IN THE SUPREME COURT OF FLORIDA

NO. SC02-1180

ALFRED LEWIS FENNIE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

This is Mr. Fennie'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. Fennie 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 jury trial proceedings shall be referred to as "R." followed by the appropriate page number(s), with the separately numbered record on appeal instruments designated “R.I.” All other references will be self-explanatory or otherwise explained herein.

INTRODUCTION

Significant errors which occurred at Mr. Fennie's capital trial and sentencing were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel.

The issues which appellate counsel neglected demonstrate that counsel's performance was deficient and that the deficiencies prejudiced Mr. Fennie. "[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. 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. Fennie is entitled to habeas relief.

PROCEDURAL HISTORY

The Circuit Court of the Fifth Judicial Circuit, Hernando County, entered the judgments of conviction and sentence under consideration. Mr. Fennie was charged by indictment dated September 27, 1991, with first degree murder and related offenses. (RI. 20-21). After a jury trial, Mr. Fennie was found guilty on November 12, 1992, as charged on all counts. (R. 1923-25, RI. 384-387). On November 13, 1992, the jury recommended a death sentence for the first degree murder conviction. (R. 2150-51, RI. 389). On December 1, 1992, the trial court imposed a sentence of death. (RI. 529). On direct appeal, the Florida Supreme Court affirmed Mr. Fennie's convictions and sentences. Fennie v. State, 648 So. 2d 95 (Fla. 1994). The United States Supreme Court denied certiorari on February 21, 1995. Fennie v. Florida, 115 S. Ct. 1120 (1995).

At the circuit court’s direction, Mr. Fennie filed amended claims to his motion for postconviction relief on October 20, 2000, and November 13, 2000. A Huff hearing was held on December 8, 2000, and the circuit court issued an Order Setting Evidentiary on February

12, 2001. Following an evidentiary hearing on June 4-7, 2001, the circuit court issued an Order Denying Relief on October 5, 2001, and an Amended Order Denying Relief on October 10, 2001.

Mr. Fennie now files this petition seeking habeas corpus relief. With this petition, Mr. Fennie simultaneously files an appeal from the circuit court's denial of postconviction 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. Fennie's convictions and 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. Fennie'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. Fennie 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. This 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. Fennie's claims.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Fennie 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

THE TRIAL COURT'S SENTENCING ORDER DOES NOT REFLECT AN INDEPENDENT WEIGHING OR REASONED JUDGMENT, CONTRARY TO FLORIDA LAW AND THE EIGHTH AND FOURTEENTH AMENDMENTS. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE ON DIRECT APPEAL.

Florida law requires the sentencing judge to independently weigh the aggravating and mitigating circumstances. Section 921.141(3), Fla. Stat. (1985), provides the following:

> (3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH -- Notwithstanding the recommendation of a majority of the jury, **the court**, after weighing the aggravating and

> mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing **its** findings upon which the sentence is based as to the facts:
>
> (a) The sufficient aggravating circumstances exist as enumerated in subsection (5), and
> (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.
>
> In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If **the court** does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with S. 775.082

(Emphasis added). From this language, it is clear that the sentencing court alone is to perform the weighing of the aggravating and mitigating circumstances before making **its** findings regarding the imposition of a death sentence. In Mr. Fennie's case, the trial court failed to independently weigh the aggravating and mitigating circumstances in several ways. Appellate counsel was ineffective for failing to raise this issue on appeal, and habeas relief is proper.

A. In preparing his Sentencing Order, the trial court adopted the State's Memorandum of Law, with no notice to Mr. Fennie's trial counsel, and trial counsel had no opportunity to rebut.

Mr. Fennie's jury returned its advisory sentence on November 13, 1992, and the trial court set December 1, 1992, as its sentencing date.[1] The record reflects that the trial court never requested that the State or defense counsel submit written sentencing memoranda.[2] The State filed a sentencing memorandum in open court on December 1, 1992, the day of the sentencing, and the certificate of service indicates that a copy of the memo was faxed to trial counsel on November 30, 1992, the day

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[1]Mr. Fennie was tried prior to this Court's decision in Spencer v. State, 615 So.2d 688 (Fla. 1993), and there was no intermediate hearing.

[2]Note that in his Order Denying Relief regarding Mr. Fennie's 3.850 motion, the trial court, who was not the judge who presided over the trial, found that, "[I]t is clear from the record and testimony at the evidentiary hearing, that the Court never asked for a sentencing memo." (p. 14.)

before the sentencing. (RI. 467-478) At the sentencing hearing on December 1, 2002, trial counsel raised this issue:

> Judge, I'm not a hundred percent sure of the procedure, but we would like to formally object to the memorandum regarding sentencing that was sent by the State Attorney's Office to my office yesterday. And we would object to their recommendation of five aggravating circumstances at least under the case law.

(RI. 524.) Following argument by counsel, the trial court stated, "At this time I will now announce and read the findings of fact in support of this sentencing." (RI. 529-30). The Findings of Fact the trial court read in open court (RI. 530-544) are the same as the written Findings of Fact filed by the Court on that very day, December 1, 1992 (RI. 452-463).

A comparison of the trial court's Findings of Fact (see Attachment A) and the State's sentencing memorandum (see Attachment B) reveals that the two documents, filed at the same hearing on the same day, are **nearly identical**. The order in which the aggravating circumstances are addressed has been changed in the trial court's Findings of Fact, but the findings are the same as those argued in the State's sentencing memorandum. In fact, following is the trial court's Findings of Fact, the underlined portions being a duplicate of the State's sentencing memorandum:

FINDINGS OF FACT IN SUPPORT OF SENTENCING ORDER

> **THIS CAUSE** came before this Court upon the Indictment of ALFRED LEWIS FENNIE for the offenses of First Degree Murder, Kidnapping While Armed, and Robbery While Armed, and the jury having found the Defendant guilty on all counts as charged in the Indictment; and further at a subsequent sentencing hearing the jury having recommended to this Court by a vote of 12-0 that the Defendant, ALFRED LEWIS FENNIE, be sentenced to death, the Court now, pursuant to F.S. 921.141(3), hereby sets forth the findings of fact upon which the Court relies in following the recommendation of the jury and imposing the sentence of death upon the Defendant:
>
> **AGGRAVATING CIRCUMSTANCES**
>
> The Court finds that five aggravating circumstances have been established by the evidence beyond and to the exclusion of every reasonable doubt, as follows:
>
> 1. THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED WAS COMMITTED WHILE HE WAS ENGAGED OR AN ACCOMPLICE IN THE COMMISSION OF THE CRIME OF KIDNAPPING. [F.S. 921.141(5)(d)]

The Defendant forced Mary Elaine Shearin into her car trunk at gunpoint and[3] subsequently drove around the streets of Tampa, while she was so confined. Eventually, with the aid of Pamela Colbert, the Defendant drove Mary Elaine Shearin from Hillsborough County to Hernando County. During the course of Mrs. Shearin's abduction, until her death at the hands of the Defendant, she was clearly terrorized, having had to listen to the Defendant discuss her impending death; and, in fact, was so terrorized that at one point she physically forced her hand through the seam of the trunk, in an attempt to attract attention to her plight. Further, just prior to the Defendant binding her hands behind her back, marching her into the darkness, and placing a bullet in her head, she was heard to be begging for her life and to be allowed to return to her children.

2. THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY. [F.S. 921.141(5)(e)]

In the early morning hours of September 8, 1991, the Defendant robbed, raped and kidnapped Mary Elaine Shearin at gunpoint. The Defendant took no precautions to prevent the victim from seeing his face. Had she survived, she would have been a key witness against him. Each of the three crimes described above are serious in nature and punishable by life in prison. The Defendant stated to his co-defendant, MICHAEL ANTOINE FRAZIER, that he had to kill Mary Elaine Shearin because she saw his face. From the evidence above, it is clear that the elimination of the witness was the "dominant motive" that drove the Defendant to take the life of Mary Elaine Shearin.

3. THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED WAS COMMITTED FOR FINANCIAL GAIN. [F.S. 921.141(5)(f)]

The original purpose for the Defendant flagging down the victim on the streets of Tampa in the early morning hours of September 8, 1991, was to rob her. The Defendant has been convicted of robbing her. The Defendant repeatedly demanded the personal identification number to the victim's automatic teller machine card and made several attempts to withdraw money from her account using the same. The Defendant appropriated the victim's 1986 Cadillac automobile to his own use, driving it around the streets of Tampa for several days after the murder because, in his opinion, it would take some time for her body to be found. At the time the Defendant was apprehended, he was still driving the victim's car and, by his own admission, one day after the murder, the Defendant attempted to cash one of the victim's

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[3]The State's argument on this aggravator was only two sentences long. The instant findings are essentially a paraphrasing of the discussions of the other aggravators. The Court will note, in its own independent comparison of the court's Findings of Fact (Attachment A) and the State's sentencing order (Attachment B), that with the exception of this aggravator and the last two proposed mitigators, that in most of the sections not underlined words have simply been reordered or rephrased rather than changed. The discussions of HAC and CCP in particular are clearly verbatim from the State's memo, and the other aggravators are virtually so.

checks in the amount of $200. It is clear that one of the motives for the murder of Mary Elaine Shearin was pecuniary gain.

4. THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL. "HEINOUS" MEANS EXTREMELY WICKED OR SHOCKINGLY EVIL. "ATROCIOUS" MEANS OUTRAGEOUSLY WICKED AND VILE. "CRUEL" MEANS DESIGNED TO INFLICT A HIGH DEGREE OF PAIN WITH UTTER INDIFFERENCE TO, OR EVEN ENJOYMENT OF, THE SUFFERING OF OTHERS. THE KIND OF CRIME INTENDED TO BE INCLUDED AS HEINOUS, ATROCIOUS, OR CRUEL IS ONE ACCOMPANIED BY ADDITIONAL ACTS THAT SHOW THAT THE CRIME WAS CONSCIENCELESS OR PITILESS AND WAS UNNECESSARILY TORTUROUS TO THE VICTIM. [F.S. 921.141(5)(h)]

Mrs. Shearin died as a result of a single bullet wound, which rendered her unconscious instantly. Yet, she suffered before her death. The autopsy revealed numerous bruises on her body. She was placed in the trunk of her car by a man with a gun. She was taken to a deserted darkened alley where the gunman raped her. There was obvious fear in her voice as she told Mr. Fennie that she did not allow her husband to do the things he was doing to her. There was fear in her voice as she insisted that she had given the correct number for her automatic teller machine card. While in the trunk, she was in a position to hear the occupants of the car discussing the merits and methods of killing her. She was terrified to the point of wedging her fingers past the trunk lid in an attempt to get help. She was desperate enough to face two men, one armed with a gun, while she was armed only with a wrench. After being tied up, Mrs. Shearin began to cry as she pleaded to be allowed to go home to see her children.

The Florida Supreme Court upheld this circumstance in Adams v. State, 412 So.2d 850, stating at p. 857 "fear and emotional strain preceding a victim's almost instantaneous death may be considered as contributing to the heinous nature of the capital felony." And in Jennings v. State, 453 So.2d 1109 (Fla. 1984), the Court stated, "The mindset or mental anguish of the victim is an important factor, in determining whether the aggravating circumstance of heinous, atrocious and cruel applies." 453 So.2d 1109 at 1115.

The Florida Supreme Court has consistently held that strangulation deaths are, by definition, heinous, atrocious, or cruel. While the method of Mrs. Shearin's death is different, the logic behind these cases is applicable: "We have previously held that it is permissible to infer that strangulation, when perpetrated upon a conscious victim, involves foreknowledge of death, extreme anxiety and fear, and that this method of killing is one to which the factor of heinousness is applicable." Tompkins v. State, 502 So.2d 415 at 421 (Fla. 1986). Clearly, in the instant case, Mary Elaine Shearin had "foreknowledge of death, extreme anxiety and fear."

In Cooper v. State, 492 So.2d 1059 (Fla. 1986), the Court cited the following facts as justifying this same circumstance: (1) the three victims were actually aware of their impending deaths by gunfire, (2) they were tied up, (3) one of the guns misfired, and (4) one of the victims begged for his life.

The facts in Koon v. State, 513 So.2d 1253 (Fla. 1987), are very close to the facts in this case: the victim, Dino, was abducted and driven across the state; at one point, the killers attempted unsuccessfully to put him into the car's trunk at gunpoint; the victim asked if he was going to be killed; and he was eventually marched into the woods and executed with a shotgun blast to the head.

The opinion notes that Mr. Koon's victim was also beaten severely, losing part of an ear, but goes on to state: "While Dino's end may have been quick, rather than lingering, he was subjected to hours of terror before his death." "The mental anguish inflicted on Dino during the hours immediately preceding his death is sufficient to support a finding of atrocity." 513 So.2d at 1257.

The mistreatment suffered by Mr. Koon's victim was analogous to that suffered by Mrs. Shearin, who, in addition to everything else, was raped, confined in her trunk for hours, and forced to listen to a discussion of the method of her own death.

To conclude that Mary Elaine Shearin did not suffer extreme emotional pain is to ignore the facts of this case. Borrowing from the Florida Standard Jury Instructions in Criminal Cases, Mr. Fennie's every act toward the victim was conscienceless and pitiless. From the time she was raped until the bullet ended her suffering, Mrs. Shearin experienced mental torture far beyond that which was necessary to accomplish her death. Surely, by any definition, what happened to Mary Elaine Shearin is shockingly evil.

5. 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. "COLD" MEANS WITHOUT EMOTION OR PASSION. "CALCULATED" MEANS A CAREFUL PLAN OR PREARRANGED DESIGN. [F.S. 921.141(5)(I)]

From the time the victim was raped, placed back in the trunk of her car, and the Defendant obtained the four concrete blocks, clearly he was reflecting upon the manner by which he would kill Mary Elaine Shearin. When he later obtained the rope from his girlfriend's apartment, he was acting upon his plan to kill the victim. As the car left the outskirts of Tampa, he announced that he had to kill Mrs. Shearin, because she had seen his face. Later, when told by Mr. Frazier that he (Frazier) did not have the heart to kill someone, Mr. Fennie stated: "If you don't have the heart to do it, then don't be around when it's done." Later still, Mr. Fennie announced that he changed his mind; rather than drown Mrs. Shearin with the concrete blocks, he had decided to shoot her. Her captors drove her to a remote area of Hernando County, stopping several times along the way.

Several minutes before Mrs. Shearin's murder, Mr. Fennie ignored the victim's plea to be allowed to go home and see her children. He tied her hands behind her back, and calmly walked her down a dirt road until he found an appropriately isolated location. Mr. Fennie then executed the victim with one shot to the back of her head. According to the facts presented at trial, at a minimum, two hours elapsed between the time Mr. Fennie obtained the concrete blocks with which to drown the victim, and her eventual execution by shooting.

The facts of this case compel no other conclusion that the murder of Mary Elaine Shearin was cold, calculated and premeditated. See, State v. Malloy, 382 So.2d 1190 (Fla. 1979): ". . . execution type murders . . . ordinarily should result in the imposition of the death penalty." (382 So.2d at 1193). In the instant case, the Defendant executed Mary Elaine Shearin.

MITIGATING CIRCUMSTANCES

The Court, having previously found that five statutory aggravating circumstances have been proven, now proceeds to determine if any mitigating circumstances have been established by the greater weight of the evidence, as follows:

A. STATUTORY MITIGATING CIRCUMSTANCES:

In determining the sentence to be imposed upon the Defendant in the instant cause, the Court first considered whether any Statutory Mitigating Circumstances were proven by the greater weight of the evidence, and finds that none have been so proven.

1. DEFENDANT HAS NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY. [F.S. 921.141(6)(a)]

No evidence has been presented to even suggest that this circumstance exists. To the contrary, at the hearing upon his motion to suppress, Mr. Fennie admitted to in excess of twenty prior felony convictions. There was also testimony from his mother and sister that he had been to prison and jail on several occasions.

2. THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED WAS COMMITTED WHILE HE WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE. [F.S. 921.141(6)(b)]

No evidence has been presented in support of this circumstance.

3. THE VICTIM WAS A PARTICIPANT IN THE DEFENDANT'S CONDUCT OR CONSENTED TO THE ACT. [F.S. 921.141(6)©)]

All the evidence before this Court is to the contrary.

4. THE DEFENDANT WAS AN ACCOMPLICE IN THE OFFENSE FOR WHICH HE IS TO BE SENTENCED BUT THE OFFENSE WAS COMMITTED BY ANOTHER PERSON AND THE DEFENDANT'S PARTICIPATION WAS RELATIVELY MINOR. [F.S. 921.141(6)(d)]

All of the credible evidence before this Court establishes that the Defendant personally killed the victim.

5. THE DEFENDANT ACTED UNDER EXTREME DURESS OR UNDER THE SUBSTANTIAL DOMINATION OF ANOTHER PERSON. [F.S. 921.141(6)(e)]

The only time Mr. Fennie exhibited any distress was when he returned from Mrs. Shearin's body to find the car was not already running, for a fast getaway. Between himself and his accomplices, the Defendant was the dominant personality.

6. THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW WAS SUBSTANTIALLY IMPAIRED. [F.S. 921.141(6)(f)]

There has been no evidence presented from which this statutory mitigating circumstance could be found.

7. THE AGE OF THE DEFENDANT AT THE TIME OF THE CRIME. [F.S. 921.141(6)(g)]

The Defendant's date of birth is December 28, 1961. On September 8, 1991, he was 29 years, 8 months old. In Lara v. State, supra, the Court reviewed the trial judge's refusal to give the jury an instruction on this mitigating circumstance, and held that the Defendant's age of 25 did not require such an instruction. The appellant in Simmons v. State, 419 So.2d 316 (Fla. 1982), was 23 years old. The Florida Supreme Court said the trial court was not required to find that age to be a factor in mitigation. And in Garcia v. State, 492 So.2d 360 (Fla. 1986), the Court stated, at p. 367, ". . . Every murderer had an age. The fact that a murderer is twenty years of age, without more, is not significant, and the trial court did not err in not finding it as mitigating."

