IN THE SUPREME COURT OF FLORIDA

NO. 1999-150

FILED
DEBBIE CAUSSEAUX
DEC 2 1 1999
CLERK, SUPREME COURT
BY

ARTHUR DENNIS RUTHERFORD

Petitioner,

v.

MICHAEL W. MOORE,
Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

GREGORY C. SMITH
Florida Bar No. 279080
Capital Collateral Counsel -
Northern Region

C. ANDREW THOMAS
Florida Bar No. 0317942
Chief Assistant CCC-NR
CAPITAL COLLATERAL COUNSEL -
NORTHERN REGION
Post Office Drawer 5498
Tallahassee, FL 32314-5498
(850) 487-4376

COUNSEL FOR PETITIONER

PRELIMINARY STATEMENT

This is Mr. Rutherford's first habeas corpus petition in this Court. Art. 1, 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 Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, claims demonstrating that Mr. Rutherford was deprived of the right to a fair, reliable, and individualized sentencing proceeding and that the proceedings resulting in his conviction and death sentences violated fundamental constitutional imperatives.

Citations shall be as follows: The record on appeal concerning the original court proceedings shall be referred to as "R." followed by the appropriate page number. The supplemental record, containing the proceedings that occurred at Mr. Rutherford's first trial, shall be referred to as "Supp. R." followed by the appropriate page number. The postconviction record on appeal will be referred to as "PC-R." followed by the appropriate page number.

This Court's opinion on Mr. Rutherford's initial direct appeal will be referred to as Rutherford I. The Court's opinion on his appeal of the postconviction decision will be referred to as Rutherford II. All other references will be self-explanatory or otherwise explained herein.

INTRODUCTION

Significant errors which occurred at Mr. Rutherford's capital trial and sentencing were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel. For example, appellate counsel raised no issues regarding the guilt/innocence phase of Mr. Rutherford's case, other than the double jeopardy issue. This is so despite numerous objections and errors that occurred at Mr. Rutherford's trial. In addition, appellate counsel failed to challenge the "cold, calculated and premeditated" and "heinous, atrocious and cruel" aggravating factors despite objections by trial counsel.

The issues which appellate counsel neglected demonstrate that counsel's performance was deficient and that the deficiencies prejudiced Mr. Rutherford. "[E]xtant legal principles.. .provided a clear basis for ... compelling appellate arguments [s]." Fitzpatrick, 490 So. 2d at 940. Neglecting to raise fundamental issues such as those discussed herein "is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome." Wilson v. Wainwrisht, 474 So, 2d 1162, 1164 (Fla. 1985). Individually and "cumulatively," Barclay v. Wainwrisht, 444 So. 2d 956, 959 (Fla. 1984), the claims omitted by appellate counsel establish that "confidence in the correctness and fairness of the result has been undermined." Wilson, 474 So. 2d at 1165 (emphasis in original) .

Additionally, this petition presents questions that were ruled on, on direct appeal, but that should now be revisited in light of subsequent caselaw or in order to correct error in the appeal process that denied fundamental constitutional rights. As this petition will demonstrate, Mr. Rutherford is entitled to habeas relief.

PROCEDURAL HISTORY

The Circuit Court of the First Judicial Circuit, Santa Rosa County, Florida, entered the judgments and sentences. On September 11, 1985, a Grand Jury indicted Mr. Rutherford for first degree murder (R. 1). Mr. Rutherford pleaded not guilty.

On January 28, 1986, Mr. Rutherford's trial commenced before the Honorable George E. Lowrey. On January 31, 1986, the jury found Mr. Rutherford guilty as charged (R. 74), and on February 1, 1986, the jury recommended the death penalty by a vote of eight (8) to four (4) (R. 75) .

Pursuant to a defense motion for mistrial, the court found that the State had committed a material, substantial, knowing and willful discovery violation at trial and ordered a retrial on all issues (R. 106-111).

Before the retrial, venue was transferred to Walton County, before the Honorable Clyde B. Wells. On September 29, 1986, Mr. Rutherford's retrial commenced. He was convicted on October 2, 1986 (R. 150).

The penalty phase was conducted on October 2, 1986. At the penalty phase Mr. Rutherford presented family testimony. After

which, the jury recommended death by a seven (7) to five (5) vote (R. 156). On December 9, 1986, a sentencing hearing was held and Mr. Rutherford was sentenced to death (R. 948-949). On December 17, 1986, eight days later, the trial court entered its sentencing order (Supp. R. 3) .

On direct appeal, Mr. Rutherford's conviction and sentence was affirmed. Rutherford v. State, 545 So. 2d 853 (Fla. 1989). On November 3, 1989, certiorari was denied by the United States Supreme Court. Rutherford v. Florida, 110 S. Ct. 353 (1989).

On August 1, 1991, Mr. Rutherford filed his motion under Rule 3.850, Fla. R. Crim. P. (PC-R. 2) . On October 16, 1992, Mr. Rutherford filed an amendment to his motion (PC-R. 286). On January 29, 1993, the lower court issued an order summarily denying some claims and ordering an evidentiary hearing on other claims (PC-R. 386-394) . An evidentiary hearing was conducted on April 24-26, 1996. Following the evidentiary hearing, the court denied relief (PC-R. 675-834). The court also denied Mr. Rutherford's motion for rehearing (PC-R. 835-841). On appeal, this Court affirmed the circuit court's denial of Rule 3.850 relief. Rutherford v. State, 727 So. 2d 216 (Fla. 1998), reh'g denied (March 2, 1999) . Presently, Mr. Rutherford has prepared and filed this petition seeking habeas corpus relief.

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. Rutherford's sentence of death.

Jurisdiction in this action lies in this Court, see, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Rutherford's direct appeal. See Wilson, 474 So. 2d at 1163; Bassett 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. Rutherford 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, 474 So. 2d at 1162.

This Court has the inherent power to do justice. The ends of justice call on the 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 of its authority to correct constitutional errors such as those herein pled, is warranted in this action. As the petition shows, habeas corpus

relief would be more than proper on the basis of Mr. Rutherford's claims.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Rutherford asserts that his 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 State Constitution and the corresponding provisions of the Florida Constitution.

CLAIM I

MR. RUTHERFORD WAS DENIED EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL. APPELLATE COUNSEL FAILED TO RAISE ANY OF THE NUMEROUS PRETRIAL MOTIONS RAISED BY TRIAL COUNSEL.

Mr. Rutherford's trial counsel raised several issues through pretrial motions and objections during the guilt/innocence and penalty phase of Mr. Rutherford's capital trial. For the convenience of this Court, these issues are being presented in one claim, however, each issue standing alone has merit. When taken as whole, the cumulative effect of these errors rendered Mr. Rutherford's capital trial constitutionally infirm. Mr. Rutherford was denied his rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

A. THE TRIAL COURT ERRED IN DENYING MR. RUTHERFORD'S MOTION TO DECLARE STATUTE 921.141 UNCONSTITUTIONAL. MR. RUTHERFORD'S DIRECT APPEAL ATTORNEY WAS INEFFECTIVE FOR FAILING TO **RAISE** THIS ISSUE.

Mr. Rutherford's trial counsel filed a Motion to Declare Statute § 921.141 Unconstitutional (R. 116). This motion stated that the Statute "fails to set forth with particularity the

method and means by which the jury should reach an opinion as to the advisory sentence" (R. 116).

The trial court denied this motion. (R. 176). The jury recommended Mr. Rutherford be sentenced to **death** (R. 156) .

Petitioner's direct appeal attorney failed to raise this preserved issue. Accordingly, Mr. Rutherford **was** denied the effective assistance of appellate counsel to which he is entitled. Mr. Rutherford **was** denied his rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

B. THE TRIAL COURT ERRED IN DENYING MR. RUTHERFORD'S MOTION TO DECLARE STATUTE 922.10 UNCONSTITUTIONAL. MR. RUTHERFORD'S DIRECT APPEAL ATTORNEY WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE.

Mr. Rutherford's trial counsel filed a Motion to Declare Statute § 922.10 Unconstitutional (R. 123). This motion stated that: "Death by electrocution 'in the electric chair', is cruel and unusual punishment' . . ." (R. 123).

The trial court denied this motion. The trial court sentenced Mr. Rutherford to death by electrocution (R. 949).

Petitioner's direct appeal attorney failed to raise this preserved issue. Accordingly, Mr. Rutherford was denied the effective assistance of appellate counsel to which he is entitled. Mr. Rutherford was denied his rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

C. **THE TRIAL COURT ERRED IN DENYING MR. RUTHERFORD'S MOTION TO DECLARE FLORIDA STATUTE 782.04(1) UNCONSTITUTIONAL. MR.**

RUTHERFORD'S DIRECT APPEAL ATTORNEY WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE.

Mr. Rutherford's trial counsel filed a Motion to Declare Florida Statute § 782.04(1) Unconstitutional (R. 125-128). This motion was premised on the statutory construction of the felony murder provision.

The trial court denied this motion (R. 179-181). The jury found Mr. Rutherford guilty as charged (R. 150).

Petitioner's direct **appeal** attorney failed to **raise** this preserved issue. Accordingly, Mr. Rutherford was denied the effective assistance of appellate counsel to which he is entitled. Mr. Rutherford **was** denied his rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

D. THE TRIAL COURT ERRED IN DENYING MR. RUTHERFORD'S MOTIONS TO VACATE DEATH PENALTY. MR. RUTHERFORD'S DIRECT APPEAL ATTORNEY WAS INEFFECTIVE FOR FAILING TO RAISE THESE ISSUES.

Mr. Rutherford's trial counsel filed several Motions to Vacate the Death Penalty (R. 133-135, 136-137, 138-140, 141-142). These motions included challenges to the death penalty statute: 1) § 921.141 is unconstitutional on its face and as applied (R. 133-135); 2) the State of Florida is unable to justify the death penalty (R. 133-135); 3) the death penalty in Florida is arbitrary and capricious (R. 133-135); 4) the **aggravating** circumstances are not sufficiently defined (R. 136-137); 5) Fla. Stat. § 921.141 is a rule of procedure (R. 138-140); 6) use of non-record information in sentencing defendants to death violates due process and **equal** protection (R. 141-142).

The trial court denied these motions (R. 175-190). The trial judge sentenced Mr. Rutherford to death (R. 949) .

Petitioner's direct appeal attorney failed to raise these preserved issues. Accordingly, Mr. Rutherford was denied the effective assistance of appellate counsel to which he is entitled. Mr. Rutherford was denied his rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

E. THE TRIAL COURT ERRED IN DENYING MR. RUTHERFORD'S REQUEST FOR INDIVIDUAL VOIR DIRE.

Mr. Rutherford's trial counsel filed a Motion for Individual Voir Dire (R. 148-149). The trial court denied this motion (R. 176-178).

