IN THE SUPREME COURT OF FLORIDA

NO. SC01-2862

ROGER LEE CHERRY,

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. Cherry'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. Cherry 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. Cherry's trial shall be referred to as "R.__" followed by the appropriate page number. Mr. Cherry's initial post-conviction record on appeal shall be referred to as "PC-R. __" followed by the appropriate page number. The record on appeal after an evidentiary hearing shall be referred to as "PC-R2. __" followed by the appropriate page number. This Court's opinion following Mr. Cherry's direct appeal, Cherry v. State, 544 So. 2d 184 (Fla. 1989), will be referred to as Cherry I. This Court's opinion affirming in part, reversing in part and remanding for an evidentiary hearing on Mr. Cherry's post-conviction claim of ineffective assistance of penalty phase counsel, Cherry v. State, 659 So. 2d 1069 (Fla. 1995), will be referred to as Cherry II. Finally, this Court's opinion following Mr. Cherry's evidentiary

hearing, Cherry v. State, 781 So. 2d 1040 (Fla. 2000), will be referred to as Cherry III. All other references will be self-explanatory or otherwise explained herein.

INTRODUCTION

This petition presents questions that were addressed on direct appeal but that should now be revisited to correct error in the appellate process that has denied Mr. Cherry his constitutional rights. Particularly, this Court has issued contradictory opinions in Mr. Cherry's case that have resulted in a violation of his constitutional rights.

Mr. Cherry's trial counsel's sole action during the penalty phase was to enter into evidence a four page psychiatric report, which included minimal reference to Mr. Cherry's abusive childhood and an opinion that he was competent to stand trial. However, trial counsel elected not to mention this report to the jury in his closing argument. Similarly, the sentencing order indicates that the circuit court found no mitigation. On direct appeal, this Court affirmed Mr. Cherry's death sentence "**[i]n the absence of any mitigating factors**," Cherry I, at 188 (emphasis added), and later ordered an evidentiary hearing on Mr. Cherry's postconviction claim that his trial counsel provided ineffective assistance in his penalty phase. Cherry II, at 1074. Despite an extensive and emotional hearing where numerous witnesses detailed the horrific treatment Mr. Cherry endured at the hands of his father, this Court affirmed the circuit court's decision that Mr. Cherry's penalty phase counsel was not ineffective. Cherry III,

at 1044. The basis for this decision was that the evidence and testimony was "merely cumulative and [did] nothing more than bolster the information that was already presented." Id. at 1046. The trial court never considered the psychiatric report or any mitigation on Mr. Cherry's behalf. Further, the change in this Court's position regarding the significance of the report has undermined the confidence in the result of Mr. Cherry's trial and appeal. Consequently, Mr. Cherry must be granted a new penalty phase to ensure that he receives the individualized treatment to which he is constitutionally guaranteed. Parker v. Dugger, 498 U.S. 308, 321 (1990); Woodson v. North Carolina, 428 U.S. 280, 303 (1976).

Additionally, significant errors which occurred at Mr. Cherry's capital trial and sentencing were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel. Appellate counsel's failure to present the meritorious issues discussed in this petition demonstrates that his representation of Mr. Cherry involved "serious and substantial" deficiencies. Fitzgerald v. Wainwright, 490 So. 2d 938, 940 (Fla. 1986). The issues which appellate counsel neglected to raise demonstrate that his performance was deficient and the deficiencies prejudiced Mr. Cherry. "[E]xtant legal principle[s] . . . provided a clear basis for . . . compelling appellate argument[s]," which should have been raised in Mr. Cherry's appeal. Fitzpatrick, 490 So. 2d at 940. Neglecting to raise such fundamental issues, 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). Had counsel presented these issues, Mr. Cherry would have received a new trial, or, at a minimum, a new penalty phase. Individually and "cumulatively," Barclay v. Wainwright, 444 So. 2d 956, 969 (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. Cherry is entitled to habeas relief.

REQUEST FOR ORAL ARGUMENT

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

PROCEDURAL HISTORY

On September 6, 1986, a Grand Jury in the Circuit Court of Volusia County issued an indictment of Mr. Cherry on two counts of first degree murder, one count of burglary of a dwelling, and one count of grand theft of the second degree. (R. 1070-71). Mr. Cherry entered a written plea of not guilty. (R. 1072). Mr. Cherry's trial was held on September 22 - 24, 1987. The jury found him guilty on all counts. A penalty phase proceeding was conducted on September 25, 1987, after which the jury recommended a sentence of death for the murder of Mr. Wayne by a vote of seven (7) to five (5), and for the murder of Mrs. Wayne by a vote

of nine (9) to three (3). (R. 1239-40). Mr. Cherry, was sentenced to death on September 26, 1987. (R. 1067).

On direct appeal, this Court affirmed the convictions and the death sentence imposed as to Mrs. Wayne. However, this Court vacated the sentence as to Mr. Wayne and remanded it for the imposition of a life sentence without the possibility of parole for twenty-five years. Cherry I, at 188 (explaining that death is not "a proportional punishment when the victim dies of a heart attack during a felony in the absence of any deliberate attempt to cause the heart attack."). This Court also vacated the sentences for the two noncapital felony counts and remanded for resentencing on those counts with instruction that the trial court resentence Mr. Cherry using a guidelines score sheet. Id.

On April 16, 1992, Mr. Cherry filed his first motion under Florida Rule of Criminal Procedure 3.850. On March 12, 1993, the circuit court summarily denied Mr. Cherry's motion without conducting an evidentiary hearing and rejected Mr. Cherry's arguments to disqualify the trial judge from presiding over the 3.850 proceedings. This Court affirmed the lower court's denial of Mr. Cherry's 3.850 claims, except in regards to the claims that alleged ineffective assistance of counsel during the penalty phase, which were remanded for an evidentiary hearing. Cherry II, at 1071-72, 1074.

The evidentiary hearing was conducted in December of 1996. On June 26, 1996, the circuit court entered an order that denied Mr. Cherry relief. This Court affirmed the trial court's denial

of Mr. Cherry's ineffective assistance of counsel claims during the penalty phase. Cherry III, at 1048.

On August 7, 1997, after filing a notice of appeal, Mr. Cherry filed a successor 3.850 motion, alleging newly discovered evidence. Mr. Cherry requested that this Court relinquish jurisdiction over his case, so that the circuit court could hear the successor claims. This Court denied Mr. Cherry's motion. On September 14, 2001, in accordance with Huff v. State, 622 So. 2d 982 (Fla. 1993) and Florida Rule of Criminal Procedure 3.851(c), a hearing was held to determine whether Mr. Cherry was entitled to an evidentiary hearing. On October 16, 2001, the circuit court summarily denied Mr. Cherry's second Rule 3.850 motion.

Mr. Cherry filed a Motion for Rehearing on October 25, 2001. On October 31, 2001, the circuit court issued an order granting Mr. Cherry's motion and scheduled an evidentiary hearing on the newly discovered evidence claims for January 11, 2002.[1]

Mr. Cherry now files this petition seeking habeas corpus relief.[2]

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

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[1] On the State's motion and without objection by Mr. Cherry, the circuit court recently continued Mr. Cherry's evidentiary hearing.