The Defendant is not some naive person of tender years. His brazen lies to the police, blaming an innocent man for a murder he himself had committed, attests to that. His age should in no way suggest leniency.

B. NONSTATUTORY MITIGATING CIRCUMSTANCES:

While no statutory mitigating circumstances have been proven, the Court does find certain nonstatutory mitigating circumstances have been proposed by the defense. Of those proposed, the Court finds the following proven by the greater weight of the evidence:

1. THE DEFENDANT CAME FROM A BROKEN HOME, AND HIS FATHER HAD LITTLE CONTACT WITH HIM AS HE WAS GROWING UP.

2. THE DEFENDANT IS THE FATHER OF THREE CHILDREN.

3. THE DEFENDANT HAS SOME TALENT AS AN ARTIST.

4. THE DEFENDANT HAS PAID CHILD SUPPORT TO THE MOTHERS OF HIS CHILDREN WHEN HE COULD.

5. THE DEFENDANT HAS COUNSELED CHILDREN ABOUT OBEYING THEIR ELDERS AND ABOUT THE PERILS OF PRISON LIFE AND A LIFE OF CRIME.

6. THE DEFENDANT SPENT TIME CARING FOR HIS SISTER'S CHILDREN, INCLUDING ONE WHO WAS HANDICAPPED.

7. THE DEFENDANT HAS BEEN A MODEL PRISONER IN THE EYES OF THE STAFF OF THE HERNANDO COUNTY JAIL.

8. THE DEFENDANT GREW UP IN THE HOUSING PROJECTS OF TAMPA.

9. THE DEFENDANT IS A HUMAN BEING.

10. THE DEFENDANT WAS NOT KNOWN TO BE A VIOLENT TYPE OF PERSON.

In addition to those nonstatutory mitigating circumstances listed above, two additional circumstances were proposed by the defense; however, the Court finds no mitigating factors have been established regarding the same, for the reasons set forth below:

1. THE DEFENDANT URGES THE COURT TO CONSIDER THE FACT THAT HIS TWO CO-DEFENDANTS GOT LIFE IN PRISON AS A CIRCUMSTANCE IN MITIGATION.

In rejecting this circumstance as a mitigating factor, the Court would cite the authority contained in Rogers v. State, 511 So.2d 526 (Fla. 1987) ". . . accomplice's sentence is irrelevant where as here the evidence shows that the accused perpetrated the murder without aid or counsel from the accomplice. Where the facts are not the same or similar for each defendant, unequal sentences are justified." Clearly, in the instant cause, the Defendant's unaided act of executing Mary Elaine Shearin by marching her down the road and putting a bullet in her head, without the aid or assistance of either of his co-defendants, warrants a distinction between any sentence he might receive and that which has been previously imposed upon his co-defendants.

2. THE DEFENDANT URGES THE COURT TO CONSIDER THAT HE FACES POSSIBLE MULTIPLE, CONSECUTIVE LIFE SENTENCES AS A BASIS TO CONCLUDE HE MAY NEVER BE RELEASED FROM PRISON SHOULD THE COURT IMPOSE SUCH A SENTENCE.

The Court determines that while this potential eventuality may exist, it does not extenuate or reduce the moral culpability of the Defendant. Rogers v. State, 511 So.2d 526 at p. 534 (Fla. 1987).

CONCLUSION AS TO THE APPROPRIATE SENTENCE TO BE IMPOSED

> Based upon the evidence presented and records of both the trial and sentencing proceedings in this cause, and upon the Court having considered this evidence, the argument of counsel, the unanimous recommendation of the jury, that the Defendant be sentenced to death, and having carefully considered and weighed the aggravating and mitigating circumstances, the Court finds that sufficient aggravating circumstances, as set forth above, exist and that the aggravating circumstances far outweigh the mitigating circumstances. Accordingly, it is the judgment of this Court that the only appropriate sentence to be imposed upon the Defendant, pursuant to Count I of the Indictment, is death.

Such wholesale adoption of the State's sentencing memorandum was clearly inappropriate. In Patterson v. State, 513 So.2d 1257,1261 (Fla. 1987),this Court "condemned the practice of a trial judge delegating to the State the responsibility of preparing the sentencing order." Morton v. State, 789 So.2d 324, 333 (Fla. 2001).

> As we explained in Patton v. State, 784 So.2d 380, 388 (Fla. 2000), the sentencing order is a "statutorily required personal evaluation by the trial judge of aggravating and mitigating factors" that forms the basis for a sentence of life or death. The sentencing order is the foundation for this Court's proportionality review, which may ultimately determine if a person lives or dies. Id. If the trial judge does not prepare his or her own sentencing order, then it becomes difficult for the Court to determine if the trial judge in fact independently engaged in the statutorily mandated weighing process.

Morton v. State, 789 So.2d 324, 333 (Fla. 2001).

This Court has additionally explained:

> In Nibert,[4] we addressed a claim that the trial court instructed the state attorney to prepare the sentencing order. In that case, however, we found that "[t]he record reflects that the trial judge made the findings and conducted the weighing process necessary to satisfy the requirements of section 921.141, Florida Statutes (1985)." 508 So.2d at 3-4. Further, that although the judge instructed the state attorney to reduce his findings to writing, defense counsel did not object. Again, we strongly urged trial courts to prepare their own written statements of the findings in support of the death penalty, commenting that the failure to do so does not constitute reversible error "so long as the record

[4]Nibert v. State, 508 So.2d 1 (Fla. 1987).

> reflects that the trial judge made the requisite findings at the sentencing hearing." Id. at 4.

Patterson v. State, 513 So.2d 1257, at 1262 (Fla. 1987). In Mr. Fennie's case, it is clear that trial counsel was unaware of the mechanism by which the order was prepared, and in fact he objected to the filing of the State's sentencing memorandum, then attempted to rebut its substance prior to the imposition of sentence.[5] It is also clear that at no time did the court make any kind of independent findings sufficient to support the imposition of death. Judge Springstead made no oral findings apart from the reading of the sentencing order.

It is irrelevant whether the State prepared the sentencing order or the trial court simply adopted the State's memorandum:

> In the sentencing context, this Court has held that the trial court may not request that the parties submit proposed orders and adopt one of the proposals verbatim without a showing that the trial court independently weighed the aggravating and mitigating circumstances.

Valle v. State, 778 So.2d 960, at FN 9 (Fla. 2001) (cites omitted). Again, whether Judge Springstead solicited the State's memorandum or not, it is clear that his verbatim adoption of the memo precluded any independent weighing prior to sentencing Mr. Fennie to death.

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[5]Obviously at this point, it would have been too late to rebut the state's memorandum anyway. The State's memorandum was filed almost simultaneously with Judge Springstead's verbatim sentencing order. Whether the State wrote Judge Springstead's order or the judge simply adopted the State's memo, the court's written findings were prepared prior to the sentencing hearing so he could read from them. Nothing defense counsel could say could change the judge's mind or the written words on the pages in front of him.

This claim is cognizable on direct appeal. In fact, in Holton v. State, 573 So.2d 284 (Fla. 1990), the defendant challenged on direct appeal the procedure by which Mr. Holton was sentenced, alleging that it was the customary practice of the trial judge to have the State prepare his sentencing orders.[6] However, this Court found the cold record did not support the challenge. This Court explained, "Holton also claims that the state rather than the trial judge was responsible for preparing the written findings of fact in support of the death penalty. The record, however, does not support this contention." Holton v. State, 573 So.2d 284, 291 (Fla. 1990). In Mr. Fennie's case, the State's sentencing memorandum and the trial court's virtually identical Findings of Fact were filed in the record, as was the transcript containing trial counsel's objection to the State's memo. Appellate counsel should have raised this issue on direct appeal, and the failure to do so was clearly ineffective.

B. The trial court failed to weigh the aggravating and mitigating factors in his Sentencing Order as required by Florida law.

In his sentencing order, the trial court found no statutory mitigating circumstances to be present in Mr. Fennie's case, but he did list ten nonstatutory mitigating circumstances as having been "proven by the greater weight of the evidence." (RI. 461.) Although the trial court found these mitigating factors to exist, he failed to

[6]Mr. Fennie is not alleging ex parte contact between Judge Springstead and the State in preparing the sentencing order, although that may be a logical inference from the record. However, as the case law discussed herein demonstrates, there need not be ex parte contact for the trial court to fail to independently weigh the aggravating and mitigating circumstances in sentencing Mr. Fennie to death, thus violating Mr. Fennie's constitutional rights and requiring relief.

assign weight to these factors, nor did he weigh the aggravating circumstances against the mitigating circumstances. In fact, the only reference to the vital weighing process in the trial court's order was as follows:

> Based upon the evidence presented... and having carefully considered and weighed the aggravating and mitigating circumstances, the Court finds that sufficient aggravating circumstances, as set forth above, exist and that the aggravating circumstances far outweigh the mitigating circumstances.

