeals denied Mr. Thompson relief. Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986), cert. denied, Thompson v. Dugger, 481 U.S. 1042 (1987).

Mr. Thompson then filed a second 3.850 motion, asserting the failure of the sentencing judge to allow presentation and jury consideration of nonstatutory mitigating circumstances in the penalty phase. The trial court denied relief, but the Florida Supreme Court reversed under the authority of Hitchcock v. Dugger, 481 U.S. 393 (1987), and remanded for resentencing. Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987), cert. denied, 485 U.S. 960 (1988).

Following a resentencing, Mr. Thompson's jury recommended a death sentence by a vote of seven to five (7 to 5) on June 6, 1989 (R5. 553-554). The trial court followed the jury's recommendation and imposed a sentence of death on August 25, 1989. Mr. Thompson received life sentences for the remaining counts of the indictment, to run consecutive to each other (R5. 755-757).

In support of its death sentence, the trial court found the following aggravating circumstances, the crime was: (1) committed during the course of a felony; (2) committed for financial gain; (3) especially heinous, atrocious, or cruel; (4) committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification (R5. 758-771). Although two other trial judges had found two mitigating circumstances, the trial court found no statutory or non-statutory mitigating circumstances to exist (R5. 778-771).

Mr. Thompson's death sentence from his resentencing was affirmed on direct appeal by the Florida Supreme Court. Thompson v. State, 619 So. 2d 261 (Fla. 1993).

The United States Supreme Court denied a timely filed petition for writ of certiorari on November 8, 1993. Thompson v. Florida, 114 S.Ct. 445 (1993). Thereafter, Mr. Thompson's timely filed this motion for postconviction relief pursuant to Rule 3.850.

CLAIM I

MR. THOMPSON WAS DENIED EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL AND ADEQUATE REVIEW ON DIRECT APPEAL AND EFFECTIVE REPRESENTATION BY POST-CONVICTION COUNSEL BECAUSE THE TRANSCRIPT WAS AND IS UNRELIABLE AND INCOMPLETE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. NO RELIABLE TRANSCRIPT OF MR. THOMPSON'S CAPITAL TRIAL EXISTS. RELIABLE APPELLATE REVIEW WAS AND IS NOT POSSIBLE. THERE IS NO WAY TO ENSURE THAT THAT WHICH OCCURRED IN THE TRIAL COURT WAS OR CAN BE REVIEWED ON APPEAL, AND THE JUDGMENT AND SENTENCE MUST BE VACATED.

The due process constitutional right to receive trial transcripts for use at the appellate level was acknowledged by the Supreme Court in Griffin v. Illinois, 351 U.S. 212 (1956). The existence of an accurate trial transcript is crucial for adequate appellate review. Id. at 119. The Sixth amendment also mandates a complete transcript.

At the time of resentencing, appellate counsel was provided with an inadequate record where substantial pre-trial proceedings were made off the record. A review of the record on appeal reveals that critical resentencing proceedings were either not transcribed or conducted off-the-record. Mr. Thompson was remanded for resentencing on September 9, 1987,

Thompson v. Dugger, 515 So. 2d 173 (1987), and his petition for certiorari to the United State's Supreme Court was denied on March 21, 1988. Thompson v. Florida, 114 S. Ct. 445 (1988).

On April 21, 1988, Mr. Thompson's appellate counsel entered a motion to withdraw before the trial court that conducted Mr. Thompson's resentencing. Thereafter, Mr. Thompson was represented by the Public Defender until special appointed counsel could be appointed. The first court appearance transcribed begins May 17, 1989. Only one other pre-trial appearance on May 18, 1989 is transcribed and contained in the record on appeal. Mr. Thompson's counsel began voir dire on May 22, 1989. Notably absent from Mr. Thompson's record on appeal is evidence of any court appearances or proceedings prior to May 17, 1989. The transcribed record, which does exist of counsel's appearance on May 17, 1989, makes clear that prior proceedings had taken place. Pre-trial motions had been filed and argued but no record exists of these proceedings. Evidentiary issues were litigated but not recorded. Neither trial counsel nor appellate counsel requested that these proceedings be transcribed.

Complete and effective appellate advocacy requires a complete trial record. The record is missing portions of the voir dire and in some instances so incomplete that it is incomprehensible. The trial record does not contain a transcript of any bench conferences. It is impossible to know what actually occurred and which issues were properly preserved. Appellate counsel was ineffective for failing to ensure that a complete record was available to this Court. Likewise, the trial court erroneously failed to require that a complete record had been prepared.

This Court has recognized the importance of having a complete record on appeal, review. On April 19, 1996, this Court issued a new amendment to the Fla. R. Jud. Admin. 2.050(h) which states:

> (h) Status Conference After Compilation of Record in Death Cases. In any proceeding in which a defendant has been sentenced to death, the circuit judge assigned to the case shall take such action as may be necessary to assure that a complete record on appeal has been properly prepared. To that end, the judge shall convene a status conference with all counsel of record as soon as possible after the record has been prepared pursuant to rule of appellate procedure 9.200(d) but before the record has been transmitted. The purpose of the status conference shall be to ensure that the record is complete.

(Emphasis in original.) Mr. Thompson is entitled to a complete record on appeal.

Mr. Thompson suggests that this case be remanded for the type of status conference contemplated by Rule 2.050(h). Mr. Thompson make meaningful claims regarding trial or appellate counsel's ineffectiveness only after the preparation of a complete record. He should be allowed to amend his claims or pursue new facts under Chapter 119 after preparation of a complete record.

Entsminger v. Iowa, 386 U.S. 748 (1967) held that appellants are entitled to a complete and accurate record. Evitts v. Lucey, 105 S. Ct. 830 (1985) held that effective appellate review begins with giving an appellant an advocate and the tools necessary to do an effective job. Appellate counsel did not have the necessary tools to provide Mr. Thompson with effective representation.

Mr. Thompson should not suffer the ultimate sentence of death when he did not have the benefit of a constitutionally guaranteed review of a bona fide record of the trial

proceedings or effective assistance of counsel. Fla. Const. art. V, sec. 3(b)(1). See Delap v. State, 350 So. 2d 462, 463 (Fla. 1977).

Without the benefit of a pre-trial record, complete voir dire, or sidebar conferences, it was impossible for this Court to provide a proper review of the trial judge's actions.

No meaningful appellate review could occur. A new appeal must be allowed. This result is constitutionally required.

Because the record in this case is incomplete, inaccurate and unreliable, confidence in the appellate review is undermined. The resulting inaccuracies denied due process of law, a reliable appellate process, and effective assistance of counsel on appeal. Mr. Thompson's constitutional right to a meaningful review by the highest court in the State did not occur, in violation of the Sixth, Eighth and Fourteenth Amendments.

Thus, Mr. Thompson continues to be prejudiced because neither appellate counsel, this Court, nor post-conviction counsel have ever fully reviewed the trial proceedings for error with any confidence that the transcript on which they were relying was correct or complete. Mr. Thompson cannot adequately plead this claim until an adequate record on appeal and a complete and accurate trial transcript of all proceedings have been provided to counsel.

CLAIM II

MR. THOMPSON WAS DENIED A PROPER DIRECT APPEAL FROM HIS JUDGMENT OF CONVICTION AND A PROPER APPEAL FROM HIS SENTENCE OF DEATH IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ART. 5, SEC. 3(b)(1) OF THE FLORIDA CONSTITUTION AND FLORIDA STATUTES ANNOTATED, SEC. 921.141(4), DUE TO OMISSIONS IN

THE RECORD. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE.

Portions of the record were missing from both of Mr. Thompson's appeals. The circuit court is required to certify the record on appeal in capital cases, Fla. Stat. Ann. sec. 921.141(4), Fla. Const. art. 5, sec. 3(b)(1). When errors or omissions appear, re-examination of the complete record in the lower tribunal is required. Delap v. State, 350 So. 2d 462 (Fla. 1977).

Mr. Thompson asserts that his former counsel rendered ineffective assistance in failing to assure that a proper record was provided to the court.

CLAIM III

THE FLORIDA SUPREME COURT DID NOT CONDUCT A PROPER HARMLESS ERROR ANALYSIS AS REQUIRED BY THE CONSTITUTION OF THE UNITED STATES.

In the direct appeal of Mr. Thompson's resentencing, this Court expressly found that two constitutional errors occurred: (1) error to admit photographs of victim's body taken during autopsy; and, error to use and find aggravating circumstance of cold, calculated, and premeditated manner. 619 So. 2d at 266. This Court found these errors to be harmless. Id. However, this Court failed to conduct the proper harmless error analysis required by the United States Supreme Court. Chapman, 87 S. Ct. 824 (1967); Sochor v. State, 112 S. Ct. 2114 (1992).

With respect to the autopsy photographs of the victim's body, this Court simply stated:

> [W]e find it was error to admit the autopsy photographs, but the error was harmless given the testimony of the eyewitnesses, the

With regard to the aggravating circumstance of "cold, calculated, and premeditated", this Court simply asserted, without analysis, that use of the invalid aggravating circumstance was "harmless error under the circumstances of this case." Thompson v. State, 619 So. 2d at 266. No further elaboration was provided. No mention was made of the Chapman "harmless beyond a reasonable doubt" standard. No discussion or analysis was made whether the error contributed to the sentence obtained. Chapman.

With respect to the inflammatory autopsy photographs, this Court only stated:

> The error was harmless given the testimony of the eyewitness, the medical examiner, and [Mr. Thompson] himself, and the other photographs admitted into evidence. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

619 So. 2d at 266. Notably absent from this Court's opinion is any analysis stating the applicable standard that the error "was harmless beyond a reasonable doubt" in that "it did not contribute to the [sentence] obtained." Chapman, 386 U.S. at 274. As in Florida v. Sochor, Mr. Thompson's "error[s] cannot be taken as cured by the State Supreme Court's consideration of the case" and Mr. Thompson's "cannot stand on the existing record of appellate review." 112 S. Ct. at 2124.

The Florida Supreme Court has failed to conduct a proper analysis as required by the United States Supreme Court and the United States Constitution. Had it conducted a proper analysis of harmless error under Chapman it would have recognized the harmfulness of the error. Even though the Florida Supreme Court had found that there was no evidence to support the aggravating circumstance, the trial court gave the cold, calculated factor great weight in its sentencing order. It relied upon a tainted jury recommendation of death by a seven to five (7 to 5) vote. Obviously, the trial court did not understand this vague

instruction since it found the aggravator to exist even though there was no evidence to support it. The jury also relied on this vague instruction. Similarly, the inflammatory photographs also were relied upon by the jury and judge in sentencing Mr. Thompson to death. Even with these errors, the jury vote for death was by the slimmest margin, seven to five (7 to 5). These errors cannot be harmless when Mr. Thompson's life hung in the balance of one vote.

This Court, without an accurate record, was prevented from conducting a meaningful review of Mr. Thompson's sentence by appellate counsel's ineffectiveness. Had this Court been informed by an accurate record, it could not find that the jury was properly instructed. It could not find that the jury properly weighed the evidence when it was subjected to gruesome and inadmissible photographs. This Court cannot conclude that these errors were harmless beyond a reasonable doubt when the constitutional errors were so egregious and the seven to five jury (7 to 5) vote so close. Mr. Thompson is entitled to an evidentiary hearing on this issue.

CLAIM IV

MR. THOMPSON WAS DENIED THE EFFECTIVE ASSISTANCE OF APPELLATE AND POST-CONVICTION COUNSEL BECAUSE APPELLATE COUNSEL FAILED TO PROPERLY CHALLENGE ANY ASPECT OF HIS GUILTY PLEA IN VIOLATION OF THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Mr. Thompson's decision to enter a guilty plea on September 18, 1978 was not voluntarily, knowingly or intelligently made. A guilty plea "must be voluntarily made by

one competent to know the consequences of that plea and must not be induced by promises, threats or coercion." Mikenas v. State, 460 So. 2d 259, 361 (Fla. 1984). Mr. Thompson failed to understand the terms of the plea agreement, did not comprehend the rights he was foregoing by entering the plea, and was unable to make a rational decision based on his own best interests. Mr. Thompson's judgment was impaired by psychological problems, which rendered his guilty plea constitutionally infirm.

Mr. Thompson's competency was based on incomplete and inaccurate information. Mr. Thompson was evaluated for competency and sanity by four mental health professionals in 1976. However, the trial judge refused to allow additional competency testing in 1978, when Mr. Thompson entered his guilty plea. Even if Mr. Thompson been competent to make rational decisions about his case, trial counsel failed to investigate whether Mr. Thompson knew of his legal rights and options. It was impossible for Mr. Thompson to make choices regarding his case without disclosure of his legal options.

Counsel failed to adequately advise Mr. Thompson as to the facts and law of his case. The outcome of Mr. Thompson's plea and sentencing was materially unreliable and no adversarial testing occurred in violation of Mr. Thompson's rights as guaranteed by the Constitution of the State of Florida and the Fifth, Sixth, Eighth, and Fourteenth amendments to the United States Constitution. An evidentiary hearing is required.

The trial court knew that Mr. Thompson was suffering from psychological problems. On July 25, 1978, Mr. Thompson's attorney, Harold Solomon, notified the court that something was seriously wrong with his client.

> MR. SOLOMON: Your honor, in regards to Thompson, I have had talks with him over at the jail and here.

The plea colloquy in Mr. Thompson's case was inadequate to establish that Mr. Thompson was proceeding voluntarily, knowingly and intelligently. Rather than asking questions of Mr. Thompson designed to elicit a narrative statement of his understanding, the trial court simply elicited pro forma answers to pro forma questions. The judge asked Mr. Thompson leading questions designed to elicit only a "yes" or "no" answer. The court engaged in no discussions that demonstrated Mr. Thompson's level of understanding of the proceedings. In fact, Mr. Thompson specifically told the court his understanding of pleading guilty:

> MR. THOMPSON: Your Honor, I would like to say that I pleaded guilty because I am guilty, on the basis that I need help from a psychiatrist. I feel that I know what I did was wrong, that I need help, and hope that you can understand that and help me get help.
>
> THE COURT: Well, as I previously told you, when you plead guilty to first-degree murder under these circumstances, the sole question is whether you would be executed in the electric chair or whether you would be sentenced to life imprisonment with a minimum sentence of 25 years.

