IN THE SUPREME COURT OF FLORIDA

NO. SC01-2371

MARC JAMES ASAY,

Petitioner,

v.

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

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

This is Mr. Asay'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 Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, claims demonstrating that Mr. Asay was deprived of the right to a fair, reliable, and individualized sentencing proceeding and that the proceedings resulting in his convictions and death sentences violated fundamental constitutional imperatives.

Citations shall be as follows: The record on appeal from Mr. Asay's 1988 trial shall be referred to as "R.___" followed by the appropriate page number. All other references will be self-explanatory or otherwise explained herein.

INTRODUCTION

Significant errors which occurred at Mr. Asay'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 issue regarding Mr. Asay's absence from a significant portion of jury selection including the exercise of peremptory strikes and final acceptance of the jury panel. Additionally, the trial court unconstitutionally limited Mr. Asay from

presenting mitigating evidence and refused to weigh and consider mitigation that was presented. These errors violated Mr. Asay's fundamental rights to a fair trial and individualized sentencing.

Appellate counsel's failure to present the meritorious issues discussed in this petition demonstrates that his representation of Mr. Asay involved "serious and substantial deficiencies." Fitzpatrick v. Wainwright, 490 So. 2d 938, 940 (Fla. 1986). The issues which appellate counsel neglected demonstrate that counsel's performance was deficient and that the deficiencies prejudiced Mr. Asay. "[E]xtant legal principles . . . provided a clear basis for . . . compelling appellate arguments]." 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. Wainwright, 474 So. 2d 1162, 1164 (Fla. 1985). Individually and "cumulatively," Barclay v. Wainwright, 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). As this petition will demonstrate, Mr. Asay is entitled to habeas relief.

REQUEST FOR ORAL ARGUMENT

Due to the seriousness of the issues involved, Petitioner respectfully requests oral argument.

PROCEDURAL HISTORY

Marc James Asay was indicted on two counts of first degree premeditated murder on August 20, 1987, in Duval County, Florida (R. 11). Trial commenced September 26, 1988 and Mr. Asay was convicted as charged September 29 (R. 182-1081). The jury recommended death by votes of 9-3 on both counts (R. 143-44) and the trial court imposed sentences of death(R. 156-59). Mr. Asay appealed his convictions and sentences, which were affirmed. Asay v. State, 580 So. 2d 610 (Fla. 1991). He filed his Rule 3.850 post conviction motion and amendment thereto on March 15, 1993,and November 24, 1993. On February 12, 1996, the trial court held a Huff hearing, and on March 19, 1996 the trial court entered an order denying relief on some claims and granting an evidentiary hearing on other claims. The evidentiary hearing was conducted on March 25-27, 1996. On April 23, 1997, the court issued an order denying relief. On appeal, this Court affirmed the circuit court's denial of Rule 3.850 relief. Asay v. State, 769 So. 2d 974 (Fla. 2000), reh. denied (October 26, 2000). Mr. Asay now files 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. Asay's convictions and sentences of death.

Jurisdiction in this action lies in this Court. See, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981). The fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Asay's direct appeal. See Wilson, 474 So. 2d at 1163; Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); cf. Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Asay 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 proper on the basis of Mr. Asay's claims.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Asay asserts that is capital convictions and sentences of death were obtained and then affirmed during this Court's appellate review process in violation of his rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

CLAIM I

MR. ASAY WAS ABSENT DURING CRITICAL STAGES OF THE PROCEEDING, CONSEQUENTLY HIS FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS AND RIGHT TO DUE PROCESS WERE VIOLATED. MR. ASAY'S TRIAL ATTORNEY UNLAWFULLY WAIVED HIS PRESENCE. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE ON DIRECT APPEAL AND MR. ASAY'S ABSENCE CONSTITUTED FUNDAMENTAL ERROR. CONSEQUENTLY, CONFIDENCE IN THE CORRECTNESS AND FAIRNESS OF THE RESULT HAS BEEN UNDERMINED.

Mr. Asay was absent during a critical stage of jury selection. The record reflects that challenges for cause and peremptory strikes and final acceptance of the jury panel were held at the bench and that Mr. Asay was not present.

During the first round of peremptory and cause

challenges, the record reflects that this procedure was held at the bench out of the hearing of the jury (R. 302). Mr. Asay's trial attorney stated: "let's go through it and I'll go back and ask him [Mr. Asay] if it is agreeable". Counsel for both sides then exercised challenges. It is clear from the record that Mr. Asay was not included for this round of challenges even though counsel apparently conferred with Mr. Asay after that round concluded (R. 313). During the second round of challenges however, the same procedure was employed at the bench wherein Mr. Asay was not included. This time however, defense counsel did not confer with Mr. Asay (R. 356) (wherein strikes are exercised and defense counsel accepts panel at the bench without consulting Mr. Asay). This becomes even more clear, because Mr. Asay addressed the court regarding his dissatisfaction with his trial attorney and made a pro se motion and objections. Among the items Mr. Asay detailed to the court was the fact that he did not have an opportunity to talk to his attorney, seek out witnesses and that juror Sands (who was added to the jury during the second round when Mr. Asay was not consulted) was a close friend of Mr. Asay's brother-in-law, and that he, Mr. Asay, had a conflict with his brother-in-law and that he felt Mr. Sands could not be trusted to be an impartial juror (R. 538). The trial court denied Mr. Asay's pro se motion to dismiss his

attorney[1] and stated that the issue regarding jurors could be done anytime during the trial (R. 544). Mr. Asay stated his desire to let the jury know his concerns, the judge threatened to have him "bound and gaged" if he intended to disrupt the proceedings (R. 544). Mr. Asay then requested to speak with his lawyer which the court allowed. Mr. Asay stated that he would not disrupt the trial (R. 548) which proved to be true. Mr. Asay's attorney stated that they would proceed with the trial but that Mr. Asay did not want to abandon any of his objections (R. 546). Later in the trial, Mr. Asay's attorney requested to use a peremptory challenge against juror Sands (R. 736). Mr. Asay confirmed the fact that he wanted Mr. Sands off of the jury, the trial judge took the issue under advisement and continued with the witnesses (R. 742). Just before guilt phase closing arguments, the trial court replaced Mr. Sands with alternate juror Russell and made Mr. Sands an alternate. The trial court told Mr. Asay that he would have no right to appeal because he agreed to the replacement (R. 901).[2] Mr. Asay however, never agreed to waive his presence at this critical stage of the proceedings, i.e., the

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[1] Issues regarding the denial of Mr. Asay's request was raised on direct appeal, and denied. See Asay v. State, 580 So. 2d 610, 612 fn1 (Fla. 1991).

[2] Discussions on the record concerned whether juror Sands could be removed by a peremptory strike at that point in the trial since the jury had already been sworn. The state objected, asserting that it was improper.

exercising of strikes and final acceptance of the panel, nor did he ratify the procedure employed. To the extent Mr. Asay's trial attorney waived Mr. Asay's presence by his exclusion of Mr. Asay, it was an unlawful waiver. Consequently, Mr. Asay's trial attorney did not object to Mr. Asay's absence and it was not raised on direct appeal. Petitioner asserts that Mr. Asay himself adequately preserved the issue by raising it himself before the trial court (R. 538), and appellate counsel was deficient in failing to raise it. Nevertheless, Mr. Asay's right to be present during this critical stage denied him due process and his absence constitutes fundamental error.