(RI. 463.) Such a dismissal is clearly insufficient under the law.

This Court has provided the following guidelines for the sentencing process:

> When addressing mitigating circumstances, **the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant** to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature. The court must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence.... **The court next must weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance.**

Campbell v. State, 571 So.2d 415, at 419-20 (Fla. 1990) (citations omitted) (emphasis added). These requirements were restated and emphasized in Larkins v. State:

> Once established the mitigator is weighed against any aggravating circumstances.... **The result of this weighing process must be detailed in the written sentencing order** and supported by sufficient competent evidence in the record. **The absence of any of the enumerated requirements deprives this Court of the opportunity for meaningful review.**

Larkins, 655 So.2d 95, at 101 (Fla. 1995) (emphasis added).

In Crump, this Court said it was insufficient for the trial court to say that each non-statutory circumstance was considered and "given some, but very little, weight," and that they were collectively given "slight weight." Crump v. State, 697 So.2d 1211, at 1212-3 (Fla. 1997). The trial court similarly disposed of the mitigating factors in Woodel v. State, 804 So.2d 316 (Fla. 2001). This Court found that:

> The sentencing order at issue here fails to expressly determine whether these mitigators are truly mitigating, fails to assign weights to the aggravators and mitigators, fails to undertake a relative weighing process of the aggravators vis-a-vis the mitigators, and fails to provide a detailed explanation of the result of the weighing process.

Woodel, 804 So.2d at 327. In both Crump and Woodel, the sentencing orders contained more information about the weighing process than the order sentencing Mr. Fennie to death, and in both cases this Court found the trial court's failure to file an adequate sentencing order required a resentencing. See also Jackson v. State, 704 So.2d 500 (Fla. 1998) (trial court's summary disposal of aggravators and mitigators was insufficient and resentencing required); Reese v. State, 728 So.2d 727 (Fla. 1999) (second remand for resentencing due to Campbell error); Merck v. State, 763 So.2d 295 (Fla. 2000).

The findings in support of Mr. Fennie's death sentence were completely inadequate. In Bouie v. State, under similar facts, this Court found that the trial court's written findings were "totally deficient." 559 So.2d 1113, at 1116 (Fla. 1990). This Court held:

> Because of the absence of the requisite findings, we therefore follow the statutory mandate and reduce Bouie's

> sentence to life imprisonment with no possibility of parole for twenty-five years.

Id, at 1116. Like Mr. Bouie, the prejudice to Mr. Fennie is undeniable. Mr Fennie cannot have a fair appellate review of his death sentence without an adequate sentencing order. Appellate counsel was ineffective for failing to raise this issue on direct appeal, and Mr. Fennie is entitled to a new penalty phase hearing. (See also "Cumulative Analysis," infra.)

C. The trial court improperly relied upon non-record and irrelevant information to rebut the mitigating circumstances and in support of nonstatutory aggravation in sentencing Mr. Fennie to death.

The trial court clearly relied upon non-record and irrelevant information as nonstatutory aggravation in sentencing Mr. Fennie to death. This improper reliance is evidenced by the trial court's Findings of Fact, and falls into two categories.

1. The Uncharged Rape

The State never charged Mr. Fennie with sexual battery or argued that sexual battery was the underlying felony to felony murder, yet throughout the trial the State told the jury that Mr. Fennie had raped Ms. Shearin.[7] (See Claim II.) There are at least

[7]Mr. Fennie had admitted to having consensual sex with the victim. (R. 1355.) The State relied on the testimony of Mr. Fennie's codefendant, Michael Frazier, to speculate that a rape had occurred. However, Mr. Frazier specifically testified that he did not witness and could only guess what went on in the back of the car between Mr. Fennie and the victim. (R. 1477-8.)

five separate references in the trial court's sentencing order[8] to the alleged rape of Ms. Shearin:

> In the early morning hours of September 8, 1991, the Defendant robbed, raped and kidnapped Mary Elaine Shearin at gunpoint.

(R. 453.)

* * * * *

> She was taken to a deserted darkened alley where the gunman raped her.

(R. 455.)

* * * * *

> The mistreatment suffered by Mr. Koon's victim was analogous to that suffered by Mrs. Shearin, who, in addition to everything else, was raped, confined in her trunk for hours, and forced to listen to a discussion of the method of her own death.

(R. 457.)

* * * * *

> From the time she was raped until the bullet ended her suffering, Mrs. Shearin experienced mental torture far beyond that which was necessary to accomplish her death.

(R. 457.)

* * * * *

> From the time the victim was raped, placed back in the trunk of her car, and the Defendant obtained the four concrete blocks, clearly he was reflecting upon the manner by which he would kill Mary Elaine Shearin.

(R. 457.)

The trial court clearly used the uncharged, unproven rape as nonstatutory aggravation.[9] Aggravating circumstances specified in

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[8]Recall that these references in the sentencing order were taken from the State's sentencing memorandum. See Claim I(A).

[9]This is especially evident in the quote comparing Ms. Shearin's alleged rape to the suffering of Mr. Koon's victim, Koon v. State, 513 So.2d 1253 (Fla. 1987). In comparing the uncharged rape to the victim's suffering in a case that qualified for the HAC aggravator in order to justify its applicability to Mr. Fennie, the trial court is explicitly using the rape in support of an aggravator, not simply reciting unsupported facts.

Florida's capital sentencing statute are exclusive, and no other circumstances or factors may be used to aggravate a crime for purposes of the imposition of the death penalty. Miller v. State, 373 So. 2d 882 (Fla. 1979).

2. The Motion to Suppress

The trial court relied in part upon Mr. Fennie's testimony at his Motion to Suppress hearing to rebut the statutory mitigating circumstance that the defendant had no significant history of prior criminal activity. According to the trial court's sentencing order:

> No evidence has been presented to even suggest that this circumstance exists. To the contrary, at the hearing upon his motion to suppress, Mr. Fennie admitted to in excess of twenty prior felony convictions.

(RI. 459.)

This Court has defined non-record information as "information obtained other than through evidence properly presented in court for consideration in sentencing." Craig v. State, 510 So.2d 857 (Fla. 1987). By that definition, the evidence of an uncharged rape would certainly be non-record, as it could not be properly presented for consideration in sentencing. Such information is not relevant to any statutory aggravating circumstance, and it is certainly not relevant to any mitigation. Likewise, the evidence presented during Mr. Fennie's Motion to Suppress hearing could be nothing but non-record, as it wasn't even presented during the trial on the merits.

One of the dangers of non-record information is that the defendant has no notice and cannot defend himself against the State

or court's allegations. Indeed, in Gardner v. Florida, the United States Supreme Court held that,

> We conclude that petitioner was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain.

430 U.S. 349, at 362 (1977). There was no way for Mr. Fennie to defend against a rape the State never had to prove.[10] The prejudice to Mr. Fennie is clear. Recall that this was a cross-racial crime.[11] It's difficult to overstate the impact on the jury of the inflammatory allegations that Mr. Fennie, a black defendant, raped his white female victim. The impact on the judge, a supposedly impartial arbiter of fact, is certainly clear in his sentencing order.

The use of Mr. Fennie's suppression testimony in sentencing him to death is also striking because suppression testimony is sacrosanct in the trial setting. Otherwise a defendant is faced with a "Hobson's choice" of whether to exercise his constitutional rights. As the United States Supreme Court said in Simmons v. United States,

> [I]n this case Garrett was obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination. In these circumstances we find it intolerable that one

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[10]By not trying Mr. Fennie for the rape of Ms. Shearin, the State avoided the "beyond a reasonable doubt" standard not just at the guilt phase, but also at the penalty phase where aggravating circumstances must be proven beyond a reasonable doubt.

[11]Mr. Fennie has also alleged that trial counsel was ineffective for failing to adequately voir dire the jurors on the issue of race. See Claim I of Mr. Fennie's Initial Brief on Appeal, filed simultaneously with this petition.

> constitutional right should have to be surrendered in order to assert another.

Simmons, 390 U.S. 377, at 394 (1968). While Mr. Fennie's suppression testimony certainly could have been used to impeach his trial testimony had he testified, **Mr. Fennie never testified at his trial**, so there was no acceptable legal reason for his testimony at the motion to suppress hearing, testimony which was never heard by the jury, to be considered in sentencing him to death.

Certainly the fact that the trial court utilized that specific portion of Mr. Fennie's testimony, that he had over 20 felony convictions, is prejudicial. Mr. Fennie had no opportunity to rebut, and no notice that his exercise of a constitutional right would be used against him. Further, non-record evidence was indisputably used in sentencing Mr. Fennie to death. Although the trial court explicitly noted the number of Mr. Fennie's convictions, there is no way of knowing what other portions of Mr. Fennie's suppression testimony the trial court considered, and how he considered them. It is likely that the trial court used Mr. Fennie's testimony at the suppression hearing to evaluate his codefendant's credibility, or in assessing Mr. Fennie's taped interrogation, which was admitted at trial over defense objection. In this case, prejudice should be presumed.