(R2. 46)

Mr. Thompson believed that by pleading guilty he would be entitled to psychiatric help. He was not aware of the consequences of his plea. When the trial court addressed Mr. Thompson and asked if he understood the proceedings, Mr. Thompson replied: "I'm catching on, sir." (R2. 54) This was the extent of the court's inquiry into Mr. Thompson's understanding of the proceedings.

The trial court failed to assure that Mr. Thompson was constitutionally able to enter a guilty plea. To the extent that trial and appellate counsel failed to adequately preserve this issue, trial counsel was ineffective in failing to do so. Mr. Thompson is entitled to relief.

and no adversarial testing occurred, in violation of Mr. Thompson's rights as guaranteed by the Constitution of the State of Florida and the Fifth, Sixth, Eighth, and Fourteenth amendments to the United States Constitution.

Appellate counsel raised the issue of the trial court's failure to determine Mr. Thompson's competency in 1978. In response, this Court said:

> [Mr. Thompson] contends that the trial court deprived the defendant of due process by denying the request for additional psychiatric testing. We find the trial court did not abuse its discretion in declining to order further psychiatric evaluations in view of the four previous reports and the failure of appellant's counsel to identify any particular circumstance that had caused the mental condition of the appellant to change since those prior examinations and the plea of guilty. We find that the trial court properly inquired into the competency of the appellant at the time he entered his second guilty plea in this cause.

Thompson v. State, 389 So. 2d at 199. Appellant counsel brief did, in fact, identified "particular circumstances" that had caused Mr. Thompson's mental condition to change since his 1976 examination and plea. Appellant's brief cited the dilatory effects of being warehoused on Florida's death row. The brief documented mental problems, including personality disorders and a diagnosed severe and untreatable behavior disorder. This Court failed to address the impact of this and other evidence in concluding the trial court did not abuse its discretion by failing to order a competency evaluation despite the passage of more than two years.

In addition, this Court failed to consider the trial court's failure to appoint a confidential mental health expert to assist Mr. Thompson and trial counsel in the preparation of his defense. Trial counsel could not have advised his client of the possible defenses available because he did not know what they were. Because counsel was not afforded the

opportunity to consult with a mental health expert before advising Mr. Thompson to enter a guilty plea, Mr. Thompson could not have intelligently waived his constitutional rights. To the extent appellate counsel failed to properly preserve this issue on appeal, Mr. Thompson was denied the effective assistance of appellate counsel.

CLAIM VI

MR. THOMPSON WAS DEPRIVED OF DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE NO ADEQUATE MENTAL HEALTH EVALUATION WAS CONDUCTED REGARDING COMPETENCY AND DEFENSE COUNSEL FAILED TO ADEQUATELY INVESTIGATE OR INFORM MR. THOMPSON OF THESE ISSUES.

Had a qualified defense expert been retained, counsel would have had the assistance of a confidential expert to evaluate his case. This expert would have advised counsel that Mr. Thompson's guilty plea was based on his belief that in order to obtain psychiatric help he had to plead guilty. This evidence of competency and presenting a defense would have been critical evidence for both counsel and the trial court and would certainly have resulted in Mr. Thompson not pleading guilty.

Defense counsel attempted to obtain an expert to assist in Mr. Thompson's defense. To the extent he was prevented from doing so by the practices of the State and the trial court he was rendered ineffective by those practices. Due process was denied. Even after Mr. Thompson had plead guilty and a jury had recommended death, Mr. Thompson's defense attorney made another attempt to have Mr. Thompson examined by a psychiatrist.

MR. SOLOMON: If I may proceed, number one, your Honor, if you remember the beginning, when you appointed me to defend Mr. Thompson, I asked for a psychological and neurological report to be made, and I came into the case late.

Firstly and secondly, Judge, this man had pled guilty before Judge Durrant some two years before, prior to that plea of guilty -- he was examined by psychiatrists and in a quick 30-minute interview by three --

THE COURT: It was longer.

MR. SOLOMON: I don't think so. He said about a half hour, tops.

THE COURT: If he has problems, how does he remember?

MR. SOLOMON: I think he would remember.

THE COURT: All right. All Right.

MR. SOLOMON: Your Honor, at the time when I first met the defendant, it became evident to me that there was something wrong. I couldn't put my finger on it. He indicated at that time, in passing, Judge, that he wanted to testify before a co-defendant by the name of Surace.

I questioned him, your Honor, "Why would you want to testify for this man?" And he said -- Well, this just goes to prove to me at that time he was not well.

I don't know about his mind. He said, Judge -- Mr. Solomon, they put a contract out on me, could you imagine. You are on death row-- How could you have a contract? And well he says, somebody put a contract --

I said, it is silly, but you have to defend yourself and worry about yourself and not Surace. From that moment on it was evident to me that something was wrong with him, and the first thing I think the Court did was err by not appointing a psychiatrist and ordering a neurological examination.

The trial court's finding of competency in 1976 was based on incomplete and inaccurate information. To the extent trial and appellate counsel failed to preserve this issue, Mr. Thompson was denied the effective assistance of counsel.

CLAIM VII

MR. THOMPSON WAS INCOMPETENT DURING HIS PLEA, SENTENCING AND DIRECT APPEAL PROCEEDINGS AND HIS FUNDAMENTAL DUE PROCESS RIGHT NOT TO BE CONVICTED WHILE INCOMPETENT WAS VIOLATED WHEN THE COURT FAILED TO ORDER ADEQUATE MENTAL HEALTH EVALUATIONS. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE ON DIRECT APPEAL.

Mr. Thompson was incompetent when he waived his right to trial on guilt phase issues. His counsel's advise was inadequate because of the trial court's lack of understanding that a defense expert was necessary. His trial attorney repeatedly sought psychiatric help from the court before Mr. Thompson's plea was entered and after a jury returned an advisory sentence of seven to five (7 to 5) for death. During the motion for a new trial, Mr. Thompson's attorney said:

> MR. SOLOMON: I was dealing with a separate individual. With a separate mental problem, and that problem was not, Judge, shown to me so that I could, at least, approach the Court before trial and see what could be worked out.
>
> This is a mental retard. I am not a psychiatrist. I know I am dealing and have dealt with one, and I don't think the Court should entertain a sentence to the electric chair of a man who really could not control his mind.
>
> I can't phantom (sic) it to this day. He knew what he was doing, but to turn to me and say, I am not going to get on the stand after saying he was, something is wrong. If I were a

> psychiatrist, or a neurological doctor, I could tell you. But I cannot.

(R2. 583).

It is clear that Mr. Thompson was incompetent at all stages of the proceedings; he is entitled to a new trial and/or a resentencing or other relief consistent with this motion.

Improper action by the State and the trial court prevented counsel from functioning as reasonably effective counsel by withholding information, failing to properly advise Mr. Thompson as to the facts and the law of the case. At hearing, Mr. Thompson would establish facts which support his claims. The outcome of Mr. Thompson's plea and sentencing was materially unreliable and no adversarial testing occurred in violation of Mr. Thompson's rights as guaranteed by the Constitution of the State of Florida and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. To the extent this claim was not properly preserved, Mr. Thompson was denied the effective assistance of trial and appellate counsel.

CLAIM VIII

MR. THOMPSON DID NOT MAKE A KNOWING AND INTELLIGENT WAIVER OF ANY RIGHTS UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY RAISE THIS ISSUE ON DIRECT APPEAL.

To waive any right guaranteed by the United States Constitution the defendant must be able to make a "knowing and intelligent" waiver of these rights. Mr. Thompson was

WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE.

One of the most basic constitutional guarantees of a fair trial is the right of a criminal defendant to have the zealous representation by counsel. See Gideon v. Wainwright, 375 U.S. 335 (1963). Mr. Thompson was denied his right to a zealous advocate because his long-time counsel held a conflict of interest.

Attorney Michael L. Von Zamft began representing Mr. Thompson as a volunteer in February, 1982 and continued to represent him through 1988, when he was appointed as a special assistant public defender for a new sentencing hearing and trial. At that time, however, the State Attorney notified Mr. Von Zamft that Julio Ojeda, who was the lead detective and who obtained statements and/or confessions from Mr. Thompson and his co-defendant, would be a witness in the case. Mr. Von Zamft had represented Mr. Ojeda on federal racketeering charges. When Mr. Van Zamft was notified that Mr. Ojeda would be called as a witness, he was told by the state that he could not represent Mr. Thompson. He then sought to remove himself as Mr. Thompson's attorney. Mr. Van Zamft's motion to withdraw as counsel was granted in 1988.

On April 1, 1976, Mr. Thompson made an incriminating statement to Homicide Detectives Charles Zatrepalek and Julio Ojeda. (R5. 1931-1955). Both detectives were active in investigating Mr. Thompson. However, a short time later, both detectives were indicted on federal racketeering charges, ranging from distribution of cocaine and conspiracy. Detective Zatrepalek plead guilty on January 15, 1982 to narcotics conspiracy. On September 23, 1982, Detective Ojeda was found guilty of eleven (11) counts of RICO, conspiracy, cocaine distribution and tax violations. Mr. Von Zamft represented both Mr.

Thompson and render confidential assistance to the defense pursuant to Fla. R. Crim. P. 3.216. The plea colloquy was inadequate and insufficient as to why Mr. Thompson was pleading guilty. No adequate adversarial testing occurred at any phase of the proceedings involving Mr. Thompson.

In 1976, the court appointed four mental health experts usually employed as State's experts to examine Mr. Thompson for competency. Doctors William Corwin and Charles Mutter evaluated Mr. Thompson in April and May, 1976. Dr. Anastasio Castiello evaluated Mr. Thompson in June, 1976. And, Dr. Albert Jaslow examined Mr. Thompson on an emergency basis at the court's request on June 15, 1976. Not surprisingly, each doctor determined that Mr. Thompson was competent in 1976. Not one of these doctors was called in two years later to reevaluate Mr. Thompson to determine if he was still competent to proceed and enter a guilty plea.

Even though Mr. Thompson's mental condition may have changed, the trial court erroneously relied on these findings from 1976, without having Mr. Thompson re-evaluated. Trial counsel repeatedly tried to have Mr. Thompson re-evaluated in 1978, but the trial court refused to do so (R2. 21). The trial court made its decision about Mr. Thompson's competency to plead guilty based solely on the opinions of four mental health experts who almost exclusively testify for the State. No defense expert was allowed by the court.

The court-appointed experts only relied on Mr. Thompson's self-reporting and information from the State Attorney's office. Even these State-oriented experts acknowledged that Mr. Thompson's memory was poor and failed to remember the charges against him. To take a complete case history and to make a valid mental health evaluation, it was imperative

that experts rely on more than Mr. Thompson's faulty memory. For an adequate evaluation more independent information is necessary. These State-oriented doctors had no independent information.

The trial court had no knowledge of other information about Mr. Thompson's background or information that could have mitigated against accepting a guilty plea. The court had no information except the testimony of four State-oriented doctors who were paid paid by the court to find Mr.Thompson competent. Because of the failure of the experts and trial counsel, Mr. Thompson was denied an adversarial testing.

Mr. Thompson is entitled to a new trial and/or resentencing and other relief consistent with this petition. To the extent appellate counsel failed to properly raise this issue on direct appeal, Mr. Thompson was denied the effective assistance of appellate counsel.

CLAIM XI

MR. THOMPSON WAS DENIED A FAIR AND IMPARTIAL TRIAL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE THE TRIAL COURT PERMITTED THE STATE TO INTRODUCE GRUESOME AND SHOCKING AUTOPSY PHOTOGRAPHS TAKEN AT THE MEDICAL EXAMINER'S OFFICE DEPICTING DISSECTION OF THE DECEASED VAGINAL CANAL AND ABDOMEN.

Trial counsel objected to the introduction of autopsy photos of the victim. Appellate counsel raised this issue on direct appeal. This Court found the admission of the autopsy photographs to be error, but harmless. Thompson v. State, 389 So. 2d 197 (Fla. 1980). However, this Court failed to conduct an adequate harmless error analysis under Chapman. Supra.

perforation, the laceration just below the cervix. This is the cervix of the uterus. You can see the perforation in there, the tear" (R5. 2081). The state then used this photograph to elicit overly graphic, dramatic and inflammatory testimony from the medical examiner:

State: What would one feel as the wall of the vaginal canal is being perforated by State's Exhibit 21 and/'or 23, Doctor? Try and tell us, if you can, what one would feel.

Witness: It's just painful. Is it just painful? No. It's intense pain.

Defense: I'm going to object. I think it's speculative on the part of the doctor.

Defense: also overly dramatic.

Court: Sustained as far as the expression or the drama.

State: Doctor, tell us what sort of pain a person would feel receiving injuries like that.

Witness: we.., it's an intense, excruciating pain--

Defense: Judge, object.

Witness: --of the severest.

Court: Counsel, sidebar.

Defense: Judge, my objection is based on the fact that Counsel is asking him to speculate as to what type of pain an individual would feel based on these wounds. I don't think that's within the scope of his knowledge or his expertise or his ability to testify.

State: Judge --

Defense: Judge, I also believe that counsel is soliciting these remarks from the doctor. He's doing it solely for the purpose of prejudicing the jury and having the dramatic effect upon them.

State: Certain parts of the body due to their nervous system, and I'll have the doctor explain it, are

more painful than others. When we get a haircut there's no pain. When we have calluses and corn removed from our feet there's no pain. When other parts of our body are cut, there's some moderate amount of pain. This is a scientist whose specialty is in determining how people die.

Court: You have to lay the predicate by asking if he has an opinion.

State: You have already qualified him as an expert in forenxidc [sic] pathology.