This Court addressed a similar issue in Francis v. State, 413 So. 2d 1175 (Fla. 1982)(receeded from to extent language states there is a completely unfettered right to exercise peremptory challenges). See Muhammad v. State, 782 So. 2d 343, 352 FN4. (Fla. 2001). In Francis, this Court addressed a situation wherein the defendant was present for some of the examination of prospective jurors during voir dire but where the remainder of the jury selection, specifically challenges, were conducted in chambers without the defendant. Francis at 1176-1177. There, the defense attorney waived Francis' presence without Francis' express consent. Francis at 1178. This Court stated that a defendant "has a constitutional right to be present at the stages of his trial where fundamental fairness might be thwarted by his absence. Francis at 1177,

citing Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330 (1934)and Faretta v. California, 422 U.S. 806 (1975). The Francis Court also recognized that Florida Rule Criminal Procedure 3.180(a)(4) and that "challenging of jurors is an essential stage[] of a criminal trial where a defendant's presence is mandated. Francis at 1177. Mr. Asay was similarly absent from this "essential stage" of his trial and his presence was "mandated". Accordingly, error occurred as a matter of substantive state and federal constitutional due process law as well as a matter of Florida procedure.

In reversing for a new trial, this Court noted that Francis was absent from a crucial stage, his absence was not voluntary and that he "was not questioned as to his understanding of his right to be present during his counsel's exercise of his peremptory challenges", that the "record did not affirmatively demonstrate a knowing waiver or acquiescence", that Francis' silence after the procedure had occurred did not constitute a valid waiver, and that the state failed to show that the waiver was knowing and intelligent. Francis at 1178. The same is true in Mr. Asay's case.

The Francis Court found the error could not be deemed harmless and could not assess the extent of prejudice due to the inability of Francis to consult with counsel during peremptory challenges. Francis at 1178. The same is true in Mr. Asay's case. It cannot be said that Mr. Asay's absence

from this stage is harmless because it is impossible to determine the effect upon the jury composition.

Although Francis was not physically in the same room where the challenges occurred and Mr. Asay was physically in the room but presumably not within hearing (proceedings held outside the hearing of jury,[3] Mr. Asay was likewise involuntarily absent from the exercising of peremptory challenges, as well as challenges for cause and the final acceptance of the panel and he did not thereafter ratify the procedure.

"Criminal defendants have a due process right to be physically present in all critical stages of trial, including the examination of prospective jurors." Muhammad, 782 So. 2d 343, 351 (Fla. 2001). The exercising of jury challenges is a critical stage of the proceedings where a defendant is entitled to be present. Id. In Muhammad, this Court held that where the defendant was present in the courtroom but absent at the bench wherein strikes were made,(like Mr. Asay) that although the defendant was absent during this critical stage of jury selection, it was not reversible error because: 1) defendant was present in courtroom during sidebars, 2) majority of voir dire took place in open court, 3) defendant's

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[3] There is no evidence in the record to show that when the jury could not hear the proceedings at the bench, that Mr. Asay could.

attorney consulted with him on juror selection, 4) defendant ratified procedure employed by trial court and accepted the jury, and 5) defendant responded affirmatively when asked, after selections were made, whether he had had enough time to discuss selections with his attorney. The same cannot be said in Mr. Asay's case. Mr. Asay did not waive his right to be present and/or consult with his attorney (with the exception that apparently trial counsel did confer with Mr. Asay after the first round, only,[4] he was not questioned regarding that right, nor did he acquiesce to the procedure as evidenced by his bringing to the court's attention the juror Sands issue. Additionally, as stated in Francis, silence is not an adequate waiver. Francis at 1178.

Arguably, there is no distinction between whether a defendant is out of the room when peremptory challenges are made and he is not consulted and a situation wherein the defendant is present in the courtroom but out of the hearing of the challenges and is not consulted about those challenges. In both situations, the defendant is not "present" in a meaningful sense. Mere presence in the courtroom but

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[4] Although Mr. Asay's trial counsel did confer with him after the first round of challenges had been made (R.313), that action did not allow for Mr. Asay to participate during those strikes, moreover, trial counsel did not consult with Mr. Asay at all regarding the second round of challenges and his ultimate acceptance of the panel. Thus, the defect was not cured.

exclusion as to what is going on is a vacant notion of what is contemplated when the presence of a defendant during critical stages of the proceedings is contemplated. But see, Boyette v. State, 688 So. 2d 308 (Fla. 1996).

Petitioner asserts that appellate counsel was ineffective for failing to raise this issue. It was apparent and clear on the record that Mr. Asay was not consulted regarding the final round of voir dire. Had Mr. Asay been included during the exercising of strikes before the panel was accepted by his attorney, he would have had an opportunity to voice his concerns at that time to his attorney and the dynamics of the jury selection and final composition would have been altered. Instead, it occurred after the fact, after the jury was sworn and after the jury had heard the evidence. Although juror Sands was made an alternate, the fact that the jury selection process and final composition would nevertheless have been altered had Mr. Asay had been included in the process at the time it occurred, is inescapable. There is no evidence in the record that the alternate who replaced Mr. Sands would necessarily wind up on the final panel or that the final composition would have been the same had Mr. Asay consulted with his attorney during the process of exercising challenges. Additionally, the belated peremptory strike was Mr. Asay's tenth strike. Arguably, Juror Sands should have been excused for cause, thus, Mr. Asay would have had an additional

peremptory strike to use if he chose to.

In order for Mr. Asay to prevail on ineffective assistance of appellate counsel, he must meet the test of deficient performance and prejudice enunciated in Strickland v. Washington, 466 U.S. 668 (1984). Francis was decided by this Court in 1982, six years before Mr. Asay's trial and approximately seven years before his direct appeal was filed.[5] A criminal defendant's Sixth and Fourteenth Amendment rights to be present at all critical stages of the proceedings against him was a settled question at that time. Illinois v. Allen, 397 U.S. 337, 338 (1970); Hopt v. Utah, 110 U.S. 574, 579 (1984); Diaz v. United States, 223 U.S. 442 (1912); Proffit v. Wainwright, 685 F. 2d 1227 (11th Cir. 1982). The standard announced in Hall v. Wainwright, 805 F. 2d 945, 947 (11th Cir. 1986), is that "[where 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." The Francis court in 1982, recognized that constitutional right existed.

Furthermore, appellate counsel could have raised ineffective assistance of trial counsel because trial counsel

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[5] Mr. Asay's Initial Brief was filed in 1989.

did not ensure Mr. Asay's presence or consult with him for the final round of voir dire and acceptance of the final panel. It was apparent from the record that trial counsel did not consult Mr. Asay and that Mr. Asay brought the juror Sands issue to the court's attention. See e.g. Blanco v. Wainwright, 507 So. 2d 1377, 1384 (Fla. 1987)(recognizing exceptions where counsel may successfully raise ineffectiveness on direct appeal when apparent on the record). In Garcia v. State, 492 So. 2d 360 (Fla. 1986), this Court addressed the issue of a defendant's absence at critical stages (although not specifically the exercising of peremptory challenges). The Court recognized that a defendant has a constitutional right to be present during critical stages of the trial citing among other cases, Francis v. State, and that a waiver of a defendant's presence at a crucial stage "without acquiescence or ratification by the defendant is error" Garcia, at 363 citing State v. Melendez, 244 So.2d 137 (Fla. 1971) but found no prejudice to Garcia on the absence issue. Thus, appellate counsel would have had authority to raise the issue and trial counsel's improper waiver of Mr. Asay's presence.