[2] Mr. Cherry simultaneously files with his petition a motion to hold the proceedings in this Court in abeyance.

jurisdiction pursuant to Fla. R. App. 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. Cherry's sentence of death.

Jurisdiction in this action lies in the 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. Cherry'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. Cherry 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 v. Wainwright, 474 So. 2d 1162, 1163 (Fla. 1985).

This Court has the inherent power to do justice. The ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. The petition pleads claims involving fundamental constitutional error. See Dallas v. Wainwright, 175 So. 2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So. 2d 362 (Fla. 1984). The Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action. As the petition shows, habeas corpus

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

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Cherry 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 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. CHERRY'S DEATH SENTENCE IS UNCONSTITUTIONAL BECAUSE HE WAS DEPRIVED OF AN INDIVIDUALIZED SENTENCING DETERMINATION, IN VIOLATION OF ARTICLE I, SECTIONS 9 AND 17 OF THE FLORIDA CONSTITUTION AND THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE FEDERAL CONSTITUTION.

In its sentencing order, the trial court stated that the court had charged the jury with four mitigating circumstances[3] and that "these mitigating circumstances were rejected by the Jury by the votes herein set forth." (R. 1243). After listing the aggravators in Mr. Cherry's case, the trial court stated that Mr. Cherry was not an accomplice in the case and his age, thirty-six years, was not a mitigating circumstance. The sentencing order did not reference any other mitigation. Rather, the trial court wrote that "[i]t is the opinion and determination of the Court and the Court further finds that the aggravating circumstances in the cause far outweigh mitigating circumstances in this cause." (R. 1243). Further, the sentencing order indicates that the trial court failed to consider any mitigation.

> These findings and the order of this Court are based **solely** on the testimony of the witnesses in this matter before the Jury and the argument of counsel for the State and

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[3] The jury was charged with four mitigating circumstances: 1) the crimes were committed while the Defendant was under the influence of extreme mental or emotional disturbance; 2) the Defendant acted under extreme duress or under the substantial domination of another person; 3) 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; 4) any other aspect of the Defendant's character or record, and any other circumstance of the offense.

> Defense. . . . The Court further certifies that the decisions of this Court in this Order are not based on any Pre-Sentence Investigations, juvenile case files, **psychiatric reports** or otherwise.

(R. 1243-44)(emphasis added). As the psychiatric report was the only evidence presented during Mr. Cherry's penalty phase and Mr. Cherry's counsel failed to discuss the contents of the report in his argument to the jury, the trial court did not consider any mitigating evidence that may have been included in the report.

On direct appeal, Mr. Cherry's appellate counsel argued that "the trial court erred in failing to consider a psychiatric report introduced into evidence by defense counsel during the penalty phase of the trial." (Initial Brief, Point VIII, 67-69).[4] This Court did not address the claim in its decision on Mr. Cherry's direct appeal[5] and found it meritless. Cherry I at 186-87. In the same opinion, after striking one aggravator because of improper doubling, this Court explained that "[i]n the absence

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[4] In Mr. Cherry's postconviction motion, Mr. Cherry again asserted that "the trial court failed to conduct an independent evaluation of the mitigating evidence." (PC-R. 413-22). However, this Court dismissed the claim on the grounds that it was procedurally barred, because it "should have been raised on direct appeal,". Cherry II at 1071-72.

[5] This Court only briefly mentioned Mr. Cherry's penalty phase while summarizing the case. "During the penalty phase, the state offered no additional evidence. The defense evidence was limited to a September 10, 1987, psychiatric evaluation by George W. Barnard, M.D." A footnote pared the contents of the report to three issues: "Dr. Barnard reported that Mr. Cherry's father beat him severely and that his mother had alcohol problems. In the year before his arrest, Mr. Cherry smoked approximately $700 worth of 'crack,' the last time being on June 28, 1986." Cherry I at 186, n.1.

of *any* mitigating factors, under these circumstances we affirm the death penalty as to Mrs. Wayne." Id. at 188.

In subsequent opinions, and in conflict with the circuit court's order and this Court's opinion from Mr. Cherry's direct appeal, this Court asserted that the trial court did consider the report and found mitigation within the report. In Cherry II, this Court granted Mr. Cherry an evidentiary hearing to determine if his attorney provided ineffective assistance at the penalty phase.

At the hearing Mr. Cherry presented numerous witnesses who testified about, among other mitigating factors, the abject poverty in which Mr. Cherry was raised; the physical, psychological and emotional torture experienced by Mr. Cherry as a child and adolescent due to his father's repeated, severe abuse and neglect; Mr. Cherry's being raised by an alcoholic mother with mental and physical illnesses; Mr. Cherry's retardation and brain damage; and Mr. Cherry's desperate attempts to escape his pathetic existence by turning to alcohol and drugs, including crack cocaine.

Despite presenting compelling, weighty mitgation, the circuit court denied Mr. Cherry relief. This Court affirmed the denial of relief in an opinion that quoted large portions of the circuit court's order. See Cherry III. This Court reasoned that Dr. Barnard's report was considered by the jury[6] and that the

[6] The circuit court held "that Dr. Barnard's evaluation/examination was introduced into evidence at the

witnesses from the evidentiary hearing would be cumulative to the mitigation already included in the report.[7] Cherry III at 1046. This rationale contradicts this Court's position from Mr. Cherry's direct appeal that the trial court did not find any mitigation and that no mitigation existed.

Presuming that the trial court did consider Dr. Barnard's report, it would have had a glimpse, however limited, of Mr. Cherry's background. The report included a brief background of Mr. Cherry's life:

> As he was growing up his father had a very bad temper and beat the defendant severely. He ran away from home 8 or 9 times in order to get away from the beatings. He said that when he was 13 his father put a chain around his neck and made him walk around so that others could see what was taking place. He did this for about 3 days and went without any food or water, except what he was given by his brother.

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penalty phase at which time it was considered by the jury panel." Cherry III at 1046.

[7] The circuit court in analyzing prejudice held:

> because the report of Dr. Barnard which summarized and contemplated the Defendant's background, mental history and alcohol and drug abuse was entered into evidence at penalty phase and thus was considered by the jury in their recommendation, the affidavits and witnesses presented at the evidentiary hearing are merely cumulative and do nothing more than bolster the information that was already presented by Dr. Barnard in his mental health evaluation report which was entered into evidence at penalty phase and was considered by the jury.

Id.

(R. 1167). Mr. Cherry was knocked unconscious when he was thirteen after being "hit in the mouth with a hammer." (R. 1168). And, his mother eventually died from alcohol problems. (R. 1167). Although this brief report cannot, by any standards, illustrate the horrendous childhood that Mr. Cherry endured as a result of his parents' alcoholism and constant, severe abuse, it at least alludes to a difficult life.[8] Nevertheless, the trial court dismissed the report without any explanation.

[8] Dr. Barnard's brief mention of Mr. Cherry's childhood does not begin to portray the life he endured. Unfortunately, classifying the events in Mr. Cherry's childhood as severe abuse does not accurately illustrate the countless gruesome and appalling events he endured, such as being tied up with a rope soaked in gasoline until his wrists bled while beaten with a rope, a water hose, or a shovel handle, (PC-R2. 163, 239, 358); being chained like a dog and dragged around the neighborhood while being kicked and beaten, (PC-R2. 162, 187, 195); being hog-tied or tied to a tree and beaten, (PC-R2. 195); being denied food and water so that he had to forage in dumpsters to survive, (PC-R2. 360); being left in dirty clothes and unbathed (PC-R2. 353); being so terrified of his alcoholic and sadistic father that he hid under his neighbor's house at night; and watching his father beat his mother and kill another man.