Court: I understand. In any one of these questions you have to ask him whether he has an opinion based on his expertise and whether -- and he can give his opinion, if it falls within the realm of his expertise. But the thing that I feel that defense Counsel is correct in, if the doctor is an expert, he doesn't have to be overly dramatic about his answers. He can answer as an expert would ordinarily answer

(R5. 2083-85)(emphasis added).

On direct appeal, Mr. Thompson's counsel alleged that the trial court improperly admitted photographs of the victim's body taken during the autopsy (Appellant's Initial Brief on Direct Appeal at 29-30, FSC Case No. 55,697, (Brief filed February 14, 1979)). This Court agreed that "it was error [for the trial court] to admit the autopsy photographs" but that the error was harmless. Thompson v. State, 619 So. 2d 261, 266 (Fla. 1993). The slim margin of the seven to five (7 to 5) jury recommendation did not make this harmless error.

Notwithstanding this Court's opinion, the prejudicial effect of the photographs undermined the reliability of Mr. Thompson's death sentence. The photographs did not independently establish any material part of the State's case, nor were they necessary to corroborate a disputed fact. The trial court's error in admitting these photographs cannot be

considered harmless beyond a reasonable doubt. Chapman v. California, 87 S. Ct. 824 (1967); State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). O'Neal v. McAninch, 115 S. Ct. 992 (1995).

Use of these gruesome photographs, which were cumulative, inflammatory and improperly appealed to the jury's emotions, denied Mr. Thompson a fair trial in violation of Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Relief is proper and should be granted.

CLAIM XII

NEWLY DISCOVERED EVIDENCE SHOWS MR. THOMPSON'S CAPITAL CONVICTION AND SENTENCE ARE CONSTITUTIONALLY UNRELIABLE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Evidence uncovered since the time of Mr. Thompson's capital resentencing establishes that Mr. Thompson is innocent of the offense for which he was convicted, was coerced into confessing to the crime, and was forced to plead guilty. Consideration of this evidence is required, for it establishes that Mr. Thompson's conviction and death sentence violate the Eighth and Fourteenth Amendments. Jones v. State, 591 So. 2d 911 (Fla. 1991).

to the defense, whether that information relates to guilt/innocence or punishment, and regardless of whether defense counsel requests the specific information. A defendant's right to present favorable evidence is violated by such state action. See Chambers v. Mississippi, 410 U.S. 284 (1973); see also Giglio v. United States, 405 U.S. 150 (1972). Exculpatory evidence and statements material to Mr. Thompson's case were undisclosed.

Evidence that Ms. Savage's absence from the resentencing may have been due to the strong-armed tactics of the State that was never presented to the jury. The state unreasonably failed to disclose its tactics in the mysterious absence of Ms. Savage. Moreover, the prosecution interfered with counsel's ability to provide effective representation and insure an adversarial testing. The prosecution denied the defense the information necessary to alert counsel to the avenues worthy of investigation and presentation to the jury. As a result, no adversarial testing occurred. Confidence is undermined in the outcome. There is a reasonable probability of a different outcome. Kyles v. Whitley, 115 S. Ct. 1555 (1995). To the extent appellate counsel failed to properly raise this issue, Mr. Thompson was denied the effective assistance of appellate counsel.

CLAIM XIV

MR. THOMPSON WAS DENIED CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF COUNSEL AT ALL STAGES OF HIS PROCEEDINGS. THE COURT AND STATE ALSO RENDERED COUNSEL INEFFECTIVE. NO ADVERSARIAL TESTING OCCURRED. MR. THOMPSON'S CONVICTIONS AND DEATH SENTENCES ARE UNRELIABLE. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY RAISE THIS ISSUE ON DIRECT APPEAL.

The trial court at Mr. Thompson's 1978 guilty plea denied defense counsel the opportunity to obtain a competency evaluation for Mr. Thompson. Mr. Thompson's incompetence impeded his ability to communicate meaningfully with trial counsel. As a result, Mr. Thompson's guilty plea was not voluntary, knowing and intelligent. It cannot be relied upon to support his conviction or subsequent death sentence.

The State Attorney, trial court, and Dade County Finance Office denied Mr. Thompson effective assistance of counsel by failing to authorize and/or timely deliver adequate funds for defense counsel to prepare his case. Mr. Thompson was denied the opportunity to have the appointment of a confidential mental health expert; the transportation and location of witnesses; case investigation and mental health experts. Defense counsel spent as much time arguing to the trial court over payment of defense expenses as litigating issues central to the case.

The State offered and the trial court admitted the prior trial testimony of the state's star witness, Barbara Savage, as an unavailable witness despite the fact that the defense was denied the means to ascertain her whereabouts and attendance. (R5. 1701-1820) The trial court rendered counsel ineffective by failing to grant a continuance, which would have

allowed defense counsel the opportunity to locate Ms. Savage and obtain her presence (R5. 1625). The prejudicial impact of Ms. Savage's testimony cannot be overstated. Ms. Savage was not only present before, during, and after the commission of the acts for which Mr. Thompson was sentenced to death, but she also was biased against Mr. Thompson because she was the co-defendant's girlfriend at the time of the crime.

Ms. Savage's testimony accused Mr. Thompson of acts which the trial court eventually relied upon in its sentencing order to support Mr. Thompson's death sentence. Not only was her testimony hearsay itself, it was replete with hearsay attributable to Mr. Thompson and Mr. Surace. Further, the State relied extensively on Ms. Savage's testimony to support its case (R5. 1608-09). Yet, Mr. Thompson was unable to confront this witness because the state and trial court refused to furnish defense counsel the means to locate her and obtain her presence. Instead, Mr. Thompson's resentencing counsel was unable to elicit from Ms. Savage facts which would have clearly established mitigation, including Mr. Thompson's intoxication and domination by his co-defendant Rocco Surace.

Defense counsel repeatedly asked for funds to locate Ms. Savage but was denied these critical resources (R5. 990, 1625-1627). Counsel also was denied the appointment of appellate counsel to file a interlocutory certiorari petition appealing the trial court's adverse ruling.

Mr. Thompson failed to have the opportunity to meaningfully cross-examine Ms. Savage at his 1978 sentencing. Ms. Savage's direct testimony consumed more than 100 pages (R5. 1701-1815) yet her cross examination took less than five (5) pages (R5. 1816-1820). Defense counsel at that time failed to adequately cross-examine Ms. Savage.

Defense counsel did not object on the basis of hearsay, self-incrimination, right to counsel, or due process to evidence that Mr. Thompson called 911 (R5. 1614-1615), or gave statements to various police officers, including a handwritten and formal confession.(R5. 1860-1920, 1931-1954). Mr. Thompson received ineffective assistance of counsel.

Mr. Thompson's trial counsel failed to secure the presence of Mr. Thompson during critical stages of the resentencing proceedings. (R5. 796, 879, 1665-1676, 1824).

Mr. Thompson was denied effective assistance of counsel in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments by the acts and or omissions of the trial court, state, trial counsel and appellate counsel.

CLAIM XV

MR. THOMPSON'S SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS SHIFTED THE BURDEN TO MR. THOMPSON TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE SENTENCING JUDGE USED THIS IMPROPER STANDARD IN SENTENCING MR. THOMPSON TO DEATH. THE PROSECUTORS COMMENTS ALSO SHIFTED THE BURDEN TO MR. THOMPSON. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE.

The jury instructions and the prosecutor's argument at Mr. Thompson's resentencing unconstitutionally shifted the burden to Mr. Thompson to show death was an inappropriate penalty (R5. 3049-89, 3116, 3119, 3122-3124)). See, Mullaney v. Wilbur, 421 U.S. 684 (1975); Simmons v. South Carolina, 114 S. Ct. 2187 (1994).

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 aggravating circumstances outweighed the mitigating circumstance.

State v. Dixon, 283 So. 2d 1 (Fla. 1973)(emphasis added). To the contrary, the burden was shifted to Mr. Thompson on the question of whether he should live or die.

Shifting the burden to the defendant to establish that mitigating circumstances outweigh aggravating circumstances conflicts with the principles of Dixon. Such instructions unconstitutionally shift the burden 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. Dugger, 107 S. Ct. 1821 (1987), and Maynard v. Cartwright, 108 S. Ct. 1853 (1988).

Jury instructions at Mr. Thompson's capital penalty phase required that the jury impose death unless mitigation was not only produced by Mr. Thompson, but also unless Mr. Thompson proved that the mitigation he provided outweighed and overcame the aggravation (R. 525). This standard shifted the burden to Mr. Thompson to establish that life was the appropriate sentence and limited consideration of mitigating evidence to only those factors proven sufficient to outweigh the aggravation. The standard given to the jury violated state law. The jury could not "full[y] consider" and "give effect to" mitigating evidence. Penry, 109 S. Ct. at 2951. The instructions given to the jury were inaccurate and

misleading regarding who bore the burden of proof as to whether a death recommendation should be returned.

The standard upon which the judge instructed Mr. Thompson's jury is an abrogation of Florida law and Eighth Amendment principles. Mr. Thompson was required to establish (prove) that life was the appropriate sentence, and the jury's and judge's consideration of mitigating evidence was limited to mitigation "sufficient to outweigh" aggravation.

Mr. Thompson was forced to prove mitigating circumstances outweighed aggravating circumstances to show his innocence of the death penalty (R5. 3116, 3119, 3122-3124). The instructions violated Florida law and the Eighth and Fourteenth Amendments. The jury was not instructed in conformity with the standard set forth in Dixon.

In being instructed that mitigating circumstances must outweigh aggravating circumstances before the jury could recommend life, the jury was told that once aggravating circumstances were established, it need not consider mitigating circumstances unless those mitigating circumstances were sufficient to outweigh the aggravating circumstances. Cf. Mills v. Maryland, 108 S. Ct. 1860 (1988); Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821 (1987). The jury was precluded from considering mitigating evidence, Hitchcock, and from evaluating the "totality of the circumstances" in considering the appropriate penalty. Dixon v. State, 283 So. 2d at 10. According to the instructions, jurors would reasonably have understood that only mitigating evidence that rose to the level of "outweighing" aggravation need be considered. Mr. Thompson is entitled to relief in the form of a new sentencing hearing, because his sentencing was tainted by improper instructions.

Mr. Thompson received ineffective assistance of appellate counsel as a result of counsel's failure to raise this issue on direct appeal. Habeas relief is warranted.

CLAIM XVI

MR. THOMPSON'S EIGHTH AMENDMENT RIGHTS WERE VIOLATED BY THE SENTENCING COURT'S REFUSAL TO FIND THE MITIGATING CIRCUMSTANCES SET OUT IN THE RECORD. APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE THIS ISSUE.

The proceedings resulting in Mr. Thompson's sentence of death violated the constitutional mandate of Eddings v. Oklahoma, 455 U.S. 104 (1982). Sentencing judges are required to specifically address nonstatutory mitigation presented and/or argued by the defense. Campbell v. State, 571 So. 2d 415 (Fla. 1990). The failure to give meaningful consideration and effect to the evidence in mitigation requires reversal of a death sentence. Penry v. Lynaugh, 109 S. Ct. 2934 (1989).

Mr. Thompson presented substantial evidence to establish statutory and non-statutory mitigation. However, the trial court failed to find statutory and non-statutory mitigation on Mr. Thompson's behalf. The trial court did not find as a non-statutory mitigating circumstance (1) Mr. Thompson had changed for the better since being in prison; (2) Mr. Thompson's remorse; (3) Mr. Thompson's drug and alcohol abuse; (4) Mr. Thompson was a slow learner; (5) Mr. Thompson was intoxicated at the time of the offense; (6) his age of 24 years at the time of the offense; (7) no significant history of criminal activity; (8) Mr. Thompson was under the influence of extreme mental or emotional disturbance; (9) Mr. Thompson acted under extreme duress or under the substantial domination of another person, Mr. Surace; (10) Mr. Thompson's capacity to appreciate the criminality of his conduct or to

conform his conduct to the requirements of laws was substantially impaired; and, (11) Mr. Thompson was abused as a child.

"When a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved." Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990). See Maxwell v. State, 604 S. 2d 409 (1992).

The trial court's sentence of death stated that the court found no mitigation even though the State failed to refute or address significant mitigating evidence presented by the defense. The Court perceived its duty only extended to "offering" the defendant an opportunity to present mitigation. This Court has recognized that trial courts "continue to experience difficulty in uniformly addressing mitigating circumstances." Campbell, 571 So. 2d 415, 419 (Fla. 1990).

Moreover, this Court noted that the failure to set forth specific findings concerning all aggravating and mitigating circumstances could prevent it from adequately carrying out its responsibility of providing the constitutionally required meaningful appellate review, including proportionality review. Campbell, 571 So. 2d 419-20; State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973). Indeed, lack of uniformity in the application of aggravating and mitigating circumstances invariably would result in the arbitrary and capricious imposition of the death penalty. Furman v. Georgia, 408 U.S. 238 (1972); Grossman v. State, 525 So. 2d 833, 850 (Fla. 1988) (Shaw, J., concurring).

The trial court's inadequate consideration of Mr. Thompson's unrefuted mitigation was not cured by this Court's analysis:

(R5. 2151-2152, 2160, 2168, 2186, 2335, 2387, 2400, 2473-2475, 2508, 3224, 3253-3254, 2908-2909); Mr. Thompson's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired, including low IQ, mental disfunction, drug and alcohol abuse.

This Court failed to address these individual mitigating circumstances. The failure of the trial court to find and give weight to the mitigating evidence cannot be overestimated because Mr. Thompson's jury only recommended death by a vote of seven to five (7 to 5).

Meaningful appellate review was denied. The lack of any factual findings or reasons for the trial court's and this Courts conclusions regarding any of the proposed nonstatutory mitigating factors falls far short of the requirements set forth in Campbell. A trial court must make specific findings concerning each proposed mitigating circumstance, including the weight to be accorded to each mitigating factor. Campbell, 571 So. 2d at 419-20. There is no way to know whether the trial court properly considered all the relevant mitigation advanced by Mr. Thompson and no way for this Court to have performed meaningful review of Mr. Thompson's death sentence. Mr. Thompson is entitled to habeas relief. Appellate counsel was ineffective for failing to present this issue on direct appeal.