Additionally in Rose v. Dugger, 508 So. 2d 321 (Fla. 1987), this Court addressed Rose's assertion that his absence from the questioning of two prospective jurors was fundamental error and that appellate counsel was ineffective for failing

to raise the issue. The Rose Court denied relief because the record did not support Rose's absence allegation, that the jurors in question were ultimately excused for cause and there was no prejudice. Rose, at 324-325. Similarly, in 1988, this Court addressed the issue wherein a defendant was absent for the excusal of two jurors in Lambrix v. State, 529 So. 2d 1110 (Fla. 1988). There, the Court acknowledged Francis stating:

> In Francis the defendant was involuntarily absent when peremptory challenges were made, was not advised by his lawyer regarding the challenges, and thus the defendant's absence from the courtroom was reversible error. We held that his absence could not be waived by counsel alone. We see no reason to extend that protection beyond the situation in which it arose. That part of the jury selection process requiring the defendant's presence is limited to the question, challenging, impaneling and swearing of jurors. Fla. R. Crim.P. 3.180 (a)(4).

Lambrix, at 1111-1112. Lambrix was distinguished from Francis because there the excusal of the jurors was not part of voir dire. Thus, the legal landscape was such that appellate counsel could have and should have raised this meritorious issue in Mr. Asay's case. As the cases above demonstrate, other similar issues were being raised by appellate counsel during a relevant time frame.

The Strickland prejudice prong is established because had appellate counsel raised the issue, he could have demonstrated that due to Mr. Asay's absence from the exercising of peremptory challenges and the acceptance of the final panel without his consultation, the dynamics of the challenges and

ultimate constitution of the jury were effected. It cannot be said with confidence that the jury that heard Mr. Asay's case would have been the same had Mr. Asay been given the opportunity to aid his attorney in the selection process. See e.g, Chief Justice Harding's dissenting opinion in State v. Ellis, 718 So. 2d 749, 750 (Fla. 1998). Moreover, it cannot be said that there is no reasonable possibility that the outcome would be different, whether regarding the guilt determination or the sentencing recommendation. Having established deficient performance and prejudice, Mr. Asay should be granted a new trial.

In 1995, this Court decided Coney v. State, 653 So. 2d 1009 (Fla. 1995)(interpreting Fla. R. Crim P. 3.180 and prospectively ruling "defendant has a right to be physically present at the immediate site where pretrial juror challenges are exercised" Coney at 1013 FN1) which was then superseded by Amendments to Florida Rules of Criminal Procedure, 685 So. 2d 1252, 1254 n. 2 (Fla. 1996) and receded from in part by Boyette v. State, 688 So. 2d 308, 309 (Fla. 1996). See also, Henderson v. State, 698 So. 2d 1205 (Fla. 1997) and Hill v. State, 700 So. 2d 646 (Fla. 1997) for prospective application of Coney. It was not until 1998 in Carmichael v. State, 715 So. 2d 247 (Fla. 1998), wherein the Court stated that Carmichael should have timely raised the Coney issues in the lower court. Carmichael at 249. See also Gibson v. State, 661

So.2d 288 (Fla. 1995).

First, Mr. Asay did present this issue to the lower court (R. 538). Additionally, Carmichael and Gibson are distinguishable from Mr. Asay's case in that in those cases the trial attorney consulted with the defendant immediately prior to jury selection and "neither Carmichael nor his lawyer expressed any interest in Carmichael being present at the bench during jury selection" Carmichael at 249. See also State v. Ellis, id. at 750; Lopez v. State, 718 So. 2d 754, 755 (Fla. 1998); Lee v. State, 713 So. 2d 1003, 1004 (Fla. 1998). The same cannot be said in Mr. Asay's case.[6] Furthermore, as noted by this Court, Carmichael had the benefit of the Coney decision at the time of his trial where Mr. Asay did not.

Ultimately, Mr. Asay was denied a meaningful presence during the exercising of his peremptory challenges and final acceptance of the jury. The exercising of peremptory challenges is not merely a legal exercise. Rather, Mr. Asay would have been able to assist his attorney in this crucial stage. "The exercise of peremptory challenges has been held to be essential to the fairness of a trial by jury and has been described as one of the most important rights secured to a

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[6] The fact that Mr. Asay brought the issue of juror Sands to the trial court's attention demonstrates his interest in the process.

defendant". Francis at 1178-1179. He was denied this right.

To the extent that Mr. Asay's actions at the trial were not adequate to preserve the issue for appellate review, petitioner asserts that Mr. Asay's absence from the exercising of his peremptory challenges and final acceptance of the jury constituted fundamental error therefore no trial objection was required in order to raise this issue on appeal. The issue raised here, is not merely one of procedure that would require Mr. Asay to fit within the narrow window of Coney. Rather, the issue is fundamental constitutional due process as in Francis where the issue was raised for the first time in a motion for new trial. Frances at 1177. See also e.g. Chief Justice Harding's concurring opinion in Carmichael v. State, 715 So. 2d 247, 250 (Fla. 1988)("Nevertheless, an error regarding a defendant's right to be present at a critical stage in a trial can be raised for the first time on appeal or in a motion for new trial"). Petitioner recognizes disagreement with this assertion. See, e.g, Lee v. State, 713 So. 2d 1003 (Fla. 1998). Lee however, as stated above, is distinguishable. Petitioner asserts that Mr. Asay's constitutional and due process rights were violated (above and beyond the Coney procedural requirements) because the strikes occurred outside of his presence, i.e., although he was in the courtroom he was denied a meaningful presence during this crucial stage of the proceedings because they were conducted

in such a manner as to exclude Mr. Asay from hearing and contributing helpful information to his attorney regarding the exercise of those strikes. "Presence" surely must include a meaningful opportunity to confer with one's trial attorney. However, if a meaningful opportunity does not include the right to be included in the challenges at the bench and acceptance of the final jury, the constitutional right to be "present" during this crucial stage of the proceedings is a hollow concept. In further support of this assertion, petitioner notes decisions that have recognized fundamental error occurring during the jury selection process. For example, in a negligence action wherein the trial court refused to permit a third round of peremptory challenges, the Fifth District Court of Appeals relied upon Gilliam v. State, 514 So. 2d 1098 (Fla. 1987) to find that "a trial judge cannot infringe upon a party's right to challenge any juror" and that to do so was per se reversible error. Preacher v. Cohn, 786 So. 2d 1282, 1283-1284 (Fla. 5th D.C.A. 2001). While, Mr. Asay's trial court did not specifically deny Mr. Asay an opportunity to exercise his challenges, his trial attorney did by his actions of excluding Mr. Asay from the process, thereby infringing upon Mr. Asay's right to meaningfully exercise his challenges. Also, although not stated in specific terms of fundamental error, the Fourth District Court of Appeals reversed and remanded a case wherein no timely objection was

made to jury selection issues. The court distinguished Carmichael stating: "although appellant was in the courtroom, there is no evidence in the record that he had the opportunity to confer with his lawyer prior to the conference. Further the trial judge's inaccurate reporting of the sidebar discussion deprived appellant of the opportunity to make an informed decision concerning those particular jurors." Eaves v. State, 730 So. 2d 717 (4th D.C.A. Fla. 1999).