A. MR. CHERRY'S SENTENCE IS A RESULT OF A VIOLATION OF THE INDIVIDUALIZED WEIGHING PROCESS TO WHICH MR. CHERRY IS CONSTITUTIONALLY GUARANTEED.

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, 438 U.S. 586, 604 (1978) (emphasis in original); Hitchcock v. Dugger, 481 U.S. 393 (1987).

When the circuit court denied Mr. Cherry's claims at the evidentiary hearing, its order was based on its assumption that, because it was admitted into evidence, the jury considered the psychiatric report. However, that is not the issue. The issue is whether the co-sentencer, i.e., the **trial court** considered the psychiatric report. Even in 1987 when Mr. Cherry's trial occurred, it was established that the trial court has a duty to independently evaluate the evidence and weigh the aggravators against the mitigators. "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." Fla. Stat. 921.141(3)(1987). Both the circuit court at the evidentiary hearing and this Court failed to assess whether this occurred.

"Under both federal and Florida law, the trial judge could not refuse to consider any mitigating evidence." Parker v. Dugger, 498 U.S. 308, 315 (1990). Had the court considered the

psychiatric report, it would have been obligated to find mitigating circumstances. "Whenever 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). Mr. Cherry's trial judge failed to consider Dr. Barnard's psychiatric report and in doing so completely rejected abuse so severe that it prompted a child to repeatedly flee from home. Child abuse is a common mitigator given varying weight by courts but, nonetheless, acknowledged and given weight. See generally Remeta v. State, 522 So. 2d 825, 828 (1988). Specifically, Judge Blount, who presided over Mr. Cherry's trial and imposed his death sentence, has found that a defendant's abuse as a child constitutes a mitigating factor. Anthony Joseph Farina v. State, 2001 WL 920230 (Fla. 2001) (finding that the defendant had an "abused and battered childhood" and "a poor upbringing by his mother," among thirteen other nonstatutory mitigators); Jeffery Allen Farina v. State, 680 So. 2d 392 (Fla. 1996)(finding that the defendant suffered child abuse and was "raised with limited emotional and financial support" established mitigating circumstances). However, in both of these cases, Judge Blount detailed which nonstatutory mitigators he found.[9]

[9] Because this Court repeated in its opinions which nonstatutory mitigators Judge Blount found, it is a safe assumption that Judge Blount at least listed the nonstatutory mitigators that he found.

Judge Blount's omission of mitigation in the sentencing order issued in the instant case indicates that he failed to consider such evidence.

Nothing in the trial court's order indicates that the trial court considered the mitigation included in Dr. Barnard's report. As this Court must now do, the United States Supreme Court in Parker v. Dugger,[10] 498 U.S. 308 (1991), was required to determine, from the facts and history of the case, whether the trial judge found mitigating factors. Because the judge had ambiguously stated in his order that he "found no mitigating circumstances to balance against the aggravating factors," the Supreme Court evaluated whether the trial judge considered the mitigation evidence at all. Id. at 318. Concluding that the trial judge must have regarded the mitigating evidence, the Supreme Court cited four factors: the defendant undoubtedly presented mitigating evidence through several witnesses; in his order, the judge said that he "considered *all the evidence and testimony at trial and at advisory sentence proceedings*, the presentence Investigation Report, the applicable Florida Statutes, the case law, and all other factors touching upon this case;" every court reviewing the Parker's sentence found that the evidence substantiated a finding of nonstatutory mitigation; the judge only overrode the jury's recommendation for one murder conviction

[10] In this case, the United States Supreme Court reviewed a trial judge's decision to override a jury recommendation of life and sentence the defendant to death.

but affirmed a jury recommendation of life for a second murder conviction. Id. at 314-16.

In Mr. Cherry's case, none of Parker circumstances are present: the presentation of mitigation is questionable, as any mitigation was within a report that was entered without comment; the trial judge unambiguously stated that the decisions in the sentencing order were not based on psychiatric reports but only on the testimony of witnesses and arguments of counsel. (R. 1243-44); this Court, upon review of the sentence, stated that there was "an absence of any mitigating factors." Cherry I, at 188. "[A] judge who fails to consider . . . nonstatutory mitigating circumstances commits reversible error." Riley v. Wainwright, 517 So. 2d 656, 657 (Fla. 1987). Consequently, Mr. Cherry's constitutional rights were violated. 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). Mr. Cherry's deprivation of the individualized treatment to which he is constitutionally guaranteed requires this Court to find that fundamental error occurred. Since fundamental error is "equivalent to the denial of due process," Mr. Cherry's sentence must be vacated. State v. Johnson, 616 So. 2d 1 (Fla. 1993).

B. IF THE TRIAL COURT DID CONSIDER THE PSYCHIATRIC REPORT AND ANY EVIDENCE WITHIN, THE CONFIDENCE OF MR. CHERRY'S SENTENCE HAS BEEN COMPROMISED BY THE ABSENCE OF A MEANINGFUL REVIEW AS WELL AS THE FAILURE TO REWEIGH THE AGGRAVATING AND MITIGATING FACTORS AFTER ONE AGGRAVATOR WAS STRUCK.

1. Appellate counsel provided Mr. Cherry ineffective assistance, which result in an inadequate review, by neglecting to argue that the trial court's failure to discuss the mitigating circumstances it considered renders the sentencing order utterly deficient.

If the trial court did assess the psychiatric report, its sentencing order was completely deficient and the error should have been raised on direct appeal. By failing to raise this claim, Mr. Cherry was denied effective assistance of appellate counsel.

> The criteria for proving ineffective assistance of appellate counsel parallel the *Strickland*[11] standard for ineffective trial counsel: Petitioner must show 1) specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance and 2) the deficiency of that performance compromised the appellate counsel to such a degree as to undermine confidence in the fairness and correctness of the appellate result.

Wilson v. Wainwright, 474 So. 2d 1162, 1163 (Fla. 1985).

As statutes and case law obligate judges to enunciate their findings, Mr. Cherry's counsel was ineffective by not drawing this Court's attention to the trial judge's inadequate order. According to Fla. Stat. 921.141 (3) (1987), "[i]n each case in which the court imposes the death sentence, the determination of the court shall be supported by **specific** written findings of fact." (emphasis added). Mr. Cherry's sentencing order did not meet this standard and instead vaguely stated that "the

[11] Strickland v. Washington, 466 U.S. 668 (1984).

aggravating circumstances in the cause far outweigh mitigating circumstances in this cause." (R. 1243).

Prior to Mr. Cherry's case, this Court evaluated a similar sentencing order in Magill v. State, 386 So. 2d 1188 (Fla. 1980), and found it deficient. In Magill, the trial court

> found that there were 'no mitigating circumstances which outweigh the aforementioned aggravating circumstances.' However, the court did not specifically list the mitigating circumstances which he may or may not have considered. Even though the trial judge may have considered some mitigating circumstances, he is charged with the further responsibility of articulating them, so as to provide this Court with the opportunity of giving a meaningful review of the sentence of death.

