IN THE SUPREME COURT OF FLORIDA

NO. _____

GREGORY MILLS,

Petitioner,

v.

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

Respondent.

CONSOLIDATED PETITION FOR A WRIT OF HABEAS CORPUS, PETITION FOR EXTRAORDINARY RELIEF, AND MOTION TO REOPEN DIRECT APPEAL

TODD G. SCHER
Litigation Director
Florida Bar No. 0899641
CAPITAL COLLATERAL
REGIONAL COUNSEL
101 NE 3d Avenue, Suite 400
Ft. Lauderdale, Florida 33301
(954) 713-1284
Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PROCEDURAL HISTORY OF CASE

Mr. Mills was indicted in Seminole County for first-degree felony murder and related offenses. Trial commenced before Judge J. William Woodson on Thursday, August 16, 1979, and the jury returned guilty verdicts the next day.[1] After a one-day penalty phase on Monday, August 20, 1979, the jury recommended Mr. Mills be sentenced to life imprisonment without the possibility of parole for twenty-five (25) years. Eight (8) months later, on April 18, 1980, the trial court overrode the jury's life recommendation and sentenced Mr. Mills to death, finding six (6) aggravating circumstances: (1) under sentence of imprisonment; (2) previous conviction of violent felony; (3) great risk of death to many persons; (4) felony murder; (5) pecuniary gain; and (6) heinous, atrocious, or cruel. Addressing only statutory mitigating factors,[2] the court found that no mitigating circumstances had been established.

The conviction and override sentence of death were affirmed by this Court in a 5-2 decision. Mills v. State, 476 So. 2d 172 (Fla. 1985), cert. denied, 475 U.S. 1031 (1986). The Court, however, vacated the aggravated battery conviction because "we do not believe it proper to convict a person for aggravated battery

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[1]The jury found Mr. Mills guilt of felony murder, aggravated battery, and burglary.

[2]The trial judge's sentencing order stated: "there are sufficient aggravating circumstances as specified in 921.141 and insufficient mitigating circumstances therein that a sentence of death is justified" (R. 642).

and simultaneously for homicide as a result of one shotgun blast." Id. at 177. The Court also struck three (3) of the aggravating circumstances found by the trial court. The "great risk of death to many persons" aggravator was struck because "[t]he finding that Mills knowingly created a great risk of death to many persons was, as the state conceded, erroneous." Id. at 178. The pecuniary gain factor was struck due to improper doubling with the felony murder aggravator. Id. Lastly, the Court struck the "heinous, atrocious, or cruel" aggravator as inapplicable to the facts of the case. Id.

Following the signing of a death warrant, a Rule 3.850 motion was filed and summarily denied. On appeal, this Court remanded the case for an evidentiary hearing "in regards to counsel's failure to develop and present evidence that would tend to establish statutory or nonstatutory mental health mitigating circumstances." Mills v. Dugger, 559 So. 2d 578, 579 (Fla. 1990). The Court also denied a request for state habeas corpus relief. Id.[3] Following the evidentiary hearing and the lower court's order denying relief, the Court, in a sharply divided 4-3 vote, affirmed. Mills v. State, 603 So. 2d 482 (Fla. 1992).

Subsequent to the decisions in Stringer v. Black, 503 U.S. 222 (1992), and Sochor v. Florida, 504 U.S. 527 (1992), Mr. Mills

[3]In his state habeas petition, Mr. Mills challenged, *inter alia*, the constitutionality of the Court's purported harmless error analysis on direct appeal. Justice Barkett would have granted habeas relief on this issue. Mills, 559 So. 2d at 579 (Barkett, J., concurring specially).

sought habeas corpus relief in this Court challenging both the adequacy of that Court's harmless error analysis in his case as well as the application of the "during the course of a felony" aggravating circumstance. The Court held that Sochor was not new law under Witt v. State, 387 So. 2d 922 (Fla. 1980), and therefore the claim, raised for the second time, was procedurally barred. Mills v. Singletary, 606 So. 2d 622, 623 (Fla. 1992). The Court ruled in the alternative that "[w]e . . . applied, and applied correctly, a harmless error analysis in Mills' direct appeal." Id. at 623. Regarding the claim that the felony-murder aggravating factor is an unconstitutional automatic aggravating circumstance, the Court held: "We considered and rejected the substance of this claim on direct appeal." Id.

On December 23, 1992, Mr. Mills sought habeas corpus relief in the United States District Court for the Middle District of Florida. The district court entered judgment against Mr. Mills on August 18, 1996. The Eleventh Circuit Court of Appeals affirmed. Mills v. Singletary, 161 F. 3d 1273 (11th Cir. 1998), cert. denied sub nom Mills v. Moore, 528 U.S. 1082 (2000).

JURISDICTION

This is an original action pursuant to Fla. R. App. P. 9.100(a). See also Art. I, § 13, Fla. Const. The Court's jurisdiction is invoked pursuant to Art. V, § 3(b)(9), Fla. Const., and Fla. R. App. P. 9.030(a)(3). The Court also has jurisdiction to reopen Mr. Mills' previous habeas and appeal proceedings, as well as to reconsider his motion for rehearing. Parker v. State, 643 So. 2d 1032, 1033 (Fla. 1994). The Court also has jurisdiction to correct failings in the review process under Art. V, §§ (3)(b)(7) and (9).

SUMMARY OF THE ARGUMENTS

1. The recent decision of the Supreme Court of the United States in Apprendi v. New Jersey establishes that the override scheme under which Mr. Mills was convicted violates the United States and Florida Constitutions. Pursuant to Apprendi, other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. Under the statute in effect at the time, life imprisonment was the mandatory sentence for first-degree capital murder, unless the court, after a separate proceeding, makes findings that the defendant is death eligible. As the Court held in Apprendi, this violates due process and the Sixth Amendment. Apprendi is new law which should be retroactively applied to Mr. Mills.