CLAIM XVII

THE PROSECUTORS' MISCONDUCT RENDERED MR. THOMPSON'S CONVICTIONS AND DEATH SENTENCE FUNDAMENTALLY UNFAIR AND UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The comments and argument of the State were not supported by admissible evidence; comments on the credibility of witnesses; not relevant, or if relevant, the prejudicial effect

Wilbur, 421 U.S. 684 (1975), and does not define "sufficient aggravating circumstances." Further, the statute does not sufficiently define for consideration each of the aggravating circumstances listed in the statute. See Godfrey v. Georgia, 446 U.S. 420 (1980). These deficiencies led to the arbitrary and capricious imposition of the death penalty and violate the Eighth Amendment to the United States Constitution. Richmond v. Lewis, 113 S. Ct. 528 (1992). Florida's capital sentencing procedure does not have the independent reweighing of aggravating and mitigating circumstances required by Proffitt v. Florida, 428 U.S. 242 (1976).

The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner, and juries receive unconstitutionally vague instructions on the aggravating circumstances. See Godfrey v. Georgia; Espinosa v. Florida, 112 S. Ct. 2926 (1992).

Florida law creates a presumption of death if a single aggravating circumstance is found. This creates a presumption of death in every felony-murder case, and in nearly every premeditated-murder case. Once an aggravating factor is found, Florida law provides that death is presumed to be the appropriate punishment, which can only be overcome by mitigating evidence so abundant as to outweigh the aggravating factor. This presumption of death does not satisfy the Eighth Amendment's requirement that the death penalty be applied only to the worst offenders. See Furman v. Georgia, 408 U.S. 238 (1972); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988).

Because of the arbitrary and capricious application of Florida's death penalty, the statute as it exists and as applied is unconstitutional under the Eighth and Fourteenth

The consideration and finding of this aggravating circumstance was tainted by an unconstitutionally vague statute and instruction. See Sochor v. Florida, 112 S. Ct. 2114 (1992). The use of this aggravating factor rendered the aggravating circumstances illusory. Stringer v. Black, 112 S. Ct. 1130 (1992). The trial court considered and found an automatic statutory aggravating circumstance; therefore, Mr. Thompson entered the penalty phase already eligible for the death penalty, whereas other similarly (or worse) situated petitioners would not.

This automatic aggravating factor did not channel and narrow the sentencer's discretion or the class of persons eligible for the death penalty. Mr. Thompson did not receive a reliable and individualized sentencing determination in violation of the Sixth, Eighth, and Fourteenth Amendments. Habeas relief must be granted.

To the extent trial and appellate counsel did not properly preserve this claim, Mr. Thompson received ineffective assistance of counsel.

CLAIM XX

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE NUMEROUS RECORD ERRORS OCCURRING AT MR. THOMPSON'S RESENTENCING. IN ADDITION, TRIAL AND APPELLATE COUNSEL WERE RENDERED INEFFECTIVE BY THE ACTION OF THE TRIAL COURT AND STATE.

The State Attorney, trial court, and Dade County Finance Office denied Mr. Thompson effective assistance of counsel by failing to authorize and/or timely deliver adequate funds for defense counsel to prepare his case. Mr. Thompson was denied the opportunity to have the appointment of a confidential mental health expert; the transportation and location of witnesses; case investigation, and mental health experts. Defense counsel

appellate counsel to file a interlocutory certiorari petition appealing the trial court's adverse ruling.

Mr. Thompson was denied the opportunity to meaningfully cross-examine Ms. Savage at his 1978 sentencing. Ms. Savage's direct testimony consumed more than 100 pages (R5. 1701-1815) while her cross examination took up less than five (5) pages (R5. 1816-1820). Defense counsel at that time failed to adequately cross-examine Ms. Savage. Defense counsel failed to impeach her with inconsistent prior statements or elicit facts supporting Mr. Thompson's intoxication and relative culpability as well as other mitigating circumstances. At the time of her testimony, the trial court, state, jury, and defense counsel were operating under the mistaken belief that Mr. Thompson was limited to presenting only statutory mitigation. Therefore, Mr. Thompson was never given the opportunity to cross-examine Ms. Savage regarding the mitigation he was constitutionally entitled to present to his sentencers.

Mr. Thompson received his resentencing based upon Hitchcock v. Dugger, 481 U.S. 393 (1987). Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987), cert. denied, 485 U.S. 960 (1988). Ms. Savage's testimony given in the context of a constitutionally infirm sentencing proceeding cannot be separated from that Hitchcock error and violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. Accordingly, admission of her prior testimony infected Mr. Thompson's resentencing with the same error and rendered counsel ineffective.

The trial court also limited and impeded Mr. Thompson's trial counsel's representation during the new penalty phase. The trial court excluded testimony of defense witnesses who would have testified that Mr. Thompson should not be sentenced to death (R5. 2153, 2161, 2168, 2192, 2211, 2225, 2434, 2616, 2659). Further, the trial court erred in

failing to disqualify assistant state attorney David Waksman (R5. 153-156) or grant a defense continuance to find Ms. Barbara Savage (R5. 1625). The trial court also failed to ensure Mr. Thompson an impartial jury by failing to conduct individual voir dire or strike the jury panel once it became apparent that the jurors were obsessed with the possibility that Mr. Thompson might be released on parole. The trial court also erred by failing to honor defense counsel's invocation of the sequestration rule with respect to material witness, Betty Ivester, the victim's mother (R5. 1663-1694). Further, the trial court failed to control audience members from distracting the jury during the trial (R5. 1909).

The trial court's hindrance of defense counsel rendered counsel ineffective, violated Mr. Thompson's right to due process, and rendered his trial fundamentally unfair.

Trial counsel failed to object to prosecutor misconduct which occurred throughout Mr. Thompson's penalty phase. For example, the state inflamed the emotions of the jury by making an improper Golden Rule Argument in its opening statement:

> If I asked all of you to imagine the most horrible kind of death that you could imagine, Sally Ivester suffered (R5. 1602).

The prosecutor characterized the crime as "horrible" (R5. 1605) and diminished the jury's sentencing responsibility by informing them that "the judge makes the final decision" regarding whether Mr. Thompson will or will not die (R5. 1610). To the extent no objection was made, Mr. Thompson received ineffective assistance of counsel.

Trial counsel also failed to object when the State diminished the sentencing responsibility of the jury by arguing automatic, inapplicable, and vague aggravating circumstances. In its closing argument, the state prejudiced Mr. Thompson by informing the jury that he had been sentenced to death on two prior occasions:

> He pled guilty in 1976,. Joe Durant sentenced him to death. Overturned for a new trial, he pled guilt[sic] in 1978. Judge Tanksley sentenced him to death (R5. 3038).

The actions of the State rendered defense counsel ineffective and denied Mr. Thompson a fair trial.

Defense counsel did not object on the basis of hearsay, self-incrimination, right to counsel, or due process to evidence that Mr. Thompson called 911 (R5. 1614-1615), or gave statements to various police officers, including a handwritten and formal confession.(R5. 1860-1920, 1931-1954). Mr. Thompson received ineffective assistance of counsel.

Mr. Thompson's trial counsel failed to secure the presence of Mr. Thompson during critical stages of the resentencing proceedings. (R5. 796, 879, 1665-1676, 1824).

Trial Counsel failed to consult with or present to Mr. Thompson's jury a mental health expert that could have clearly established the existence of statutory and nonstatutory mitigation. The facts and circumstances of this case manifest an undeniable sexual element involving complex psycho-sexual dynamics. These dynamics were never explored because trial counsel failed to obtain a confidential defense expert to assist him in investigating, preparing, and presenting mitigating evidence. Consequently, neither Mr. Thompson's sentencing jury or trial court were presented with an accurate picture of the relationship between Mr. Thompson background and character and the circumstances of the offense.

Trial counsel failed to ensure that all circuit court proceedings transpired in the presence of a court reporter, transcribed, and presented to the Florida Supreme Court. Direct appeal counsel was also ineffective for failing to assure a complete and accurate record on appeal was presented to the Florida Supreme Court on direct appeal.

Generally accepted mental health principles require that an accurate medical and social history be obtained "because it is often only from the details in the history" that organic disease or major mental illness may be differentiated from a personality disorder. R. Strub & F. Black, Organic Brain Syndrome, 42 (1981). This historical data must be obtained not only from the patient but from sources independent of the patient. Patients are frequently unreliable sources of their own history, particularly when they suffer from head injury, drug addiction, alcoholism, mental retardation, and other serious mental illness such as schizophrenia. Consequently, a patient's knowledge may be distorted by knowledge obtained from family and his own organic or mental disturbance, and a patient's self-report is thus suspect:

> [I]t is impossible to base a reliable constructive or predictive opinion solely on an interview with the subject. The thorough forensic clinician seeks out additional information on the alleged offense and data on the subject's previous antisocial behavior, together with general "historical" information in the defendant, relevant medical and psychiatric history, and pertinent information in the clinical and criminological literature. To verify what the defendant tells him about these subjects and to obtain information unknown to the defendant, the clinician must consult, and rely upon, sources other than the defendant.

Bonnie & Slobogin, The Role of Mental Health Professionals in the Criminal Process: The Case of Informed Speculation, 66 Va. L. Rev. 727 (1980) (cited in Mason, 489 So. 2d at 737).

In this case, Mr. Thompson was denied his right to "a competent psychiatrist . . . [to] conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." Ake, 105 S. Ct. at 1096 (1985). The court relied on the testimony of four

State-oriented doctors to determine competency. All of these doctors based their opinions almost exclusively on Mr. Thompson's self-report. No mental health experts had examined Mr. Thompson for mitigation evidence.

It is well-recognized that a patient is often an unreliable data source for his own medical and social history: "the past personal history is somewhat distorted by the patient's memory of events and by knowledge that the patient obtained from family members." **Kaplan and Sadock** at 488. Accordingly, "retrospective falsification, in which the patient changes the reporting of past event or is selective in what is able to be remembered, is a constant hazard of which the psychiatrist must be aware." Id. Because of this phenomenon:

> [I]t is impossible to base a reliable constructive or predictive opinion solely on an interview with the subject. The thorough forensic clinician seeks out additional information on the alleged offense and data on the subject's previous antisocial behavior, together with general "historical" information on the defendant, relevant medical and psychiatric history and pertinent information in the clinical and criminological literature. To verify what the defendant tells him about these subjects and to obtain information unknown to the defendant, the clinician must consult, and rely upon, sources other than the defendant.

Bonnie and Slobogin, The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation, 66 Va. L. Rev. 427 (1980). Accord Kaplan and Sadock at 550; American Psychiatric Association, "Report of the Task Force on the Role of Psychiatry in the Sentencing Process," Issues in Forensic Psychiatry 202 (1984); Pollack, Psychiatric Consultation for the Court, 1 Bull. Am. Acad. Psych. & L. 267, 274 (1974); H. Davidson, Forensic Psychiatry 38-39 (2d ed. 1965); MacDonald at 98.

Bill Thompson was born to Bernard and Helen Thompson in Newark, Ohio on February 19, 1952. He was the second oldest of six children. From the beginning, Bill was

for a year. Records describe a child who was not accepted by his family or peers and a child who was unable to succeed academically. Eventually, Bill dropped out of school at the age of 18. By then, he had only made it to the eighth grade.

After leaving home at age 18, he began experimenting with drugs. He began to drink heavily and abuse drugs such as marijuana, hashish and quaaludes. He worked several odd jobs, including as a bouncer, short order cook and a "carny" working carnivals. He entered the Marine Corps in 1972 where he was subsequently discharged for lying about past homosexual behavior. Following his discharge from the Marines he eventually found himself in Florida. He drifted around Florida without any purpose or direction in his life. He was incapable of taking care of himself. He was without a job and he had no money so he relied on "friends" to help him. These "friends" taught him how to hustle male homosexuals and he became a male prostitute.

During this same time, he met Donna Adams. They met in a bar and she took him home with her. The relationship survived for several years. They eventually had two children, a son and a daughter, who were born while he was incarcerated.

Two weeks before the instant offense, Bill met Rocco Surace. Bill was in awe of Rocco, also known as Rocky. Rocky told Bill that he was a member of the Outlaw Motorcycle Gang and this further bolstered his status in Bill's eyes. Bill also was very fearful of Rocky. Bill was already sheepish and very eager to please. Rocky knew this about Bill and took advantage at every opportunity. Rocky was a violent and heartless individual who would do anything to protect his own life.

What the jury was never actually told was that Bill Thompson is a retarded individual who suffers from Attention Deficit Disorder with Hyperactivity, has a chronic motor tic and organic brain damage.

Two others were in the room the day of the incident who were more intelligent than Bill. The evidence shows that Rocco Surace instigated this crime and is responsible for Sally Ivester's death. As for Bill Thompson, always eager to please and in constant fear of not being accepted, he went along with Rocky's violence. Just as Barbara Savage sat and watched this incident transpire without a word or assistance to her friend for fear that she would be the next target, Bill Thompson also was under the spell of Rocky, fearing for his own life.

As the unfolding tragedy of Bill Thompson's life clearly shows, substantial mitigation was amply available. None of this evidence reached the jury or the judge because counsel failed to adequately investigate and prepare for the penalty phase of the capital proceedings and failed to properly prepare its mental health experts. Counsel failed to discover and use the wealth of mitigation available in Mr. Thompson's background -- mitigating evidence without which no individualized consideration could occur. Had counsel adequately prepared and discharged his Sixth Amendment duties, overwhelming mitigating evidence which would have precluded a sentence of death in this case would have been uncovered.

Mr. Thompson's sentencing jury heard nothing in mitigation in terms of what could clearly have been presented. Any of the available material and relevant evidence discussed herein which counsel could have presented would have made a difference. Although ample mitigating evidence was easily accessible, trial counsel failed to present it in mitigation at the

penalty phase. Counsel's failure in this regard was not based on "tactics"; rather, it was based on the failure to adequately investigate and prepare. The evidence was not hard to find, and it cried out for presentation.