Accordingly, for the foregoing reasons, Petitioner respectfully requests that this Court grant Mr. Asay habeas relief in the form of a new trial.

CLAIM II

MR. ASAY'S DEATH SENTENCES ARE UNCONSTITUTIONAL BECAUSE MR. ASAY WAS IMPERMISSIBLY LIMITED FROM PRESENTING MITIGATION AND THE TRIAL COURT FAILED TO CONSIDER AND WEIGH MITIGATION PRESENT IN THE RECORD AND THE PROSECUTOR'S ARGUMENT IMPROPERLY LIMITED MITIGATION AND OVER BROADLY ARGUED AGGRAVATING FACTORS AND IMPERMISSIBLY ARGUED NON STATUTORY AGGRAVATING FACTORS.

Mr. Asay's sentences of death are unconstitutional because of numerous factors. Taken individually or cumulatively these errors entitle Mr. Asay to a new penalty phase. The errors violate the basic tenants of Proffit v. Florida, 428 U.S. 242 (1976); Lockett v. Ohio,438 U.S. 586, 98 S. Ct. 2954 (1978) and Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821 (1987).

A. TRIAL COURT'S REFUSAL TO ALLOW MR. ASAY TO PRESENT MITIGATING EVIDENCE.

This portion of this claim was presented on direct appeal. See Initial Brief at page 34. This Court denied relief. Asay v. State, 580 So. 2d 610, 612 FN2 (Fla. 1991). Petitioner, however, respectfully requests this Court to reconsider this issue individually and cumulatively with the entire claim. Reconsideration is necessary because the trial court's denial of this issue was not premised upon all of the information presented by Mr. Asay to the lower court, thus this Court's affirmance of the lower court's decision is likewise tainted. A cumulative analysis of all the issue raised in this claim is necessary because in their entirety they establish fundamental error in the sentencing proceeding.

At trial, Mr. Asay made the following specific request of the trial court:

> [MR. ASAY]: Okay, Your Honor, because we were unable – at the time, I was unable to contact Mr. David and advise him that I expected to call other witnesses other than family, you know, I wanted to call some friends who are of the black race who would come in and testify in my favor, we were unable to get them because time has got away, and other problems came up that we've had to get taken care of, but I wish to call these witnesses in my behalf.
>
> It would warrant the assistance of Mr. Ken Moncrief to come in, because some of the witnesses are in prison themselves and would need to be brought back. You know, I have talked to the witnesses, and they would come back, They have affirmed to me that they would be willing to come in and testify.
>
> THE COURT: Uh-huh.

THE DEFENDANT: And at the present time I don't know where my witnesses are. My family members, other than my sister and sister-in-law and my mother, that were expected to come in, and I have some friends here in Jacksonville, also that were going to come in that apparently have run into problems.

One specific witness I talked to yesterday, I didn't get any specifics about what I expected him to do today in the courtroom, but he told me at the time of the telephone conversation that if I could have this scheduled for another day, as he had a doctor's appointment scheduled for today, he could come to the court to testify for me.

Okay, and I really feel that my argument here would be unsatisfactory to persuade the jury not to sentence me to death, you know, being forced to come into this unprepared, without these witnesses to testify. And I ask for a continuance, for at least a seven day continuance to prepare these witnesses to come in, you know, to make arrangements so they can notify their employers, or be subpoenaed, or whatever we have to do to have them in this courtroom.

THE COURT: What's the relevance of the black witnesses, to testify about your character? Are you thinking that the State is going to argue that -

THE DEFENDANT: Well, Your Honor, the State has already argued, and the jury is conscious that the State has purported these as racial killings.

Now, I can't specifically say what the jury thinks, but I would imagine if they really believed that these were racially motivated, that maybe the mitigating circumstances could be proven otherwise, by having these witnesses present, not only just to prove that I'm not racial, but also to prove my character, you know. Because some of these other witnesses here that I have, you know that I'm requesting to call here, have - I have helped them financially in many ways. I've been a friend to them, I've helped them as a - you know, in just an all around way that I could help these people, I have helped them, and I don't think that I've been a negative person, you know.

As you know, as a result of this trial, you know, I've been convicted, but I wish to prove that my character does not warrant the death penalty.

THE COURT: Well, I've made my rulings on what

the State can and can [sic] can't present by way of aggravation, and they haven't even asked about presenting any evidence that you are racist, or that the killings were racial, so that's not going to be an issue. The State is limited very severely in what they can argue in the penalty phase and what evidence they can present, and that's not one of the factors they are allowed to do.

THE DEFENDANT: Up until this time, though, I've basically been treated like I was incompetent. I haven't had a chance to really work this out with my attorney. You know, we could have been ready today if I would have had that opportunity to get with Mr. David, and to contact the private investigator that we have hired, you know, to do some regular work in this case, but without being provided that opportunity, I'm right here in the midst of this hearing with no testimony on my behalf.

THE COURT: You've got witnesses here, don't you, Mr. David?

MR. DAVID: His mother and Dr. Miller, I plan to call in.

THE COURT: He's subpoenaed witnesses for the mitigation testimony that goes with the type of mitigation that he submitted intent to argue. If you are thinking that you should get a continuance to bring people who are black and who have bee - who have the opinion you are not a racist, that would not be proper testimony, because they are not going to be allowed to put anybody on that says you are a racist.

THE DEFENDANT: Well, no sir, they can testify more broadly than that. Some of them have medical problems that I have helped feed, you know, had shaking hands and couldn't eat. I've brought other people clothes, and gave clothes away. I've bought people cigarettes, and taken care of them. Just basically, not only to the ground whether or not I'm racial, but more broadly to express my character to this jury.

I don't believe the jury has any idea of what my character really truly is, because I wasn't able to testify on the stand to give them any idea. You know, I don't think the picture would be sufficient

> enough to establish my character for this jury, and that's basically all they got was a picture, because I never opened my mouth one time through the trial.
>
> THE COURT: Well, knowing what I know about your record, I would think the picture they have of your character is better because you didn't take the stand than if you had. There is a lot in your background that you really certainly don't want them to know.
>
> THE DEFENDANT: I think auto theft is a big step away from murder.
>
> THE COURT: Okay, the motion for continuance will be denied. . . .

(R. 998-1005).

The trial court's ruling ignored important reasons Mr. Asay proffered for calling additional mitigation witness. Instead, the trial court based its denial upon the fact that since the state was precluded from arguing that the killings were racially motivated at the penalty phase then Mr. Asay's proposed mitigating evidence would be irrelevant to rebut a racial argument. The trial court however (and thus, this Court's affirmance thereof) ignored the other permissible and routinely accepted mitigation that Mr. Asay was attempting to secure an opportunity to present including humanitarian acts to other human beings in need. Mr. Asay specifically informed the trial court that the mitigation he wanted to present was "more broad" than the issue of race. He also told the court that he expected his sister and sister-in-law to testify at the penalty phase (they did not).

Petitioner, respectfully requests this Court to do justice and correct the error committed when Mr. Asay was limited from presenting mitigation and to consider this issue individually as well as cumulatively with the other errors detailed below in this claim.