386 So. 2d at 1191.

In Mann v. Florida, 420 So. 2d 578 (Fla. 1982), from the trial court's sentencing order, this Court was "unable to discern if the trial judge found the mental mitigating circumstances did not exist" or if he "found them to exist and weighed them against the proper aggravating circumstances. We, however, cannot tell what occurred." Mann at 581. Likewise, it is obvious from the various decisions this Court has issued in Mr. Cherry's case that the trial court's findings were grossly deficient. In fact, this Court has based one decision on the presumption that the trial court did not find any mitigation and another decision on the presumption that the trial court did find mitigation. "The trial judge's findings in regard to the death sentence should be of unmistakable clarity so that we can properly review them and not

speculate as to what he found." Mann 581.

Mr. Cherry was denied proper review of his sentence as a result of the trial court's deficient sentencing order. Because "[a] most important safeguard is the propounding of aggravating and mitigating circumstances, which are determinative of the sentence imposed," there is no explanation why Mr. Cherry's counsel did not bring this claim in his direct appeal. Magill at 1191. The omissions in the instant sentencing order have prejudiced Mr. Cherry by stripping this Court of the opportunity to adequately review his sentence.

2. Mr. Cherry has been prejudiced by his appellate counsel's failure to argue that after striking an aggravating factor, the aggravators and mitigators should have been reweighed.

If, as this Court's most recent decision regarding Mr. Cherry indicates, Dr. Barnard's report supported a finding of child abuse as a mitigating factor, then Mr. Cherry did not receive a constitutionally adequate direct appeal.[12] Parker v.

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[12] Mr. Cherry does not concede that his sentence is appropriate in the scenario that this Court reassert its earlier position that there was an "absence of any mitigating factors." Cherry I, at 188. In fact, Mr. Cherry believes that even in the absence of mitigation, his sentence should have been reevaluated after an improper aggravator was struck:

> [A] fundamental element of due process of law is the right to be sentenced by the trial level trier of fact who has heard the proof. . . . Whether or not the appellate court perceives that the ultimate penalty could have been imposed on less than all the circumstances presented to the lower court, the appellate court is not empowered to

Dugger, 498 U.S. 301 (1991). In Parker v. Dugger, upon concluding that the trial court did consider and find nonstatutory mitigation, the United States Supreme Court turned its focus to the errors that occurred when this Court struck two aggravators. On Parker's direct appeal, this Court struck two

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> impose the death sentence on the basis of those lower circumstances. The crucial question in reviewing a death sentence when some of the circumstances relied on by the lower court are invalidated is not whether the trier of fact constitutionally *could have*, but whether it *would have* imposed the death penalty on the basis of those lesser circumstances. Because the question of what the trier of fact would have done can not be answered by an appellate body in any consistent and reliable manner but only through pure speculation, in these circumstances affirmance of the death penalty by the appellate courts violates the reliability and consistency requirements of the eighth amendment. When it is found on appellate review that any of the aggravating factors on which the trial court relied in initially imposing the death sentence are invalid, the appellate court has no method by which to determine whether those factors were the tones to tip the initial sentencer's decision in favor of the death penalty. Even when only one circumstance is invalidated on appeal a reviewing court is not equipped to judge the actual significance to a trial judge or jury that one, now invalid, factor. To speculate as to the degree of significance violates not only the mandate of the eighth amendment as interpreted in Furman [v. Georgia, 408 U.S. 238 (1972)] and its progeny but also the due process right actually to be sentence by the trial level judge or jury.

Ford v. Strickland, 696 F. 2d 804, 869-70 (1983)(dicitations omitted; emphasis in original).

aggravating factors, yet affirmed the death sentence on the grounds that "'[t]he trial court found no mitigating circumstances to balance against the aggravating factors.'" Id. Similarly, in Mr. Cherry's case, this Court found that "the aggravating factor of murder for pecuniary gain was erroneously doubled." Cherry I, at 188. However, this Court explained that the majority of mitigating evidence that was presented during his evidentiary hearing was "cumulative to that stated in Dr. Barnard's report." Cherry III, at 1051. In light of this mitigation, this Court's assumption that the improper doubling was harmless deprived Mr. Cherry of a fair sentence.

The Supreme Court in Parker reasoned that this Court "erred in its characterization of the trial judge's findings, and consequently erred in its review of Parker's sentence." Parker, 498 U.S. at 318 (citations omitted). After this Court strikes an aggravator, it may conduct a harmless error analysis or reweigh the evidence. Id. at 319. "In affirming Parker's sentence, the court explicitly relied on what it took to be the trial judge's findings of no mitigating circumstances. Had it conducted an independent review of the evidence, the court would have had no need for such reliance." Nonetheless, this Court has repeated that "it does not reweigh the evidence of aggravating or mitigating circumstances." Id. (citations ommitted).

The Supreme Court speculated that this Court, as is its practice, conducted a harmless error analysis in Parker.

Believing that the trial judge properly had

> found four aggravating circumstances and no mitigating circumstances to weigh against them, the Florida Supreme Court may have determined that elimination of two additional aggravating circumstances would have made no difference to the sentence. But, as we have explained, the trial judge must have found mitigating circumstances. . . . What the Florida Supreme Court could not do, but what it did, was to ignore the evidence of mitigating circumstances in the record and misread the trial judge's findings regarding mitigating circumstances, and affirm the sentence based on a mischaracterization of the trial judge's findings.

Id. at 319-20 (citations omitted).

Just as the Supreme Court ruled that this error "deprived Parker of the individualized treatment to which he is entitled under the Constitution," this Court must recognize that Mr. Cherry, too, was deprived of his constitutional rights. Parker, 498 U.S. at 322. Mr. Cherry's appellate counsel erred by failing to claim that after striking an aggravator, Mr. Cherry's sentence should be reevaluated. Although he properly alleged that Mr. Cherry was prejudiced by the improper doubling of the pecuniary gain aggravator, appellate counsel failed to include the argument about improper doubling. After improper doubling of an aggravator, when there is mitigation, a harmless error analysis is inappropriate; he should have alleged that Mr. Cherry should have received a reweighing of his aggravating and mitigating circumstances.

If the trial court did consider the mitigation presented in Dr. Barnard's psychiatric report, after striking an aggravator, this Court needed to either reweigh the three remaining

aggravators versus the mitigation or remand the case for the trial court to do so. Gafford v. State, 387 So. 2d 333, 337 (1980)("[T]he doubling up of the aggravating factors coupled with the fact that the trial court found two mitigating circumstances requires us the remand.); cf. Mills v. State, 476 So. 2d 172, 179 (Fla. 1985)("Because there were no mitigating circumstances, we find that the court's erroneous finding of two statutory aggravating circumstances was harmless and did not impair the sentencing process.")

Mr. Cherry suffered substantial prejudice by appellate counsel's failure to inform this Court of the need to reweigh the aggrvators and mitigators or remand the case for the trial court to do so. "When a defendant challenges a death sentence . . ., the question is whether there is a reasonable probability that, absent the errors, the sentencer "including an appellate court, to the extent it independently reweighs the evidence" would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland v. Washington, 466 U.S. 668, 694 (1984). Without reweighing the evidence, this Court's affirmance of Mr. Cherry's sentence "cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686.