Petitioner's direct appeal attorney failed to raise this preserved issue. Accordingly, Mr. Rutherford was denied the effective assistance of appellate counsel to which he is entitled. Mr. Rutherford was denied his rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

F. THE TRIAL COURT ERRED IN DENYING PETITIONER'S REQUEST FOR SPECIAL INSTRUCTIONS.

Mr. Rutherford's trial counsel submitted several specially requested jury instructions. They are:

1. Trial counsel submitted ***Defendant's Proposed Penalty Phase Instruction.*** The requested instruction read as follows:

> Where the same aspect of the offense at issue gives rise to two or more aggravating circumstances, that aspect can only be considered as one aggravating circumstance.

(R. 152).

2. Trial Counsel submitted ***Defendant's Proposed Penalty Phase Instruction.*** This instruction read as follows:

> You are instructed that the aggravating circumstances which you may consider are limited to those listed in the Statute and about which you have been instructed.
>
> The mitigating circumstances which you may consider are unlimited and you may consider any evidence presented at trial or the sentencing proceeding in mitigation of the defendant's sentence.

(R. 153).

3. Trial counsel submitted ***Defendant's Proposed Penalty Phase Instruction.*** That instruction read as follows:

> With regard to your recommendation of life or death, the Court hereby instructs you that the death penalty is intended for only the most aggravated and unmitigated of cases.

(R. 154) .

4. Trial counsel also submitted ***Defendant's Proposed Penalty Phase Instruction.*** That instruction read as follows:

> You are to use a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of circumstances present. You are not to use a counting process in determining whether aggravating circumstances outweigh mitigating circumstances.

(R. 155).

The instructions were denied (R. 152, 153, 154, 155).

The foregoing instructions illustrate that defense counsel was attempting have the jurors hear instructions that were more clear than the standard instructions and fit the circumstances of

the case. It was error for the trial court to deny the request.

The denial of these instructions denied Mr. Rutherford his rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Appellate counsel was ineffective for failing to raise these preserved issues.

CLAIM II

MR. RUTHERFORD WAS DENIED EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL BECAUSE AVAILABLE OBJECTIVE FACTS AND CIRCUMSTANCES INDICATING THE PROSECUTOR INTENTIONALLY GOADED MR. RUTHERFORD INTO MOVING FOR A MISTRIAL TO GAIN TACTICAL ADVANTAGE UPON RETRIAL WAS NOT ASSERTED ON DIRECT APPEAL, THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT WAS VIOLATED AND MR. RUTHERFORD WAS UNCONSTITUTIONALLY SUBJECTED TO REPEATED PROSECUTIONS FOR THE SAME OFFENSE.

Mr. Rutherford's direct appeal contained a claim that the trial court lacked jurisdiction to try him a second time since the granting of a mistrial during the initial trial was based upon intentional prosecutorial misconduct and the Double Jeopardy Clause barred the second prosecution. Counsel asserted the trial court's finding of an intentional discovery violation constituted intent to provoke the mistrial in order to gain tactical advantage on the part of the prosecution. Counsel asserted the narrow exception to the general rule that the Double Jeopardy Clause does not bar retrial after granting of a mistrial at the accused's request applied. Oregon v. Kennedy, 456 U.S. 667 (1982).

Counsel argued that the granting of the mistrial "cured the discovery problem" for the prosecutor and "insured the

admissibility of the critical testimony" during retrial. (Initial Brief at 21). Otherwise, counsel pointed to no objective facts and circumstances in support of his argument.

In this Court's opinion, it was acknowledged that the trial court found "the prosecution had committed a willful discovery violation", but concluded there was "no indication" the prosecutor's motivation was to obtain a mistrial. Rutherford v. State, 545 So. 2d 853, 855 (Fla. 1989) . This Court was convinced that the prosecutor was motivated by a desire to "introduce evidence that tended to convict Rutherford" and "not to create error that would force a new trial". Id. Finally, this Court concluded there was no goading the defense into moving for a mistrial and thus no bar to retrial.

What this Court did not know at the time of direct appeal due to ineffective assistance of appellate counsel requires reexamination of this claim, Objective evidence of the prosecutor's intent to provoke a mistrial and thereby gain tactical advantage was available to appellate counsel, but not asserted on appeal. Objective facts and circumstances demonstrate that the prosecutor's willful discovery violation was "bad faith conduct" designed to "afford the prosecution a more favorable opportunity to convict" and obtain a recommendation of death during penalty phase. Oregon v. Kennedv, 456 U.S. 667, 674, 679 (1982) .

A criminal defendant has a protected interest in having his guilt or innocence (and the penalty in a capital case) decided in

one proceeding. **Arizona v.** Washington, 434 U.S. 497 (1978) . A second prosecution may be "grossly unfair" and allows a prosecutor to shop for a more favorable trier of fact and correct deficiencies in his case. Id.

In Mr. Rutherford's case, this is precisely what occurred. By intentionally withholding statements attributed to Mr. Rutherford until they were blurted out from the witness stand during trial, the government forced or "goaded" Rutherford's trial counsel into asking and obtaining a mistrial. The government did this to obtain **a different** trial judge and a **different trier** of fact. How do we know this? Because the same prosecuting authority engaged in remarkably similar behavior in the capital prosecution against Anthony Braden Bryan.

In both the Rutherford and Bryan cases the prosecuting authority was the State Attorney for the First Judicial Circuit of Florida. In both **cases** the crimes were alleged to have occurred in Santa Rosa County, Florida. In both cases the trial judge assigned to try the case was the Honorable George E. Lowrey. Judge Lowrey was well known in the legal community as an expert on evidence and a strict judge regarding the admission of evidence. He was a "detail" oriented judge who held the prosecuting authority to high ethical standards and he would exclude any evidence where prejudice outweighed probative value. As Judge Wells observed during a discussion regarding admissibility of evidence during Mr. Rutherford's second trial: "Judge Lowrey tends to be a little more detailed that I tend to

be in setting out things" (R. 188). Remarkably, the prosecuting authority obtained mistrials in **both** Rutherford and Bryan in a matter of two months. Mr. Rutherford's first trial was in January, 1986; it ended in mistrial following an intentional discovery violation, Mr. Bryan's first trial was in February, 1986; it ended in mistrial following the State's star witness testifying to similar fact crimes prohibited by court order.

More remarkable is the fact that both Mr. Rutherford and Mr. Bryan were subsequently moved to Walton County, Florida, for retrial before the same new judge: the Honorable Clyde B. Wells. Judge Wells was well-known in the legal community as being friendly to the prosecuting authority. Unlike Judge Lowrey, he would allow the prosecuting authority to present virtually **any** evidence of guilt, regardless of probative value as weighed against prejudicial impact upon the defendant's right to a fair trial. In fact, the hidden evidence **was** admitted against Mr. Rutherford upon retrial, just **as** similar fact evidence excluded by Judge Lowrey was admitted by Judge Wells against Mr. Bryan upon retrial,

Further, objective evidence would support the proposition that Walton County juries are much more conservative to convict and sentence to death in comparison to Santa Rosa County juries.

Thus, Mr. Rutherford should not have been retried. Where the prosecuting authority intentionally provoked the mistrial in order to gain tactical advantage by both obtaining a more prosecution-friendly judge and a more conviction/death prone

jury, the narrow exception to Oregon v. Kennedy, supra, is established and retrial was barred by the Fifth Amendment's Double Jeopardy Clause.

This instant claim is one of fundamental error. To the extent Mr. Rutherford's trial and appellate lawyers failed to discover and assert the pattern of judge and jury shopping by the prosecuting authority in the First Judicial Circuit of Florida, their legal representation was deficient and prejudicial to Rutherford. No objection to the retrial was asserted by trial counsel and on appeal this evidence was not revealed to this Court. No hearing has ever occurred regarding this matter. To the extent this claim requires evidentiary development, this Court should temporarily relinquish jurisdiction to an appointed circuit judge from outside the First Judicial Circuit of Florida and allow for fact-finding.

Mr. Rutherford is entitled to relief.

CLAIM III

APPELLATE COUNSEL FAILED TO RAISE ON DIRECT APPEAL THE FUNDAMENTAL ERROR CAUSED BY TESTIMONY OF INCOMPETENT WITNESSES.

Mr. Rutherford was deprived of a fair trial and sentencing proceeding by the prosecution's presentation of testimony by incompetent witnesses in violation of Mr. Rutherford's rights as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. This issue constitutes fundamental error . Therefore, appellate counsel's failure to raise this issue on direct appeal, even in the absence of an objection by

trial counsel, constitutes deficient performance which prejudiced Mr. Rutherford, Habeas relief is warranted.

At his capital trial, the prosecution presented the testimony of Mary Heaton (R. 398-424). Ms. Heaton testified that on the day of the crime Mr. Rutherford visited her at her house and asked her for her assistance in writing a check (R. 399-401). She also testified that Mr. Rutherford then drove her to a bank where she attempted to cash the victim's check (R. 402-403). She was unable to cash the check because it **was** not signed (R. 404). Ms. Heaton then testified that Mr. Rutherford signed the check and sent her back into the bank (R. 407-408).

On cross examination Ms. Heaton admitted that she had been in a mental institution for the past five months (R. 411). She testified: "I had a nervous breakdown, I had a stroke and I had brain damage" (R. 412). In addition, Ms. Heaton had trouble differentiating if what happened on the day of the crime was fact or fantasy (R. 412).

Ms. Ward, another prosecution witness, testified that she assisted Mr. Rutherford in filling out the check (R. 428-429). At the time of the crime Ms. Ward **was** thirteen years old.

Ms. Heaton and Ms. Ward were crucial prosecution witnesses because they were the only witnesses to place the victim's check or checkbook in Mr. Rutherford's possession. In fact, the only other testimony regarding the victim's check placed Ms. Heaton is sole possession of this item and a substantial amount of money thereafter (R. 241-247).

Ms. Heaton's testimony was inadmissible because she was incompetent to testify. Even the prosecutor characterized his witness as "emotionally disturbed" (R. 903). Introduction of her testimony was fundamental error and the issue should have been raised on direct appeal. Appellate counsel's failure to **raise** this issue was ineffective.

> Although, under section 90.601, Florida Statutes (1997), every person is presumed competent to testify as a witness if he or she lacks the capacity (i) to communicate in such a manner as to be understood, (ii) to understand the duty of a witness to tell the truth, or (iii) **to perceive and recollect the facts when testifying***

State v. Green, 733 So. 2d 583, 584 (1999) (emphasis added). In addition, "In order to have the requisite personal knowledge of the matter about which [a witness] is to testify, a witness must have the ability to perceive, remember and communicate facts." C. EHRHARDT, FLORIDA EVIDENCE, (1999), § 603.1 at 391.