Additionally, the trial court's refusal to permit Mr. Asay an opportunity to present his proposed mitigation witnesses was error even regarding Mr. Asay's desire to rebut the State's evidence that the killings were racially motivated. The jury was instructed that it was allowed to consider **any evidence presented at the guilt phase** when determining its recommendation. Mr. Asay's jury was instructed:

> [THE COURT]: The State and the defendant may now present evidence relative to the nature of the crime and the character of the defendant. You are instructed that this evidence, when considered with the evidence you have already heard, is presented in order that you might determine, first, whether sufficient aggravating circumstances exist that would justify the imposition of the death penalty, and second, whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances.

(R. 1007-1008)(emphasis added). Although the court then instructed the jury that they would later receive instructions on what they may consider in aggravation and mitigation, just before giving the instructions on aggravating and mitigating circumstances, the trial court again instructed the jury:

> Your advisory sentence should be based upon the evidence that you have heard while trying the guilt or the innocence of the defendant, and the evidence that's been presented to you in these proceedings.

(R.1065)(emphasis added).

Accordingly, the jury was left with the instruction that they were to consider evidence presented during the guilt-innocence phase of the trial. During the guilt-innocence phase of the trial, the State presented and argued that Mr. Asay committed these offense because he was a racist. See e.g., (R. 499; 501; 559; 744-770; 851-852; 853; 854; 869; 879-880; 884; 885; 886; 893). Thus, if the jury followed the instructions, they considered the State's evidence of racism and the trial judge improperly precluded Mr. Asay from presenting evidence to rebut it. Additionally, this allowed the jury to consider non statutory aggravation given the fact that "hate crimes" or racist motivation for killing was not an enumerated statutory aggravating factor. See Fla. Stat. 921.141 (1987).

The court also incorrectly told the jury during voir dire:

> . . . mitigating factors mean factors that mitigate the seriousness of it, or counts as some sort of excuse or justification for the act.

(R. 275-276)(emphasis added). Although no defense objection was made and the issue was not raised on direct appeal, this statement by the court was clearly wrong and left the jury

with the incorrect statement that mitigating evidence was evidence of an "excuse" or of "justification".[7] This is a serious mistake in defining the nature of mitigation. Mitigation by its nature is evidence that while not amounting to an excuse or justification, is evidence the judge and jury must consider and weigh.

The trial court also limited the evidence Mr. Asay was allowed to present during the guilt phase which would have been relevant evidence in mitigation. Mr. Asay's trial attorney attempted to elicit information regarding the effect of the victims having been under the influence of alcohol and cocaine and the victims' demeanor (R. 445). Trial counsel was allowed to establish that Mr. Booker had a blood alcohol level of .09, a .04 level of cocaine in his blood; 38 milliliters per liter of cocaine in his urine and .2 milligrams per kilogram in his liver (R. 443) and that Mr. McDowel had .01 milligrams per liter of cocaine in his blood, 158 milligrams per liter in his urine and 5 milligrams per kilogram in his liver (R. 451). However, when trial counsel attempted to establish how these substance levels affected Booker and McDowell, the trial court sustained the state's objection (R. 445). Evidence of the degree to which the victims were under

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[7] The State capitalized on this incorrect statement and reinforced it during penalty phase closing argument (R. 1040; 1041; 1057).

the influence of mind altering substances would have been relevant evidence regarding their demeanor (e.g. aggressiveness) and moreover would have been relevant information regarding the circumstances of the offense. Since the jury was instructed that they could consider any of the evidence presented during the guilt phase, this is evidence that the jury could have properly considered regarding the circumstances surrounding the offenses in mitigation. Mr. Asay was precluded from presenting this evidence due to the trial court's ruling. Instead, the state was able to argue that the defense was attempting to persuade the jury that since the victims were under the influence of drugs that the defense was arguing that they somehow deserved to be killed or that their lives were less valuable (R. 862). Finally, the trial court stated that it would refuse further evidence to be presented at the Spencer hearing.[8] When discussions were held after the jury had given it's sentencing recommendation regarding a date for sentencing, the following exchange occurred:

> [THE STATE]: Are we going to set it at a certain time, Judge?
>
> THE COURT: Nope. Let me explain that. To my understanding at this point is that you walk out, and I impose sentence. I have heard your

[8] Although Mr. Asay's trial occurred in 1988, these hearings have come to be known as "Spencer hearings." Spencer v. State, 615 So. 2d 688 (1993).

> final arguments so we don't need any real time on the calender.
>
> [THE STATE]: To present whatever aggravation or mitigation we should.
>
> THE COURT: No, you have presented you aggravation and mitigation.
>
> [THE STATE]: All right.
>
> THE COURT: I've heard it, why would I hear it twice? It can't change at this point.
>
> [THE STATE]: That's true. The 8th is fine with me, Judge.
>
> THE COURT: Is that all right with you Mr. David?
>
> MR. DAVID: Yes.

(R. 1078-1079). Thereafter a hearing was held on November 18, 1988, where the defense requested to address the court before the imposition of sentencing (R. 1097). The defense did address the court and argued factors as to why the court should not impose the death penalty (R. 1097-1102). Mr. Asay's mother then addressed the court arguing for the court to spare her son's life as well (R. 1102-1103). The trial court then immediately sentenced Mr. Asay to death (R. 1104-1107). The trial judge's previous statements that he would not consider any additional matters regarding sentencing and the court's action of immediately rendering his decision of death after the defense and Mr. Asay's mother addressed the court at the Spencer hearing, clearly indicate that the judge did not, in fact, consider anything presented on behalf of Mr.

Asay at that hearing. Matters the trial court did not consider include the following: Mr. Asay's prior conviction was not a violent crime, that the "cold, calculated and premeditated" aggravating factor as established by the circumstances of the offense (taking the state's version of events as to what happened) was not established, the large amount of alcohol involved, Dr. Miller's testimony of the effect of alcohol on a person's ability to make judgments, that Mr. Asay was protective of his family members, cared for young children, that Mr. Booker may have been "messing with" Mr. Asay's brother, that O'Quinn and Robbie Asay did not come forward until eleven days after the offense, that Mr. Asay was not violent during his previous incarceration and that he did well there, that racial overtones ran throughout the case, that he had no opportunity but to go to trial because the only offer from the state was to plead "straight up to the death penalty", that the judge consider giving Mr. Asay a break, that his family has been with him and supported him, and that he believed Mr. Asay could be rehabilitated if given a chance(R. 1097-1101). The trial court's sentencing order and finding of facts also did not properly consider and weigh the mitigating evidence (R. 160-162). See, e.g., Campbell v. State, 571 So. 2d 415 (Fla. 1990). But see Trease v. State, 768 So.2d 1050 (Fla. 2000) (receding from Campbell to extent that it disallows trial courts from assigning no weight to

mitigating factors). Here however, the judge did not even consider the mitigation which was error. It was error for the trial court to refuse to consider this information in mitigation and appellate counsel was ineffective for failing to raise it on direct appeal.

B. PROSECUTORIAL ARGUMENT ALSO LIMITED MR. ASAY'S JURY FROM CONSIDERING VALID MITIGATION.

The State's penalty phase argument also contributed to the constitutional error in limiting Mr. Asay's presentation of mitigation. During closing argument the prosecutor told the jury:

> But the bottom line is you do look at the crimes, because that's what we're talking about, and you look at the character of the defendant and it stays limited to arguing certain statutory mandated aggravating factors, and the defense can argue some statutory mitigation.