Given the numerous and detailed instances of prejudicially deficient performance, it is clear that Mr. Thompson is entitled to relief. Mr. Thompson was sentenced to death by a judge and jury who knew very little about him. No adversarial testing occurred. The evidence set forth in this claim demonstrates that an unreliable death sentence was the resulting prejudice. Mr. Thompson's sentence of death should not be permitted to stand under the Sixth, Eighth, and Fourteenth Amendments. As confidence in the result is undermined, relief is appropriate.

CLAIM XXII

MR. THOMPSON'S SENTENCING JURY WAS REPEATEDLY MISLED BY INSTRUCTIONS AND ARGUMENTS WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED THEIR SENSE OF RESPONSIBILITY FOR SENTENCING, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE THIS ISSUE.

This Court has held that this claim should have been raised on direct appeal. Thompson v. State, 593 So. 2d 206, 208 (Fla. 1992). Appellate counsel was ineffective in failing to raise this claim on direct appeal. To the extent that the transcript is incomplete and inaccurate, appellate counsel was rendered ineffective.

A capital sentencing jury must be properly instructed as to its role in the sentencing process. Hitchcock v. Dugger, 481 U.S. 393 (1987); Caldwell v. Mississippi, 472 U.S. 320 (1985); Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(en banc), cert. denied, 109 S. Ct.

1353 (1989). Therefore, even instructional error not accompanied by a contemporaneous objection warrants reversal. Meeks v. Dugger, 576 So. 2d 713 (Fla. 1991); Hall v. State, 541 So. 2d 1125 (Fla. 1989).

Mr. Thompson does not have to show that the effect of the inconsistent instructions was to unconstitutionally dilute the jury's sense of responsibility. In Boyde v. California, 110 S. Ct. 1190, the United States Supreme Court held that where there was a reasonable likelihood that a jury had understood an instruction to preclude them from considering mitigating evidence in violation of Lockett v. Ohio, 438 U.S. 586 (1978), relief was warranted. There was much more than a reasonable likelihood that Mr. Thompson's jury misunderstood the effect of its decision in the Florida sentencing calculus. The overall effect of this was to create a grave danger that the sentence that emerged from Mr. Thompson's trial did not represent "a decision that the State had demonstrated the appropriateness of the defendant's death." Caldwell, 472 U.S. at 332.

From the beginning of voir dire to the final instructions, the trial court misled the jury about the significance attached to its sentencing verdict. At Mr. Thompson's resentencing, prospective jurors and the jury were told the ultimate responsibility for sentencing Mr. Thompson rested with the trial court; thus, diminishing the jury's responsibility for Mr. Thompson's sentence. (R5. 1005, 1071-1073, 1089, 1324, 3115)

Juror responsibility also was diminished by the state's opening and closing statement. The record is replete with characterizations of the jury's decision as only "advisory". (R5. 1610, 3115, 3116).

In Hitchcock v. Dugger, 481 U.S. 393 (1987), the United States Supreme Court held that instructions for the sentencing jury in Florida were governed by the Eighth Amendment. Thus, the intimation that a capital sentencing judge has the sole responsibility for the imposition of sentence, or is in any way free to impose whatever sentence he or she sees fit, irrespective of the sentencing jury's own decision, is inaccurate, and is a misstatement of the law. As the court stated in Mann: "[t]o give effect to the legislature's intent that the sentencing jury play a significant role, the Supreme Court of Florida has severely limited the trial judge's authority to override a jury recommendation of life imprisonment. In Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975), the court held that a trial judge can override a life recommendation only when 'the facts [are] so clear and convincing that virtually no reasonable person could differ'." Mann, 844 F.2d at 1450-51. Mr. Thompson's jury, however, was led to believe that its determination meant very little. Under Hitchcock, the sentencer was erroneously instructed.

The state must demonstrate the comments and instructions at issue had "no effect" on the jury's sentencing verdict. Caldwell, 472 U.S. at 341. If the jurors had not been misled and misinformed as to their proper role, had their sense of responsibility not been minimized, and had they consequently voted for life, such a verdict, for a number of reasons, could not have been overridden. The evidence of non-statutory mitigation in the record provided more than a "reasonable basis" that would have precluded an override. See Hall v. State, 541 So. 2d 1125 (Fla. 1989); Brookings v. State, 495 So. 2d 135 (Fla. 1986); McCampbell v. State, 421 So. 2d 1072 (Fla. 1982). The Caldwell violations in this case had

an effect on the jurors, and also infected the sentencing judge because of the great weight given to the jury's recommendation. Espinosa.

Mr. Thompson's appellate counsel was ineffective for failing to raise this issue on direct appeal. To the extent that the record is incomplete and/or inaccurate, Mr. Thompson was deprived his right to meaningful review and his rights under the Sixth, Eighth, and Fourteenth Amendments. Habeas relief must issue.

CLAIM XXIII

THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING FACTOR IS UNCONSTITUTIONALLY VAGUE. MR. THOMPSON'S SENTENCING JURY WAS IMPROPERLY INSTRUCTED ON THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING FACTOR WHICH, AS A MATTER OF LAW, DID NOT APPLY TO HIS CASE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY RAISE THIS ISSUE ON DIRECT APPEAL.

Trial counsel objected to the jury being instructed on the "cold, calculated and premeditated" aggravator. Counsel's objections were overruled and the jury was simply instructed:

> The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification (R5. 3117).

In Mr. Thompson's case, this aggravating factor was overbroadly applied, see Godfrey v. Georgia, 446 U.S. 420 (1980); Maynard v. Cartwright, 108 S. Ct. 1853 (1988), failed to genuinely narrow the class of persons eligible for the death sentence, see Zant v. Stephens, 462 U.S. 862, 876 (1983), and did not apply as a matter of law. Power v. State, 605 So. 2d 856 (Fla. 1992). This Court agreed with Mr. Thompson on direct appeal and

held "that the record does not support a finding that the homicide was committed in a cold, calculated, and premeditated manner." Thompson v. State, 619 So. 2d 261, 266 (Fla. 1993). As a result, Mr. Thompson's death sentence was imposed in violation of the Eighth and Fourteenth Amendments to the United States Constitution. Jackson v. State, 648 So. 2d 85 (Fla. 1994).

Mr. Thompson's jury was inadequately guided and channelled in its sentencing discretion. Jackson v. State, 648 So. 2d 85 (Fla. 1994). In Espinosa, the United States Supreme Court explicitly held that "an aggravating circumstance is invalid...if its description is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor." Espinosa, 112 S. Ct. at 2928. Although the jury received an instruction regarding the "cold, calculated and premeditated" aggravating factor in this case, it received no instruction on any of the Florida Supreme Court's limiting constructions explaining this aggravating circumstance. The instruction given in Mr. Thompson's case violates Jackson v. State, 648 So. 2d 85 (Fla. 1994); Espinosa v. Florida, 112 S. Ct. 2926 (1992); Stringer v. Black, 112 S. Ct. 1130 (1992); Sochor v. Florida, 112 S. Ct. 2114 (1992); Maynard v. Cartwright, 108 S. Ct. 1853 (1988), Godfrey v. Georgia, 446 U.S. 420 (1980), and the Eighth and Fourteenth Amendments to the United States Constitution. Mr. Thompson was deprived of his constitutional right to an accurately informed jury. Simmons v. South Carolina, 114 S. Ct. 2187 (1994).

This Court has adopted several limiting instructions regarding this aggravating factor. In Jackson v. State, 648 So. 2d 85 (Fla. 1994), the court said the following instruction must be used:

> The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense or moral or legal justification. In order for you to consider this aggravating factor, you must find the murder was cold, and calculated, and premeditated, and that there was no pretense of moral or legal justification. 'Cold' means the murder was the product of calm and cool reflection. 'Calculated' means the defendant had a careful plan or prearranged design to commit the murder. 'Premeditated' means the defendant exhibited a higher degree of premeditation than that which is normally required in a premeditated murder. A 'pretense of moral or legal justification' is any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide.

Id. at 10-11, n.8.

Before adopting the above narrowing construction, this Court held that "calculated" consists "of a careful plan or prearranged design," Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987), and "premeditated" refers to a "heightened" form of premeditation which is greater than the premeditation required to establish first-degree murder. Hamblen v. State, 527 So. 2d 800, 805 (Fla. 1988). In addition to the heightened premeditation element, the Court has made clear that to satisfy the "coldness" element, the murder must also be the product of calm and cool reflection. See, e.g., Richardson v. State, 604 So. 2d 1107 (1992) ("[w]hile there is sufficient evidence to show calculation on Richardson's part, the record clearly establishes that the present murder was not 'cold'"); Santos v. State, 591 So. 2d 160, 163 (Fla. 1991) ("there was no deliberate plan formed through calm and cool reflection"). In the "pretense of moral or legal justification" prong of the aggravating factor, the Florida Supreme Court held that this is "any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculated

nature of the homicide." Banda v. State, 536 So. 2d 221, 224-25 (Fla. 1988), cert. denied, 489 U.S. 1087 (1989).

In Jackson, this Court invalidated as unconstitutionally vague a jury instruction on the cold, calculated, and premeditated aggravating circumstance that mirrored the statute. The instruction in Mr. Thompson's case is similarly vague and unconstitutional.

The jury instructions regarding the cold, calculated, and premeditated aggravating circumstance did not include the Florida Supreme Court's limiting construction of the aggravating circumstance in finding this factor (R5. 3117). Jackson v. State, 648 So. 2d 85 (Fla. 1994).

This Court requires trial judges to apply these limiting constructions, often and consistently rejecting the aggravator when these limitations are not met. See, e.g., Thompson v. State, 619 So. 2d 261 (1992); Waterhouse v. State, 596 So. 2d 1008 (1992); Geralds v. State, 601 So. 2d 1157 (1992); Power v. State, 605 So. 2d 856 (1992); Jackson v. State, 599 So. 2d 103 (1992); Richardson v. State, 604 So. 2d 1107 (1992); Happ v. State, 596 So. 2d 991 (Fla. 1992); Green v. State, 583 So. 2d 647, 652-53 (Fla. 1991); Sochor v. State, 580 So. 2d 595, 604 (Fla. 1991); Wright v. State, 586 So. 2d 1024 (Fla. 1991); Santos v. State, 591 So. 2d 160 (Fla. 1991); Bedford v. State, 589 So. 2d 245 (Fla. 1991); Dailey v. State, 594 So. 2d 254 (Fla. 1991); Holton v. State, 573 So. 2d 284, 292 (Fla. 1990); Bates v. State, 465 So. 2d 490, 493 (Fla. 1985). Such "confusion in lower courts is evidence of vagueness which violates due process." Hermanson v. State, 604 So. 2d 856 (1992) (citing United States v. Cardiff, 344 U.S. 174 (1952)).

Mr. Thompson's sentencing jury was not told about the aforementioned limitations, but presumably found this aggravator present. Jackson; Espinosa, 112 S. Ct. at 2928. In fact, the trial court erroneously found this factor to exist. Power v. State, 605 So. 2d 856 (Fla. 1992). As this Court has held, the instruction given the jury in Mr. Thompson's case inadequately explains the "cold, calculated and premeditated" aggravating factor. See Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987); Gorham v. State, 454 So. 2d 556 (Fla. 1984). Under these circumstances, it must be presumed that the erroneous instruction tainted the jury's recommendation, and in turn the judge's death sentence, with Eighth Amendment error. Espinosa.

Mr. Thompson's judge and jury unconstitutionally relied upon the same facts to support two vague aggravating circumstances: the cold, calculated and premeditated manner; and that the crime was especially heinous, atrocious, or cruel. The constitutionally infirmity in these vague instructions was further compounded by an unconstitutional doubling effect that infected the judge and jury's careful weighing.

This error cannot be considered harmless in this case:

> [W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale. When the weighing process itself has been skewed, only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence. Stringer v. Black, 112 S. Ct. 1130, 1137 (1992).

Mr. Thompson's jury recommended death by a narrow margin of seven to five (7 to 5). This Court cannot say the error was harmless beyond a reasonable doubt because the invalid aggravator undoubtedly skewed the weighing process in favor of death.

To the extent trial and appellate counsel did not properly object or otherwise present this issue, Mr. Thompson received ineffective assistance of counsel. As Mr. Thompson's rights were violated under the Sixth, Eighth, and Fourteenth Amendments, this Court should grant relief.

CLAIM XXIV

MR. THOMPSON'S SENTENCE OF DEATH VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE THE JURY INSTRUCTIONS PROVIDED NO LIMITING CONSTRUCTION OF THE "HEINOUS, ATROCIOUS OR CRUEL" AGGRAVATING CIRCUMSTANCE AND THE TRIAL COURT APPLIED NO LIMITING CONSTRUCTION TO THIS AGGRAVATING FACTOR. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY RAISE THIS ISSUE.

Mr. Thompson's jury was given the standard jury instruction that was in effect at the time of his trial and that has been declared inadequate in Espinosa:

> The crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel.

(R5. 3117). This is identical to the instruction held invalid in Espinosa.

Mr. Thompson's jury was given a legally invalid circumstance to apply and weigh. The jury's death recommendation and, accordingly, the judge's sentence clearly tainted by the invalid aggravating circumstance. See Espinosa; Maynard v. Cartwright; Shell v. Mississippi, 111 S. Ct. 313 (1990); Stringer; Sochor. The State must therefore establish beyond a reasonable doubt that the error was harmless.

It cannot be said that the improper instruction and argument had no effect upon the jury. Mr. Thompson was only narrowly sentenced to death by a jury vote of 7 to 5. It

cannot be contested that mitigating circumstances were present which would have provided a reasonable basis upon which the jury could have based a life recommendation. See Hall v. State, 541 So. 2d 1125 (Fla. 1989)(question whether constitutional error was harmless is whether properly instructed jury could have recommended life). Mitigation was presented on Mr. Thompson's behalf at trial. Additional mitigation would have been presented had Mr. Thompson's trial attorney provided him effective assistance of counsel.