The lower court never determined Ms. Heaton could accurately remember the events in question. Admittedly, Ms. Heaton had difficulty distinguishing fact from fantasy (R. 412), thus her testimony failed to meet the requirement that she be able to provide a "correct account of the matters which [she] ha[d] **seen** or heard relative to the question at issue." Kaelin v. State, 410 so. 2d 1355, 1357 (Fla. 4th DCA 1982). The lower court should have prevented the jury from hearing her testimony. The fact that the jury heard the testimony constitutes fundamental **error** and should have been raised on direct appeal.

In addition, regarding Ms. Ward's testimony, the lower court did not address:

> '(1) whether the child is capable of observing and recollecting facts, (2) whether the child is capable of narrating those facts to the court or jury, and (3) whether the child has a moral sense of obligation to tell the truth.'

Hammond v. State, 660 So. 2d 1152, 1156 (Fla. 2d DCA 1995), citing Kertell v. State, 649 So. 2d 892, 893 (Fla. 2d DCA 1995)(citing Lloyd v. State, 524 So. 2d 396 (Fla. 1988)). The lower court should have determined whether Ms. Ward was competent to testify. The lower court's failure to do so constitutes fundamental error. Appellate counsel was ineffective for failing to raise this claim. Habeas relief is proper.

CLAIM IV

APPELLATE COUNSEL FAILED TO RAISE ON DIRECT APPEAL THE PREJUDICIAL ERROR CAUSED BY THE ADMISSION OF INFLAMMATORY PHOTOGRAPHS THAT VIOLATED MR. RUTHERFORD'S FIFTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

At the penalty phase of Mr. Rutherford's trial the State introduced two bloody photographs taken at the morgue of the victim's face and the back of her head (R. 785-787). The introduction and use of these photographs was designed solely to inflame the jurors' emotions. The court admitted the photographs over defense counsel's objections (R. 786-787), yet appellate counsel failed to raise this issue on direct appeal.

Santa Rosa Sheriff's Officer Charles Sloan published the two photographs highlighting the bruises on the victim's mouth and the wounds on the back of her head (R. 786).

As defense counsel pointed out in his objection to the admission of the photographs, there has already been extensive testimony regarding the victim's injuries at the guilt-innocence phase (R. 786). Photographs of the victim were submitted at that phase as well (R. 505-505).

The photographs admitted at the penalty phase were gory, compelling defense counsel to describe them as "framed in blood" (R. 786). The photograph of the victim's mouth shows a closeup of the victim's face as she is lying on an autopsy table, with a person prying open her mouth in an unnatural position and with a pool of blood surrounding her head. The photograph of the back of the victim's head is also a closeup while she is lying on the autopsy table and also shows a pool of blood surrounding her head. There was no legitimate purpose in submitting these pictures to the jury. The only purpose was to inflame and enrage them. Nevertheless, the prosecutor was permitted to introduce these highly prejudicial photographs.

In addition to the photographs submitted during the penalty phase, the State introduced two photos of the victim's body at the guilt phase of the trial (R. 504-505). These photos showed essentially the same scene; the second did not add anything of an evidentiary nature to the proceedings (R. 504).

Although at the guilt phase defense counsel objected to the admission of the photos as cumulative, they were received into evidence and the issue was not raised on direct appeal.

Once again, there was no **reason for the submission of these** photos.

Photographs should be excluded when the risk of prejudice outweighs relevancy. Alford v. State, 307 So. 2d 433, 441-42 (Fla. 1975), cert. denied, 428 U.S. 912 (1976). Photographs should also be excluded when they are repetitious or "duplicates". Id., see also Adams v. State, 412 So. 2d 850 (Fla. 1982) (excluding two photographs based on trial court's determination that photos were "duplicates").

Florida **law** is clear that "[p]hotographs should be received in evidence with great caution." Thomas v. State, 59 So. 2d 517 (1952). Although relevancy is a key to admissibility of such photographs under Adams, limits must be placed on "admission of photographs which prove, or show, nothing more, than a gory scene." Thomas, 59 So. 2d at 517.

In Mr. Rutherford's case, the two photographs admitted at the penalty phase were in no way relevant to the issues involved at that stage of the proceedings. Neither the location nor appearance of injuries on a body are relevant to any statutory aggravating circumstance. The photographs were irrelevant **and** highly prejudicial.

While relevancy is the key to admissibility of photographs, this Court has indicated that courts must also consider the shocking nature of the photos and whether jurors are thereby distracted from fair factfinding. Czubak v. State, 570 So. 2d 925, 928 (1990).

The state's use of the photographs distorted the actual evidence against Mr. Rutherford at the guilt phase and unfairly skewed the weight of aggravating circumstances against him at the penalty phase. Appellate counsel failed to raise this issue despite their being proper objections by trial counsel. Habeas relief is proper.

CLAIM V

THE TRIAL COURT'S FAILURE TO ASSURE MR. RUTHERFORD'S PRESENCE DURING CRITICAL STAGES OF HIS CAPITAL PROCEEDINGS, AND THE PREJUDICE RESULTING THEREFROM, VIOLATED THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE.

A criminal defendant's Sixth and Fourteenth Amendment right to be present at all critical stages of the proceedings against him is a settled question. See, e.g., Francis v. State, 413 So. 2d 493 (Fla. 1982); Illinois v. Allen, 397 U.S. 337, 338 (1970); Hopt v. Utah, 110 U.S. 574, 579 (1884); Diaz v. United States, 223 U.S. 442 (1912); Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982); see also Fla. R. Crim. P. 3.180. The standard announced in Hall v. Wainwrisht, 805 F.2d 945, 947 (11th Cir. 1986), is that "[w]here there is any reasonable possibility of prejudice from the defendant's absence at any stage of the proceedings, a conviction cannot stand. Estes v. United States, 335 F.2d 609, 618 (5th Cir. 1964), cert. denied, 379 U.S. 964 (1965); Proffitt, 685 F.2d at 1260."

Mr. Rutherford was involuntarily absent from a critical stage of the proceedings which resulted in his conviction and

sentence of death. Mr. Rutherford never validly waived his right to be present. However, during his involuntary absence, important matters were attended to, discussed and resolved. In fact, contrary to the Fifth, Sixth, Eighth, and Fourteenth Amendments, Mr. Rutherford was not present at the penalty phase charge conference where his attorneys and the prosecutors argued the jury instructions before Judge Wells (R. 894) .

The denial of Mr. Rutherford's right to be present violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. This issue constitutes fundamental error. Therefore, appellate counsel's failure to raise this issue on direct appeal, even in the absence of an objection by trial counsel, constitutes deficient performance which prejudiced Mr. Rutherford. Habeas relief is warranted.

CLAIM VI

APPELLATE COUNSEL FAILED TO RAISE ON DIRECT APPEAL THAT MR. RUTHERFORD WAS DENIED THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL BECAUSE HIS ATTORNEYS REVEALED CONFIDENCES TO THE TRIAL COURT, VIOLATING THEIR DUTY OF LOYALTY TO THEIR CLIENT AND OPERATING UNDER A FUNDAMENTAL CONFLICT OF INTEREST, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

While the penalty phase jury was deliberating, the trial court questioned Mr. Rutherford regarding his satisfaction with the representation his attorneys had provided. Defense counsel did not object to this procedure and took the opportunity to reveal confidential information to the trial court. As a result of counsel's actions, Mr. Rutherford was deprived of the

effective assistance of counsel, in violation of the Sixth, Eighth, and Fourteenth Amendments.

Defense counsel revealed confidential and privileged information to the court:

> THE COURT: Okay, the purposes of this convening of the Court at this moment, is, Mr. Rutherford, for the Court to ask you, in view of the fact that your counsel are court appointed public defenders, do you have any complaint about the representation you have received by Mr. Gontarek and Mr. Treacy in this trial and prior to this trial?
>
> THE DEFENDANT: I aint' got no complaints against them, but I have the State Attorney.
>
> THE COURT: All right. Well, we're really not concerned at this point about the State Attorney. Because, you understand he doesn't represent you, he represents a different point of view from yours. You understand that, don't you?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Okay. Have you had an opportunity to adequately discuss the defense of your case with these attorneys?
>
> THE DEFENDANT: Well, I have a little bit.
>
> THE COURT: A little bit? They had the benefit of the prior public defender's work, didn't they?
>
> THE DEFENDANT: I had my own lawyer.
>
> THE COURT: Okay. They had the benefit of his work, didn't they?
>
> THE DEFENDANT: I think some of it.
>
> THE COURT: You don't know?
>
> THE DEFENDANT: I don't think they had all of it.

THE COURT: Isn't that true, Mr. Gontarek?

MR. GONTAREK: Judge, I was able to review and I had transcripts of the previous trial in which a mistrial was granted in and the deposition taken and I thoroughly reviewed all of those papers and had discussed the case with Mr. Rutherford.

THE COURT: You understand that to be true, don't you, Mr. Rutherford?

THE DEFENDANT: What?

THE COURT: That he had all the depositions that --

MR. SPENCER: Your Honor, everything that was in the prior trial was in this trial -- or, everything that was in this trial was in this trial -- or, everything that was in this trial was in the prior trial, with the exception of the testimony of Jan Johnson. That was all transcribed, at the order of the Court, and the defense was furnished a copy of the trial in its entirety.

THE COURT: You understand that to be the case?

THE DEFENDANT: There's a bunch of them that didn't testify in this trial that testified last time.

THE COURT: Okay.

THE DEFENDANT: There was a bunch of other State witnesses called at my last trial. And the State Attorney did not call them at this trial.

THE COURT: Okay. And you didn't call -- Did you ask your attorney to call them?

THE DEFENDANT: No, sir, I figured they was gonna have them there.

THE COURT: Okay. Do you have any specific complaints you want to register with the Court about the treatment you've received by your attorneys or any other officer of

this Court, except Mr. Spencer? I don't want to get into that.

THE DEFENDANT: No. He's a crook and I know it.

THE COURT: Okay. I'm not talking about him, now. I'm talking about anybody but him. We might get on to him in a little bit. But let's think about these other **lawyers.**

THE DEFENDANT: These two right here have done a good job. As far as what they've done, they done a good job.

THE COURT: Okay. Do you gentlemen have anything you want to put on the record with regard to this case, or any questions that I haven't asked the defendant?

MR. TREACY: No, sir, I know of nothing.