R. 1037) (emphasis added). This argument went un-objected to, however it is clearly a significant misstatement of the law and appellate counsel should have raised it as fundamental error. The prosecutor's statement effectively informed Mr. Asay's jury that it could only consider "some statutory mitigation". This unconstitutionally limited the mitigation the jury was permitted to consider.

Additionally, the prosecutor informed the jury that they must not consider sympathy when making their decision (R. 1043) undermining the jury's ability to weigh and evaluate all of the mitigating evidence. Parks v. Brown, 860 F. 2d 1545

(10th Cir. 1988) (en banc), rev'd on other grounds sub. nom. Saffle v. Parks, 494 U.S. 484 (1990). A demand to disregard the consideration of emotions improperly suggests to the sentencer "that it must ignore the mitigating evidence about the [petitioner's] background and character." California v. Brown, 479 U.S. 538 (1987) (O'Connor, J., concurring).

The jury was not free to consider all aspects of Mr. Asay's character and record, because the prosecutor told them that sympathy had no role in their decision. Not only was it wrong for the prosecutor to do this; it was fundamental error. In Nelson v. Nagle, the prosecutor during penalty phase closing told the jury that mercy was not a part of their sentencing decision. Nelson v. Nagle, 995 F.2d at 1549, 1556 (11th Cir. 1993). Citing a long line of cases stretching back to 1858, the Nelson court held that this was fundamental error. Nelson, at 1557. This is because the prosecutor's arguments precluded the jury from considering any aspect of the defendant's record as a mitigating factor. Lockett v. Ohio, 438 U.S. 586, 604 (1978). Just as in Nelson, the prosecutor in Mr. Asay's case improperly implored the jury during penalty phase closing not to consider sympathy. Exacerbating this error was the prosecutor's argument that Mr. Asay could show "some statutory mitigation" (R. 1037), thus, the jury was told that any factors not amounting to statutory mitigation, yet still mitigating were not to be considered.

Regarding the prosecutor's comments concerning sympathy, the post conviction court held that this issue should have been raised on direct appeal. See Order Determining Evidentiary Hearing Issues at page 6. It was not. Mr. Asay's appellate counsel was ineffective for not raising this issue on direct appeal. (But, see, Lukehart v. State, 776 So. 2d 906, 926 (Fla. 2001)).

The limitations imposed upon Mr. Asay whether due the trial court rulings, incorrect statements of law and/or argument by the state, resulted in an unconstitutional penalty phase in Mr. Asay's case.

In a capital sentencing proceeding, the United States Constitution requires that a sentencer not be precluded from "considering, as a mitigating factor, any aspect of defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." Lockett at 604; Hitchcock v. Dugger, 481 U.S. 393 (1987). The reasoning behind this is that if all aspects are not considered, then there is an unacceptable "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Lockett. Furthermore, the Eighth Amendment requires "particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." Woodson v. North Carolina, 428 U.S. 280, 303 (1976).

The jury's role in the penalty phase is to evaluate the circumstances of the crime and the character of the offender before deciding whether death is an appropriate punishment. Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, id. These well established principles were not followed in Mr. Asay's case.

C. IMPROPER PROSECUTORIAL ARGUMENT REGARDING STATUTORY AND NON-STATUTORY AGGRAVATION.

Compounding the errors as to what could legally be considered in mitigation, was the prosecutor's overbroad argument regarding statutory aggravation and his insistence that the jury consider impermissible non-statutory aggravation.

In penalty phase argument, the prosecutor over broadly argued otherwise permissible statutory aggravating factors. This was in violation of Espinosa v. Florida, 505 U.S. 1079 (1992); Stringer v. Black, 503 U.S. 222, 113 S. Ct. 528 (1992); Sochor v, Florida, 504 U.S. 527, 112 S. Ct. 2114 (1992); Maynard v, Cartwright,108 S. Ct. 1853 (1988); Hitchcock, id., and the Eighth and Fourteenth Amendments.

The State's argument (R. 1034-52)urged the jury to apply aggravating circumstances in a manner inconsistent with this Court's narrowed interpretation of those circumstances.

In considering Mr. Asay's Rule 3.850 post conviction motion, the post conviction court stated that this issue could

have been properly raised on direct appeal. See Order Determining Issues to be Heard at Evidentiary Hearing at page 4. This Court affirmed. Asay v. State, 769 So. 2d 974, 989, (Fla. 2000).

The State also argued numerous non-statutory aggravating factors for the jury's consideration. For example, the prosecutor impermissibly argued the future dangerousness of Mr. Asay when referring to the aggravator of being on parole: "I'm on parole so what? The defendant has defied all authority, all attempts to constraint, no alternative but that he merits death" (R. 1039-1040) and further:

> Again, why is there such a law? Why is that an aggravating factor? Because we don't want people sent to prison before to go do it again. The law says, hey you have got to stop somewhere, we can't have that because if not, what's the purpose in having the law? I mean, why, if somebody just runs – just says, the heck with it, what's the purpose in having the law?

(R. 1048)(emphasis added).

The prosecutor also impermissibly argued the unlikelihood that Mr. Asay could be rehabilitated and thus asserted future dangerousness: "[his mother] felt he could be rehabilitated. Well, it didn't work before, I mean, he's out on parole and he killed somebody else, so I don't see how that can work" (R. 1044).[9] Future dangerousness is not a valid aggravating

[9] It should be noted that the prosecutor's argument was factually incorrect when he stated "he's out on parole and he killed somebody else". Mr. Asay was never charged or convicted of killing anyone prior to this trial. The prior for which he

factor. See, Koromondy v. State, 703 So. 2d (1997).

The State also impermissibly attempted to appeal to the emotions of the jury and argued nonstatutory aggravation repeatedly referring to the "last photo" taken of Mr. Booker (R. 1038; 1044). The prosecutor also impermissibly argued in penalty phase that Mr. Asay had "no justification whatsoever, the victim didn't – was just minding his own business" (R. 1041) and "no evidence whatsoever that he ever bothered anybody, ever bothered the defendant at all that day" (R. 1042) and regarding Mr. McDowell "[n]o evidence he ever hurt anybody, no evidence that he ever hurt this defendant. And again he no longer walks the face of the earth because of this defendant's actions" (R. 1057). The prosecutor impermissibly told the jury that Mr. Asay would have to assert a justification in order to establish mitigation.

These arguments served only to negate the proper instructions the jury did receive and bolster the incorrect statements of law made by the trial court. Thus, these arguments unconstitutionally tainted Mr. Asay's penalty proceedings.

When taken alone or in conjunction with the unconstitutional limitations imposed upon Mr. Asay by the court and urged by the state, Mr. Asay was denied the constitutionally sound and reliable penalty phase to which he

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was on parole was auto theft.

was entitled.

C. THE TRIAL COURT'S REFUSAL TO CONSIDER AND WEIGH MITIGATION ESTABLISHED IN THE RECORD.

Mr. Asay was denied a reliable sentencing in his capital trial because the sentencing judge refused and failed to find and weigh the existence of mitigation established by the evidence in the record, contrary to the Eighth and Fourteenth Amendments. Appellate counsel failed to raise this issue on appeal. The post conviction court denied Mr. Asay's Rule 3.850 claim raising this issue and this Court affirmed stating that the issue could have been raised on direct appeal. Asay v. State, 769 So. 2d 974, 989 (Fla. 2000).