The jury was given erroneous instructions which resulted in improper aggravation to weigh against the mitigation. Under Stringer, Espinosa and Sochor, Mr. Thompson should have a new jury sentencing untainted by the error which occurred at the first proceeding.

Where improper aggravating circumstances are weighed by the jury, "the scale is more likely to tip in favor of a recommended sentence of death." Valle v. State, 502 So. 2d 1225 (Fla. 1987). "A vague aggravating factor used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance." Stringer, 112 S. Ct. at 1139. The jury, here, was left with the open-ended discretion found to be invalid in Furman v. Georgia, 408 U.S. 238 (1972).

Application of the harmless beyond a reasonable doubt standard requires this Court to presume an error was harmful unless and until the State proves that there is no possibility that the jury vote for death would have changed but for the extra thumbs on the death side of the scale. Brown v. Dugger, 831 F.2d 1547 (11th Cir. 1987).

Mr. Thompson's penalty jury recommended death by the slimmest of margins--seven to five (7 to 5). The errors detailed in this claim cannot be harmless beyond a reasonable

doubt. The State cannot make this showing in Mr. Thompson's case. Mr. Thompson is entitled to resentencing before a properly instructed jury.

To the extent trial and appellate counsel did not properly preserve or raise this claim, Mr. Thompson received ineffective assistance of counsel.

CLAIM XXV

AGGRAVATING CIRCUMSTANCES WERE OVERBROADLY AND VAGUELY ARGUED BY COUNSEL FOR THE STATE, IN VIOLATION OF ESPINOSA V. FLORIDA, STRINGER V. BLACK, SOCHOR V. FLORIDA, MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER, AND THE EIGHTH AND FOURTEENTH AMENDMENTS. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY RAISE THIS ISSUE ON DIRECT APPEAL.

During closing argument, the State urged the jury to apply aggravating circumstances in a manner inconsistent with the Florida Supreme Court's narrowed interpretation of those circumstances. Specifically, the prosecutor argued for application of (1) pecuniary gain (2) heinous, atrocious, or cruel; (3) during the course of a sexual battery and kidnapping; and (4) cold, calculated, and premeditated (R5. 3049-3089).

The State the jury to apply these aggravating factors in a vague and overbroad fashion. Mr. Thompson's rights under the Eighth Amendment were violated. Richmond v. Lewis, 113 S. Ct. 528 (1992); Espinosa v. Florida, 112 S. Ct. 2926 (1992).

Additionally, during the two prior penalty phases, the State conceded that the aggravators of pecuniary gain, and cold, calculated and premeditated did not apply to Mr. Thompson's case. The State waived the right to argue the applicability of this aggravator during subsequent sentencings.

CLAIM XXVI

THE TRIAL COURT ERRED IN FAILING TO FIND THE EXISTENCE OF STATUTORY MITIGATING CIRCUMSTANCES OF "AGE" AND "NO SIGNIFICANT HISTORY OF CRIMINAL ACTIVITY" AND IN FINDING THE AGGRAVATING CIRCUMSTANCES OF PECUNIARY GAIN AND COLD, CALCULATED, AND PREMEDITATED WHERE SUCH FACTUAL DETERMINATIONS HAD ALREADY BEEN FOUND IN MR. THOMPSON'S FAVOR, SUCH FINDINGS CONSTITUTED THE LAW OF THE CASE AND WERE ESTABLISHED BY COLLATERAL ESTOPPEL AND RES JUDICATA.

Mr. Thompson had been sentenced to death on two prior occasions April 24, 1976 (R1. 887-889) and September 20, 1978 (R2. 199; 567-573). At both penalty phases, the trial courts found the same two, and only two, aggravating circumstances: (1) heinous, atrocious, or cruel; (2) and during the course of a felony (R1. 888; R2. 567-573).

Both trial courts found the same two statutory mitigating circumstances: (1) Mr. Thompson did not have a significant history of prior criminal activities; and (2) Mr. Thompson's age of twenty-four (24) years (R1. 888; R2. 567-573). The mitigating circumstance's of Mr. Thompson's 1978 death sentence were affirmed by the Florida Supreme Court, establishing those mitigating circumstances as supported by the competent evidence. Thompson v. State, 389 So. 2d 197 (Fla. 1980), cert. denied, Thompson v. Florida, 435 U.S. 998 (1978).

Mr. Thompson's 1989 resentencing jury was instructed on all of the aggravating circumstances enumerated in Florida Statutes § 921.141 (R5. 3116-3117). The State argued during closing argument (R. 3049-3089), and the trial court found the existence of two additional aggravating circumstances not previously found at either of Mr. Thompson's prior

penalty phases (R5. 760-763). These two new aggravating circumstances were (1) pecuniary gain and (2) cold, calculated, and premeditated.

The presentation and finding of these two new aggravating circumstances violated Mr. Thompson's Fifth, Sixth, Eighth and Fourteenth Amendment rights under the United State's Constitution. Mr. Thompson received a resentencing because the State unconstitutionally limited his ability to present mitigating evidence. Mr. Thompson should not suffer the weight of additional aggravating circumstances because of state sponsored constitutional error. Mr. Thompson should receive a life sentence.

Similarly, Mr. Thompson's trial court erred by failing to find his "age" and "no significant history of criminal activity" as statutory mitigating circumstances even though these mitigating circumstances had been found on two prior occasions.

Under the doctrines of res judicata and law of the case, the state should not have been able to relitigate the existence of Mr. Thompson's previously established mitigating circumstances or introduce new aggravating circumstances. See Israel Discount Bank Ltd. v. Entin, 951 F.2d 311 (11th Cir. 1992); Strazzulla v. Hendrick, 177 So. 2d 1 (Fla. 1965); Hichee v. Fisher, 93 So. 2d 351 (Fla. 1957)(the purpose of res judicata is to prevent the relitigation of matters and to enforce the court's power to finally determine legal interests). This Court should accept these statutory mitigating circumstances as already established in rendering its sentence in this case. Trucking Employees of North Jersey Welfare Fund, Inc. v. Romano, 450 So. 2d 843 (Fla. 1984)(collateral estoppel, or estoppel by judgment, like its newer relative res judicata, serves to limit litigation by determining for all time an issue fully and fairly litigated between the parties).

Court held that "all points of law adjudicated upon a former writ of error or appeal became 'the law of the case' and such points were 'no longer open for discussion or consideration' in subsequent proceedings in the case." In this case, this Court found that the trial court's findings regarding mitigation were supported by the evidence. This Court's findings regarding the existence of two statutory mitigating circumstances have thus become the law of the case.

The trial court's failure to find the statutory mitigating circumstances previously proved by Mr. Thompson violated Mr. Thompson's Fifth, Sixth, Eighth and Fourteenth Amendment rights under the United State's Constitution. Mr. Thompson should not suffer the weight of additional aggravating circumstances because of state-sponsored constitutional error. Mr. Thompson should receive a life sentence.

To the extent trial and appellate counsel did not properly object or otherwise preserve this claim, Mr. Thompson received ineffective assistance of counsel.

CLAIM XXVII

THE INTRODUCTION OF NON-STATUTORY AGGRAVATING FACTORS AND THE STATE'S ARGUMENT UPON NON-STATUTORY AGGRAVATING FACTORS RENDERED MR. THOMPSON'S DEATH SENTENCE FUNDAMENTALLY UNFAIR AND UNRELIABLE, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY RAISE THIS ISSUE ON DIRECT APPEAL.

The judge and jury who sentenced Mr. Thompson was presented with and considered non-statutory aggravating circumstances in the form of Mr. Thompson's false testimony at

his co-defendant Rocco Surace's trial (R5. 1119-2043); that he had already been sentenced to death twice

> He pled guilty in 1976. Joe Durant sentenced him to death. Overturned for a new trial, he pled guilt[sic] in 1978. Judge Tanksley sentenced him to death (R5. 3058);

and (3) other evidence of uncharged crimes, including testimony by state witness Dr. Jaslow, who said Mr. Thompson had admitted to committing armed robberies for which he had never been charged (R5. 2824-2826).

Mr. Thompson testified at his co-defendant Rocco Surace's trial and falsely claimed to have inflicted all of the victim's injuries. He falsely claimed that Mr. Surace did not participate (R5. 119-2043). The State at all times believed and knew that Mr. Thompson and Mr. Surace shared similar responsibility for the victim's death: "[Prosecutor Yoss made it real plain he wanted both Rocky [Surace] and Bill [Thompson] to get the electric chair..." (R5. 5090); Thompson's initial hand-written confession (R5. 257-258) his stenographically recorded statement (R5. 261-275); and the testimony of Barbara Garritz (R5. 357-463). All of the prior testimony and statements were consistent and described the active participation of both Mr. Surace and Mr. Thompson. All suggested Mr. Surace's leadership role.

The state consistently took the position that Mr. Thompson lied at Mr. Surace's trial in hopes of obtaining some future help for himself. At the time of Mr. Surace's trial, Mr. Thompson had already been sentenced to death and it is unimaginable what benefit he would have derived from exonerating Mr. Surace and taking the entire blame.

The sentencers' consideration of improper and unconstitutional non-statutory aggravating factors violated the Eighth Amendment to the United States Constitution, and

prevented the constitutionally required narrowing of the sentencer's discretion. See Stringer v. Black, 112 S. Ct. 1130 (1992); Maynard v. Cartwright, 108 S. Ct. 1853, 1858 (1988). These impermissible aggravating factors resulted in a sentence that was based on an "unguided emotional response," in violation of Mr. Thompson's constitutional rights. Penry v. Lynaugh, 108 S. Ct. 2934 (1989).

As a result of these errors, the outcome of Mr. Thompson's trial and sentencing was materially unreliable and no adversarial testing occurred in violation of Mr. Thompson's rights as guaranteed by the Constitution of the State of Florida and the Fifth, Sixth, Eighth, and Fourteenth amendments to the United States Constitution.

To the extent trial and appellate counsel did not properly preserve this claim, Mr. Thompson received ineffective assistance of counsel.

CLAIM XXVIII

MR. THOMPSON WAS DENIED A RELIABLE SENTENCING WHEN HIS JUDGE CONSIDERED THE SAME ACTS TO SUPPORT TWO SEPARATE AGGRAVATING FACTORS IN VIOLATION OF ESPINOSA V. FLORIDA, STRINGER V. BLACK, MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER, AND THE EIGHTH AND FOURTEENTH AMENDMENTS. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY RAISE THIS CLAIM ON DIRECT APPEAL.

Mr. Thompson's jury was instructed to consider all of the aggravating circumstances enumerated in Florida Statutes § 921.141 (R5. 3116-3117), including the following:

> The crime for which the Defendant is to be sentenced was committed while he was engaged in the commission of or the attempt to commit the crime of kidnapping and/or sexual battery (R5. 3116);

> The crime for which the Defendant is to be sentenced was especially wicked, evil, atrocious or cruel (R5. 3117);.
>
> The crime for which the Defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification (R5. 3117).

The jury was never instructed to consider the kidnapping and sexual battery charge as constituting one aggravating circumstance. It can only be assumed that the jury considered these two underlying felonies as constituting separate aggravating circumstances. Although the trial court only considered the sexual battery as supporting the aggravating circumstance of during the commission of a felony (R5. 759), the jury was instructed to consider the kidnapping as well. Because the judge relied upon the jury's tainted verdict, Mr. Thompson's sentence of death is unreliable.

A review of the trial court's sentencing order reveals that the reasons given to justify the heinous, atrocious, or cruel aggravator were virtually identical as those used to support cold, calculated, and premeditated (R5. 260-262).

The Florida Supreme Court has consistently held that "doubling" of aggravating circumstances is improper. See Richardson v. State, 437 So. 2d 1091 (Fla. 1983); Provence v. State, 337 So. 2d 783, 786 (Fla. 1976); Clark v. State, 379 So. 2d 97, 104 (Fla. 1980); Welty v. State, 402 So. 2d 1139 (Fla. 1981). Mr. Thompson's jury was instructed on all of the aggravating factors listed above. The doubling of aggravating circumstances was improper, as was conceded by the state at resentencing (RS. 3321). The Florida Supreme Court has "repeatedly held that application of both of these aggravating factors is error where they are based on the same essential feature of the capital felony." Bello v. State, 547 So. 2d 914, 917 (1989). These aggravating circumstances therefore were improperly doubled in

this case. See Castro v. State, 597 So. 2d 259, 261 (Fla. 1992)("When applicable, the jury may be instructed on 'doubled' aggravating circumstances since it may find one but not the other to exist. A limiting construction properly advises the jury that should it find both aggravating factors present, it must consider the two factors as one").

The jury, a co-sentencer, was allowed to rely upon all of these aggravating factors in reaching a recommendation for death. Mr. Thompson's sentencing jury was not instructed by the court that these aggravators were to be merged into one aggravating circumstance. Because the jury is a co-sentencer in Florida, it must be given adequate jury instructions. Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993); Espinosa v. Florida, 112 S. Ct. 2926, 2928 (1992).

This type of "doubling" renders a capital sentencing proceeding fundamentally unreliable and unfair. See Welty; Clark. It also results in an unconstitutionally overbroad application of aggravating circumstances, Godfrey v. Georgia, 446 U.S. 420 (1980), and fails to genuinely narrow the class of persons eligible for death. The result is an improper capital sentence.

Because Mr. Thompson's trial counsel did object to the trial court's refusal to instruct the jury that these aggravating circumstances should be merged, Mr. Thompson is entitled to relief. No adversarial testing could occur where, as here, the jury was unconstitutionally deprived of proper instructions to narrow its discretion in considering sentence. An evidentiary hearing is warranted, and thereafter relief is proper.

Mr. Thompson's penalty phase jury recommended death by a narrow vote of 7 to 5 (R5. 553-554). The doubling effect cannot be considered harmless error where the verdict is

so close. Chapman v. California, 87 S. Ct. 824 (1967); Clemons v. Mississippi, 110 S. Ct. 1441 (1990); O'Neal v. McAninch, 56 Cr. L. 2144 (U.S. Sup. Ct. 1995).