MR. GONTAREK: **I would like it to be known, Judge, that I did inform the defendant of the possibility of if he did enter a plea in this case that he would receive, in my opinion, a life sentence from Your Honor and a recommendation of a life sentence from the State Attorney's Office, John Spencer, through discussions I had with him.**

THE COURT: **Was** that message related to you that it would be possible for you to negotiate a plea of guilty in exchange for a life sentence?

THE DEFENDANT: I ain't pleading guilty to nothing I didn't do.

THE COURT: No, sir, that's not the question.

THE DEFENDANT: Yes, sir, he told me that.

THE COURT: And you made the decision to reject that offer.

THE DEFENDANT: That's right.

THE COURT: Okay.

MR. GONTAREK: **I prepared a statement to that effect, Judge, for Mr. Rutherford to sign and he would not sign it and I had our investigator in our office, Mr. Bill Graham, prepare an affidavit, as a witness, that I did inform him of this option.**

THE COURT: Okay. Do you agree that he did make that negotiation, passed that onto you?

THE DEFENDANT: Yes, sir.

(R. 727-31) (emphasis added).

The information revealed by defense counsel during this colloquy was privileged and should not have been disclosed to the trial judge before he sentenced Mr. Rutherford. Mr. Rutherford was deprived his right to counsel because he revealed a client confidence creating a conflict of interest and "breach[ing] the duty of loyalty, perhaps the most basic of counsel's duties." Strickland, 466 U.S. at 656. In fact, Mr. Gontarek appeared to have prepared affidavits specifically for the purpose of protecting himself before the court, Mr. Gontarek unreasonably put himself in the position of allowing confidential information to be revealed to the ultimate sentencer. See Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983), vacated and remanded, 468 U.S. 1206 (1984), adhered to on remand, 739 F.2d 531 (1984).

The sentencing judge was provided information which was outside the evidence adduced at trial and it is obvious that he considered this information in his sentencing order. Mr. Gontarek volunteered to the court that Mr. Rutherford rejected a plea offer which could have resulted in a life sentence. This

admission infected the trial court's sentencing determination. In the sentencing order, the court said:

> While the Court cannot use the attitude of the defendant and his lack of remorse for this crime as an aggravating circumstance, the Court does find that the defendant's lack of remorse adds weight to the Court's determination that the crime was especially heinous, atrocious and cruel.

(Supp. R. 4).

Since no other information before the court indicated that Mr. Rutherford lacked remorse, the court's statement about his purported lack of remorse could only have come from defense counsel regarding the rejection of a plea.

Sentencing procedures in capital cases must ensure "heightened reliability in the determination that death is the appropriate punishment," Woodson v. North Carolina, 428 U.S. 280, 305 (1976), in order to prevent the "unacceptable risk that 'the death penalty may be meted out arbitrarily or capriciously' or through 'whim or mistake.'" Caldwell v. Missississi, 472 U.S. 320 (1985) (O'Connor, J., concurring),

Defense counsel were operating under an actual conflict of interest. Counsel were representing themselves by defending themselves and their actions to the court to cover themselves if the case came back in a postconviction proceeding. With a conflict between preserving counsel's reputation or defending Mr. Rutherford the right to the effective assistance of counsel is nonexistent.

This actual conflict of interest adversely affected their representation of Mr. Rutherford by having the trial court consider factors outside the evidence adduced at trial. See Cuyler v. Sullivan, 446 U.S. 335, 348-50 (1980); see also United States v. Cronic, 466 U.S. 648, 659-61 (1984); Osborn v. Shillinger, 861 F.2d 612, 625-26 (10th Cir. 1988) . In such circumstances, "when the advocate's conflicting obligations have effectively sealed his lips on crucial matters," " [t]he mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee." Holloway v. Arkansas, 435 U.S. 475, 490 (1978) .

When "a conflict of interest actually affect[s] the adequacy of his representation," Mr. Rutherford "need not demonstrate prejudice in order to obtain relief." Cuyler, 446 U.S. at 349-50.

Prejudice is presumed because a prejudice inquiry would require "unguided speculation." Holloway, 435 U.S. at 491. This is so because "the evil . . . is in what the advocate finds himself compelled to **refrain** from doing." Id. at 490 (emphasis in original) . Even though no showing of prejudice is required, the record establishes that Mr. Rutherford was prejudiced by his attorneys' conflict of interest. Defense counsel actively placed their interests above Mr. Rutherford's by informing the judge that Mr. Rutherford had rejected a life sentence.

This case is similar to Douglas v. Wainwrisht, 714 F.2d 1532 (11th Cir. 1983), vacated and remanded, 468 U.S. 1206

(1984), adhered to on remand, 739 F.2d 531 (1984), cert. denied, 469 U.S. 1207 (1985). There, defense counsel informed the sentencing judge that he had no mitigating evidence to present, that there was no mitigating evidence, and that his client should not testify because he had "not been a good boy." 714 F.2d at 1557. The Eleventh Circuit granted relief in Douglas as to sentencing, reasoning:

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

Id. at 1557 (emphasis added).

It is noteworthy that in Douglas there was no express reliance on the information disclosed by defense counsel; nevertheless, the Eleventh Circuit granted relief, holding: "The most egregious examples of ineffectiveness do not always arise because of what counsel did not do, but from what he **did** do -- or say." 714 F.2d at 1557 (emphasis in original). Here, counsel

"did not merely neglect to present available mitigating evidence. He made [statements to the sentencer] that Cdidl more harm than good." King v. Strickland, 714 F.2d 1481, 1491 (11th Cir. 1983), vacated and remanded, 104 S. Ct. 3575, adhered to on remand, 748 F.2d 1462 (11th Cir. 1984), cert. denied, 471 U.S. 1016 (1985).

Because of defense counsel's ineffectiveness and conflict of interest, the sentencing judge was provided information which could only serve to divert his attention from permissible sentencing considerations. That this information had an impact on the court is clear from the court's sentencing order. Here, the "risk" that the death sentence was imposed on the basis of irrelevant, impermissible, and unreliable considerations actualized.

Appellate counsel failed to raise this fundamental error. Habeas relief is proper.

CLAIM VII

APPELLATE COUNSEL INEFFECTIVELY FAILED TO RAISE ANY ISSUE REGARDING THE TRIAL COURT'S IMPROPER HANDLING OF THE JURY'S REQUEST TO HAVE CERTAIN TESTIMONY READ BACK.

During its deliberations, the jury requested that the testimony of Mr. Rutherford and Mr. Perritt, Jr. be read back to them (R. 779). The court told the jury to use [their] individual and collective recollection of what the testimony was" (R. 778). The court never informed Mr. Rutherford that he had the right to object to this answer and had the right to require that the testimony be read back. Fla, R. Crim. P. 3.410.

The testimony of Mr. Rutherford and Mr. Perritt, Jr. was extremely critical to Mr. Rutherford's defense. Mr. Perritt testified that on the day of the crime, Mr. Rutherford told him that he had killed the victim and asked if Mr. Perritt, Jr. would hold the money he received (R. 449).

Mr. Rutherford's testimony was also crucial because he professed his innocence throughout his testimony and accounted for his activities on the day of the crime (R. 406-463).

The court did not inform Mr. Rutherford that the rules of criminal procedure allowed reading back the testimony, Fla. R. Crim. P. 3.410. The court's action violated Rule 3.410 and due process. Appellate counsel was ineffective in failing to raise this clear error on appeal. Habeas relief is proper.

CLAIM VIII

THIS COURT MUST REVISIT THE ISSUE OF WHETHER THE INTENSE SECURITY MEASURES IMPLEMENTED DURING MR. RUTHERFORD'S TRIAL IN THE JURY'S PRESENCE DILUTED THE STATE'S BURDEN TO PROVE DEATH WAS THE APPROPRIATE PENALTY AND INJECTED MISLEADING AND UNCONSTITUTIONAL FACTORS INTO THE PENALTY PROCEEDINGS, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

On direct appeal, Mr. Rutherford raised this claim and it was rejected without discussion. Rutherford v. State, 545 So. 2d at n.4. However, this Court must address this issue because law emerged during the timeframe of Mr. Rutherford's direct appeal which establishes that Mr. Rutherford is entitled to relief on this issue.

The extreme security measures employed during Mr. Rutherford's penalty phase perverted the judicial process. The prejudice from the shackling far outweighed any possible danger and caused an unconstitutional sentence.

Just prior to closing arguments during the penalty phase of the trial, the trial judge ordered that Mr. Rutherford be placed in leg irons (R. 895). As a justification the court stated:

> The bailiff has expressed and the deputies in charge of the defendant have expressed concern about the defendant's conduct, security, and based on his conviction for the ultimate crime of first degree murder and facing a possible recommendation of death, the court has ordered that he be placed in leg irons,

(R. 895). The court overruled defense counsel's objection (R. 895). The extreme security measures distorted the judicial process and deprived Mr. Rutherford of a fair trial.

In Bello v. State, 547 So. 2d 914 (Fla. 1989), this Court granted a new sentencing to a capital defendant who was shackled during the penalty phase of his trial. The Court recognized that shackling is an inherently prejudicial restraint and that the constitutional concern centers on possible adverse effects on the presumption of innocence. Id. at 341. In Bello, as here, defense counsel objected to the shackling but the trial judge overruled the objection. There, as here, the trial judge merely relied on law enforcement's opinion. This Court held that the defendant was entitled to a new trial because the trial judge made no appropriate inquiry. Id.

Appellate counsel did not amend Mr. Rutherford's briefs with the Bello case, therefore this Court did not have the benefit of Bello when it decided this issue on direct appeal. This case mandates that relief be given now.

CLAIM IX

MR. RUTHERFORD'S JURY WEIGHED INVALID AND UNCONSTITUTIONALLY VAGUE AGGRAVATING CIRCUMSTANCES, IN VIOLATION OF HIS RIGHT TO AN INDIVIDUALIZED AND RELIABLE SENTENCING PROCEEDING, AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE.

In its opinion affirming the circuit court's denial of postconviction relief, this Court held that, as a matter of law, this claim was procedurally barred because it could have been raised on direct appeal. Rutherford II, 727 So. 2d at n. 2, 219. Appellate counsel was ineffective in failing to raise this claim on direct appeal.

Mr. Rutherford's death sentence resulted from multiple errors in the instructions to his jury concerning the proper Eighth Amendment weighing of aggravating and mitigating circumstances. That there was fundamental constitutional error in the instructions to the jury is a matter which is now not open to debate, Espinosa v. Florida, 112 S. Ct. 2926, 120 L.Ed.2d 854 (1992). Nor is there any question that in an appropriate case, those errors require that a new sentencing proceeding be conducted. James v. State, 615 So. 2d 668 (Fla. 1993). In James, this Court held that Espinosa must be retroactively applied to cases where the Essinosa error was preserved at trial

and raised on direct appeal. Id. Had appellate counsel raised this claim on direct appeal, Mr. Rutherford would have been entitled to relief. Appellate counsel **was** ineffective for failing to raise this claim.