As this Court held in Burns v. State, 609 So. 2d 600, 607 (Fla. 1992), it cannot be discerned "what weight the trial judge gave to the various aggravators and mitigators he found or what weight the invalid aggravator played." Id. However, because the errors in Mr. Cherry's sentencing order must be coupled with

several other errors that occurred in his guilt and penalty phase, a new sentencing proceeding alone would be an insufficient remedy. The Court must determine "that fairness dictates the new sentencing hearing proceeding to be before a newly empaneled jury as well as the judge." Burns, 609 So. 2d at 607.

CLAIM II

MR. CHERRY'S CONVICTION IS A RESULT OF A FUNDAMENTAL ERROR WHEREBY MR. CHERRY WAS NOT PERMITTED TO IMPEACH THE PROSECUTION'S PRIMARY WITNESS.

The focus of Mr. Cherry's trial was his testimony versus the testimony of his former girlfriend, Lorraine Neloms. In fact, that was how the prosecutor summarized the case to the jury:

> So, basically, you're put in the position now where you have heard the testimony on Roger Cherry, who says one thing, and you've heard the testimony of Lorraine Neloms, who says something else. And obviously it is your duty as jurors, you're going to have to go back there and determine, well, who do I believe? Do I believe Roger? Do I believe Lorraine? Whose testimony do we base our verdict on?

(R. 952). Because Ms. Neloms's testimony provided the foundation and bulk of the state's case against Mr. Cherry, evidence that influenced whether the jury found her to be credible was necessarily key to the outcome of this case. Nonetheless, two significant errors occurred that led to an unreliable verdict and a fundamental error that Mr. Cherry's appellate counsel should have presented in his direct appeal. "To have failed to raise so fundamental an issue" constitutes ineffective assistance of counsel. Wilson v. Wainwright, 474 So. 2d 1162, 1163 (Fla. 1985).

Specifically, the court prohibited trial counsel from introducing evidence regarding two occasions where criminal charges were brought against Ronnie Chamberlain, Ms. Neloms

previous boyfriend, for violent encounters between he and Ms. Neloms and that both charges were later dismissed. On August 22, 1985, Ms. Neloms filed a complaint, alleging that Mr. Chamberlain struck her numerous times on her head, face, and body before knocking her to the ground. It also stated that he had struck her approximately fifteen times in the two years prior to this incident. (R. 1175). Mr. Chamberlain was subsequently charged with battery on September 23, 1985. (R. 1174). Mr. Chamberlain complied with the terms of his pre-trial intervention contract and, pursuant to the contract, the charge was nolle prosequi. (R. 1171).

On December 18, 1985, Mr. Cherry filed a complaint that he and Ms. Neloms were approached by Mr. Chamberlain, who had a gun. After demanding to get his clothes from Ms. Neloms's home, Mr. Chamberlain pointed the gun at Mr. Cherry. The complaint listed Mr. Cherry as the victim and Ms. Neloms as the witness, and stated that the "action constituted agg[ravated] assault." (R. 1177). On cross-examination, Ms. Neloms admitted swearing an affidavit that Mr. Chamberlain had pulled a gun on her and beat her. (R. 445). On March 10, 1986, the State filed a No-Information or an Intent Not to Prosecute on the grounds that the State would "not be able to meet reasonable doubt standard due to prior inconsistent statement given by witness Ms. Neloms who denied that Mr. Chamberlain had produced weapon." (R. 1176).

Trial counsel argued that the felony aggravated assault "case was dismissed because Mrs. Neloms gave inconsistent testimony and we feel it's entirely relevant to showing her truthfulness, for showing, in fact, the past pattern of having charged someone and then backed out of it." (R. 784). However, the court expressed concern over the relevancy, materiality. (R. 784). Mr. Cherry's appellate counsel was grossly ineffective for failing to argue that the evidence was not only relevant, material, and admissible, but that refusal to admit the evidence resulted in significant prejudice against Mr. Cherry.

Because the credibility of a "key prosecution witness" is "a crucial issue," the court in Williams v. State, 386 So. 2d 25 (Fla. 2d DCA 1980) held that the lower court committed reversible error by refusing to allow the defense to impeach the witness's "credibility by showing that she had lied to the police on a prior occasion." The court expounded its reasoning: "This right is particularly important in a capital case such as this where a defendant's right to cross-examine witnesses is carefully guarded, and limiting cross-examination on any matter plausibly relevant to the defense may constitute reversible error." Id. at 27 (citing Coxwell v. State, 361 So. 2d 148 (Fla. 1978)). Presenting evidence of a prior inconsistent statement is one of the most common ways to impeach a witness. "Credibility may be attacked by showing that the witness made a statement prior to

trial which is inconsistent with testimony of the witness at trial." (Ehrhardt § 614.1)

When trial counsel attempted to offer this information for purposes of impeachment, (R. 786), the prosecutor objected that such evidence is not a proper way of impeaching a witness and that the evidence was repetitious, as Ms. Neloms admitted bringing the charges in cross-examination. The State explained to the court:

> if [Ms. Neloms] had come into court and said, no, I didn't give an inconsistent statement, and, no, I didn't drop the charges, then I could see that maybe this might be probative as impeachment of an inconsistent statement she made here in court but she admits, I did that. So, how does this impeach her? Basically, all it does is it agrees with what she's already said that she did.

(R. 786-87). However, denying these facts is precisely what Ms. Neloms did. Although she did admit bringing the charges, Ms. Neloms testified that the she, not the state, dropped the charges. She also failed to admit that she made conflicting statements to the police. Ms. Neloms testified:

> Q. What ever happened to the charge against [Ronnie Chamberlain] for pulling a gun on you?
>
> A. I dropped it.
>
> Q. Didn't the State drop it because you told them there was a gun and then you told them there wasn't?
>
> A. I dropped it.
>
> Q. Isn't that what happened?

A. No, I didn't. No, I dropped it.

Q. You gave them a conflicting statement, didn't you?

A. What do you mean?

Q. You told them that he assaulted you with a gun and then you told them he didn't.

A. I don't remember.

(R. 543-44).

Introducing evidence of a prior inconsistent statement, such as this one, is a proper, and frequently employed, method to impeach a witness. A prior impeaching statement may be introduced when a witness "denies making or does not distinctly admit making the prior inconsistent statement." (Ehrhardt 614.(2))(Inconsistent statements are applicable when the "witness testifies to an inability to remember whether he or she made the prior statement."). Because Ms. Neloms did not admit making conflicting statements to the police, Mr. Cherry's attorney should have been permitted to introduce this evidence to impeach Ms. Neloms's credibility. There is absolutely no valid reason why Mr. Cherry's appellate attorney did not pursue this claim in his appeal.

The impeachment provided by this evidence would have been two-fold: The evidence would have demonstrated that Ms. Neloms had made inconsistent statements to the police in the past and it would have demonstrated that Ms. Neloms was a biased witness. "When character or a trait of character of a person is an

essential element of a charge, claim, or defense, proof may be made of specific instances of that person's conduct." Fla. Stat. § 90.405(2). Here, evidence that Ms. Neloms lied to police was essential for the defense to demonstrate that her testimony and statement to the police was untrustworthy.