2. The Court's recent decision in Keen v. State establishes that, on Mr. Mills' direct appeal, the Court failed to properly apply the Tedder standard in analyzing the propriety of the judge's override of the jury's life recommendation. The flaws that the Court discussed in Keen which warranted relief are also present in Mr. Mills' case. Any failure to properly apply Tedder to Mr. Mills' case would result in the arbitrary application of the death penalty.

ARGUMENT I

A. APPRENDI'S APPLICATION TO FLORIDA'S OVERRIDE SCHEME.

In Apprendi v. New Jersey, 120 S. Ct. 2348 (2000), the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 2362-63.[4]

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[4]Apprendi involved a trial judge's application of a New Jersey "hate crime" statute. A grand jury returned a 23-count indictment charging Apprendi with shootings on four different dates, as well as the unlawful possession of various weapons. Apprendi, 120 S.Ct. at 2352. None of the counts referred to the New Jersey hate crime statute, and none alleged that Apprendi acted with a racially biased purpose. Id. Apprendi pleaded guilty to two counts of second-degree possession of a firearm for an unlawful purpose, and one count of the third-degree offense of unlawful possession of an antipersonnel bomb. Id. Under New Jersey law, a second-degree offense carries a penalty range of 5 to 10 years; a third-degree offense carries a penalty range of between 3 and 5 years. Id. If the judge found no basis for the biased purpose enhancement, the maximum consecutive sentences on those counts would amount to 20 years in aggregate. Id. If, however, the judge enhanced the sentence based on a finding of biased purpose, the maximum on one count alone would be 20 years and the maximum for the two counts in aggregate would be 30 years, with a 15-year period of parole ineligibility. Id. After holding an evidentiary hearing on the issue of Apprendi's "purpose" for the shooting, the judge concluded that, by a preponderance of the evidence, Apprendi's actions were taken "with a purpose to intimidate" as provided by the statute. Id. Finding that the hate crime enhancement applied, the judge sentenced Apprendi to a 12-year term of imprisonment on the enhanced count, and to shorter concurrent sentences on the other two counts. Id.

Apprendi appealed, arguing, *inter alia*, that the Due Process Clause of the United States Constitution requires that the finding of bias upon which his hate crime sentence was based must be proved to a jury beyond a reasonable doubt. See In re Winship, 397 U.S. 358 (1970). Apprendi, 120 S.Ct. at 1452. Over dissent, the Appellate Division of the Superior Court of New Jersey upheld the enhanced sentence; relying on McMillan v. Pennsylvania, 477 U.S. 79 (1986), the appeals court found that

The constitutional underpinning of the Apprendi Court's holding is the Sixth Amendment right to trial by jury, as well as the Fourteenth Amendment right to due process. Id. at 2355 ("At stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without `due process of law,' Amdt. 14, and the guarantee that `[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury,' Amdt. 6"). "Taken together, these rights indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.'" Id. (quotation omitted).[5] Mr. Mills submits that the override provisions under which Mr. Mills was sentenced violates Apprendi and the Sixth and Fourteenth Amendments.

The New Jersey statutory mechanism found unconstitutional in Apprendi is remarkably similar to the capital sentencing scheme

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the state legislature decided to make the hate crime enhancement a "sentencing factor," rather than an element of an underlying offense--and that decision was within the State's established power to define the elements of its crimes. Apprendi, 120 S.Ct. at 2353. A divided New Jersey Supreme Court affirmed. Id.

[5]Apprendi's holding was "foreshadowed" by the Supreme Court's decision in Jones v. United States, 526 U.S. 227 (1999). Apprendi, 120 S.Ct. at 2355. In Jones, the Court, addressing a Fifth and Sixth Amendment challenge to a federal carjacking statute, held: "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth 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, 526 U.S. at 243.

under which Mr. Mills was charged and convicted. Apprendi concerned the interplay of four statutes. The first statute, N.J. Stat. Ann. § 2C:39-4(a) (West 1995), defined the elements of the underlying offense of possession of a firearm for an unlawful purpose. The second statute, N.J. Stat. Ann. § 2C:43-6(a)(2) (West 1995), established that the offense is punishable by imprisonment for "between five years and 10 years." The third statute, N.J. Stat. Ann. § 2C:44-3(e) (West Supp. 2000), defined additional elements required for punishment of possession of a firearm for an unlawful purpose when committed as a "hate crime." The fourth statute, N.J. Stat. Ann. § 2C:43-7(a)(3) (West Supp. 2000), extended the authorized additional punishment for offenses to which the hate crime statute applied. See Apprendi, 120 S.Ct. at 2351. Each statute is independent, yet the statutes must operate together to authorize Apprendi's punishment. The Court in Apprendi held that under the due process clause, all essential findings separately required by *both* the underlying offense statute and the statute defining the elements of punishment had to be charged, tried, and proved to the jury beyond a reasonable doubt.

The version of Florida's capital override statute in place at the time of Mr. Mills' trial also required the interplay of several statutes which operate independently but must be considered together to authorize Mr. Mills' punishment. Mr. Mills was sentenced in 1980 under the provisions of §775.082 (1), Fla. Stat., which 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 finding 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. §921.141 (1979), entitled "Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence" provided:

> Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s.775.082.

Fla. Stat. §921.141(3) further provided in pertinent part:

> 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 . . .
> If the court does not make the finding requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with §775.082.

§ 775.082, the statute which applies in this case,[6] clearly sets out a scheme whereby the statutory maximum penalty for

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[6]The statute was rewritten in 1994, and now provides:

> A person who has been convicted of a capital felony shall be punishable by death if the proceedings held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punishable by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole.