A. "INVALID" AGGRAVATING CIRCUMSTANCES WERE PRESENTED TO MR. RUTHERFORD'S JURY.

Mr. Rutherford's jury was never properly instructed on aggravating factors. The court simply read the list of aggravating factors from the statute (R. 920-921).

The United States Supreme Court has set standards governing the function of aggravating circumstances:

> [S]tatutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty,

Zant v. Stephens, 103 S. Ct. 2733, 2743 (1983). The Court went on to state that: "An aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty". Id. at 2742-2743.

What occurred in Mr. Rutherford's trial was precisely what the Eighth Amendment was found to prohibit in Maynard v. Cartwrisht, 108 S. Ct. **1853** (1988), the year before Mr. Rutherford's capital trial. The result here should be the same:

> Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and **as a result leaves them and appellate courts with the kind of open-**

> **ended discretion which was held invalid in Furman v. Georgia, 408** U.S. 238 (1972).

Cartwright, 108 S. Ct. at 1859 (emphasis added).

In Cartwright, the Court held that "the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action". Cartwrisht, 108 S. Ct. at 1858. There must be a "principled way to distinguish [the] case, in which the death penalty was imposed, from the many cases in which it was not". Id. at 1859 (quoting Godfrey v. Georgia, 446 U.S. 420, 433 (1980). In Mr. Rutherford's case, the jury was not instructed as to the limiting constructions placed upon any of the aggravating circumstances.

Furthermore, in Sochor v. Florida, 112 S. Ct. 2114 (1992), the Supreme Court made clear that the Eighth Amendment is violated whenever the sentencer in a "weighing" state, like Florida, considers an "invalid" aggravating circumstance. An aggravating circumstance may be invalid either because it does not apply as **a** matter of law, Sochor, 112 S. Ct. 2114, or because it is so undefined that it fails to offer adequate guidance to the sentencer. As the Court noted in Sochor, either type of error tilts the weighing process in favor of death:

> In a weighing State like Florida, there is Eighth Amendment error when the sentencer weights an "invalid" aggravating circumstance in reaching the ultimate decision to impose a sentence. See Clemons v. Mississippi, 494 U.S. 738, 752 (1990). Employing an invalid aggravating factor in the weighing process

> "creates the possibility ... of randomness," Stringer v. Black, 503 U.S. __, __ (1992) (slip op. at 12), by placing a "thumb [on] death's side of the scale," id., thus "creat[ing] the risk of treat[ing] the defendant as more deserving of the death penalty." Id. Even when other valid aggravating factors exist as well, merely affirming a death sentence reached by weighing an invalid aggravating factor deprives a defendant of "the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances." Clemons, 494 U.S. at 752 (citing Lockett v. Ohio, 438 U.S. 586 (1978) and Eddinss v. Oklahoma, 455 U.S. 104 (1982)); see Parker v. Dugger, 498 U.S. ___, __ (1991) (slip op. at 11).

Sochor, 119 L.Ed.2d at 336-37.

In the instant case, the trial court instructed the jury to consider the "especially wicked, evil, atrocious or cruel" aggravating factor (R. 921) . The instruction given to Mr. Rutherford's jury was unconstitutionally vague and encouraged the jury to find the aggravator for improper reasons. Although this Court has noted that if the "especially wicked" aggravating factor were applied to cases of this type, it would violate the requirement that aggravating factors genuinely narrow the class of defendants eligible for the death penalty, see Cannadv v. State, 620 So. 2d 165, 169 (Fla. 1993), "we must presume," Espinosa, 112 S. Ct. at 2928, that the jury did weigh the factor in this case. Moreover, the jury also received unconstitutionally vague instructions on the "cold, calculated and premeditated" aggravating factor, and was allowed to consider "doubled" aggravating circumstances, based on identical facts. Mr. Rutherford's jury weighed multiple invalid aggravating

circumstances, as discussed below. That fact requires that his death sentence be invalidated. Stringer v. Black, 112 S. Ct. 1130 (1992).

Without addressing the deficient instructions, this Court upheld the trial court's findings of aggravating factors. Espinosa makes clear, however, that the analysis does not end with the trial court findings concerning aggravating circumstances, but must extend to the jury's weighing process also:

> Our examination of Florida case law indicates, however, that a Florida trial court is required to pay deference to a jury's sentencing recommendation, in that the trial court must give "great weight" to the jury's recommendation, whether that recommendation be life, see Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975), or death, see Smith v. State, 515 So. 2d 182, 185 (Fla. 1987), cert. denied, 485 U.S. 971 (1988); Grossman v. State, 525 So. 2d 833, 839, n. 1 (Fla. 1988), cert. denied, 489 U.S. 1071-1072 (1989). Thus, Florida has essentially split the weighing process in two. Initially, the jury weighs aggravating and mitigating circumstances, and the result of that weighing process is then in turn weighed within the trial court's process of weighing aggravating and mitigating circumstances.
>
> It is true that, in this case, the trial court did not directly weigh any invalid aggravating circumstances. But, we must presume that the jury did so, see Mills v. Maryland, 486 U.S. 367, 376-377 (1988), just as we must further presume that the trial court followed Florida law, cf. Walton v. Arizona, 497 U.S. 639, 653 (1990), and gave "great weight" to the resultant recommendation. By **giving "great weight" to the jury recommendation, the trial court indirectly weighed the invalid aggravating factor that we must presume the jury found.** This **kind of indirect weighing of an invalid**

> **aggravating factor creates the same potential** for **arbitrariness as the direct weighing** of **an invalid aggravating factor,** cf. Baldwin v. Alabama, 472 U.S. 372, 382 (1985), **and the result, therefore,** was **error.**

Espinosa, 112 s. ct. at 2928 (emphasis added).

1. "Heinous, atrocious, or cruel" aggravating circumstance

In State v. Dixon, 283 So. 2d 1, 9 (1973), this Court provided the following limiting construction of the "heinous, atrocious, or cruel" aggravating circumstance:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies--the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

Mr. Rutherford's jury was not advised of these limitations on the "heinous, atrocious or cruel" aggravating factor. As a result, the instructions failed to limit the jury's discretion and violated Maynard v. Cartwrisht, 108 S. Ct. 1853 (1988).

Espinosa specifically holds that Florida's standard jury instructions on the "especially heinous, atrocious or cruel" aggravating factor, see, e.g., Florida Standard Jury Instructions (Criminal) (1981), violate the Eighth Amendment. As the Court noted in Espinosa, the weighing of an aggravating circumstance violates the Eighth Amendment if the description of the

circumstance "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. The Court further noted that it previously held "instructions more specific and elaborate" than Florida's "heinous, atrocious, or cruel" instruction to be unconstitutionally vague. Id.

After concluding that, in every sense meaningful to the Eighth Amendment, the Florida jury sentences, the Supreme Court had no difficulty in concluding that the provision of the Florida "heinous, atrocious, or cruel" instruction violated the Eighth Amendment. The error in Espinosa **was** not cured by any trial court "independent" weighing of aggravation and mitigation, even though in Espinosa, unlike the instant case, the trial court **did not improperly weigh the "especially heinous" aggravator:**

> It is true that, in this case, the trial court did not directly weigh any invalid aggravating circumstances. But, we must presume that the jury did so, see Mills v. Maryland, 486 U.S. 367, 376-77 (1988), just **as** we must further presume that the trial court followed Florida law, cf. Walton v. Arizona, 497 U.S. 639, 653 (1990), and **gave** "great weight" to the resultant recommendation. **By giving "great weight" to the jury recommendation, the trial court indirectly weighed the invalid aggravating factor that we must presume the jury found. This kind of indirect weighing of an invalid aggravating factor creates the same potential for arbitrariness as the direct weighing of an invalid aggravating factor,** cf. Baldwin v. Alabama, 472 U.S. **372, 382** (1985), **and the result, therefore, was error.**

Espinosa, 112 S. Ct. at 2928 (emphasis added).

Essinosa makes it undeniable, therefore, that where a Florida jury recommends death after receiving either the standard jury instruction or any similar instruction that suffers from the defects identified by the Supreme Court in Godfrev, Mavnard or Shell, the verdict is infected with Eight Amendment error. In such cases, the death sentence is tainted because the jury presumably weighed an invalid aggravating factor, thus placing a thumb on "death's side of the scale." Stringer v. Black, 112 S. ct. 113, 133 (1992).

In the instant case, the court gave the standard jury instruction, over the defense's objection, on the "especially heinous" aggravating circumstance (R. 921).

Prior to Mr. Rutherford's retrial, trial counsel filed a motion to vacate the death penalty (R. 136-137), partially based on the grounds that the "especially heinous" and "cold, calculated" aggravating circumstances were unduly vague (R. 136-137). The court denied the motion. In addition, during the charge conference, trial counsel again objected to the "heinous, atrocious and cruel" aggravating circumstance (R. 894).

Accordingly, the trial court proceeded to give, over the **clearly** preserved objection of Mr. Rutherford, the standard jury instruction: "Three, the crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel" (R. 921) .

This instruction suffers from at least two fatal defects under Espinosa and the United States Supreme Court's other cases

regarding the definition of aggravating factors. Firstly, the instruction allows the jury to find and weigh the aggravating factor if they determine that the crime was either "wicked" or "evil" **or** "atrocious" or "cruel," and then provides no definitions of those terms and no guidance to the jury other than the merely "pejorative adjectives" that "describe the crime as a whole." See Arave v. Creech, 113 S. Ct. 1534, 1541 (1993). As a result, the instruction permitted the lay jury to apply the aggravating factor to virtually any first degree murder. This is precisely the same defect that the Supreme Court found in the Mississippi jury instruction struck down in Shell v. Mississippi, 498 U.S. 1 (1990). See id. (Marshall, J., concurring).

Secondly, and perhaps more fundamentally, the instruction permitted the jury to find and weigh the aggravating factor based on anything at all that Mr. Rutherford did prior to the homicide that the jury found to be "heinous" or "atrocious." This **gave** the jury full, unlimited discretion to find the aggravating factor **based** on any of the facts of the **case.** Condemnation of such unchanneled discretion is the very heart of the holding in Espinosa.

In Espinosa, the Court held that where an improper instruction is given, it may be presumed that the jury weighed the invalid aggravating factor. 112 S. Ct. at 2928. In the instant case, in addition to this presumption, we can be virtually certain that the jury weighed the factor improperly. In closing argument, the prosecutor seized on the facts preceding

the homicide -- which the instruction allowed the jury to consider -- in arguing vehemently that the aggravating factor applied and that Mr. Rutherford should be put to death.