During the penalty phase, Mr. Asay presented a variety of mitigating evidence. He showed that he was affectionate toward and protective of his family (R. 1031), that he assisted his family financially (R. 1026), that he had been gainfully employed prior to this offense (R. 1026), that he was good with and kind to children (R. 1027), that he remodeled his mother's house for her (R. 1027), that he helped with fellow inmates in the jail to the point of giving them the clothes off his back (R. 1029-30), that he had rehabilitation potential (R. 1030), that he was only twenty-three years old at the time of his arrest (R. 1024), and that he received his GED while in prison (R. 1030). This evidence was un-controverted and un-impeached. The prosecution even

conceded during penalty phase closing that there was evidence of Mr. Asay's good character (R. 1044). In addition, Mr. Asay presented evidence that he was under the influence of alcohol at the time of the crime (R. 1017-18).

Despite this mitigating evidence, the trial court found only one mitigator in his sentencing order - age at the time of the crime. In a sentencing proceeding, the United States Constitution requires that a sentencer not be precluded from "considering, as a mitigating factor, any aspect of defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, at 604; Hitchcock v. Dugger, 481 U.S. 393 (1987). Additionally, "[w]henever a reasonable quantum of competent, uncontroverted evidence of mitigation has been presented, the trial court must find that the mitigating circumstance has been proved." Spencer v. State, 645 So. 2d 377, 385 (Fla. 1994)(citing Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990). Moreover, the "exclusion of any relevant mitigating evidence affects the sentence in such a way as to render the trial fundamentally unfair" Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987) at FN2. The mitigation in Mr. Asay's case satisfied the Spencer standards, because it was uncontroverted by the prosecution and it was introduced by competent witnesses. Therefore, all of this mitigation should have been considered. The failure to do this rendered the trial

fundamentally unfair, and was fundamental error. "[A] judge who fails to consider or is precluded from considering nonstatutory mitigating circumstances commits reversible error". Riley v. Wainwright, 517 So. 2d 656, 657 (Fla. 1987).

Mr. Asay's appellate counsel was deficient in failing to raise this claim. The law supporting it was clearly established at the time of direct appeal and the record reflected that this mitigation was not considered. Mr. Asay was prejudiced as a result because the failure to provide Mr. Asay with the individualized sentencing proceeding to which he was entitled to was never presented to this Court for a remedy. Taken individually or in conjunction with the errors described above, Mr. Asay's sentence is not worthy of confidence or reliable. Mr. Asay was prejudiced. It cannot be said that but for the errors there is no reasonable possibility that the outcome would have been different. Appellate counsel was ineffective for not raising this on direct appeal.

D. CONCLUSION

The cumulative effect of the above errors was to deny Mr. Asay the reliable and individualized sentencing proceeding to which he was clearly entitled.

As a result of the trial court's limiting the mitigation

that Mr. Asay was allowed to present, incorrect statements of law to the jury, the state's urging limitation of mitigation, overbroad argument of statutory aggravation, argument for nonstatutory aggravation and the trial court's refusal to consider and weigh mitigation that was presented, Mr. Asay's sentencer was deprived the of the opportunity to consider, and did not consider relevant mitigating circumstances. See Penry v. Johnson, ___ U.S.___, 121 S.Ct. 1910, 1920 (2001); Penry v. Lynaugh, 492 U.S. 302, 318, 109 S. Ct. 2934 (1989); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869 (1982); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct 2954 (1978); Woodson v. North Carolina, 428 U.S. 280, 96 S. Ct. 2978 (1976). Accordingly, the death sentence was imposed upon Mr. Asay in a fundamentally unconstitutional manner. Proffitt.

Appellate counsel did not raise this claim in it's entirety as presented herein. Accordingly, Petitioner requests this Court exercise its authority to remedy an injustice, and to do justice by granting Mr. Asay habeas relief in the form of a new penalty phase.

CLAIM III

MR. ASAY'S JURY WEIGHED THE UNCONSTITUTIONALLY VAGUE AGGRAVATOR OF 'COLD, CALCULATED AND PREMEDITATED'. THIS WAS 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.

The instruction given to Mr. Asay's jury on the "cold,

calculated and premeditated" aggravating factor was unconstitutionally vague and overbroad.

Mr. Asay's trial attorney filed a "Motion to Prohibit Instruction on Aggravating Factors 5(h) 5(i)" (R. 134-135). This was contemporaneous with the judge's penalty phase instructions on CCP. The court denied the motion.

Mr. Asay's trial attorney also requested the following proposed instruction on the CCP aggravator.

> The phrase "cold, calculated and pre-meditated" refers to a higher degree of pre-meditation than that which is normally present in a pre-meditated murder. This aggravating factor applies only when the facts show a particularly lengthy, methodic, or involved series of atrocious events or a substantial period of reflection and thought by the perpetrator before the murder.

(R. 995).

The judge gave the following instruction on the CCP aggravator:

> The phrase cold, calculated and premeditated, refers to a higher degree of premeditation than that which is normally present in a premeditated murder. This factor is applicable when the facts showed a particularly lengthy period of reflection and thought by the perpetrator before the murder.

(R. 1067). This instruction failed to adequately guide the jury and narrow the class of defendants eligible for the death penalty. The Court addressed and defined "cold, calculated, and premeditated" one year prior to Mr. Asay's trial in Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987). Also in 1987, Nibert v. State, 501 So. 2d 1 (Fla. 1987 was decided and

supported Mr. Asay's trial attorney's argument that a "substantial" period of reflection and thought was required for CCP. Nibert was decided before Mr. Asay's trial. The Nibert court stated that CCP "has been found when the facts show a particularly lengthy, methodic, or involved series of atrocious events or a substantial period of reflection and thought by the perpetrator." Nibert, at 4. The language the Nibert court used mirrors Mr. Asay's proffered jury instruction. 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). This Court requires courts to apply these limiting constructions and consistently rejects this aggravator when these limitations are not met. See e.g., Green v. State, 583 So. 2d 647, 652 (Fla. 1991); Bates v. State, 465 So. 2d 490, 493 (Fla. 1985).

In affirming the denial of post conviction relief, this Court held that the CCP vagueness claim was procedurally barred because "although [ ] not raised on direct appeal, [it] could have been." Asay v. State, 769 So. 2d 974, 988 (Fla. 2000).

The defense proposed jury instruction was qualitatively different from the instruction given at trial. The existing case law at time of Mr. Asay's direct appeal should have

alerted the direct appeal attorney to raise this issue, however this issue was not raised on direct appeal. Appellate counsel's performance was deficient and Mr. Asay was prejudiced. Mr. Asay was prejudiced by the fact that his jury considered the aggravating factor in an overbroad fashion and the jury was not given adequate guidance regarding its applicability.

"[T]here is Eighth Amendment error when the sentencer weighs an "invalid" aggravating circumstance in reaching the ultimate decision to impose a death sentence." Sochor v. Florida, 504 U.S. 527, 532 (1992)."[A]n aggravating circumstance is invalid in this sense if its description is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor." Espinosa v. Florida, 505 U.S. 1079, 1081 (1992). To prevent vagueness, a limiting construction must be applied. Under these circumstances, the erroneous instruction tainted the jury's recommendation, and in turn the judge's death sentence, with Eighth Amendment error. Id. In conjunction with the other errors cited throughout this petition, it cannot be said that this error was harmless beyond a reasonable doubt.