In Jaggers v. State, 536 So. 2d 321 (Fla. 2d DCA 1988), the court explained that evidence "relevant to the possible bias, prejudice, motive, intent or corruptness of a witness is nearly always not only admissible, but necessary, where the jury must know of any improper motives of a prosecuting witness in determining that witness' credibility." Id. at 327. The same rationale applies to the State's principal witness. If permitted to introduce the impeachment evidence, trial counsel could have argued that Ms. Neloms was not an impartial witness. Further counsel could have argued the fact that she was a primary witness in the aggravated assault case against Mr. Chamberlain and then, inexplicably, changed her statement gives weight to the idea that Mr. Chamberlain may have persuaded her to make false accusations against Mr. Cherry. Ms. Neloms also admitted that Mr. Chamberlain previously abused her, a fact corroborated by her statement in the battery charge against Mr. Chamberlain. (R. 454, 1175).

Mr. Chamberlain had the control and motive to force Ms. Neloms to implicate Mr. Cherry in the crime. For instance, Ms.

Neloms was still living with Mr. Chamberlain when she met Mr. Cherry; it was then, that she stopped living with Mr. Chamberlain and began a relationship with Mr. Cherry. (R. 460). Additionally, Mr. Cherry made a statement against Mr. Chamberlain in the aggravated assault case. Evidence was also presented that at the time of Mr. Cherry's arrest, Mr. Chamberlain and Ms. Neloms were considering reconciling. Two days after the crime, Ms. Neloms met Mr. Chamberlain at her mother's house. (R. 864). This meeting prompted a later argument between Ms. Neloms and Mr. Cherry, during which she stated that she would probably be better with Mr. Chamberlain than Mr. Cherry. (R. 865).

The hold Mr. Chamberlain had over Ms. Neloms was also a factor in Mr. Cherry's trial, as Mr. Chamberlain put her in contact with police investigator J.D. Brown to blame Mr. Cherry for the crimes. (R. 441, 445). According to Mr. Cherry, Ms. Neloms admitted that she made up the statement she gave police, because Mr. Chamberlain made her. (R. 872). However, because the court refused to admit this evidence, which diminished Ms. Neloms's credibility, the jury was left with an incomplete, and thus inaccurate, picture of Ms. Neloms and the legitimacy of her testimony. Mr. Cherry was prejudiced, as Ms. Neloms was the State's chief witness against him and the issue should have been argued in Mr. Cherry's direct appeal. "The decision not to raise this issue cannot be excused as mere strategy or allocation of

appellate resources. This issue is crucial to the validity of the conviction and goes to the heart of the case." Wilson v. Wainwright, 474 So. 2d 1162, 1163 (Fla. 1985).

Furthermore, Ms. Neloms's credibility was improperly bolstered by another witness, which compounded the prejudice and injustice that Mr. Cherry suffered. On three occasions during Investigator Bradley's testimony, the defense counsel objected that Investigator Bradley was bolstering the credibility of Ms. Neloms. Each time, the objection was sustained. However, the judge never gave a curative instruction to the jury.[13] Although trial counsel failed to request and argue for a curative instruction, appellate counsel was ineffective for not presenting this error in conjunction with the improper exclusion of evidence regarding Ms. Neloms. While failure to request a curative instruction alone may not constitute deficient performance of counsel, this omission is magnified by the court's subsequent refusal to admit evidence to impeach Ms. Neloms. Together the

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[13]

> BRADLEY: The information itself that I was given left no doubt in my mind, you know, that there was something of substance to this lead.
>
> MR. MILLER: Judge, I've got to object. The witness is vouching for the credibility of a witness and I would ask the jury - -
>
> THE COURT: Don't say anything. Your objection is sustained.

(R. 512).

wrongdoings constitute a fundamental error which should have been presented in Mr. Cherry's direct appeal. "It is the unique role of that [appellate] advocate to discover and highlight possible error and to present it to the court." Wilson v. Wainwright, 474 So. 2d 1162, 1165 (Fla. 1985). Here, Mr. Cherry was prejudiced by his appellate counsel's failure to present the singular and cumulative effect of these errors. Barclay v. Wainwright, 444 So. 2d 956, 969 (Fla. 1984).

> In a case where the credibility of the two principal antagonistic witnesses is the foundation for the conviction, hearsay evidence that improperly bolsters the credibility of the one of them cannot be said – beyond a reasonable doubt – to be of no effect on the finder of fact. Such a bolstering of credibility for the state's witness considerably weakens one's confidence in the outcome and creates reasonable doubts as to the state's assertion that the error did not contribute to the verdict.

Smith v. State, 762 So. 2d 969 (Fla. 4th DCA 2000). Similar to the situation in Smith, where inconclusive DNA evidence made the cornerstone of the trial the differing testimony of the defendant and the state's primary witness, Mr. Cherry's trial became his word against Ms. Neloms's.

In his closing argument, the prosecutor drew attention to Investigator Bradley's improper comments:

> Now the very day this arrest was made, the 2nd of July, 1986, when she went to the police, she told them what she knew about Roger Cherry. The police didn't just saddle up in their police cars and go out and grab

> up Roger Cherry, they put her information to the test . . . So, the police department didn't just take her at her word, they put her to the test and she passed that test.

(R. 955). The prosecutor suggests, as Investigator Bradley did during his testimony, that the police department believed the story offered by Ms. Neloms and the jury should as well.

Because the testimony of Ms. Neloms was a feature of the State's case, attacking the credibility of Ms. Neloms was a crucial feature to Mr. Cherry's defense. When the court refused to admit evidence that lessened her credibility and failed to give a curative instruction after a police investigator impliedly, yet repeatedly, bolstered her credibility, Mr. Cherry was prejudiced. This Court cannot find "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Chapman v. California, 386 U.S. 18, 24 (1967). Furthermore, because of the gravity of Ms. Neloms's it is inexcusable for appellate counsel to have not raised this issue. Such a "substantial omission by appellate counsel and resulting prejudice to the appellate process [is] sufficient to undermine confidence in the outcome." Fitzpatrick v. Wainwright, 490 So. 2d 938, 940 (Fla. 1986). As a result, this Court must vacate Mr. Cherry's conviction and remand this case for a new trial.

CLAIM III

THE PROSECUTOR'S EGREGIOUSLY IMPROPER COMMENTS AND ARGUMENTS DURING MR. CHERRY'S TRIAL RENDERED MR. CHERRY'S DEATH SENTENCE UNRELIABLE, IN VIOLATION OF HIS RIGHTS UNDER ARTICLE I, 9 AND 17 OF THE FLORIDA CONSTITUTION AND THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

As this Court stated in its review of Mr. Cherry's post-conviction petition, improper prosecutorial comments are properly raised on direct appeal. Cherry II, 659 So. 2d at 1071-72. Nevertheless, Mr. Cherry's counsel did not bring to this Court's attention the prosecutor's numerous arguments that were improper, unconstitutional, and prejudicial to Mr. Cherry.