The prosecutor then began his argument concerning the "especially wicked" aggravating, relying specifically on the instruction given by the court:

> Consider the cruel and atrocious aspect of it. . . .
>
> Also consider the testimony of Ms. Elkins and Ms. DeVon (phonetic) that said that she, that she was afraid of this man, that she didn't want anything to do with him. Also consider the testimony of Mr. Attaway. And his Honor will instruct you, under the law, that you can consider not only the aggravating factors and mitigating factors in the penalty phase, but what you heard all week, you can also consider that, those factors also.
>
> You can consider the other testimony. Harold Attaway said "I heard her say, 'Take the doors and forget about the money.'" And that's consistent with Ms. Elkins and Ms. DeVon, that she was afraid of the man, she didn't want anything to do with him, she wanted him out of her life, out of her house, not around. She was afraid of he was over there casing the house, as she said. . . . So consider those factors, and consider the fact that the house was locked up, and that when she knew he was coming over there she wanted this man there with her, or to be on call, the neighbor.

(R. 900-903).

Almost any juror, hearing this recitation of facts by the prosecutor, in light of the instruction given by the court, would find that the murder was "especially wicked." There can be no question that the trial court's erroneous instruction and the

prosecutor's argument urged the jury to apply an invalid aggravating factor, and it must be presumed that they did so. The constitutional error is apparent.

2. "Cold, calculated and premeditated" aggravating circumstance

As with the "wicked, evil, atrocious, or cruel" aggravating circumstance, Mr. Rutherford objected to the vagueness of the "cold, calculated, and premeditated" aggravating factor (R. 146-147). Once again, the court gave the standard jury instruction: "Four, the crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification" (R. 921). Trial counsel filed a two pre-trial motions to strike this aggravator (R. 145, 146-147). The basis for one of those motions was the vagueness of the instruction (R. 146-147).

Like the instruction on the "especially wicked" aggravating factor, this instruction set the jury free to rely on virtually any of the facts of the case in finding the aggravating factor, and failed to convey to the jury the limiting construction placed on the aggravator by this Court. In the absence of a limiting construction, the "cold, calculated" aggravating factor is unconstitutionally vague and fails to narrow the class of defendants eligible for the death penalty, see Arave v. Creech, 113 S. Ct. at 1542, because it conveys to the jury the notion that simple premeditation is sufficient for the aggravating factor to apply. An aggravating factor that would apply to every

first degree murder would violate the Eighth Amendment. Id.; Cannadv v. State, 620 So. 2d at 169.

This Court has discussed the "cold calculated" aggravating factor on numerous occasions. See, e.g., McCray v. State, 416 So. 2d 804, 807 (Fla. 1982); Combs v. State, 403 So. 2d 418 (Fla. 1981). This Court has further defined "cold, calculated, and premeditated" to require proof of "heightened premeditation":

> We also find that the murder was not cold, calculated and premeditated, because the state has failed to prove beyond a reasonable doubt that Rogers' actions were accomplished in a "calculated" manner. In reaching this conclusion, we note that our obligation in interpreting statutory language such as that used in the capital sentencing statute, is to give ordinary words their plain and ordinary meaning. See Tatzel v. State, 356 So. 2d 787, 789 (Fla. 1978). Webster's Third International Dictionary at 315 (1981) defines the word "calculate" as "[t]o plan the nature of beforehand; think out . . . to design, prepare or adapt by forethought or careful plan." There is an utter absence of any evidence that Rogers in this case had a careful plan or prearranged design to kill anyone during the robbery. While there is ample evidence to support simple premeditation, we must conclude that there is insufficient evidence to support the heightened premeditation described in the statute, which must bear the indicia of "calculation."

Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987). This Court's subsequent decisions have plainly recognized that cold, calculated and premeditated requires proof beyond a reasonable doubt of a "careful plan or prearranged design." Mitchell v. State, 527 So. 2d 179, 182 (Fla. 1988) ("the cold, calculated and premeditated factor [ ] requir[es] a careful plan or prearranged

design,") . This Court requires trial courts to apply these limiting constructions and consistently rejects this aggravator when these limitations are not met. See, e.g., Gore v. State, 599 So. 2d 978, 986-7 (Fla. 1992); Jackson v. State, 599 So. 2d 103, 109 (Fla. 1992); Green v. State, 583 So. 2d 647, 652-3 (Fla. 1991) ; Sochor v. State, 580 So. 2d 595, 604 (Fla. 1991); Holton v. State, 573 So. 2d 284, 292 (Fla. 1990); Bates v. State, 465 so. 2d 490, 493 (Fla. 1985) .

Although this Court has attempted to require more for this aggravating circumstance than simple premeditation, the jury was not told that in Mr. Rutherford's case. Instead, the jury was given a confusing instruction that left them free to find the aggravating circumstance on the basis of a host of factors other than the required heightened premeditation,

Espinosa, and Sochor now make clear that the instruction to the jury was Eighth Amendment error. In Sochor, the Supreme Court held that this Court's striking of the "cold, calculated and premeditated" aggravating factor meant that Eighth Amendment error had occurred. The aggravating factor was "invalid in the sense that the Supreme Court of Florida had found [it] to be unsupported by the evidence . . . It follows that Eighth Amendment error did occur when the trial judge weighed the coldness factor in the instant case." Sochor, 119 L.Ed.2d at 341." Failure to provide a limiting instruction concerning the

[1] In Sochor, the court struck the "cold, calculated and premeditated" aggravating factor because the evidence did not (continued...)

aggravating circumstance likewise renders it invalid. Essinosa; Hodges v. Florida, 113 S. Ct. 33, 121 L.Ed.2d 6 (1992) (remanding in light of Essinosa a case raising the constitutionality of the "cold, calculated" jury instruction; cf. Hodges v. State, 619 So. 2d 272 (1993) (refusing to address the issue on procedural grounds).

Mr. Rutherford's jury was not instructed about these limitations and presumably found this aggravator present. Espinosa, 112 S. Ct. at 2928. Under these circumstances, the erroneous instruction tainted the jury's recommendation, and in turn the judge's death sentence, with Eighth Amendment error. Id.

B. THE EIGHTH AMENDMENT ERROR WHICH INFECTED THE JURY'S WEIGHING PROCESS IS NOT HARMLESS BEYOND A REASONABLE DOUBT.

The effect of jury weighing of an invalid aggravating factor on the resulting death sentence has been discussed by the United States Supreme Court in a number of cases, notably Espinosa and Stringer v. Black, 112 S. Ct. 1130 (1992). In Stringer, the Court held that relying on such an aggravating factor, particularly in a weighing state, **invalidates** the death sentence;

> Although our precedents do not require the use of aggravating factors, they have not permitted a state in which aggravating factors are decisive to use factors of vague

---

1(...continued)
satisfy the limiting construction requiring "heightened" premeditation. Sochor v. State, 580 So. 2d 595, 603 (Fla. 1991). Although the trial court found this aggravator and this Court upheld it, Mr. Rutherford does not concede that the aggravator applies to his case.

> or imprecise content. A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to **channel** the sentencer's discretion. 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 on the existence of an illusory circumstance. **Because** the use of a vague aggravating factor in the weighing process creates the possibility not only of randomness but also of **bias in favor of the death penalty,** we cautioned in Zant that there might be a requirement that **when the weighing process has been infected with a vague factor the death sentence must be invalidated.**

Id. at 1139 (emphasis added) .

Consideration of an invalid aggravating factor distorts the entire weighing process, adding improper weight to death's side of the **scales** and depriving the defendant of the right to an individualized sentence:

> [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.

Id. at 1137. The jury's "weighing process" in Mr. Rutherford's case was "skewed" in the same **way** that the process was skewed by the invalid aggravator in Espinosa.

This Court did not conduct any review of the effect of the error in the instructions to Mr. Rutherford's jury on the "wicked, evil, atrocious, or cruel, " or "cold, calculated and premeditated". Mr. Rutherford's jury was presented with aggravating factors that were invalid under Espinosa. The State

argued with equal furor that these aggravating factors were applicable and justified a sentence of death. Any one of the errors standing alone requires a resentencing in this case before a new jury.

The instructional errors in this case were similar, but even more prejudicial to Mr. Rutherford, than the error that this Court held required reversal in James, 615 So. 2d at 668. On direct appeal, this Court struck the "especially heinous" aggravating factor, leaving four valid aggravating factors and no mitigating factors. James v. State, 453 So. 2d 786, 792 (Fla. 1984), cert. denied, 469 U.S. 1098 (1984). The court determined that the trial court's error in finding the aggravating factor was harmless. James, 453 so. 2d at 792. However, on postconviction appeal, when the court considered the effect of the Espinosa error in instructing James' jury on the invalid aggravating factor, it could not say that the error was harmless:

> In closing argument the state attorney argued forcefully that the murder was heinous, atrocious or cruel. On appeal, on the other hand, we held that the facts did not support finding that aggravator. James, 453 so. 2d at 792. Striking that aggravator left four valid ones to be weighed against no mitigators, and we believe that the trial court's consideration of the invalid aggravator was harmless error. We **cannot say beyond a reasonable doubt, however, that the invalid instruction or that its recommendation would have been the same if the requested expanded instruction had been given.**

James, 615 So. 2d at 669 (emphasis added),

Moreover, **five** (5) jurors voted for life even after having been instructed to weigh the invalid aggravating factor (R. 156). Thus, since the error was not harmless in James, the error cannot be harmless here. When the effect of the additional unconstitutional instructions on the "cold, calculated" is considered as well, there can be no question that the multiple jury instruction errors prejudiced Mr. Rutherford.

Mr. Rutherford's jury voted for death by the narrow margin of seven (7) to five (5). Had just one more juror found the scales tipped in favor of mitigation, Mr. Rutherford would have been sentenced to life -- not death. This Court cannot assume that the sentence would have been death if "the thumb" of an invalid aggravating circumstance -- not to mention one other finger -- "was removed from death's side of the scale." Stringer, 112 S. Ct. at 1137. This Court cannot find "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Chapman v. California, 386 U.S. 18, 24 (1967). Habeas relief is warranted,

CLAIM X

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

In its opinion affirming the Mr. Rutherford's conviction and sentence of death, this Court rejected Mr. Rutherford's claim finding that it **was** procedurally barred. Rutherford II, 727 So.

2d at n. 2, 219. Appellate counsel was ineffective in failing to raise this claim on direct appeal.