To the extent trial and appellate counsel did not properly preserve or raise this claim, Mr. Thompson received ineffective assistance of counsel.

CLAIM XXIX

MR. THOMPSON'S TRIAL AND APPELLATE COURT PROCEEDINGS WERE FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS, WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL AND APPELLATE REVIEW GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Mr. Thompson contends that he did not receive the fundamentally fair trial and appellate review to which he was entitled under the Eighth and Fourteenth Amendments. See Ray v. State, 403 So. 2d 956 (Fla. 1981); Heath v. Jones, 941 F.2d 1126 (11th Cir. 1991). It is Mr. Thompson's contention that the process itself failed him. It failed because the sheer number and types of errors involved in his trial and appeal, when considered as a whole, virtually dictated the sentence that he would receive.

In Jones v. State, 569 So. 2d 1234 (Fla. 1990) this Court vacated a capital sentence and remanded for a new sentencing proceeding before a jury because of "cumulative errors affecting the penalty phase." Id. at 1235 (emphasis added). In Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990) and Taylor v. State, 640 So. 2d 1127 (Fla. 1st DCA 1994) cumulative prosecutorial misconduct was the basis for a new trial.

This Court has consistently emphasized the uniqueness of death as a punishment. Death is "an unusually severe punishment, unusual in its pain, in its finality, and in its

enormity." Furman, 408 U.S. at 287 (Brennan, J., concurring). It differs from lesser sentences "not in degree but in kind. It is unique in its total irrevocability." Id. at 306 (Stewart, J., concurring). The severity of the sentence "mandates careful scrutiny in the review of any colorable claim of error." Zant v. Stephens, 462 U.S. 862, 885 (1983). Accordingly, the cumulative effects of error must be carefully scrutinized in capital cases.

The flaws that resulted in Mr. Thompson's death sentence are many. They have been pointed out throughout this pleading, but also in Mr. Thompson's direct appeal. While there are means for addressing each individual error, addressing these errors on an individual basis will not afford adequate safeguards against an improperly imposed death sentence -- safeguards which are required by the Constitution. Repeated instances of ineffective assistance of counsel and error by the trial court at both the original trial and direct appeal significantly tainted the process. The absence of a reliable transcript renders the proceedings hopelessly unreliable. These errors cannot be harmless.

CLAIM XXX

MR. THOMPSON'S JURY RECEIVED AN UNCONSTITUTIONAL INSTRUCTION REGARDING REASONABLE DOUBT AND THE ERROR WAS COMPOUNDED BY IMPROPER PROSECUTORIAL COMMENT IN VIOLATION OF MR. THOMPSON'S CONSTITUTIONAL RIGHTS. MR. THOMPSON'S APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY RAISE THIS ISSUE.

During Mr. Thompson's resentencing, the jury was instructed that an aggravating circumstance had to be proven beyond a reasonable doubt (R5. 3119). The jury was not, however, instructed as to the definition of reasonable doubt. The jury had no guidance in explaining the state's burden in proving the existence of an aggravating circumstance. Rather

than using the standard florida jury instruction for "reasonable doubt," Mr. Thompson's jury did not receive any instruction whatsoever.

The state must prove beyond a reasonable doubt every element of a charged offense. In re Winship, 397 U.S. 358 (1970). The Supreme Court in Sullivan v. Louisiana, 113 S. Ct. 2078, 2081 (1993), stated: "It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty" (emphasis in original). The jury instruction given to Mr. Thompson's jury violated Sullivan and Cage v. Louisiana, 111 S. Ct. 328 (1990).

In addition to Mr. Thompson's jury receiving an unconstitutional instruction on reasonable doubt, the prosecutor improperly argued the definition of reasonable doubt (R. 294). The prosecutor argued that, under the jury instructions, the jury was obligated to convict "[i]f you believe in your heart that William Thompson is guilty of first degree murder" (R. 294).

Moreover, in Sullivan, the Court held that failure to properly instruct the jury on the State's burden to prove guilt beyond a reasonable doubt is a structural defect that can never be harmless. "Denial of the right to a jury verdict of guilt beyond a reasonable doubt is certainly an error of the [structural] sort, the jury guarantee being a 'basic protection' whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function." 113 S. Ct. at 2083.

To the extent trial and appellate counsel did not properly preserve or raise this claim, Mr. Thompson received ineffective assistance of counsel.

CLAIM XXXI

MR. THOMPSON WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE HIS DEFENSE ATTORNEY FAILED TO PRESENT EVIDENCE THAT A LIFE SENTENCE IS REGARDED BY THE PAROLE COMMISSION AS A LIFE SENTENCE WITHOUT THE POSSIBILITY OF PAROLE. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY RAISE THIS ISSUE.

During voir dire in 1989, the jury inquired about the possibility that if Mr. Thompson received a life sentence, could he be released after twelve years. This inquiry came about because Mr. Thompson had already been incarcerated for thirteen years (since 1976). Defense counsel requested individual voir dire to explore the jurors' bias towards the death penalty. Defense counsel also moved to strike the panel. After these requests were denied, defense counsel accepted the Court's instruction, which avoided the issue altogether. But the jury instruction was insufficient to cure the prejudice infected the entire resentencing proceeding.

During voir dire, juror Garson repeatedly voiced his concern that the recommendation of a life sentence might mean Mr. Thompson's release to society in only twelve years:

> ...so in other words, he only has to go for twelve?
>
> * * * *
>
> ...Is he actually getting twenty-five years or twelve, the thirteen years he's been on the cooker? (R5. 1361).

Mr. Garson's questions were never answered and the jury was permitted to speculate that a recommendation other than life would result in the Mr. Thompson's premature release. Defense counsel expressed his "well-founded fear" that the question had become a key issue

among the jurors and that they would not be satisfied with instructions to "merely disregard" their concern (R5. 1364). Defense counsel noted that all of the jurors were laughing and he expressed fear that the jury was biased against rendering a decision that might result in the defendant receiving only an additional twelve years.

Defense counsel moved to strike Juror Garson for cause and suggested that Garson be questioned as to his bias and state of mind (R5. 1373-1374). When the trial court expressed a reluctance to "open the door to a number of [other] questions," defense counsel renewed his challenge for cause and requested individual voir dire on the issue (R5. 1374-1377). The defense moved to strike the panel based on the questions and comments that had been made (R. 1383-1385). Ultimately, the trial court denied all the relief requested by the defense except to instruct the jury as follows:

> Mr. Garson and all of the potential jurors, with regard to your question, it is irrelevant to your consideration. You are only to concern yourself with what punishment would be recommended to be imposed upon the defendant. That is a life sentence without the possibility of parole for twenty-five years or death. The parole consequences, if any, are not for your consideration (R5. 1389).

The Court's instruction did nothing to allay the fears of Juror Garson who subsequently responded to the prosecutor's questioning:

> Mr. Garson: I have to be honest with you. I still feel that I'm asked to judge the two scales of justice and I have to know what's on those scales. Now, with all due respect, his answer did not answer my question.
>
> * * * *
>
> Mr. Garson: Again, I go back to my question, which was never answered, that is: is a twenty-five years from the

point retroactive to the point he went in or is it retroactive from when he will be--

State: We can't answer that question.

* * * *

Mr. Garson: In other words, it is conceivable, it is possible he could go in twelve years and be out in twelve years? (R5. 1399-1400).

Defense counsel again renewed his request for individual voir dire, moved to strike Juror Garson, and declared that this juror's comments "contaminated everybody in this room" (R5. 1401). Defense counsel renewed his motion to strike the entire panel (R5. 1403). These motion's were denied (R5. 1406).

Mr. Thompson's fundamental right to a fair and impartial trial by a jury that was accurately instructed on the applicable law was violated. Simmons v. South Carolina, 114 S. Ct. 2187 (1994); California v. Ramos, 463 U.S. 992, 103 S. Ct. 3446 (1983); Lockett v. Ohio, 438 U.S. 586, 604 (1978); McCleskey v. Kemp, 481 U.S. 279, 305 (1987).

Mr. Thompson pled guilty and was sentenced to two life sentences for kidnapping and sexual battery. The jury should have been instructed or received expert testimony that those sentences, with a life sentence without parole for twenty-five years, would have been considered by the parole commission as life without parole. Indeed, Mr. Thompson's two life sentences are consecutive to each other (R5. 755-757). The prospect of his release after twelve years was non-existent. Defense counsel was ineffective for failing to present this critical information to Mr. Thompson's jury. Further, appellate counsel was ineffective for failing to properly raise this issue on direct appeal.

CLAIM XXXII

THE TRIAL COURT ERRED IN FAILING TO GRANT MR. THOMPSON'S MOTION TO STRIKE THE JURY PANEL AND IN FAILING TO CONDUCT INDIVIDUAL VOIR DIRE WHEN IT LEARNED THE JURY WAS CONCERNED WITH WHETHER MR. THOMPSON COULD BE RELEASED AFTER 12 YEARS IF THE JURY RECOMMENDED A LIFE SENTENCE. THIS TRIAL ERROR VIOLATED MR. THOMPSON'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO THE U.S. CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

During voir dire, Juror Ed Garson asked whether Mr. Thompson, if given a life sentence, would be eligible for parole in twelve (12) years because he had already served thirteen (13) years in prison. As Juror Garson said:

> MR. GARSON: My question is this: he's been in 13 years. Now, if he is given let's say the term life or the 25 years, is that already deducted from the 25? So, in other words, he only has to go for 12?
>
> MR. WAKSMAN: I don't know if I can answer that. You just have one question before you, which is should you recommend death or should you recommend life with the 25-years minimum.
>
> What happens after that --
>
> MR. GARSON: I would like to know if it went the other way, is he actually getting the 25 years or 12, the 13 years he's been on the cooker?

(R5. 1361).

After a side-bar discussion, the defense requested individual voir dire of Mr. Garson, to explore his possible bias towards the death penalty. The defense also moved to strike the panel, based on the questions and comments made by Mr. Garson. The trial court denied

individual voir dire and the motion to strike. (R5. 1387). When the jury returned, the trial judge told the entire jury panel that parole consequences were irrelevant and should not be considered. (R5. 1389). The trial judge, however, refused to answer the question. Mr. Garson continued to remain unsatisfied with the judge's response.

> MR. GARSON: I have to be honest with you. I still feel that I'm asked to judge the two scales of justice and I have to know what's on those scales.
>
> Now, with all due respect, his answer did not answer my question.
>
> MR. WAKSMAN: There's many, many questions that people might have that we can't answer, but you only have to say should I recommend a life sentence or should I recommend a death sentence.
>
> MR. GARSON: But you mentioned it's more than the life sentence. You mentioned something about twenty-five years.
>
> MR. WAKSMAN: It has a minimum mandatory which you're not eligible for parole until twenty-five years have been served.
>
> MR. GARSON: Again, I go back to my question, which was never answered, that is: Is the twenty-five years from the point retroactive to the point he went in or is it retroactive from when he will be --
>
> MR. WAKSMAN: We can't answer that question.
>
> MR. GARSON: You cannot answer that at this whole point?
>
> MR. WAKSMAN: Then you get into a gray area, what does parole mean.
>
> MR. GARSON: In other words, it is conceivable, it is possible he could go in twelve years and be out in twelve years?
>
> MR. BADINI: Side bar.

(R5. 1399-1400).

At side bar, defense counsel moved to strike Mr. Garson for cause, and to strike the entire panel as Mr. Garson's comments contaminated all potential jurors. The trial court denied the motion to strike. (R5. 1405). Mr. Garson admitted he could not return a fair verdict, because to do so, he would need to know the consequences of his recommendation. (R5. 1407-1408). Mr. Garson eventually was excused.(R5. 1443).

The trial court's failure to conduct adequate voir dire and its attempt to cure Mr. Garson's questions were insufficient to remedy the prejudice that existed. The jury's seven to five (7 to 5) recommendation in favor of death was improperly influenced by the fear that Mr. Thompson would rejoin society after only 12 years. The bias that resulted rendered the proceedings unreliable and the death penalty unlawful.

The Court's answer to the jury was ambiguous and misleading, and did not prevent the jury from considering improper matters. The jury could reasonably have believed that Mr. Thompson would serve only thirteen (13) years in prison if he were not executed.

By denying defense counsel's motion to strike the jury panel, the court allowed Mr. Thompson's jury to hear erroneous and misleading information Simmons v. South Carolina, 114 S. Ct. 2187 (1994); see also Skipper v. South Carolina, 476 U.S. 1 (1986); Gardner v. Florida, 430 U.S. 349 (1977). The Court's instruction, and its refusal to grant defense counsel's motion, violated due process. Simmons, 114 S. Ct. at 2196.

The jury was asked to decide Mr. Thompson's fate, while at the same time, it was told it could not know the consequences of a life sentence. The instruction to the jury was confusing, contradictory, misleading and reversible error. Key West Electric Company v. Albury, 109 So. 2d 223 (1926). No jury could reasonably be expected to ignore the issue

and set aside fears that Mr. Thompson may be eligible for parole after twelve years if it did not recommend a death sentence. See Simmons, 114 S. Ct. 2187 (1994).

Mr. Thompson's fundamental right to a fair and impartial trial by jury was violated. It was error for the trial court to give erroneous, misleading or incomplete jury instructions. Bass v. State, 50 So. 2d 531 (Fla. 1909); Barnes v. State, 348 So. 2d 599 (Fla. 4th DCA 1977). The purpose of voir dire is to safeguard the right to a jury trial that "guarantees to the criminal accused a fair trial by a panel of impartial, 'indifferent' jurors." Irvin v. Dowd, 366 U.S. 717 (1961). A defendant has the right to probe for the hidden prejudices of jurors. Lurding v. United States, 179 F.2d 419, 421 (6th Cir. 1950). In this case, the trial court erred in failing to grant Mr. Thompson's motion to strike the jury panel, after it had been exposed to Mr. Garson's repeated inquiries into parole eligibility. Mr. Thompson is entitled to a new trial/sentencing.