D. Cumulative Analysis

Any one of the above errors is sufficient, standing alone, to require relief. However, this Court must perform a cumulative analysis of these errors and those alleged in Mr. Fennie's Initial

Brief on Appeal, filed simultaneously with this petition. In State v. Riechmann, the State prepared the order sentencing the defendant to death. This Court held:

> We therefore approve the evidentiary hearing judge's findings and conclusion, which he summarized as followed:
>
> > **When the cumulative effect of the trial counsel's deficiency is viewed in conjunction with the improper actions of the trial judge and prosecutor during the penalty phase,** the Court is compelled to find, under the circumstances of this case, that confidence in the outcome of the Defendant's penalty phase has been undermined, and that the Defendant has been denied a reliable penalty phase proceedings [sic].

State v. Riechmann, 777 So.2d 342, at 352 (Fla. 2000) (citations omitted) (emphasis added). Certainly, the fact that either the trial court adopted the State's sentencing memo or the State prepared the trial court's Findings of Fact; the trial court failed to weigh the aggravating and mitigating circumstances in its sentencing order, violating Campbell and preventing meaningful appellate review of Mr. Fennie's death sentence; and that the trial court relied on non-record evidence in sentencing Mr. Fennie to death, entitle Mr. Fennie to habeas relief.

On the basis of the Florida Supreme Court's decision in Van Royal v. State, 497 So.2d 625 (Fla. 1986), Mr. Fennie asserts that the proper remedy is the imposition of a life sentence. In Van Royal, the Florida Supreme Court found that the sentencing judge had failed to recite oral findings in support of the sentence of death and did not independently weigh the aggravating and mitigating circumstances until after the notice of appeal had been filed.

Accordingly, the Florida Supreme Court found that section 921.141(3), Florida Statutes (1985) required the imposition of a life sentence. The Florida Supreme Court explained:

> The chronology of events show that more than a month elapsed between the time the jury recommended life sentences and the time the judge overrode the jury recommendation of life by orally sentencing appellant to death. Unlike Cave, Ferguson, and Thompson, the judge did not recite the findings on which the death sentences were based into the record. Moreover, the findings here were not made for an additional six months until after the record on appeal had been certified to this Court. We appreciate that the press of trial judge duties is such that written sentencing orders are often entered into the record after oral sentence has been pronounced. Provided this is done on a timely basis before the trial court loses jurisdiction, we see no problem. Here, however, there are three factors present which we consider significant. First, the findings were not made until after the trial court surrendered jurisdiction to this Court. Second, we are faced with a mandatory statutory requirement that death sentences be supported by special findings of fact. Unlike Cave, Ferguson, and Thompson, the record is devoid of specific findings. A court's written finding as to aggravating and mitigating circumstances constitutes an integral part of the court's decision; they do not merely serve to memorialize it. This is even more true when, as here, we are faced with a jury override. Without these findings this Court cannot assure itself that the trial judge based the oral sentence on a well-reasoned application of the factors set out in section 921.141(5) and in (6) and in Tedder v. State, 322 So.2d 908 (Fla. 1975). Thus, the sentences are unsupported. Third, although we could order that the record be supplemented in accordance with Florida Rule of Appellate Procedure 9.200(f) as was done in Cave and Ferguson, we are not inclined to do so when the record is inadequate and not merely incomplete.

Van Royal, 497 So.2d at 628.

In Bouie v. State, this Court found that the trial court's written findings were "totally deficient" and failed to properly weigh the aggravating and mitigating circumstances in violation of Campbell. 559 So.2d 1113, at 1116 (Fla. 1990). This Court held:

> Because of the absence of the requisite findings, we therefore follow the statutory mandate and reduce Bouie's sentence to life imprisonment with no possibility of parole for twenty-five years.

Id, at 1116.

Here, there were no oral findings made at the sentencing and the written findings were produced by the State, either by explicit preparation of the sentencing order or when Judge Springstead adopted the State's sentencing memorandum with no notice to Mr. Fennie's counsel. Judge Springstead did not engage in the independent weighing required by the statute and then reduce the results of his independent weighing to writing. And even now, ten years later, Judge Springstead has not submitted written findings that were the product of his independent weighing. See Muehleman v. State, 503 So.2d 310 (Fla. 1987)(trial court's written findings were filed two and one half months after sentencing and thus Van Royal did not apply). This Court, therefore, should order the imposition of a life sentence.[12] In the alternative, this Court should order a new penalty phase.

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[12]Mr. Fennie recognizes that this issue was not addressed in the Riechmann opinion. However, it does not appear that Mr. Riechmann argued that the proper remedy was the imposition of a life sentence. Nonetheless, Mr. Fennie argues that a life sentence should be imposed.

CLAIM II

THE PROSECUTORS' INFLAMMATORY AND IMPROPER COMMENTS AND ARGUMENTS RENDERED MR. FENNIE'S DEATH SENTENCE FUNDAMENTALLY UNFAIR AND UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS CLAIM ON DIRECT APPEAL.

At the penalty phase, the prosecutors injected all manner of impermissible, improper, and inflammatory matters into the proceedings. Through the testimony they presented and through their comments and arguments, the prosecutors urged consideration of improper matters, misstated the law, and injected emotion into the proceedings. The prosecutors' arguments were fundamentally unfair and deprived Mr. Fennie of due process.

The prosecutors improperly relied upon facts outside the record throughout Mr. Fennie’s trial and particularly during closing arguments. The most prejudicial of the prosecutor’s extra-record comments focus on the alleged rape of the victim. The State never charged Mr. Fennie with sexual battery or argued that sexual battery was the underlying felony to felony murder, yet throughout the trial the State told the jury that Mr. Fennie had raped Ms. Shearin.

During the testimony of the medical examiner, Dr. Pillow (R. 1091-1122), the State asked several questions regarding rape, despite the fact that Dr. Pillow ultimately testified to finding no indication of forced sex. Several defense objections to the State's questions regarding rape were sustained, but the issue was still

clearly put in front of the jury.[13] The State was given permission to ask these questions by the trial court on the basis of needing to rebut the notion that Mr. Fennie had consensual sex with the victim, yet Dr. Pillow's testimony, at most, only established that the victim probably had sex with someone.

Additionally, the State focused the jury's attention on the alleged but uncharged rape during the testimony of the victim's husband, John Shearin, by eliciting testimony from him that he had not had sex with the victim for probably "over a week" before the killing, and that she had lost the desire for sex due to a hysterectomy. (R. 1148-51). The State also emphasized the alleged but uncharged rape during the testimony of Michael Frazier, although Frazier's testimony was that he did not witness a rape, or even sex at all, but heard the victim say that “she don’t let her husband do those types of things to her.” (R. 1477, 1504).

During the State’s guilt phase closing, the prosecutor argued:

> And out of sheer gratitude this woman agreed to have sex with [Mr. Fennie]. Just because she was so appreciative of Mr. Fennie having shown her where she could buy cocaine.

(R. 1835.)

* * * * *

> Not the lie that this woman was some kind of cocaine whore and rode around with these people willingly giving them her car and everything else.

(R. 1849.)

* * * * *

13Even more egregious was the fact that, at one point, the trial judge assisted the State in asking one of these question properly, thus further sanctioning and emphasizing the area of inquiry in the eyes of the jury. (R. 1119)

> The instruction asks you, commands you, to compare his testimony with the other evidence in the case. Compare it with John Shearin's testimony. The horrible question I had to ask him about when the last time was he had had sex with his wife. And why. The effects of her surgery on her desire to have sex. And what did Michael Frazier say? After she had been dragged out of the trunk of her car because Alfred Fennie was angry that the numbers weren't working that he made her get into the back seat of the car while Mr. Frazier walked away. And that while Alfred Fennie was raping Mary Elaine Shearin, she told him that she didn't even let her husband do these things to her.
>
> Compare it to what [Alfred Fennie] said. He claims he had consensual sex with Mary Shearin. That it happened in the car and Michael Frazier walked away. And he only said that after Carlos Douglas told him that there was evidence that this lady had had intercourse prior to her death. Oh yeah, I had sex with her.

(R. 1855.)

* * * * *

> And Eric changed, because with Eric he had sex with this lady. He didn't mention that the first time, only mentioned that when Carlos Douglas told him there was evidence that this woman had had intercourse before she died. . . . And then Sandy Noblitt came back. And now Eric was Michael Frazier, and he had sex with the lady, and he went with Michael Frazier to that Circle K, all the way out of Tampa. . . . And then, within forty-five minutes of that statement, he gave the taped statement that we've talked about it. And it's still Michael Frazier, and he still had sex with this lady, and they still stopped at the Circle K, but now he went to the woods with them and he heard the shot.

(R. 1861-2.)

* * * * *

> [Alfred Fennie] is the one that, at gun point, raped her.[14]

(R. 1865.)

14Not only did Mr. Frazier specifically testify that he did not witness and could only guess what went on in the back of the car between Mr. Fennie and the victim, he never mentioned Mr. Fennie having a gun in his possession or directing it at the the victim at this point. Thus there was no evidence presented to support a rape, and not even the self-serving testimony of Mr. Fennie's codefendant indicated a rape at gunpoint. (R. 1477-8.)