The victim impact argument in this case was particularly prejudicial to Mr. Cherry, largely because it invited the jury to sentence him to death based on the similarity between the jurors and the victims and the great disparity between the jurors and Mr. Cherry. A sentencing proceeding is unreliable when the jurors are misled as to their role in the sentencing proceedings or as to the matters that they may consider in making their sentencing determination. See Caldwell v. Missippi, 472 U.S. 320, 329 (1985); Wilson v. Kemp, 777 F.2d 621, 626 (11th Cir. 1985). Consideration of victim impact arguments violates the mandate of Caldwell, as well as the due process clauses of both the Florida and United States Constitutions. See Caldwell, 472 U.S. at 328-29.

From the beginning of Mr. Cherry's trial to its conclusion, the prosecutor's goal was to pit the jury against Mr. Cherry. The victims in this case were an elderly, white couple, and the State achieved a jury with similar participants. First, the prosecutor succeeded in excluding from the jury the only two blacks members of the jury venire. (R. 182). Moreover, at least half of the trial jurors were themselves relatively elderly. With this jury composition, the State proceeded to emphasize that, much like the jurors themselves, the victims were an elderly, white married couple, while the defendant was different. According to the prosecutor, Mr. Cherry was an unintelligent, inarticulate, black man. Although this tactic was apparently successful, it is in clear violation of Florida and federal law.

Victim impact evidence and argument is impermissible under longstanding Florida law because it constitutes a non-statutory aggravating circumstance on which a death sentence cannot be based. Grossman v. State, 525 So. 2d 833, 842 (Fla. 1988), cert. denied, 489 U.S. 1071 (1989). Furthermore, under Booth v. Maryland, which was decided on June 21, 1987 and thus was fully applicable during Mr. Cherry's trial and direct appeal,[14] such evidence is also constitutionally impermissible. Booth held that permitting testimony concerning the impact of a crime of the

[14] Booth was reversed in part in Payne v. Tennessee, 111 S. Ct. 2597 (1991).

victim's survivors or the characteristics of the victim violates the Eighth Amendment because it creates an unacceptable risk that the death penalty will be imposed because of constitutionally impermissible or simply irrelevant considerations, such as the existence and articulateness of distressed members of the victim's family or the victim's personal characteristics. Booth v. Maryland, 482 U.S. 496 (1987). Prosecutorial argument concerning victim impact characteristics is "indistinguishable" from testimony. South Carolina v. Gathers, 490 U.S. 805, 811 (1989), overruled in part, Payne v. Tennessee, 111 S. Ct. 2597 (1991).

The prosecutor's improper comments regarding the victims began in his opening argument, as he explained that this case involves "an elderly couple, living here in Deland." (R. 284). This line of argument was present in every phase of the trial. The prosecutor presented considerable testimony concerning the close relationship between the victims and their family, to be later used as a part of the victim impact argument. (R. 898-900) In the State's closing, the prosecutor in summarizing Lorraine Neloms's testimony, said that Mr. Cherry told her that "the *old* woman woke up" and that "[t]he old lady tried to fight with me and I pushed the old man." (R. 935, 951). This is an intentional misstatement of the evidence. Ms. Neloms did not remark on the ages of the victims, nor did she suggest that they were elderly.

She testified only that Mr. Cherry told her "the lady tried to fight him or something and he hit her and pushed the man and he grabbed his chest." (R. 437). Again, in the State's rebuttal closing argument, the State focused on the victims: "He knew that the people that lived there were old and feeble, couldn't offer much resistance if they tried." (R. 1004).

However, the State's argument in Mr. Cherry's penalty phase contained the most severe constitutional violations:

> What about Leonard and Esther Wayne? Do we just forget about them? Are they just now statistics and numbers that we ignore? . . . We know that during their life they were more than that. We've heard the testimony of their son . . ., the lady that lived down the street. She was their neighbor. We've heard the testimony of . . . the lady that used to go to McDonald's with them . . . We know that they were grandparents. We heard the testimony of one of their grandchildren . . . These were living viable people. Old people, they were hearty enough to and independent enough that they chose to live out their years together. The kind of people that the poet Robert Browning wrote about when he said: Grow old along with me, the best is yet to be. The last of life for which the first was made, our times are in his hand.

(R. 1046). The overall effects of the prosecutor's statements and victim impact argument was to convince the jury that they should issue a death verdict because the victims were like them. The argument, which focused the jury's consideration on the victims and their attributes, rather than the character of the defendant and the nature of the crime, was inimical both to the

principles of Booth and Gathers and to longstanding Florida law precluding reliance on nonstatutory aggravating factors.

Although the prosecutor did concentrate on his portrayal of the victims, he did not completely neglect Mr. Cherry, who he attempted for the jury to see only as an unintelligent, black man. In response to the State's question, Mr. Cherry explained how he accidentally cut his thumb while cleaning a fish. The prosecutor, in an effort to show that Mr. Cherry's thumb could have been cut by cutting the phone line at the victims' house, insinuated that Mr. Cherry was "stupid":

> [STATE]: Let's just pretend that this wire is a telephone wire, okay. You can cut your thumb the same way cutting a telephone wire, couldn't you?
>
> [CHERRY]: If you're stupid enough to do something like that there.
>
> [STATE]: Well, you're stupid enough to cut your thumb cutting a fish, you could do it cutting a telephone wire, couldn't you?

(R. 885). This remark was indecent and improper, yet the prosecutor continued along these same lines in his closing argument by stressing Mr. Cherry's race. Mr. Cherry "lives with a black female, lives in a house with other black individuals, circulates in a black community." (R. 962). In addition to the aforementioned comments that the prosecutor improperly and unconstitutionally made, he also argued the non-statutory factor that Mr. Cherry had committed a crime in prison. The prosecutor asked the jury if they were going to send Mr. Cherry back to

jail, thus rewarding him, and described Mr. Cherry as a "man who somehow manages to commit crimes even while he is in prison, because one of those judgment and sentence forms that you reviewed yesterday was for the introduction and possession of contraband in a state prison." (R. 1049).

In an additional example of prosecutorial misconduct, the prosecutor urged the jury to vote for a death sentence as a way of expressing their frustration with the criminal justice system:

> The criminal justice system in this country is a frustrating thing. People feel that they have no control over it. They have no voice in it. That it just happens, that all the rights are the Defendant's rights or whatever. It doesn't work well, it's slow, it's whatever. And they really have no voice in the criminal justice system, they're frustrated. And on the few occasions when they do have a voice, it seems like nobody cares, nobody listens, nobody pays attention. Today, ladies and gentlemen, each one of you individually and collectively have a unique opportunity in a situation. You have a voice in the criminal justice system. Not only do each of you have a voice, but that voice will be heard today.

(R. 1048). Again, the State urged the jury to condemn Mr. Cherry not because of the facts of the case or the presence of any aggravator, but rather as a means to voice their frustrations, their lack of control in the criminal justice system, their belief that defendants have excessive rights, and their anger over the ineptitude of the system. This argument was a blatant and "deliberate attempt to destroy the partiality and objectivity of the jury." Pennsylvania v. Chambers, 599 A.2d 630 (Pa. 1991).

Appealling to the passions and prejudices of the jurors' is entirely improper. See, e.g., Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985).