§ 775.082 (1), Florida Statutes (1994 Supp.). See 1994 Fla. Sess. Law Serv. Ch. 94-228 (S.B. 158). Although the newer statute also poses constitutional problems under Apprendi, that statute is not at issue in these proceedings.

capital crimes is life imprisonment *unless* the court, after holding a separate and distinct proceeding under §921.141, makes findings of fact that establish the defendant is death-eligible. Mr. Mills was not eligible for the death penalty simply upon his conviction of first-degree murder; if the court were to sentence Mr. Mills after the conviction, the court would only be able to impose life because Florida's scheme required the State to prove at least one aggravating factor beyond a reasonable doubt *before* the defendant is eligible for the death penalty. Moreover, the aggravating circumstance(s) must be sufficiently weighty to call for the death penalty, State v. Dixon, 283 So. 2d 1, 9 (FLa. 1973), and, because this case involved a jury recommendation of life, the facts had to have been so clear and convincing that no reasonable person could differ as to the penalty. Tedder v. State, 322 So. 2d 908 (Fla. 1975).

Thus, Florida's statute unambiguously "describe[s] an increase beyond the maximum authorized statutory sentence," Apprendi, 120 S.Ct. at 2365 n.19. It cannot be seriously debated that the "differential" between a sentence of life imprisonment with the possibility of parole after 25 years and a sentence of death "is unquestionably of constitutional significance." Id. at 2365. See also Woodson v. North Carolina, 428 U.S. 280, 305 (1976) ("Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of the qualitative difference, there is a corresponding difference in the need for reliability in the

determination that death is the appropriate punishment in a specific case"). Under Apprendi and consistent with due process and the Sixth Amendment right to trial by jury, the elements relied on by the State to enhance Mr. Mills' punishment under § 775.082 had to be charged and found beyond a reasonable doubt by the jury. This was not done, and the result is that Mr. Mills' death sentence is unconstitutional under both the United States and Florida Constitutions.

The Apprendi Court addressed whether its decision impacted "state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death." Apprendi, 120 S.Ct. at 2366 (citing Walton v. Arizona, 497 U.S. 639 (1990)). The Apprendi majority held that the capital cases falling under the Walton-type of scheme (*i.e.* judge sentencing states), "are not controlling," citing Justice Scalia's dissent in Almendarez-Torres v. United States, 523 U.S. 224 (1998):

> Neither the cases cited, nor any other case, permits a judge to determine the existence of a factor which makes a crime a capital offense. What the cases cited hold is that, once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether the maximum penalty, rather than a lesser one, ought to be imposed . . . The person who is charged with actions that expose him to the death penalty has an absolute entitlement to jury trial on all the elements of the charge."

Apprendi, 120 S.Ct. at 2366 (citing Almendarez-Torres, 523 U.S.

at 257 n.2 (Scalia, J., dissenting). While the majority decision in Apprendi suggested that Walton was distinguishable, four justices strongly suggested that Walton had in fact been overruled, Apprendi, 120 S.Ct. at 2387-89 (O'Connor, J., dissenting, joined by Rehnquist, C.J., Breyer and Kennedy, J.J.), and a fifth justice explicitly left the door open to reexamining the continuing validity of Walton for another day. Id. at 2380 (Thomas, J., concurring). The Apprendi majority's distinction of Walton, as the dissenters suggested, is illogical and at odds with the new rule of law announced by the Apprendi majority. Be that as it may, however, Mr. Mills submits that Walton's applicablilty to Florida's override sentencing scheme, particularly in light of the unique circumstances of his case, is dubious.

Apprendi's reasoning is even more potent in Mr. Mills' case, which involves an override of the jury's recommendation of life imprisonment. Under Apprendi, as applied to Florida's unique capital sentencing scheme, the jury **must** determine death eligibility in order to not violate due process and the Sixth Amendment right to trial by jury. However, "[t]he Florida death penalty procedure is not based on a controlling jury recommendation concerning sentencing" but rather is "advisory only." Spaziano v. State, 433 So. 2d 508, 511-12 (Fla. 1983). See also Spaziano v. Florida, 468 U.S. 447 (1984). Contrary to the constitutional underpinnings of Apprendi, because Florida jury's sentencing decision is not binding on a court, a trial

court's ability to override a jury's sentencing decision violates due process and the Sixth Amendment right to trial by jury. Once Mr. Mills' jury returned its life recommendation, Mr. Mills was acquitted of the death penalty under Apprendi and therefore must be sentenced to life at this time.

Mr. Mills recognizes that the Supreme Court, in 1984, upheld the constitutionality of Florida's override scheme in Spaziano v. Florida, 468 U.S. 447 (1984). Spaziano addressed various constitutional attacks on Florida's override scheme, including an Eighth Amendment challenge, a Double Jeopardy challenge, and a Sixth Amendment trial by jury challenge. That decision, as well as this Court's holding in the underlying Spaziano litigation, see Spaziano v. State, 433 So. 2d 508 (Fla. 1983), must be revisited in light of Apprendi. The Supreme Court in Spaziano determined that while a capital sentencing proceeding is "like a trial" for Double Jeopardy purposes, this "does not mean that it is like a trial in respects significant to the Sixth Amendment's guarantee of a fair trial." Id. at 459. Certainly, the Spaziano Court's conclusion that "[t]he Sixth Amendment never has been thought to guarantee a right to a jury determination of that issue" is in irreconcilable conflict with the Apprendi holding.[7]

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[7]In fact, the dissent in Spaziano suggested that because of the uniqueness of capital sentencing proceedings, the "normal presumption that a judge is the appropriate sentencing authority does not apply in the capital context." Spaziano, 468 U.S. at Stevens, J., concurring in part and dissenting in part). As Justice Stevens wrote:

The same consideration that supports a constitutional

The issue put to the forefront in Apprendi is who is constitutionally required to make the findings necessary to increase a punishment beyond the statutory maximum. Apprendi holds that it must be a jury that makes the death-eligibility determination beyond a reasonable doubt.

Apprendi's application to Mr. Mills' case is even more clear

> entitlement to a trial by jury rather than a judge at the guilt or innocence stage--the right to have an authentic representative of the community apply its lay perspective to the determination that must precede a deprivation of liberty--applies with special force to the determination that must precede a deprivation of life. In many respects capital sentencing resembles a trial on the question of guilty, involving as it does a prescribed burden of proof of given elements through the adversarial process. But more important than its procedural aspects, the life-or-death decision in capital cases depends on its link to community values for its moral and constitutional legitimacy.