Prosecutorial argument and judicial instructions at Mr. Rutherford's capital penalty phase required that the jury impose death unless mitigation was not only produced by Mr. Rutherford, but also unless Ms. Rutherford proved that the mitigation he provided outweighed and overcame the prosecution's aggravation. The trial court then employed the same standard in sentencing Mr. Rutherford to death. This standard obviously shifted the burden to Mr. Rutherford to establish that life was the appropriate sentence and limited consideration of mitigating evidence to only those factors proven sufficient to outweigh the evidence in aggravation. According to this standard, the jury could not "full[y] consider[]" and "give effect to" mitigating evidence. Penry, 109 S. Ct. at 2951. This burden-shifting standard thus "interfered with the consideration of mitigating evidence." Boyde v. California, 110 S. Ct. 1190, 1196 (1990). Since "[s]tates cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the [death] penalty," McCleskey v. Kemp, 481 U.S. 279, 306 (1987), the argument and instructions provided to Mr. Rutherford's sentencing jury, as well as the standard employed by the trial court, violated the Eighth Amendment's "requirement of individualized sentencing in capital cases [which] is satisfied by allowing the jury to consider all relevant mitigating evidence." Blystone v. Pennsylvania, 110 S. Ct. 1078, 1083

(1990). See also Lockett v. Ohio, 438 U.S. 586 (1978); Hitchcock v. Dugger, 481 U.S. 393 (1987).

As explained below, the standard which the prosecutor argued, upon which the judge instructed Mr. Rutherford's jury, and upon which the judge relied is a distinctly egregious abrogation of Eighth Amendment principles, qualitatively different from the recently-established standards in Blystone and Boyde. In this case, Mr. Rutherford, the capital defendant, 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.

At the penalty phase of trial, prosecutorial argument and judicial instructions informed Mr. Rutherford's jury that death was the appropriate sentence unless "there are mitigating circumstances sufficient to outweigh the aggravating circumstances" (R. 781). Such instructions, which shift to the defendant the burden of proving that life is the appropriate sentence, violate the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975).

At the outset of the penalty phase, the jury was instructed as follows:

> The State and defendant will present evidence as to the nature of the crime and the character of the defendant and you're instructed that this evidence when considered with the evidence that you have already heard is presented so that you can determine, first, if sufficient aggravating circumstances exist that justify the

> imposition of the death penalty to outweigh the excuse me. Second if **there are mitigating circumstances sufficient to outweigh the aggravating circumstances** if any.

(R. 781) (emphasis added).

The prosecutor emphasized this burden-shifting instruction in his closing argument:

> If you find there are aggravating factors, then you then must decide whether the mitigating factors outweigh the aggravating **factors so that you can recommend life.** If they do not outweigh it, then your recommendation should be **death.**

(R. 898) (emphasis added).

> You must decide whether these factors outweigh the aggravating factors that have been proven.

(R. 900).

Finally, in his instructions before the jury retired to deliberate, the judge again explained that once aggravating circumstances were found the jury was to recommend death unless the mitigating circumstances outweighed the aggravating circumstances:

> However, **it is your duty to follow the law that will now be given to you by the** Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty **and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.**

(R. 920) (emphasis added).

Then, the trial court at sentencing stated:

> THE COURT: All right. The Court has heard the trial, heard the penalty phase, considered the verdicts of the jury, has considered the aggravating and mitigating circumstances, and considered the Presentence Investigation that I had run, and it was my conclusion that in this case there were four mitigating -- excuse me, four aggravating circumstances present, two of which merged, D and F merged, **leaving as a net of three aggravating circumstances in this case.**
>
> From my examination of the evidence I **could find only one mitigating circumstance,** that being the fact that the defendant had no significant prior criminal history, leaving as a balance of three aggravating circumstances to one mitigating circumstance, **and it is my understanding of the law that when that is the situation, that the law dictates that the defendant shall receive the ultimate penalty.**

(R. 948) (emphasis added).

> On the record, when I said the aggravating circumstances outweighed the mitigating **dictates that I am to impose the sentence,** it does not mean that I have lost my discretion, **but it means that to me that that is the sentence indicated under the law, and that in this case there's no reason that I can see to depart from that sentence.**

(R. 950) (emphasis added). The court thus believed that the existence of three aggravating factors and one mitigating factor "dictated" a death sentence -- the application of **a** presumption of death -- and that in such a situation, the defendant must provide a "reason . . . to depart from that sentence" -- requiring the defendant to shoulder the burden of establishing that life **was** the appropriate sentence.

The instructions, and the standard upon which the court based its own determination, violated the Eighth and Fourteenth

Amendments in three ways. Firstly, the instructions shifted the burden of proof to Mr. Rutherford on the central sentencing issue of whether he should live or die. Under Mullaney, this unconstitutional burden-shifting violated Mr. Rutherford's due process and Eighth Amendment rights. See also Sandstrom v. Montana, 442 U.S. 510 (1979); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988).[2] Moreover, the application of this unconstitutional standard at the sentencing phase violated Mr. Rutherford's right to a fundamentally fair and reliable capital sentencing determination, i.e., one which is not infected by arbitrary, misleading and/or capricious factors. Jackson.

Secondly, in being instructed that mitigating circumstances must outweigh aggravating circumstances before the jury could recommend life, **the jury was effectively 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, 107 S. Ct. 1821 (1987). Thus, the jury was precluded from considering mitigating evidence, Hitchcock, and from evaluating the "totality of the circumstances" in considering the

---

2 The jury instruction had the same effect as an instruction which told the jury to "presume" death appropriate once any aggravating factors were established. The prosecutor argued for a presumption. For a presumption to arise the word "presumed" need not be used. When the jury is told that once certain predicate facts have been established, i.e., aggravating circumstances, it must reach a particular result, i.e., death is the appropriate sentence, a mandatory presumption has been employed. That is what occurred here.

appropriate penalty. State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973). According to the instructions, jurors would reasonably have understood that only mitigating evidence which rose to the level of "outweighing" aggravation need be considered. We must presume that the jury was misled by this instruction, resulting in a death recommendation despite factors calling for life. See Espinosa v. Florida, 112 S. Ct. 2926 (1992). We must also presume that the trial court gave great weight to the jury's recommendation. Espinosa; Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). In Mr. Rutherford's case the trial court did not understand the law regarding the weighing of aggravating and mitigating factors. Presumably, then, the court not only took the jury's error-based recommendation into consideration, but also incorrectly weighed the aggravators and mitigators on his own, doubling the impact of this unconstitutional burden-shifting on Mr. Rutherford's sentencing. See Espinosa.

Thirdly, the process is qualitative, not quantitative. A death sentence cannot be imposed merely because the total number of aggravating circumstances exceeds the total number of mitigating ones. As this Court has stated:

> It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present.

State v. Dixon, **283** So. 2d 1, 10. The constitutionality of the statute depends in part upon the faithful application of this standard. Proffitt v. Florida, 428 U.S. 242 (1976). The trial judge did not apply this standard, and Mr. Rutherford's death sentence must be reversed.

At least three times, the trial judge expressed his use of a counting process in determining the sentence to be imposed:

> [I]t was my conclusion that in this **case** there were four mitigating-- excuse me, four aggravating circumstances present, two of which merged, D and F merged, leaving as **a net of three aggravating circumstances** in this case. From my examination of the evidence I **could find only one mitigating** circumstance, that being the fact that the defendant had no significant prior criminal history, **leaving as a balance of three aggravating circumstances to one mitigating circumstance,** and it is my understanding of the law that when that is the situation, that the law **dictates** that the defendant shall receive the ultimate penalty.

(R. 948) (emphasis **added)**. The judge reiterated this same reasoning in his written findings of fact in support of the sentence:

> Balancing the aggravating factors against the mitigating **factors, the Court** determines that four of the **aggravating** circumstances exist but because "d" and "f" overlap, it **leaves a net of three aggravating factors present,**
>
> **On the other hand the Court could find only one mitigating factor present** leading the Court to the conclusion that the appropriate sentence in this case is the sentence that was recommended by the trial jury by a majority of seven.

Furthermore, the judge denied a requested penalty phase jury instruction which would have advised the jury that a counting process was not the proper way to evaluate the aggravating and mitigating circumstances (R. 155).

In Arango v. State, 411 So. 2d 172, 174 (1982), this Court held that a capital sentencing jury must be

> told 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 only be given **if the state showed the aggravating circumstances outweighed the mitigating circumstances.**

Accord State v. Dixon, 283 So. 2d 1 (Fla. 1973) (emphasis added). This Court has, in fact, held that shifting the burden to the defendant to establish that the mitigating circumstances outweigh the aggravating circumstances would conflict with the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), as well as with Dixon. Aranso. Thus, Mr. Rutherford was sentenced to death in violation of Florida law in effect at the time of his trial and direct appeal,

The constitutional infirmity of these instructions and arguments is not simply that they placed the burden of proof on Mr. Rutherford -- which they did -- but also that they precluded the jury from considering mitigating evidence unless that evidence was "sufficient to outweigh" aggravation. Thus, although the jury was instructed to consider statutory and nonstatutory mitigation, the burden-shifting instruction essentially negated those instructions by telling the jury that

only mitigation "sufficient to outweigh" aggravation need be considered. The jurors' understanding of the instructions would have resulted in their failure to fully and fairly assess and consider mitigating factors calling for a life sentence.

Lockett instructs that a capital defendant must **be** allowed to present any evidence regarding his character and background and the circumstances of the offense which **calls** for a sentence less than death, and Penry mandates that a capital sentencer must be able to "full[y] consider[]" and "give effect to" that evidence. See **also** Eddings v. Oklahoma, 455 U.S. 104 (1982). When a capital sentencer's view of the procedure to be followed in determining sentence does not provide for "full consideration" or for "giv[ing] effect to" mitigating evidence, the sentencing process does not conform to the Eighth amendment. Penry; Lockett; Hitchcock; Eddings.

This is precisely the effect resulting from the burden-shifting instructions given here. The procedure the jury followed did not allow for a "reasoned moral response" to the issues at Mr. Rutherford's sentencing or permit full consideration of mitigation.

In this case, because of the burden-shifting instruction, it is presumed that the jury understood that it was precluded from considering life unless it found the defense presented mitigating circumstances that outweighed the aggravating circumstances. Espinosa. This prevented Mr. Rutherford's jury from providing Mr. Rutherford the "particularized consideration" the Eighth

Amendment requires. The Eighth Amendment requires that capital sentencers be able to "fully consider" and "give effect to" evidence of mitigation. Penry, 109 S. Ct. at 2951. This is necessary in order for a capital sentencer to provide a "reasoned **moral** response to the defendant's background, character, and crime." Id. (emphasis in original) . Undeniably, the presentation of evidence in mitigation of punishment involves the jury's humane, merciful reaction to the defendant. Peek v. Kemp, 784 F.2d 1479, 1490 and n.12 (11th Cir. 1986) (en banc) (the role of mitigation is to present "factors which point in the direction of mercy for the defendant"); see also Tucker v. Zant, 724 F.2d 882, 891 (11th Cir.), vacated for reh'g in banc, 724 F.2d 898 (11th Cir. 1984), reinstated in relevant part sub nom. Tucker v. Kemp, 762 F.2d 1480, 1482 (11th Cir. 1985)(in banc).