CLAIM XXXIII

MR. THOMPSON'S SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE RESENTENCING JURY WAS MISLED AND NOT INFORMED AS TO WHY A NEW PENALTY PHASE WAS NECESSARY TWELVE YEARS AFTER MR. THOMPSON WAS INITIALLY CONVICTED. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY RAISE THIS ISSUE ON DIRECT APPEAL.

Mr. Thompson's Fifth, Sixth, Eighth and Fourteenth amendment rights were violated by omissions at the resentencing. The trial judge failed to explain to the jury why a new proceeding was being held 12 years after the initial conviction. These omissions rendered

Mr. Thompson's conviction fundamentally unfair and unreliable. The trial judge simply said:

> THE COURT: ...in 1978 the defendant, Mr. William Thompson, pled guilty to first-degree murder, kidnapping and sexual battery in this case. He was sentenced to life imprisonment on the kidnapping and sexual battery charges. Sentencing in the murder charge is here for your consideration. Consequently, you will not concern yourself with the question of his guilt or any of the charges.
>
> You are not to concern yourself, or yourselves, with the passage of time, since the 1976 arrest and incarceration of the defendant on those charges.

(R5. 1004).

This error cannot be considered harmless because Mr. Thompson's jury recommended death by a vote of seven to five (7 to 5). To the extent trial and appellate counsel failed to properly raise or preserve this issue, Mr. Thompson received ineffective assistance of counsel.

CLAIM XXXIV

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO OFFER AND INTRODUCE THE PREVIOUS TRIAL TESTIMONY OF ITS CHIEF PROSECUTION WITNESS WHERE THE SCOPE OF CROSS EXAMINATION WAS DIFFERENT, THE STATE FAILED TO ESTABLISH THE REQUISITE DUE DILIGENCE IN ATTEMPTING TO PROCURE THE ATTENDANCE OF THAT WITNESS, AND THE DEFENDANT WAS DENIED THE OPPORTUNITY AND RESOURCES TO OBTAIN THE WITNESS HIMSELF, THEREBY DENYING THE DEFENDANT HIS RIGHT OF CONFRONTATION AND DUE PROCESS OF LAW GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Over defense counsel's repeated objections and requests for resources, the trial court permitted the state to introduce into evidence the prior testimony of its chief prosecution witness, Barbara Garritz Savage (R5. 1702, et. seq.; State Exhibit 42: R5. 357). Appellate counsel also raised this issue on direct appeal (Appellant's Initial Brief on Direct Appeal at 34-45, FSC Case No. 75,499, Brief Filed October 24, 1990).

The State offered and the trial court admitted the prior trial testimony of Barbara Garritz Savage as an unavailable witness despite the fact that the defense was denied the means to ascertain her whereabouts and attendance. (R5. 1701-1820) Also, the trial court rendered counsel ineffective by failing to grant a continuance, which would have allowed defense counsel the opportunity to locate Ms. Savage and obtain her presence (R5. 1625). The prejudicial impact of Ms. Savage's testimony cannot be overstated.

Ms. Savage was not only present before, during, and after the commission of the acts for which Mr. Thompson was sentenced to death, but she was also biased against Mr. Thompson because she was the co-defendant's girlfriend at the time of the crime. Ms.

Savage's testimony accused Mr. Thompson of acts which the trial court eventually relied upon in its sentencing order to support Mr. Thompson's death sentence. Not only was her testimony hearsay, it was replete with hearsay attributable to Mr. Thompson and Rocco Surace. Further, the State relied extensively upon Ms. Savage's testimony to support its case (R5. 1608-09). Yet, Mr. Thompson was unable to confront this witness because the state and trial court refused to furnish defense counsel the means to locate her and obtain her presence. Instead, Mr. Thompson's resentencing counsel was unable to elicit from Ms. Savage facts which would have clearly established mitigation, including Mr. Thompson's intoxication and domination by his co-defendant Rocco Surace. Defense counsel repeatedly asked for funds to locate Ms. Savage but was denied these critical resources (R5. 990, 1625-1627). Counsel also was denied the appointment of appellate counsel to file a interlocutory certiorari petition appealing the trial court's adverse ruling.

Mr. Thompson was denied the opportunity to meaningfully cross-examine Ms. Savage at his 1978 sentencing. Ms. Savage's direct testimony consumed more than 100 pages (R5. 1701-1815) yet her cross examination took less than five (5) pages (R5. 1816-1820). At that time, defense counsel failed to adequately cross-examine Ms. Savage. Defense counsel failed to impeach her with inconsistent prior statements or elicit facts supporting Mr. Thompson's intoxication and relative culpability as well as other mitigating circumstances. At the time of her testimony, the trial court, state, jury, and defense counsel were operating under the mistaken belief that Mr. Thompson was limited to presenting only statutory mitigation. Therefore, Mr. Thompson was never given the opportunity to cross-examine Ms. Savage regarding the mitigation he was constitutionally entitled to present to his sentencers.

Mr. Thompson received his resentencing based upon Hitchcock v. Dugger, 481 U.S. 393 (1987). Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987), cert. denied, 485 U.S. 960 (1988). Ms. Savage's testimony cannot be separated from the Hitchcock error and violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. Admission of her prior testimony infected Mr. Thompson's resentencing and rendered counsel ineffective.

Ms. Savage's testimony was extremely prejudicial to Mr. Thompson because it provided the State with a narrative of events. Without her testimony, the State would have been unable to submit to the jury the aggravating circumstances. The prosecutor relied extensively on Ms. Savage's prior testimony in opening and closing argument to support the state's version of events that established aggravating circumstances (R5. 1608-1609).

The admission of Barbara Garritz Savage's testimony denied Mr. Thompson the opportunity to confront this witness and elicit mitigating evidence in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution. To the extent trial and/or appellate counsel did not properly preserve or raise this claim, Mr. Thompson received ineffective assistance of counsel.

CLAIM XXXV

THE SENTENCING COURT ERRONEOUSLY INSTRUCTED THE JURY ON THE STANDARD BY WHICH THEY MUST JUDGE EXPERT TESTIMONY. THE JURY MADE DECISIONS OF LAW THAT SHOULD HAVE BEEN WITHIN THE PROVINCE OF THE COURT. AS A RESULT, THE JURY'S RECOMMENDATION, AND MR. THOMPSON'S SENTENCE OF DEATH, IS CONSTITUTIONALLY UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY RAISE THIS ISSUE ON DIRECT APPEAL.

The Court instructed the jury on expert witnesses as follows:

> Expert witnesses are like other witnesses, with one exception: The law permits an expert witness to give his opinion.
>
> However, an expert's opinion is only reliable when given on a subject about which you believe him to be an expert.
>
> Like other witnesses, you may believe or disbelieve all or any part of an expert's testimony.

(R5. 3121-3122)(emphasis added). Defense counsel did not object to this instruction.

The Court's instruction was an erroneous statement of law. The decision of whether a particular witness is qualified as an expert to present opinion testimony to be made by the trial judge alone. Ramirez v. State, 651 So. 2d 1164 (1995) (citing Johnson v. State, 393 So. 2d 1069, 1072 (Fla. 1980), cert. denied, 454 U.S. 882 (1981)). The Court's instruction permitted the jury to decide whether an expert was truly expert in the field in which the Court had already qualified him. In addition to judging his credibility, the jury was permitted to judge his expertise. This determination belongs solely to the judge.

By permitting the jury to accept or reject an expert's qualification allowed the jury to reject the experts' opinions without legal basis for doing so. See Strickland v. Francis, 738 F.2d 1542, 1552 (11th Cir. 1984). In instructing the jury, the Court violated Mr. Thompson's fundamental right to present a defense, guaranteed by the Sixth and Fourteenth Amendments.

The instruction permitted the jury to reject the experts' testimony, which was the only evidence defense counsel presented to establish the statutory mitigating factors. Because the jury was free to reject mitigating evidence, the instruction given violated Mr. Thompson's rights under the Eighth Amendment. Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982).

Defense counsel failed to object to this erroneous instruction, and failed to offer an alternative instruction that defined the limits of the jury's discretion regarding expert witnesses. Counsel had no tactical or strategic reason for permitting the jury to be instructed in error. As a result, the outcome of the jury's deliberations is fundamentally unreliable. The prejudice to Mr. Thompson is manifest. Relief is proper. To the extent this claim was not properly preserved or raised by trial and appellate counsel, Mr. Thompson received the ineffective assistance of counsel.

indicating that Mr.Thompson had been an abused child, had suffered numerous problems in the home as a child, had a below normal IQ, had diffused brain damage and had a number of problems along those lines, both psychiatrically and environmentally?

Was any of that presented to you at that point in time?

Durant: No. I don't think any mitigating evidence was ever heard in that trial.

Question: Since that point in time, have you been advised of or made aware of the fact that those mitigating factors, which I just delineated, did, in fact, apply to Mr. Thompson, even though you weren't aware of them back then?

Durant: Yes.

Question: And, at this point in time, do you believe that Mr. Thompson would have been sentenced to death by you if you had, in fact, known those mitigating circumstances which I just delineated?

State: This is the State's objection, Your Honor.....

The Court: . . .I'm going to sustain the objection, but I'll allow the testimony as a proffer.

Durant: No. The sentence could not be the same for a couple of reasons.

I frankly think, if the jury heard mitigating testimony, they would not have unanimously recommended the death penalty, and frankly, having been made aware of some of this mitigating testimony, I could not impose the death penalty.

I'm very much opposed to the death penalty. It's the only case I ever gave it in. I had to in this case because there was no mitigating evidence whatsoever.

Defense: Is it your testimony, if mitigating evidence had been presented that I had delineated, would you not have imposed the death penalty, but would have, in fact, sentenced Mr. Thompson to a life sentence, correct.

Durant: Correct.

(R5. 2429 -2438)

After the proffer, the trial court ruled that Judge Durant would be precluded from testifying about what his recommendation would have been. All that the jury heard from this witness was the defense failed to present any mitigation on behalf of Mr. Thompson. (R5. 2457).

The trial court's ruling violated Eddings v. Oklahoma, 455 U.S. 104 (1982) and Lockett v. Ohio, 438 U.S. 586 (1978). Evidence offered by a capital defendant during the penalty phase is relevant if it either rebuts an aggravating circumstance or it constitutes a mitigating factor. Skipper v. South Carolina, 476 U.S. 1 (1986). A mitigating factor is "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Eddings v. Oklahoma, 455 U.S. 104, 110 (1982), quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978).

This Court has held that "[e]vents that result in a person succumbing to the passions or frailties inherent in the human condition necessarily constitute valid mitigation under the Constitution." Cheshire v. State, 568 So. 2d 908 (Fla. 1990).

The evidence discussed herein was precisely the type of mitigating evidence contemplated by Lockett, as it directly related to the "circumstances of the offense." Id., 438 U.S. at 650. Similarly, there can be no doubt that here, as in Skipper and Hitchcock, the jury was precluded from hearing and considering compelling mitigating evidence. This court should grant habeas corpus relief.

CONCLUSION

Mr. Thompson was prejudiced by trial and appellate counsel's failure to ensure a complete and accurate transcript was provided to this Court for its review of his death sentence. Mr. Thompson was deprived of an accurate record on appeal. Mr. Thompson was sentenced to death and yet was denied effective assistance of appellate counsel as a result of an incomplete transcript which prevented the full presentation of his constitutional claims.

Furthermore, inadequate appellate review in a capital case caused the sentencing to be arbitrary in violation of the prohibition against cruel and unusual punishment. A complete review of all claims of error in appeals from a death sentence must be performed or the appellate court cannot make a reliable individualized determination. Parker v. Dugger, 498 U.S. 308 (1991); Clemons v. Mississippi, 494 U.S. 738 (1990).

Counsel's performance was deficient and those deficiencies prejudiced Mr. Thompson. "[E]xtant legal principles...provided a clear basis for ... compelling appellate arguments[s]." Fitzpatrick v. Wainwright, 490 So. 2d 938, 940 (Fla. 986). The issues were preserved at trial and available for presentation on appeal. Failing to raise fundamental issues such as those discussed herein is below the range of acceptable appellate performance.

Moreover, the claims discussed above should have resulted in a reversal on direct appeal. The many errors which occurred cannot be considered harmless beyond a reasonable doubt in light of Mr. Thompson's narrow death recommendation of seven to five. Mr. Thompson did not have meaningful appellate review. This Court should grant habeas corpus relief on the basis of the clear violations of Mr. Thompson's rights under the Fifth, Sixth,

Eighth and Fourteenth Amendments which Mr. Thompson has presented in these proceedings.

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Habeas Corpus has been furnished by United States Mail, first class postage prepaid, to all counsel of record on June 25, 1996.

TERRI L. BACKHUS
Florida Bar No. 0946427
Assistant CCR
Post Office Drawer 5498
Tallahassee, Florida 32314-5498
(904) 488-7200
Attorney for Petitioner

Copies forwarded to:

Office of the Attorney General
401 NW Second Avenue, Suite 921N
Miami, Florida 33128

SID J. WHITE, CLERK
Supreme Court of Florida
500 SOUTH DUVAL STREET
TALLAHASSEE 32399-1927
(904) 488-0125

Ms. Terri L. Backhus
Office of CCR
P.O. Drawer 5498
Tallahasee, FL 32314-5498

6/29/96 filed 6/25/96

WILLIAM L. THOMPSON
v.
HARRY K. SINGLETARY, JR., etc.

CASE NO. 88,321

I have this date received the below-listed pleadings or documents:

Petition for Writ of Habeas Corpus (original & 7 copies)

Please make reference to the case number in all correspondence and pleadings.

Most cordially,

Clerk, Supreme Court

ALL PLEADINGS SIGNED BY AN ATTORNEY MUST INCLUDE THE ATTORNEY'S FLORIDA BAR NUMBER.

SJW/tc
cc: Ms. Fariba Komeily