Id. at 482-83. Justice Stevens later dissented in Walton, labeling as "unfortunate" the Court's decision in Spaziano. Walton, 497 U.S. at 714. See also id. at 709 ("The Court holds ... that a person in not entitled to a jury determination of facts that must be established before the death penalty is imposed. I am convinced that the Sixth Amendment requires the opposite conclusion.") In Jones v. United States, 526 U.S. 227 (1999), Justice Stevens, concurring, wrote that the right to jury trial "encompasses facts that increase the minimum as well as the maximum permissible sentence, and also facts that must be established before a defendant may be put to death." Id. at 253 (Stevens, J., concurring). In so writing, Justice Stevens concluded that the Court in Walton "departed from that principle" and "should be reconsidered in due course." Id. Ironically, Justice Stevens authored the Apprendi decision wherein he acknowledged the difficulty in reconciling Walton but simply wrote that the capital cases "are not controlling." Apprendi, 120 S.Ct. at 2366. It was this incongruence that the dissenters in Apprendi could not logically explain. See id. at 2388 (O'Connor, J., dissenting) ("Indeed, at the time Walton was decided, the author of the Court's opinion today understood well the issue at stake. . . If the Court does not intend to overrule Walton, one would be hard pressed to tell from the opinion it issues today").

because not only did the jury acquit Mr. Mills of the death penalty, but the State then submitted additional evidence to support aggravating circumstances to the judge alone, not to the jury,[8] and the judge discarded the jury's recommendation without undertaking the required determination of its reasonableness. See Tedder v. State, 322 So. 2d 908 (Fla. 1975); Keen v. State, 2000 WL 1424523 (Fla. Sept. 28, 2000). See Argument II, infra. While noting that it is permissible for judges "to exercise discretion--taking into consideration various factors relating both to the offense and offender--in imposing a judgment within the range prescribed by statute", Apprendi, 120 S.Ct. at 2358 (citing Williams v. New York, 337 U.S. 241, 246, 69 S.Ct. 1079)), the Apprendi majority nevertheless made clear that "nothing in Williams implies that a judge may impose a more severe sentence than the maximum authorized by the facts found by the jury." Apprendi, 120 S.Ct. at 2358 n.9. In Mr. Mills' case, the judge

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[8]Prior to trial, the State submitted a Statement of Aggravating Circumstances it "intends to present to the jury as grounds upon which the State expects to seek the death penalty" (R. 604). The State listed four (4) aggravating circumstances: that Mr. Mills was under a sentence of imprisonment at the time of the crime; that Mr. Mills was previously convicted of a felony (Aggravated Assault); that the crime was committed during the course of a felony; and that the crime was heinous, atrocious, or cruel (R. 604). Those were the only four aggravating circumstances argued to the jury by the prosecution (Penalty Phase Transcript, August 20, 1979, at 82-92). The jury returned a life recommendation. However, at the sentencing before the judge, the prosecution presented additional evidence of criminal convictions to support the aggravating circumstances (Id. at 19 *et. seq.*). Immediately following the presentation by counsel, the trial court found that all but one of Florida's statutory aggravating circumstances applied (even ones not argued by the State) (Id. at 45-46). See also R. (sent order).

imposed a sentence of death over the jury's recommendation of life. The jury did not make any factual findings as to death eligibility. In fact, there is no way to know if the jury found that any aggravating circumstances had been proven beyond a reasonable doubt. All that is known is that a majority of the jury believed that a life sentence was appropriate. Apprendi's holding thus establishes that Mr. Mills' sentence of death violates not only the Sixth, Eighth, and Fourteenth Amendments, but also the Florida Constitution. See Art. I, §§ 9, 17, 22, Fla. Const; Blair v. State, 698 So. 2d 1210, 1213 (Fla. 1997) ("the right to jury trial to be an indispensable component of our system of justice").

B. APPRENDI IS A FUNDAMENTAL CHANGE IN LAW.

Mr. Mills submits that he should be entitled to the benefit of Apprendi at this time. In Witt v. State, 387 So. 2d 922, 929-30 (Fla. 1980), this Court held that "major constitutional changes of law" as determined by either this Court or the United States Supreme Court are cognizable in postconviction proceedings. Under Witt, for a new rule of law to apply retroactively, a three-part test is applied. First, the new rule must originate in either the United States Supreme Court or the Florida Supreme Court. Second, the new rule must be constitutional in nature. Third, the new rule must have fundamental significance.

Apprendi clearly qualifies under all of the Witt criteria, and the Court is "required by this [Apprendi] decision to re-

examine this matter as a new issue of law." Thompson v. Dugger, 515 So. 2d 173, 175 (Fla. 1987). Mr. Mills submits that Apprendi qualifies under Witt to be a change in law and also is of such significance as to defeat any procedural defaults. In Thompson, this Court held Hitchcock v. Dugger, 481 U.S. 393 (1987), to be a change in Florida law because it "represent[ed] a sufficient change in the law that potentially affect[ed] a class of petitioners, including Thompson, to defeat the claim of a procedural default." Id. at 175. See also Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987) (holding that Lockett v. Ohio, 438 U.S. 586 (1978), is new law requiring retroactive application). The same can be said for Apprendi, which can be no clearer in its rejection of this Court's prior precedent that Florida's judicial override scheme did not violate due process or the Sixth Amendment right to jury trial. See Spaziano v. State, 433 So. 2d 508, 511-12 (Fla. 1983). Apprendi represents such a watershed change in law that Florida defendants should not be required to have preserved the issue.[9]

Even if prior presentation of the issue is required in order to receive the benefit of Apprendi, see James v. State, 615 So. 2d 668 (Fla. 1993), Mr. Mills is still entitled to the benefit of

[9]The dissenting opinion in Apprendi, authored by Justice O'Connor and joined by Chief Justice Rehnquist and Justices Breyer and Kennedy, wrote that the majority decision cast "serious doubt . . . on sentencing systems employed by the Federal Government and States alike," and concluded that the decision was "a watershed change in constitutional law." Apprendi, 120 S.Ct. at 2380 (O'Connor, J., dissenting).