During penalty phase closing arguments, the prosecutor didn't even use the pretense of arguing witness credibility, but instead simply argued the rape independently as nonstatutory aggravation, another reason Mr. Fennie deserved to die:

> [Y]ou know how Ms. Shearin was raped. . .

(R. 2097.)

* * * * *

> [Discussing how the defendant's actions speak louder than words]
> His action in robbing Elaine Shearin, and kidnapping and raping Elaine Shearin, in making her do things that she didn't let her husband do, in murdering Elaine Shearin, in having breakfast minutes after her death.

(R. 2111.)

* * * * *

> He decided to avoid being arrested for armed rape and armed robbery and armed kidnapping.

(R. 2113.)

* * * * *

> You know, had Mr. Fennie decided when he finished robbing her, when he finished raping her, to just shoot her, he would have done her a favor.

(R. 2113.)

* * * * *

> He chose to take her out of the trunk of her car and rape her.

(R. 2118.)

Again, **Mr. Fennie was never tried for the rape of Ms. Shearin.** Although Ms. Shearin had sexual relations prior to her death, there was nothing but the self-serving testimony of his codefendant Mr. Frazier to even suggest that Mr. Fennie had forced himself upon Ms. Shearin. The State's repeated reliance upon an unproven and uncharged rape of a white woman by a black defendant in order to

secure his death sentence was unconscionable.

While there was no mention of the alleged rape of Ms. Shearin in this Court's opinion on direct appeal [Fennie v. State, 648 So.2d 95 (Fla. 1994)], it is clear that the trial court relied upon the sexual assault as nonstatutory aggravation in sentencing Mr. Fennie to death. There are at least five separate references in the trial court's sentencing order to the alleged rape of Ms. Shearin.[15]

Aggravating circumstances specified in Florida's capital sentencing statute are exclusive, and no other circumstances or factors may be used to aggravate a crime for purposes of the imposition of the death penalty. Miller v. State, 373 So. 2d 882 (Fla. 1979). Further,

> We must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death. [quoting Elledge v. State, 346 So.2d 998, 1003 (Fla.1977)].
>
> Strict application of the sentencing statute is necessary because the sentencing authority's discretion must be "guided and channeled" by requiring an examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition. Proffitt v. Florida, 428 U.S. 242, 258, 96 S. Ct. 2960, 49 L.Ed.2d 913 (1976).

Miller v. State, 373 So.2d at 885-6. See also Riley v. State, 366 So. 2d 19 (Fla. 1979); Robinson v. State, 520 So. 2d 1 (Fla. 1988).

15Note that these references in the sentencing order were taken from the State's sentencing memorandum. See Claim I for further discussion and specific references.

The penalty phase of Mr. Fennie's trial did not comport with these essential principles. Rather, the State introduced evidence which was not relevant to any statutory aggravating factors and argued this evidence and other impermissible matters as a basis for imposing death. The testimony and the prosecutor's arguments regarding the alleged rape of the victim were "of such a nature as to evoke the sympathy of the jury" and thus violated the rule intended "to assure the defendant as dispassionate trial as possible." Welty v. State, 402 So. 2d 1159, 1162 (Fla. 1981).

The prosecutor's presentation of wholly improper and unconstitutional nonstatutory aggravating factors starkly violated the eighth amendment, and the sentencer's consideration and reliance upon nonstatutory aggravating circumstances prevented the constitutionally required narrowing of the sentencer's discretion. See Stringer v. Black, 112 S. Ct. 1130 (1992); Maynard v. Cartwright, 108 S. Ct. 1853, 1858 (1988). As a result, these impermissible aggravating factors evoked a sentence that was "an unguided emotional response," a clear violation of Mr. Fennie's constitutional rights. Penry v. Lynaugh, 108 S. Ct. 2934 (1989). Appellate counsel was ineffective for failing to raise this issue on appeal.[16]

The prosecutor also asked the jurors to consider other nonrecord evidence. When discussing the mitigative weight to assign to codefendant Mr. Frazier's life recommendation for the same crime,

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16Appellate counsel did note in his argument that the trial court improperly found the heinous, atrocious or cruel circumstance, that the trial court's statement that the victim was raped was conjecture.

Mr. Gross encouraged the jury to, "[A]sk yourselves, is it possible that that jury came to the conclusion that Mr. Fennie was the active participant and that Mr. Frazier was–his part was relatively minor." (R. 2106.) Speculation on the deliberative process of Mr. Frazier's jury is highly improper. Further, this was not the first time the prosecutor asked the jurors to engage in such speculation:

> The question that I ask you to determine is how much weight are those [Mr. Frazier's and Ms. Colbert's] recommendations to be given? And when you are considering that question, I ask you to consider some of the salient facts that you heard during the course of this trial. For example, with regard to Mr. Frazier's recommendation for life, **Mr. Frazier told you that he testified before his jury. They had his testimony to consider when they decided to –**

(R. 2101) (emphasis added). Such argument was not only impeaching Mr. Frazier's jury's verdict, it was an improper comment on Mr. Fennie's right not to testify.[17] Defense counsel objected on that grounds, as well as that the prosecutor was bringing in facts not in evidence before Mr. Fennie's jury. (R. 2101-5.)[18] After the trial court overruled the defense objection, the prosecutor returned to his argument that Mr. Frazier had been convicted and sentenced to life by

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17This issue was raised by appellate counsel, but was not addressed by this Court on direct appeal except insofar as to say that Mr. Fennie's remaining claims were "without merit." Fennie v. State, 648 So.2d 95, 99 (Fla. 1994). None of the other objectionable comments were raised on direct appeal.

18This comment on Mr. Fennie's right to testify was the only one of the improper comments discussed in this claim that was objected to by defense counsel at trial.

his jury as a principal to the crime rather than an active participant. (R. 2105-6.)[19]

During his penalty phase closing arguments, the prosecutor engaged in an extensive improper "Golden Rule" argument. The record is as follows:

> **(Thereupon, the videotape player was set up)**
>
> **I've looked at this video a number of times.** And I've always wondered about those feet. How they ended up that way. And I thought about it. And it comes to me that if she was standing up and she was shot in the back of the head, what are the chances that her feet would end up like that?
>
> **(Demonstrating). On the other hand, if she was on her knees, and her hands were behind her back, and she was shot in the back of the head with a bullet that went almost level from right to left, can you hear her voice, ladies and gentlemen? Can you hear her begging for her life? Can you hear her crying? Can you hear her asking to go home to see her children?**
>
> **(Standing). Can you hear those things? Mr. Fennie can.**
>
> You know we heard some very interesting testimony about the technology that exists with regard to crime scene processing from Mr. Whitfield. He told us about the light energy scan that he uses. He told us about the Luma-lite tests. He talked about how the technology has come to the point that they can actually process things with these various techniques and cause them to glow, cause the evidence, whether it's trace materials or gunpowder residues or fingerprints, to actually glow. **But the technology unfortunately has not gotten to the point where they can process for a woman's tears. Because if they could, and he processed that trunk, that trunk would glow.**

19This was not the first improper comment on Mr. Fennie's right to testify. During the prosecutor's guilt phase closing argument, he said, "[Michael Frazier's] testimony was presented so that you would know what really happened to her. Not the lie that [Alfred Fennie] left you with, but what really happened to her." (R. 1849.) Recall that Mr. Fennie's taped interrogation statement was admitted at trial, but Mr. Fennie did not testify. (R. 1351-1379.)

> **It's too bad that they don't have a test that could detect fear and terror, because if they did, that trunk would glow.**
>
> **And it's really a shame that they don't have a test that detects a mother's longing for her children, because if they did, that trunk would glow.**

(R. 2116-7) (emphasis added). Arguments that invite the jury to put themselves in the victim's place are generally characterized as "Golden Rule" arguments and are improper. According to this Court, "the prohibition of such remarks has long been the law of Florida." Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985), citing Barnes v. State, 58 So. 2d 157 (Fla. 1951). Further, the Court emphasizes that, "[Closing argument] must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law." Bertolotti 476 So.2d at 134.

In State v. Urbin, this Court stated,

> We also note that the prosecutor, as in Garron, went far beyond the evidence in emotionally creating an imaginary script demonstrating that the victim was shot "while pleading for his life." We find that, as in Garron, the prosecutor's comment constitutes a subtle "golden rule" argument, a type of emotional appeal we have long held impermissible. By literally putting his own imaginary words in the victim's mouth, i.e., "Don't hurt me. Take my money, take my jewelry. Don't hurt me," the prosecutor was apparently trying to "unduly create, arouse and inflame the sympathy, prejudice and passions of [the] jury to the detriment of the accused." Barnes v. State, 58 So.2d 157, 159 (Fla. 1951); see Garron, 528 So.2d at 359 nn. 6, 8 & 9; Bertolotti, 476 So.2d at 133.