A sentence of death cannot stand when it results from prosecutorial comments which may mislead the jury into imposing the sentence for irrelevant or impermissible reasons. Caldwell v. Mississippi, 472 U.S. 320 (1985); Wilson v. Kemp, 777 F.2d 621, 626 (11th Cir. 1985), cert. denied, 476 U.S. 1153 (1986). However, such comments are precisely what led to Mr. Cherry's sentence of death. The cumulative effect of the pronounced and persistent misconduct in this case was to deprive Mr. Cherry of his fundamental right to a fair sentencing proceeding. Such egregiously improper conduct constitutes fundamental error that requires reversal of the death sentence. Pait v. State, 112 So. 2d 380, 385 (Fla. 1959). Because the combined severity of the improper prosecutorial comments reach the level of fundamental error, it is inexcusable for appellate counsel to not have raised this issue on appeal. Had he brought this issue to the Court's attention, Mr. Cherry would have received a new trial. To remedy the constitutional violations that Mr. Cherry has suffered, this Court should vacate his sentence and conviction and remand this case for a new trial.

CLAIM IV

MR. CHERRY WAS DENIED HIS RIGHT TO A TRIAL BEFORE AN IMPARTIAL JURY, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, WHEN A JUROR ACTED INAPPROPRIATELY AND WHEN THE COURT FAILED TO ADDRESS THIS ISSUE PROPERLY.

While Mr. Cherry's appellate counsel failed to raise numerous issues of great significance, perhaps the most prejudicial is his failure to raise a claim regarding misconduct by a juror. Although this issue was raised at trial, the court's treatment of the matter was totally deficient. The court never obtained the identity of the juror at hand. The court never questioned the juror about the incident, or about the fact that the juror disobeyed the court's instructions by not coming forward to disclose the incident.

During Mr. Cherry's trial, the victims' daughter-in-law, who was a state witness, was approached by and spoke with one of the jurors. When this issue first appears in the record, it is obvious that the attorneys and judge had previously addressed it. However, because of an incomplete record,[15] the substance of the

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[15] The record in Mr. Cherry's trial contains numerous omissions or events where the court reporter was absent. For instance, the record indicates that there were at least thirty bench conferences that went unrecorded. (R. 76, 112, 156, 182, 214, 228, 229, 237, 245, 254, 257, 274, 311, 337, 377, 425, 462, 463, 516, 563, 697, 698, 747, 770, 781, 817, 819, 907, 964, 1023). In fact, only seven bench conferences were recorded. (R. 182, 280, 489, 508-09, 681, 770, 897).

On top of the omitted bench conferences, the court's rulings on several defense motions were never recorded, either through the transcript or court order. The defense filed a motion fo the

initial discussion of the incident is not apparent:

> MR. MILLER: . . . [W]e have previously discussed during the day the acquaintance, and I don't mean to load that term, the relationship between Mrs. Wayne and one of the jurors and I would simply like to ask Mrs. Wayne a question or two about that relationship, if it's possible to do so.
>
> THE COURT: Is the witness available?
>
> MR. MARSHALL: I'll check, Your Honor.
>
> THE COURT: So the record will understand what we're talking about, earlier today the State Attorney advised Defense Counsel and the Court that a witness may possibly know a juror and we had protected the sanctity of the record by reserving this time, in the

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appointment of a serologist, microanalyst, and forensic pathologist; a motion to allow inspection of the crime scene; a motion for disclosure of grand jury proceedings; and a motion to require the State to disclose and permit inspection of fingerprint evidence. The record, through the trial transcript or orders, does not bespeak the disposition of these motions. Consequently, Mr. Cherry's ability to plead and appeal certain claims was impeded.

"[I]n all capital cases, the appellant has an absolute, fundamental right to have his entire record reviewed." Songer v. Wainwright, 423 So. 2d 355, 356 (Fla. 1982); Ray v. State, 403 So. 2d 956, 960 (Fla. 1981) (concluding that the failure of the trial court to record the entire proceedings constitutes fundamental error in that it amounts to a denial of due process); Delap v. State, 350 So. 2d 462, 463 (Fla. 1977)("[S]ince the full proceedings requested by the defendant is unavailable for review by this Court, and since the omitted requested portions of the transcript are necessary to do a complete review of this cause, this Court has no alternative but to remand for a new trial."). With an undisputed legal proposition, such as the fundamental error of an incomplete record, there is no reason for not raising the matter on direct appeal. The frequent, and significant, omissions in Mr. Cherry's transcript have infringed upon his right to an meaningful appeal and should have been raised on direct appeal. By not raising this issue, Mr. Cherry's counsel provided him with ineffective counsel.

> absence of the jury, to address ourselves to that.

(R. 464-65). Mr. Cherry's counsel then proffered Mrs. Wayne's recitation of her interaction. She explained that while at lunch a juror signaled her towards him. When she approached him, they realized that they knew each other from the bank where she was a manager and he was a customer. Although they did not know each other's name, they recognized one another and apparently knew one another in passing. (R. 465-68). This interaction, though brief, was improper. Mr. Cherry's trial counsel requested, and received, the opportunity to discuss this matter with his client overnight and address it with the court the following day. (R. 486). However, there is no further mention of the incident.

Whether trial counsel did discuss this with Mr. Cherry, whether he requested that the court excuse the juror, or whether he did nothing at all is unclear. However, because there were only two alternate jurors, both of whom remained alternates at the conclusion of the trial, it is clear that this acquaintance of Mrs. Wayne was not removed from the jury. (R. 274-75, 1020). Because this juror participated in the deliberations to decide Mr. Cherry's guilt and sentence, misconduct by him is extraordinarily egregious.

Moreover, because it was he who was participating in deliberations, and not Mrs. Wayne, it was essential for the court to discuss the situation directly with him. Ms. Wayne's memory

of the juror and their relationship is of little consequence. The real issues concern the juror's memory of their conversation, his memory of their business relationship, his impresion of the relationship, his understanding of Mrs. Wayne's involvement in the proceedings against Mr. Cherry, and whether his, past and present, interaction with Mrs. Wayne would influence his decision in any way. However, none of these issues were addressed. In short, the court's treatment of this issue delved into Mrs. Wayne's state of mind but totally ignored the juror's state of mind.

While the interaction with Mrs. Wayne alone may not constitute reversible error, that the court addressed the issue without the record and dealt with the issue in a grossly inadequate manner, and the juror's apparent willingness to disregard the instructions of the court combine to reach the level of a fundamental error.[16] See Scull v. State, 533 So. 2d 1137, 1141 (Fla. 1988). Misconduct by a juror is grounds for a new trial. Fla. R. Crim. P. 3.600(b)(4). Although the trial court and counsel failed to adequately protect Mr. Cherry's right to a fair trial, appellate counsel again failed to serve Mr. Cherry by not raising this claim. Mr. Cherry is entitled to a new trial with a fair and impartial jury.

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[16] After being sworn, Mr. Cherry's jury received the standard preliminary instructions concerning their conduct during court recesses.

CONCLUSION AND RELIEF SOUGHT

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing **PETITION FOR WRIT OF HABEAS CORPUS** has been furnished by United States Mail, first-class postage prepaid, to all counsel of record on December 28, 2001.

CERTIFICATE OF TYPE SIZE AND STYLE

This is to certify that the Petition has been reproduced in a 12 point Courier type, a font that is not proportionately spaced.

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