Apprendi. On direct appeal, appellate counsel challenged Florida's capital sentencing statute which permitted a trial judge to override a jury's sentencing recommendation as violative of, *inter alia*, the state and federal constitutions, specifically the right to a trial by jury and due process:

> [T]he sentencing judge's rejection of the jury's advisory verdict of life imprisonment and imposition of the ultimate punishment constitutes double jeopardy, cruel and/or unusual punishment, deprivation of Appellant's right to trial by jury and due process of law established by U.S. Const. Amend., V, VI, VIII, XIV, and by Fla. Const. Art. I, §§ 9, 16, 22.

(Initial Brief of Appellant, Mills v. State, No. 59,140, at 45 n.5). Mr. Mills' appellate counsel further challenged as violative of the right to jury trial and due process the fact that the State was permitted to present evidence of aggravating circumstances to the judge only, not the jury:

> [T]he prosecutor and trial judge are not constitutionally permitted to circumvent the Tedder standards by reserving additional evidence for the judge alone, after the jury's life recommendation, as was done in the present case (R. 911-920, 931-932). In Presnell v. Georgia, 439 U.S. 14 (1978), the Court held that fundamental principles of procedural fairness (due process of law) apply with no less force at the penalty phase of trial in a capital case than they do in the guilt-determining phase of any criminal trial. See also Gardner v. Florida, 430 U.S. 349 (1977), and Green v. Georgia, 422 U.S. 95 (1979). Pursuant to Presnell, the defendant believes that as a matter of due process he is entitled to have the existence and validity of aggravating circumstances determined as they were placed before his jury. Any other conclusion which would open the door for a post-jury determination of aggravating circumstances would not only deprive the appellant of due process but would also deny him his right to trial by jury. Post-jury determination of aggravating circumstances would correlatively destroy the trifurcated sentencing procedures which were, in great measure, the basis for the conclusion that

> capital punishment was constitutionally permissible. State v. Dixon, 283 So. 2d 1 (Fla. 1973), and Proffitt v. Florida, 428 U.S. 242 (1976). The capital sentencing process under Section 921.141, Florida Statutes, creates a system of checks and balances which requires that the jury's advisory function not be distorted, lest the whole statutory scheme be distorted.

(Id. at 46-47).[10] In response, the State on direct appeal argued that "this Court has previously addressed and specifically or impliedly rejected challenges to the constitutionality of the Florida Capital Sentencing Statute" and that "Appellant concedes that he raises the standard `due process of law' and `cruel and unusual punishment on its face and as applied' arguments in challenging the constitutionality of the statute" (Answer Brief of Appellee at 52). In its direct appeal decision, the Court noted that appellate counsel "dutifully challenges the constitutionality of Florida's capital felony sentencing statute, but the arguments raised have been previously resolved against Mills. . ." Mills v. State, 476 So. 2d 172, 177 (Fla. 1985).

The very arguments made by Mr. Mills on direct appeal have now been found to be meritorious in Apprendi. Thus, it would be "unfair" to deprive Mr. Mills of the benefit of Apprendi. James v. State, 615 So. 2d 668 (Fla. 1993). Habeas relief is warranted.

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[10]The direct appeal briefs were filed in 1980; it was not until 1985 that the Court decided the direct appeal. In a motion for rehearing following the affirmance, Mr. Mills' appellate counsel argued that the Court overlooked the argument that the override in this case violated due process and the right to jury trial.

ARGUMENT II

A. ARBITRARY APPLICATION OF TEDDER TO MR. MILLS' CASE.

Keen v. State, 2000 WL 1424523 (Fla. Sept. 28, 2000), conclusively establishes that the standard enunciated in Tedder v. State, 322 So. 2d 908 (Fla. 1975), was arbitrarily not applied to Mr. Mills' case on direct appeal. The failure to consistently apply Tedder in this case results in a violation of due process. Fiore v. White, 121 S.Ct. 712 (2001). In light of Keen and Fiore, Mr. Mills' case must be revisited at this time and the previous error corrected. Before addressing the specifics of Mr. Mills' contentions at this time, a backdrop of the Court's Tedder jurisprudence is required in order to demonstrate how its application has varied over time, resulting in a narrow class of cases, such as Mr. Mills' case, where Tedder was not properly applied at all.

1. An Overview of the Jury Override in Florida. Since the State of Florida reinstated the death penalty, approximately 150 cases involving judicial overrides of jury recommendations of life imprisonment have reached this Court on direct appellate review.[11] As is seen from the discussion in this petition, it is clear that "appealing a `life override' under Florida's capital sentencing scheme is akin to Russian Roulette." Engle v. Florida, 102 S. Ct. 1094, 1098 (1988) (Marshall and Brennan, JJ.,

[11]Florida is one of only four states that allows a judge to override a capital sentencing jury's recommendation of life imprisonment.

dissenting from the denial of petition for writ of certiorari).

In 1974, one override case was reviewed by this Court, and it was reversed,[12] resulting in a 100% reversal rate. In 1975, the year of the seminal decision in Tedder v. State, 322 So. 2d 908 (Fla. 1975), five override cases reached the Court; three were reversed[13] and two were affirmed,[14] resulting in a 60% reversal rate. In 1976, five capital override cases were reviewed; three were reversed[15] and two affirmed,[16] again a 60% reversal rate. In 1977, four cases were reviewed; two were reversed[17] and two affirmed,[18] a 50% reversal rate. In 1978, two cases reached the Court, and both were reversed[19] -- a 100% reversal rate. In 1979, three cases were reviewed; two were

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[12]Taylor v. State, 294 So. 2d 648 (Fla. 1974).

[13]Swan v. State, 322 So. 2d 485 (Fla. 1975); Tedder v. State, 322 So. 2d 908 (Fla. 1975); Slater v. State, 316 So. 2d 539 (Fla. 1975).