Urbin v. State, 714 So.2d 411, 421 (Fla. 1998). Certainly there was nothing subtle here about the prosecutor physically demonstrating his

version of how the victim was killed, a version unsupported by any testimony, and encouraging the jurors to imagine what the victim was thinking, feeling and saying to her killer as the jurors watched the crime scene video showing the victim's dead body. The prejudicial effect of such an argument cannot be overstated. Appellate counsel was ineffective for failing to raise this issue on appeal.

The prosecutor made other improper comments during the State's closing arguments as well. He began his penalty phase closing arguments by stating,

> **I come before you on behalf of the innocent, decent, law-abiding people of this community, and of this State, seeking justice.** As you probably would suspect, Mr. Lee and I have a difference of opinion as to what that term, justice, means.[20] The State has a very simple definition. We ask that the punishment fit the crime.

(R. 2096.) Shortly after this introduction, the prosecutor reminds the jurors that during voir dire, "You all agreed that if you felt that this was the appropriate case, that you had what it took to make that recommendation to this Judge." (R. 2097.)[21] Arguments that encourage the jurors to do their duty for the community or to send a message through their sentencing of the defendant are improper.

20Note that Mr. Gross's assertion that defense counsel has a different idea of justice is an improper comment on defense counsel's ethics. While a prosecutor may comment on the evidence in a case, "the law is clear that attacks on defense counsel are highly improper and impermissible." Lewis v. State, 780 So. 2d 125 (Fla. 3rd DCA 2001) (cites omitted). See also Brooks v. State, 762 So. 2d 879 (Fla. 2000).

21This argument would also have brought to mind the State's guilt closing remarks to the jury, "All of you are here because you think enough of your community to register to vote. None of you are here because you asked to be here. You got a piece of paper that said you are required. But all of you are here, all fourteen of you, because you stood and swore an oath to follow the law." (R. 1832.)

In Baker v. State, the prosecutor similarly said, "I am standing before you representing the interests of the people of the State of Florida, and there are yet other interests at stake, which is the interest of the people of the State of Florida in being safe in their environment." 578 So.2d 37, 39 (Fla. 3d DCA 1991). This comment was held to be improper, though not so prejudicial as to require reversal. As the Fourth District Court of Appeal noted of a similar argument,

> The "send 'em a message" argument may have some cachet in the political arena, but it grossly improper in a court of law. It diverts the jury's attention from the task as hand and worse, prompts the jury to consider matters extraneous to the evidence. This type of argument is calculated to inflame the passions or prejudices of the jury, and, thus, it is prohibited by ABA Standards for Criminal Justice, 3-5.8(c).

Boatwright v. State, 452 So.2d 666, 667 (Fla. 4th DCA 1984) (citations omitted). See also Grey v. State, 727 So.2d 1063, 1065 (Fla. 4th DCA 1999); Pacifico v. State 642 So.2d 1178, 1183 (Fla. 1st DCA 1994); Harris v. State, 619 So.2d 340, 343 (Fla. 1st DCA 1993).

Finally, the prosecutor misstated the law in his penalty phase argument:

> And, remember, the **law required** if the aggravating circumstances outweigh the mitigating circumstances **you are required** to return a recommendation to this court that the defendant die.

(R. 2100) (emphasis added). The jury is never required to return a recommendation of death, even where the aggravators outweigh the mitigators. Allen Ward Cox v. State, 2002 WL 1027308 (May 23, 2002); Henyard v. State, 689 So.2d 239, 249-50 (Fla. 1996).

The State was allowed to argue these impermissible factors, misstate the law, and to inflame to the passions of the jury. The cumulative effect of the prosecutors' comments was to "improperly appeal to the jury's passions and prejudices." Cunningham v. Zant, 928 F.2d 1006, 1020 (11th Cir. 1991). Such remarks prejudicially affect the substantial rights of the defendant when they "so infect the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 647 (1974); See also, United States v. Eyster, 948 F.2d 1196, 1206 (11th Cir. 1991). Although the majority of these improper comments were not objected to at Mr. Fennie's trial,[22] unobjected-to improper argument is cognizable on appeal if it rises to the level of fundamental error. Street v. State, 636 So.2d 1297 (Fla. 1994); Craig v. State, 510 So.2d 857 (Fla. 1987). All of these prejudicial comments were apparent in the record, and appellate counsel was ineffective for failing to raise them on direct appeal.

Fundamental error can lie in the cumulative effects of multiple improper comments. Nowitzke v. State, 572 So.2d 1346, 1350; Garron v. State, 528 So.2d 353, 359 (Fla. 1988); Pacifico v. State, 642 So.2d 1178 (Fla. 1st DCA 1994); Lewis v. State, 780 So.2d 125 (Fla. 3rd DCA 2001). Improper argument by a prosecutor reaches the threshold of fundamental unfairness if it is "so egregious as to create a reasonable probability that the outcome was changed."

22Recall that the comment on Mr. Fennie's right to testify was the only one of the improper comments discussed herein that was objected to by defense counsel at trial.

Brooks v. Kemp, 762 F.2d 1383, 1403 (11th Cir. 1985). A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland v. Washington, 466 U.S. 668 (1984). Clearly, the improper conduct by the prosecutor "permeated" the trial, therefore, relief is proper. See Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990).

The prosecutor's improper commentary and actions destroyed any chance of a fair penalty determination for Mr. Fennie. The remarks were of the type that the Florida Supreme Court has found "so egregious, inflammatory, and unfairly prejudicial that a mistrial was the only proper remedy." Garron v. State, 528 So. 2d 353, 358 (Fla. 1988). In fact, this case is analogous to Garron v. State, 528 So. 2d 353 (Fla. 1988).

In Garron, there was no question that the defendant killed his wife and step-daughter, and his sole defense at trial was insanity. However, this Court found that the cumulative effect of several remarks by the prosecutor justified a new penalty phase proceeding. This Court reproduced those remarks in its opinion. Garron, 528 So.2d at 358-9. These remarks included three remarks in the "send a message/do your duty" category, one misstatement of the law on aggravating and mitigating circumstances, one comment that if the victim were here she would probably argue that the defendant be punished, and one characterized as a "Golden Rule" argument. The Golden Rule argument was as follows:

> [Y]ou can just imagine the pain this young girl was going through as she was lying there on the ground dying.... Imagine the anguish and the pain the Le Thi Garron felt as she was shot in the chest and drug [sic] herself from the bathroom into the bedroom where she expired.

(Id., at 358-9.) Defense counsel objected to at least five of these six statements,[23] with his objections being sustained and the jurors being told to disregard the comments and/or given a curative instruction.

23It is unclear from this Court's opinion whether defense counsel objected to the Golden Rule argument.

Despite these cautionary measures by the trial court, this Court still found that a new penalty phase proceeding was the only appropriate remedy for Mr. Garron.

In Mr. Fennie's case, the objectionable arguments were very similar to those in Garron, but defense counsel only objected to one of the arguments, and the jurors never received curative instructions and were never told to disregard any of the improper comments. Further, the Golden Rule argument in Mr. Fennie's case, with the prosecutor painting, through his words and physical actions, an execution tableau next to a video of the victim's dead body, is far more egregious than the argument condemned in Garron. Considered cumulatively with the State's racially charged, highly inflammatory comments regarding the alleged rape of the victim, the comment on Mr. Fennie's right to testify and speculation about the codefendant's jury's deliberations and the evidence they heard, the invocation of duty and community, and the prosecutor's misstatement of the law, Mr. Fennie is certainly entitled to same relief granted to Mr. Garron.

In Rosso v. State, 505 So. 2d 611 (Fla. 3rd DCA 1987) the court defined a proper closing argument:

> The proper exercise of closing argument is to review the evidence and to explicate those inferences which may be reasonably drawn from the evidence. Conversely, it must not be used to inflame the minds and passions of the jurors so their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law.

Rosso, 505 So. 2d at 614. Further, "[a] prosecutor's concern 'in a criminal prosecution is not that it shall win a case, but that justice shall be done.' While a prosecutor 'may strike hard blows, he is not at liberty to strike foul ones.'" Rosso, 505 So. 2d at 614, cites omitted. The prosecutor's argument in Mr. Fennie's case went beyond a review of the evidence and permissible inferences. He intended his argument to overshadow any logical analysis of the evidence and to generate an emotional response, a clear violation of

Penry v. Lynaugh, 109 S. Ct. 2934 (1989). He intended that Mr. Fennie's jury consider factors outside the scope of the evidence.

Arguments such as those made by the State Attorney in Mr. Fennie's trial violate the due process of the Fourteenth Amendment and the Eighth Amendment, and render a death sentence fundamentally unfair and unreliable. See Drake v. Kemp, 762 F.2d 1449, 1458-61 (11th Cir. 1985) (en banc); Potts v. Zant, 734 F.2d 526, 536 (11th Cir. 1984); Wilson v. Kemp, 777 F.2d 621 (11th Cir. 1985); Newlon v. Armontrout, 885 F.2d 1328, 1338 (8th Cir. 1989); Coleman v. Brown, 802 F.2d 1227, 1239 (10th Cir. 1986). Here, as in Potts, because of the improprieties evidenced by the prosecutor's argument, the jury "failed to give [its] decision the independent and unprejudicial consideration the law requires." Potts, 734 F.2d at 536. In the instant case, as in Wilson, the State's closing argument "tend[ed] to mislead the jury about the proper scope of its deliberations." 777 F.2d at 626. In such circumstances, "[w]hen core Eighth Amendment concerns are substantially impinged upon . . . confidence in the jury's decision will be undermined." Id. at 627.