Not permitting the jury to make **a** "reasoned judgment" or to know it has discretion to recommend life forecloses the very reaction that evidence is intended to evoke, and therefore precludes the sentencer from fully considering relevant, admissible mitigating evidence, in violation of Lockett, Eddinss, Arango and Hitchcock. See also Skipper v. South Carolina, 476 U.S. 1 (1986).

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness and reliability of Mr. Rutherford's death sentence. Appellate counsel **was** ineffective for failing to raise this issue. Habeas relief is warranted.

CLAIM XI

THE SENTENCING COURT ERRED BY FAILING TO PROPERLY AND TIMELY IMPOSE A WRITTEN SENTENCE OF DEATH, IN DIRECT VIOLATION OF FLORIDA LAW AND MR. RUTHERFORD'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE.

In its opinion affirming the circuit court's denial of postconviction relief, this Court held that, as a matter of **law,** this claim was procedurally barred because it could have been raised on direct appeal. Rutherford II, 727 So. 2d at n. 2, 219. Appellate counsel was ineffective in failing to raise this claim on direct appeal.

At sentencing the court stated:

> THE COURT: All right. The Court has heard the trial , heard the penalty phase, considered the verdicts of the jury, has considered the aggravating and mitigating circumstances, and considered the Presentence Investigation that I had to run, and it was my conclusion that in this case there were four mitigating -- excuse me, four aggravating circumstances present, two of which merged, D and F merged, leaving as a net of three aggravating circumstances in this **case.**
>
> From my examination of the evidence I would find only one mitigating circumstance, that being the fact that the defendant had no significant prior criminal history, **leaving as** a **balance of three aggravating circumstances to one mitigating circumstance, when that is the situation,** that the law **dictates** that the defendant **shall** receive the ultimate penalty.

(R. 948)(emphasis added). The court continued:

> . . . it will be the judgment of the Court and the sentence of law that for the said offense of murder in the first degree, the

> defendant shall be electrocuted in the electric chair of the State of Florida.

(R. (948). Finally, the court added:

> The record will reflect that the Court will file written findings to support this sentence in the court file.
>
> On the record, when I said the aggravating circumstances outweighed the mitigating dictates that I am to impose the sentence, it does not mean that I have lost my discretion, but it means that to me that that is the sentence **indicated under the law.**

(R. 950) (emphasis added).

Sentencing was conducted on December 9, 1986, but not until December 17, 1986, did the court enter a written Order wherein facts supporting the imposition of the death penalty were found. this was clearly not a contemporaneous, independent weighing that the applicable statutory and constitutional standards require.

Written findings of fact in support of a death sentence are required. Fla. Stat. § 921.141(3); see also Van Royal v. State, 497 So. 2d 625 (Fla. 1986) . Florida law requires the sentencing court to state in writing specific reasons for the imposition of the death penalty. the sentencing court failed to properly state its reasons justifying the death sentence on the record. Grossman v. State, 525 So. 2d 833 (1988); Patterson v. State, 513 So. 2d 1257 (Fla. 1987); Van Royal v. State, 497 So. 2d 625 (F;a. 1986); State v. Dixon, 283 So. 2d 1 (Fla. 1973).

This Court's:

> holding in this respect is more than **a** mere technicality. The statute itself requires the imposition of a life sentence if the written findings are not made. Section

> 921.141(3), Fla. Stat. (1989) . (They) have consistently emphasized the necessity that the weighing of aggravating and mitigating circumstances take place at sentencing. Patterson v. State, 513 So. 2d 1257 (1987); Muehleman v. State, 503 So. 2d 310 (Fla.) cert. denied, **484 U.S. 882 (1987)** . The preparation of written findings after the fact runs the risk that the "sentence **was** not the result of a weighing process or the 'reasoned judgment' of the sentencing process that the statute and due process mandate." Van Royal v. State, 497 So. 2d 625, 630 (Fla. 1987) (Ehrlich, J., concurring).

Christopher v. State, 583 So. 2d 642 (Fla. 1991).

The fundamental precept of this Court's and the United States Supreme Court's modern capital punishment jurisprudence is that the sentencer must afford the capital defendant an **individualized** capital sentencing determination. This Court has therefore consistently held that the trial judge must engage in an independent and reasoned process of weighing aggravating and mitigating factors in determining the appropriateness of the death penalty in **a** given case:

> Explaining the trial judge's serious responsibility, we emphasized, in State v. Dixon:
>
> [T]he **trial** judge **actually determines the sentence to be** impose -- guided by, but not bound by, the findings of the jury. To a layman, no capital crime might appear to be less that heinous, but a trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard criminal activity which can only be developed by involvement with the trials of numerous defendants. Thus the inflamed emotions of jurors can no longer sentence a man to die.
> . . .

> The fourth step **required** by Fla. Stat. sec. 921.141, F.S.A., is that **the trial judge justifies his sentence of death in writing,** to provide the opportunity for meaningful review by this Court. Discrimination or capriciousness cannot stand where reason is required, and this is an important element added for the protection of the convicted defendant.

Patterson v. State, 513 So. 2d 1257 (Fla. 1987) (citations omitted) (emphasis added).

In this case the trial judge did not prepare his own findings until well after the sentencing. In fact, the record here reflects no contemporaneous independent weighing of aggravating and mitigating circumstances by the sentencing judge: ". . . leaving as a balance of three aggravating circumstances to one mitigating circumstance . . ." (R. 948). This **was** clearly not **a** "meaningful weighing" as required by Florida law.

This Court has addressed the ramifications of a trial judge's failure to engage in a meaningful weighing of aggravating and mitigating circumstances before imposing a death sentence. In a number of **cases,** the issue has been presented where findings of fact were issued after the death sentence was actually imposed. Nibert v. State, 508 So. 2d 1 (Fla. 1987); Van Royal v. State, 497 So. 2d 625 (Fla. 1986). In Van Royal, this Court set aside the death sentence because the record did not support a finding that the imposition of that sentence was based on **a** reasoned judgment. In his concurring opinion, Chief Justice Ehrlich explained:

> The statutory mandate is clear. This Court speaking through Mr. Justice Adkins in

> the seminal case of State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert denied sub nom. Hunter v. Florida, 416 U.S. 943, 94 S. Ct. 1950, 40 L.Ed 2d 295 (1974), said with respect to the weighing process:
>
> > It must **be** emphasized that the procedure to be followed by the trial judges and juries is **not a mere counting process of X number** of **aggravating circumstances,** but rather a **reasoned judgment** as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present.
>
> 283 So. 2d at 10 (emphasis added).

497 So. 2d at 629-30.

The duty by the legislature directing that a death sentence **may** only be imposed when there are specific written findings in support of the penalty serves to provide for meaningful review of the death sentence and fulfills the Eighth Amendment requirement that a death sentence not be imposed in an arbitrary and capricious manner. See Gregg v. Georgia, 428 U.S. 153 (1976); Proffit v. Florida, 428 U.S. 242 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

The specific written findings allow the sentencing body to demonstrate that the sentence has been imposed based on an **individualized** determination that death is appropriate. cf. State v. Dixon, 283 So. 2d 1 (1973). As this Court stated:

> We reiterate . . . that the sentencing order should reflect that the determination as to which aggravating and mitigating circumstances apply under the facts of a particular case is the result of "a reasoned judgment" by the trial court. Weighing the aggravating and mitigating circumstances is

> not a matter of merely listing conclusions. Nor do the written findings of fact merely serve to "memorialize" the trial court's decision. Specific findings of fact provide this Court with the opportunity for **a** meaningful review of a defendant's sentence. Unless the written findings are supported by specific facts and **are** timely filed, this Court cannot be assured the trial court imposed the death sentence based on a "well-reasoned application of he aggravating and mitigating factors".

Rhodes v. State, 547 So. 2d 1201, 1207 (Fla. 1989)(citations omitted). This is consistent with the United States Supreme Court's recent holding that the sentencer must make a reasoned moral response" to the evidence when deciding to impose death. Penry v. Lynaugh, 109 S. Ct. 2934 (1989).

This Court has strictly enforced the written findings requirement mandated by the legislature, Rhodes, supra, and has held that a death sentence may not stand when "the judge did not recite the findings on which the death sentence is based into the record." Van Royal, 487 So, 2d at 628. The imposition of such a sentence is contrary to the "mandatory statutory requirement that death sentences be supported by specific findings of fact." Id. The written findings serve to "assure [] that the trial judge based the [] sentence on a well-reasoned application of the factors set out in section 921.141(5) and (6)" The written findings of fact as to the aggravating and mitigating circumstances constitutes an **integral part** of the court's decision; they do not merely serve to memorialize it.

However, here, the trial court did not even "memorialize" the oral pronouncement in the written findings. The trial

court's oral sentence was purely perfunctory. There is no explanation as to why the aggravating factors outweigh the mitigating factors, only that they outnumber the mitigating factors (R. 948). This crucial weighing was not done until a full week later. This indicates that the court did not make a well-reasoned application of the factors at the oral sentencing.

The written findings assure that this integral part of capital sentencing, the weighing aggravating and mitigating factors is well reasoned. Here, the record shows no such specific findings of fact that indicate that the trial court made a well reasoned decision as to why Mr. Rutherford should die by electrocution. Thus the trial court denied Mr. Rutherford his right to an individualized and reliable sentencing determination.

Appellate counsel was well aware that the lower court erred, because the judge indicated at the sentencing hearing that he was unprepared to file his written order (R. 947). In addition, the sentencing order was not included in the original record on appeal. In fact, appellate counsel attached the sentencing order to his Initial Brief, yet he failed to raise this fundamental error. Habeas relief is proper.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Rutherford respectfully urges this Court to grant habeas corpus relief.

CERTIFICATE OF SERVICE

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 December 21, 1999.

GREGORY C. SMITH
Florida Bar No. 279080
Capital Collateral Counsel -
Northern Region

FOR C. ANDREW THOMAS
Florida Bar No. 0317942
Chief Assistant CCC-NR
CAPITAL COLLATERAL COUNSEL -
NORTHERN REGION
Post Office Drawer 5498
Tallahassee, FL 32314-5498
(850) 487-4376

COUNSEL FOR PETITIONER

Copies furnished to:

Barbara Yates
Assistant Attorney General
Office of the Attorney General
The Capitol
Tallahassee, Florida 32399-1050