[14]Gardner v. State, 313 So. 2d 675 (Fla. 1975); Sawyer v. State, 313 So. 2d 680 (Fla 1975).

[15]Chambers v. State, 339 So. 2d 204 (Fla. 1976); Provence v. State, 337 So. 2d 783 (Fla. 1976); Jones v. State, 332 So. 2d 615 (Fla. 1976).

[16]Dobbert v. State, 328 So. 2d 433 (Fla. 1976); Douglas v. State, 328 So. 2d 18 (Fla. 1976).

[17]McCaskill v. State/Williams v. State, 344 So. 2d 1276 (Fla. 1977); Burch v. State, 343 So. 2d 831 (Fla. 1977).

[18]Hoy v. State, 353 So. 2d 826 (Fla. 1977); Barclay v. State/Dougan v. State, 343 So. 2d 1266 (Fla. 1977).

[19]Shue v. State, 366 So. 2d 387 (Fla. 1978); Buckrem v. State, 355 So. 2d 111 (Fla. 1978).

reversed[20] and one affirmed,[21] a reversal rate of 66%.

In 1980, six override cases were reviewed; five were reversed[22] and one affirmed,[23] an 83% reversal rate. In 1981, fourteen override cases reached the Court; eleven were reversed,[24] and three were affirmed,[25] resulting in a 78% reversal rate. In 1982, seven cases reached the Court; four were reversed[26] and three were affirmed,[27] a 57% reversal rate. In

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[20]Malloy v. State, 382 So. 2d 1190 (Fla. 1979); Brown v. State, 367 So. 2d 616 (Fla. 1979).

[21]Dobbert v. State, 375 So. 2d 1069 (Fla. 1979).

[22]Williams v. State, 386 So. 2d 538 (Fla. 1980); McCrae v. State, 395 So. 2d 1145 (Fla. 1980); Phippen v. State, 389 So. 2d 991 (Fla. 1980); Neary v. State, 384 S0. 2d 881 (Fla. 1980); Hall v. State, 381 So. 2d 683 (Fla. 1980).

[23]Johnson v. State, 393 So. 2d 1069 (Fla. 1980).

[24]Goodwin v. State, 405 So. 2d 170 (Fla. 1981); Odom v. State, 403 So. 2d 936 (Fla. 1981); McKennon v. State, 403 So. 2d 389 (Fla. 1981); Stokes v. State, 403 So. 2d 377 (Fla. 1981); Smith v. State, 403 So. 2d 933 (Fla. 1981); Welty v. State, 402 So. 2d 1159 (Fla. 11981); Barfield v. State, 402 So. 2d 377 (Fla. 1981); Lewis v. State, 398 So. 2d 432 (Fla. 1981); Jacobs v. State, 396 So. 2d 713 (Fla. 1981). In two cases, the Court vacated and remanded for judge resentencings due to Gardner v. Florida error. Porter v. State, 400 So. 2d 5 (Fla. 1981); Spaziano v. State, 393 So. 2d 1119 (Fla. 1981).

[25]Burford v. State, 403 So. 2d 943 (Fla. 1981); Zeigler v. State, 402 So. 2d 365 (Fla. 1981); White v. State, 403 So. 2d 331 (Fla. 1981).

[26]McCampbell v. State, 421 So. 2d 1982); Walsh v. State, 418 So. 2d 1000 (Fla. 1982); Gilvin v. State, 418 So. 2d 996 (Fla. 1982); McCray v. State, 416 So. 2d 804 (Fla. 1982).

[27]Bolender v. State, 422 So. 2d 833 (Fla. 1982); Stevens v. State, 419 So. 2d 1058 (Fla. 1982); Miller v. State, 415 So. 2d 1262 (Fla. 1982).

1983, ten cases were appealed; seven were reversed[28], and three affirmed,[29] a 70% reversal rate. In 1984, nine cases reached the Court; two were reversed,[30] and seven were affirmed,[31] a 22% reversal rate. In 1985, seven cases were reviewed, including Mr. Mills' case; two were reversed,[32] and five were affirmed,[33] a 28% reversal rate. In 1986, six override cases reached the Court; one was reversed for a new trial[34] and one was reversed because no written findings were entered by the trial judge in violation of Florida law.[35] Of the four remaining cases where the override

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[28]Norris v. State, 429 So. 2d 688 (Fla. 1983); Herzog v. State, 439 So. 2d 1372 (Fla. 1983); Richardson v. State, 437 So. 2d 1091) (Fla. 1983); Hawkins v. State, 436 So. 2d 44 (Fla. 1983); Washington v. State, 432 S0. 2d 44 (Fla. 1983); Webb v. State, 433 So. 2d 496 (Fla. 1983); Cannady v. State, 427 So. 2d 1983).

[29]Routley v. State, 440 So. 2d 1257 (Fla. 1983); Spaziano v. State, 433 So. 2d 508 (Fla. 1983); Porter v. State, 429 So. 2d 293 (Fla. 1983).

[30]Rivers v. State, 458 So. 2d 762 (Fla. 1984); Thompson v. State, 456 So. 2d 444 (Fla. 1984).

[31]Eutzy v. State, 458 So. 2d 755 (Fla. 1984); Thomas v. State, 456 So. 2d 454 (Fla. 1984); Groover v. State, 458 So. 2d 226 (Fla. 1984); Parker v. State, 458 So. 2d 750 (Fla. 1984); Gorham v. State, 454 So. 2d 556 (Fla. 1984); Heiney v. State, 447 So. 2d 210 (Fla. 1984); Lusk v. State, 446 So. 2d 1038 (Fla. 1984).

[32]Huddleston v. State, 475 So. 2d 204 (Fla. 1985); Barclay v. State, 470 So. 2d 691 (Fla. 1985).

[33]Echols v. State, 484 So. 2d 568 (Fla. 1985); Mills v. State, 476 So. 2d 172 (Fla. 1985); Brown v. State, 473 So. 2d 1260 (Fla. 1985); Francis v. State, 473 So. 2d 672 (Fla. 1985); Burr v. State, 466 So. 2d 1051 (Fla. 1985).