CLAIM IV

THE PENALTY PHASE JURY INSTRUCTIONS AND THE PROSECUTOR'S COMMENTS IMPROPERLY SHIFTED THE BURDEN TO MR. ASAY TO PROVE THE APPROPRIATENESS OF A LIFE SENTENCE.

The trial judge instructed the penalty phase jury that the mitigators had to outweigh the aggravators, thereby shifting the burden to the defendant to prove a life sentence was appropriate. During penalty phase preliminary instructions, he told the jury:

> You are instructed that this evidence, when considered with the evidence you have already heard, is presented in order that you might determine, first, whether sufficient aggravating circumstances exist that would justify the imposition of the death penalty, and, second, whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances.

(R. 1008)(emphasis added).

This point was reiterated during final penalty phase instructions:

> It is your duty to . . . 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. 1064-65) (emphasis added).

The jury's impression that the burden was on the defendant to prove the appropriateness of a life sentence was exacerbated by the prosecutor's earlier comments during voir dire:

> Mr. de la Rionda: Now, on the other hand, does anyone here feel that their support for the death penalty is so strong that they would vote for the death penalty even though the aggravating factors may be outweighed by the mitigating factors?

(R. 281).

"[T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978). The judge's and the prosecutor's comments precluded the jury from considering all mitigating factors. The instruction that mitigators had to outweigh aggravators implies that those mitigators not strong enough to outweigh aggravators need not be considered. This is wrong, because under Lockett all mitigators must be considered. The jury was therefore impermissibly limited in their consideration of relevant mitigating factors. "States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty." McCleskey v. Kemp, 481 U.S. 279, 306 (1987).

Imposing a burden to upon a defendent to prove that a life sentence is appropriate violates the Due Process clause. Mullaney v. Wilbur, 421 U.S. 684, 703 (1975). The instruction that mitigators have to outweigh aggravators impermissibly shifts the burden. It places the burden on the defendant to produce enough mitigating evidence to show a life sentence is appropriate. This is a clear violation of Mullaney, because

the burden should be on the State.

The post conviction court, ruled that this issue was not an appropriate in a motion for post conviction relief and this Court affirmed. Asay v. State, 769 So. 2d 974, 988 (Fla. 2000). Appellate counsel was ineffective for not raising this issue.

CLAIM V

FLORIDA'S STATUTE SETTING FORTH THE AGGRAVATING CIRCUMSTANCES TO BE CONSIDERED IN A CAPITAL CASE IS FACIALLY VAGUE AND OVERBROAD IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. THE FACIAL INVALIDITY OF THE STATUTE WAS NOT CURED IN MR. ASAY'S CASE WHERE THE JURY DID NOT RECEIVE ADEQUATE GUIDANCE. AS A RESULT, MR. ASAY'S SENTENCE OF DEATH IS PREMISED UPON FUNDAMENTAL ERROR.

At the time of Mr. Asay's trial, sec. 921.141 (5), Fla. Stat. (1987), provided:

AGGRAVATING CIRCUMSTANCES. --

Aggravating circumstances shall be limited to the following:

> (a) The capital felony was committed by a person under sentence of imprisonment or placed on community control.
>
> * * *
>
> (i) The capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

This Court has recognized that the cold, calculated, and premeditated instruction is subject to attack on grounds of vagueness, Jackson v. State, 648 So. 2d 85 (Fla. 1994), and

has narrowed its application. Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987); Hamblen v. State, 527 So. 2d 800, 805 (Fla. 1988). Trial judges are to apply limiting constructions. See, e.g., Green v. State, 583 So. 2d 647, 652-53 (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).

Likewise, this Court has narrowed the application of the aggravating factor of "under sentence of imprisonment." The jury was not told that the weight of this aggravator was less if the defendant had not committed the homicide after escaping. In Songer v. State, 544 So. 2d 1010 (Fla. 1989), this Court indicated the gravity of this aggravator is diminished since the defendant "did not break out of prison but merely walked away from a work-release job." Songer, at 1011. The jury was not advised that the weight of this aggravator was lessened if Mr. Asay obtained his release from prison by legal and non-violent means. In considering this aggravator, the jury needed to be fully instructed. In Mr. Asay's case, the jury did not receive an instruction regarding this limitation on the consideration of aggravating circumstances.

The language of the aggravating circumstance "prior conviction of a violent felony" is also facially vague and the jury was not given adequate limiting instructions regarding

consideration of this aggravator. Mr. Asay's jury was instructed that it may consider as a prior violent felony on each count the felony of the second murder of which he was convicted. The death penalty in this case was predicated upon an unreliable automatic finding of a statutory aggravating circumstance -- the murder that formed the basis for conviction on the other charge arising out of the same incident. The use of this felony as an aggravating factor rendered the aggravator "illusory" in violation of Stringer v. Black, 112 S. Ct. 1130 (1992). The jury was instructed regarding an automatic statutory aggravating circumstance, and Mr. Asay thus entered the penalty phase already eligible for the death penalty, whereas other similarly (or worse) situated petitioners would not. The use of this automatic aggravating circumstance did not "genuinely narrow the class of persons eligible for the death penalty," Zant v. Stephens, 462 U.S. 862, 876 (1983), and therefore the sentencing process was rendered unconstitutionally unreliable. Id. "Limiting 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." Maynard v. Cartwright, 486 U.S. 356, 362 (1988). "[I]n a 'weighing' State [such as Florida], where the aggravating and mitigating factors are balanced against each other, it is constitutional error for the sentencer to give

weight to an unconstitutionally vague aggravating factor, even if other, valid aggravating factors obtain." Richmond v. Lewis, 113 S. Ct. 528 at 534. A facially vague and overbroad aggravating factor may be cured where "an adequate narrowing construction of the factor" is adopted and applied. Id. However, in order for the violation of the Eighth and Fourteenth Amendments to be cured, "the narrowing construction" must be applied during a "sentencing calculus" free from the taint of the facially vague and overbroad factor. Id. at 535.

Fundamental error occurs when the error is "equivalent to the denial of due process." State v. Johnson, 616 So. 2d 1(Fla. 1993). Fundamental error includes facial invalidity of a statute due to "over breadth" which impinges upon a liberty interest. Trushin v. State, 425 So. 2d 1126, 1129 (Fla. 1983). The failure to instruct on the necessary elements a jury must find constitutes fundamental error. State v. Jones, 377 So. 2d 1163 (Fla. 1979). This occurred in Mr. Asay's case.

Moreover, the statute is facially vague and overbroad in violation of the Eighth and Fourteenth Amendments. It impinges upon a liberty interest. Thus, the application of the statute violated due process, State v. Johnson, id., and results in the arbitrary and capricious application of the death penalty. Mr. Asay is entitled to state habeas relief.

CONCLUSION AND RELIEF SOUGHT

For all the discussed herein, Mr. Asay respectfully urges this Court to grant habeas corpus relief in the form of a new trial and/or penalty phase.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition has been furnished by United States Mail, first-class postage prepaid to Curtis French, Assistant Attorney General, The Capitol - PL-01, Tallahassee, FL 32399, on October ___, 2001.

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CERTIFICATE OF TYPE SIZE AND STYLE

This Petition is presented in 12 point Courier New, a font that is not proportionately spaced.

_____
HEIDI E. BREWER