There was mitigating evidence in the record upon which the jury could reasonably have based a life recommendation, but no reasoned assessment of the appropriate penalty could occur. The proceedings were contaminated with irrelevant, inflammatory, and prejudicial considerations. Appellate counsel was ineffective for failing to raise these issues on appeal. Habeas relief is warranted.

CLAIM III

THE FLORIDA DEATH PENALTY SENTENCING STATUTE AS APPLIED IS UNCONSTITUTIONAL UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED

STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.[24]

In Jones v. United States, the United States Supreme Court held that "under the Due Process Clause of the Fifth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Jones v. United States, 526 U.S. 227, 243 n.6 (1999). Subsequently, in Apprendi v. New Jersey, the Court held that the Fourteenth Amendment affords citizens the same protections under state law. See Apprendi v. New Jersey, 530 U.S. 466 (2000).

In Apprendi, the issue was whether a New Jersey hate crime sentencing enhancement, which increased the punishment beyond the statutory maximum, operated as an element of an offense so as to require a jury determination beyond a reasonable doubt. Apprendi, 120 S. Ct. at 2365. "[T]he relevant inquiry here is not one of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty

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24 This Court has addressed Apprendi claims in several petitions for writ of habeas corpus: Mills v. Moore, 786 So. 2d 532 (Fla. 2001); Mann v. Moore, 794 So. 2d 595 (Fla. 2001); Brown v. Moore, 800 So. 2d 223 (Fla. 2001).

However, Mr. Fennie recognizes that claims of fundamental changes in the law are generally raised in motions for postconviction relief under Florida Rule of Criminal Procedure 3.850. See Adams v. State, 543 So. 2d 1244 (Fla. 1989); Dixon v. State, 730 So. 2d 265 (Fla. 1999). Because Mr. Fennie is currently appealing the circuit court's denial of his motion for postconviction relief, he does not have an opportunity to raise this claim in such a motion. If this claim must be brought in a motion for postconviction relief, Mr. Fennie requests that this Court relinquish jurisdiction, so that he may file such a motion in the circuit court.

verdict?" Apprendi, 120 S. Ct. at 2365. Applying this test, it is clear that aggravators under Florida's death penalty sentencing scheme are elements of the offense which must be charged in an indictment, submitted to a jury during guilt phase, and proven beyond a reasonable doubt by a unanimous verdict.

As in Apprendi, in Mr. Fennie's case, the aggravating sentencing factors came into play only after he was found guilty and the maximum statutory penalty, based upon the guilty verdict, was increased from life imprisonment to death. At the time of Mr. Fennie's penalty phase, Florida Statutes, Section 775.082(1) (1989), provided:

> A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than 25 years before becoming eligible for parole unless the proceeding held to determine sentence according to the procedure set forth in §§ 921.141 results in findings by the court that such person shall be punished by death, and in the latter event such person shall be punished by death.

Fla. Stat. § 775.082(1) (1989).

Under this statute, the state must prove at least one aggravating factor in the separate penalty phase proceeding before a person convicted of first degree murder is eligible for the death penalty. See State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973); Fla. Stat. § 775.082(1) (2001); Fla. Stat. §§ 921.141(2)(a), (3)(a) (2001). Thus, Florida capital defendants are not eligible for a death sentence simply upon conviction of first degree murder. If a court sentenced a defendant immediately after conviction, the court could only impose a life sentence. See Fla. Stat. § 775.082 (2001).

In Apprendi, a hate crime sentencing enhancement was applied after the defendant was found guilty by the jury and the judge increased the sentenced the statutory maximum penalty by up to ten years. Apprendi, 120 S. Ct. at 2351. The Apprendi Court clearly dispensed with the fiction that the sentencing enhancement was not an element which received Sixth Amendment protections. "[I]t can hardly be said that the potential doubling of one's sentence from 10 to 20 years has no more than a nominal effect. Both in terms of absolute years behind bars, and because of the severe stigma attached, the differential here is unquestionably of constitutional significance." Apprendi, 120 S. Ct. at 2365. Similarly, in Mr. Fennie's case, the aggravators were applied only after he was found guilty, yet it was these aggravators that increased the statutory maximum penalty to which he could be sentenced based on the jury's guilty verdict from life imprisonment to death. Certainly, the difference between life and death has more than a nominal effect and is of constitutional significance. "[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." Woodson v. North Carolina, 428 U.S. 280, 305 (1975); see Gardner v. Florida, 430 U.S. 349, 357 (1976).

Under Apprendi's reasoning, aggravating factors in the Florida death penalty scheme are elements of a capital crime which must be decided by a unanimous jury. Florida Rule of Criminal Procedure 3.440, requires unanimous jury verdicts on criminal charges.

However, in capital cases, this Court permits jury recommendations of death based upon a simple majority vote. See Fla. Stat. §§ 921.141(1), (2) (1981); Walton v. Arizona, 497 U.S. 639, 648 (1990). The trial judge instructed Mr. Fennie's jury of this prior to their penalty phase deliberations. (R. 2145, 2146.)

Mr. Fennie was sentenced to death by a unanimous vote. (R. 2150-1.) However, it is impossible to say whether there was unanimity on the aggravating factors used to sentence Mr. Fennie to death.[25] This Court does not require jury unanimity as to the existence of specific aggravating factors. In Florida, it is the judge and not the jury who finds the specific aggravating factors that make a person death-eligible. See Fla. Stat. §§ 921.141(1), (2) (1981); Walton v. Arizona, 497 U.S. 639, 648 (1990). For Sixth Amendment purposes, these aggravators are elements of a death penalty offense. Consequently, the procedure followed in the sentencing phase should receive the protections guaranteed by Apprendi. The trial court's weighing of the jury's recommendation does not change

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25Also note that this Court found the cold, calculated and premeditated instruction given to Mr. Fennie's jury was unconstitutionally vague pursuant to this Court's decision in Jackson v. State, 648 So.2d 85 (Fla. 1994), and that the issue had been preserved by trial counsel. Fennie v. State, 648 So.2d 95, 98-9 (Fla. 1994). However, this Court found the instruction error to be harmless because the crime was cold, calculated and premeditated under any definition of those terms. Fennie, at 99. Because we do not know what various jurors found as to the aggravating factors, we cannot know the effect this had on their sentencing calculus. Further, when this Court determined that Mr. Fennie's crime was cold, calculated and premeditated under any definition rather than having a jury determine the effect of the unconstitutional instruction, this Court, like the trial court, was violating the principles of Apprendi.

that. See Walton, 497 U.S. at 648. Although this Court has said that Apprendi did not overrule Walton, see Mills v. Moore, 786 So. 2d 532, 537 (Fla. 2001), and Mr. Fennie contends that the Florida death penalty scheme is unconstitutional as applied, the United States Supreme Court has granted certiorari in Ring v. Arizona to decide precisely that question. See State v. Ring, 25 P.3d 1139 (Ariz. 2001), *cert. granted*, Ring v. Arizona, 122 S. Ct. 865 (2001).[26]

In addition to not requiring jury unanimity of a sentence nor jury unanimity of each aggravator, this Court does not require that the prosecution inform the defendant in the indictment which aggravating factors will be presented, and in fact the prosecution did not do so in this case. (RI. 20-1.) Mr. Fennie's trial counsel subsequently filed a Motion to Elect and Justify Aggravating Circumstances. (RI. 168-9) The court denied this motion. (RI.635-6.)

Because the effect of finding an aggravator exposes the defendant to a greater punishment than that authorized by the jury's guilty verdict, the aggravator must be charged in the indictment,

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26 On January 11, 2002, the United Stated Supreme Court granted Timothy Stuart Ring's petition for Writ of Certiorari. The petition raised, as it sole issue, the question of whether Walton v. Arizona, 479 U.S. 639 (1990), should be overruled in light of the Court's subsequent holding in Apprendi that "for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed" violates the defendant's Sixth Amendment right to a jury trial. Apprendi, 530 U.S. at 490. As a result of the implications Ring could have on Florida's death penalty scheme, the United States Supreme Court recently stayed the executions of two Florida inmates until an opinion is reached in Ring. See King v. Florida, 122 S. Ct. 932 (2002); Bottoson v. Florida, 2002 WL 181142 (2002).

submitted to a jury, and proven beyond a reasonable doubt. See Apprendi, 530 U.S. at 494-95. This did not occur in Mr. Fennie's case, thus, the death sentence against him is unconstitutional and habeas relief is warranted.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Fennie 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 Stephen D. Ake, Assistant Attorney General, Department of Legal Affairs, 2002 North Lois Avenue, Westwood Center, Suite 700, Tampa, Florida 33607, on this 28TH day of May, 2002.

CERTIFICATE OF TYPE SIZE AND STYLE

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