[34]Ramos v. State, 496 So. 2d 121 (Fla. 1986).

[35]VanRoyal v. State, 497 So. 2d 625 (Fla. 1986).

was analyzed, all were reversed, for a 100% reversal rate.[36] In 1987, of the six cases reviewed, five were reversed,[37] and one was affirmed,[38] for an 83% reversal rate. In 1988, nine override cases were analyzed; eight were reversed[39] and one affirmed[40], for an 89% rate of reversal. In 1989, six override cases were analyzed; five were reversed[41] and one was affirmed,[42] for an 83% reversal rate.

In 1990, five override cases were reviewed by the Court; all were reversed.[43] In 1991, eleven overrides reached the high

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[36]Irizarry v. State, 496 So. 2d 822 (Fla. 1986); Brookings v. State, 495 So. 2d 135 (Fla. 1986); Nelson v. State, 490 So. 2d 32 (Fla. 1986); Amazon v. State, 487 So. 2d 8 (Fla. 1986).

[37]Wasko v. State, 505 So. 2d 1314 (Fla. 1987); Masterson v. State, 516 So. 2d 256 (Fla. 1987); Fead v. State, 512 So. 2d 176 (Fla. 1987); Hansbrough v. State, 509 So. 2d 1081 (Fla. 1987); Ferry v. State, 507 So. 2d 1373 (Fla. 1987).

[38]Engle v. State, 510 So. 2d 881 (Fla. 1987).

[39]Spivey v. State, 529 So. 2d 1088 (Fla. 1988); Harmon v. State, 527 So. 2d 182 (Fla. 1988); Brown v. State, 526 So. 2d 903 (Fla. 1988); Caillier v. State, 523 So. 2d 158 (Fla. 1988); Perry v. State, 522 So. 2d 817 (Fla. 1988); Holsworth v. State, 522 So. 2d 348 (Fla. 1988); Burch v. State, 522 So. 2d 810 (Fla. 1988); DuBoise v. State, 520 So. 2d 260 (Fla. 1988).

[40]Torres-Arboledo v. State, 524 So. 2d 403 (Fla. 1988).

[41]Christian v. State, 550 So. 2d 450 (Fla. 1989); Fuente v. State, 549 So. 2d 652 (Fla. 1989); Freeman v. State, 547 So. 2d 125 (Fla. 1989); Cochran v. State, 547 So. 2d 928 (Fla. 1989); Pentecost v. State, 545 So. 2d 861 (Fla. 1989).

[42]Thompson v. State, 553 So. 2d 153 (Fla. 1989).

[43]Buford v. State, 570 So. 2d 923 (Fla. 1990); Cheshire v. State, 568 So. 2d 908 (Fla. 1990); Carter v. State, 560 So. 2d 1166 (Fla. 1990); Hallman v. State, 560 So. 2d 223 (Fla. 1990); Morris v. State, 557 So. 2d 27 (Fla. 1990).

court; ten were reversed[44] and one case, on appeal from a Hitchcock resentencing, was affirmed,[45] for a 91% reversal rate. In 1992, of the seven overrides appealed, four were reversed[46] and three affirmed,[47]for a 57% reversal rate. In 1993, the one override decided by the Court was affirmed.[48] In 1994, seven cases were decided on direct appeal; six were reversed[49] and two affirmed.[50] In 1995, one override case was decided and it was reversed,[51] for a 100% reversal rate. In 1996, three override

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[44]Bedford v. State, 589 So. 2d 245 (Fla. 1991); Savage v. State, 588 So. 2d 975 (Fla. 1991); Craig v. State, 585 So. 2d 278 (Fla. 1991); Wright v. State, 586 So. 2d 1024 (Fla. 1991); McCrae v. State, 582 So. 2d 613 (Fla. 1991); Cooper v. State, 581 So. 2d 49 (Fla. 1991); Dolinsky v. State, 576 So. 2d 271 (Fla. 1991); Downs v. State, 574 So. 2d 1095 (Fla. 1991); Hegwood v. State, 575 So. 2d 170 (Fla. 1991); Douglas v. State, 575 So. 2d 165 (Fla. 1991).

[45]Ziegler v. State, 580 So. 2d 127 (Fla. 1991).

[46]Scott v. State, 603 So. 2d 1275 (Fla. 1992); Reilly v. State, 601 So. 2d 222 (Fla. 1992); Jackson v. State, 599 So. 2d 103 (Fla. 1992); Stevens v. State, 613 So. 2d 402 (Fla. 1992).

[47]Coleman v. State, 610 So. 2d 1283 (Fla. 1992); Robinson v. State, 610 So. 2d 1288 (Fla. 1992); Marshall v. State, 609 So. 2d 799 (Fla. 1992).

[48]Williams v. State, 622 So. 2d 456 (Fla. 1993). The defendant in Williams was the co-defendant of defendants Robinson and Coleman, whose overrides were affirmed in 1992.

[49]Turner v. State, 645 So. 2d 444 (Fla. 1994); Barrett v. State, 649 So. 2d 219 (Fla. 1994); Caruso v. State, 645 So. 2d 389 (Fla. 1994); Esty v. State, 642 So. 2d 1074 (Fla. 1994); Parker v. State, 643 So. 2d 1032 (Fla. 1994); Christmas v. State, 632 So. 2d 1368 (Fla. 1994).

[50]Garcia v. State, 644 So. 2d 59 (Fla. 1994); Washington v. State, 653 So. 2d 362 (Fla. 1994).

[51]Perez v. State, 648 So. 2d 715 (Fla. 1995).

cases were decided, and all were reversed,[52] for a 100% reversal rate. In 1997, three override cases were decided, and all were reversed,[53] for a 100% reversal rate. In 1998, three override cases were decided; one was affirmed[54] and two reversed.[55] In 1999, no override cases were decided by the Court. In 2000, one override case was decided, and it was reversed,[56] for a 100% reversal rate.

Significantly, many of the override cases affirmed on direct appeal have been reversed on collateral attack in either state or federal court, thereby decreasing the number of override death sentences originally affirmed on direct appellate review. The death sentence upheld in Gardner v. State, 313 So. 2d 675 (Fla. 1975), was subsequently vacated by the United States Supreme Court. Gardner v. Florida, 430 U.S. 349 (1977). The death sentence affirmed in Douglas v. State, 328 So. 2d 18 (Fla. 1976), was subsequently vacated by the Eleventh Circuit Court of Appeals. Douglas v. Wainwright, 714 F. 2d 1532 (11th Cir.),

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[52]Boyett v. State, 688 SO. 2d 308 (Fla. 1996); Strausser v. State, 682 So. 2d 539 (Fla. 1996); Craig v. State, 685 So. 2d 1224 (Fla. 1996).

[53]Pomeranz v. State, 703 So. 2d 465 (Fla. 1997); Marta-Rodriguez v. State, 699 So. 2d 1010 (Fla. 1997); Jenkins v. State, 692 So. 2d 893 (Fla. 1997).

[54]Zakrzewski v. State, 717 So. 2d 488 (Fla. 1998).

[55]San Martin v. State, 717 So. 2d 462 (Fla. 1998); Mahn v. State, 714 So. 2d 391 (Fla. 1998).

[56]Keen v. State, 2000 WL 1424523 (Fla. Sept. 28, 2000). Keen was also afforded a new trial, but the Court's opinion makes clear that the override was also improper.

cert. granted and remanded, 104 S.Ct. 3575 (1983), aff'd, 739 F. 2d 531 (11th Cir. 1984). The death sentence affirmed in McCrae v. State, 395 So. 2d 1145 (Fla. 1980), was vacated by a federal district court for Hitchcock error, and the reimposition of the death sentence over the jury's life recommendation was reversed by this Court. McCrae v. State, 582 So. 2d 613 (Fla. 1991). The death sentence affirmed in Buford v. State, 403 So. 2d 943 (Fla. 1981), was also vacated in federal court due to Hitchcock error, and this Court reversed the reimposition of death following a resentencing. Buford v. State, 570 So. 2d 923 (Fla. 1990). The death sentence affirmed in Thomas v. State, 456 So. 2d 454 (Fla. 1984), was vacated by the Court in postconviction also due to Hitchcock error. Thomas v. State, 546 So. 2d 716 (Fla. 1989). The death sentence affirmed in Eutzy v. State, 458 So. 2d 755 (Fla. 1984), was vacated by the federal courts because penalty phase counsel failed to investigate and present mitigating evidence which would have precluded an override. Eutzy v. Dugger, 746 F. Supp. 1492 (N.D. Fla. 1989), aff'd, No. 89-4014 (11th Cir. 1990). The death sentence affirmed in Burr v. State, 466 So. 2d 1051 (Fla. 1985), was subsequently vacated in postconviction because the trial court relied on improper aggravating circumstances in overriding the jury's life recommendation. Burr v. State, 576 So. 2d 278 (Fla. 1991). The death sentences in Heiney v. State, 447 So. 2d 210 (Fla. 1984), Torres-Arboledo v. State, 524 So. 2d 403 (Fla. 1988), and Thompson v. State, 553 So. 2d 153 (Fla. 1989), were reversed in

postconviction due to ineffective assistance of penalty phase counsel because counsel failed to present mitigating evidence which would have precluded the override. Heiney v. State, 620 So. 2d 171 (Fla. 1993); Torres-Arboleda v. Dugger, 636 So. 2d 1321 (Fla. 1994); Thompson v. State, 731 So. 2d 1235 (Fla. 1998). The death sentence affirmed in Parker v. State, 458 So. 2d 750 (Fla. 1984), was vacated by the United States Supreme Court in Parker v. Dugger, 111 S. Ct. 731 (1991), and on remand to this Court, the override was reversed. Parker v. State, 643 So. 2d 1032 (Fla. 1994). The defendant whose override was affirmed in Engle v. State, 510 So. 2d 881 (Fla. 1987), was eventually sentenced to life imprisonment during the pendency of state collateral proceedings because his co-defendant received life in Stevens v. State, 613 So. 2d 402 (Fla. 1992). Likewise, the defendant in Brown v. State, 473 So. 2d 1260 (Fla. 1985), was sentenced to life during the pendency of state collateral proceedings pursuant to an agreement with the State after his co-defendant received a life sentence in separate trial proceedings. With respect to the override affirmed in Porter v. State, 429 So. 2d 293 (Fla. 1983), it was reversed by this Court due to judicial bias. Porter v. State, 723 So. 2d 191 (Fla. 1998). Finally, the defendant whose override was affirmed in Spaziano v. State, 433 So. 2d 508 (Fla. 1983), was awarded a new trial. State v. Spaziano, 692 So. 2d 174 (Fla. 1997).

2. The Court's Inconsistent Application of Tedder.

This Court has acknowledged that it was not consistently

applying Tedder during the time period when it addressed Mr. Mills' override on direct appeal. In Cochran v. State, 547 So. 2d 928 (Fla. 1989), both the majority and dissenting justices of this Court agreed that the Tedder standard had been inconsistently applied by the Court in cases reviewed prior to 1986. In dissenting from the reversal of the override death sentence in Cochran, Chief Justice Ehrlich cited several override cases which had previously been affirmed by the Court, and noted that a "mechanistic application" of Tedder "would have resulted in reversals of the death sentences in [several cases]." Cochran, 547 So. 2d at 935 (Ehrlich, C.J., dissenting in part). Though Chief Justice Ehrlich argued that the Tedder standard as construed today and as applied by the majority in Cochran was wrong, he correctly noted that the shift in the standard has resulted in an Eighth Amendment violation under Furman v. Georgia, 408 U.S. 238 (1972). Cochran, 547 So. 2d at 935. In response to the Ehrlich dissent, the majority in Cochran wrote:

> Finally, we agree with the dissent that `legal precedent consists more in what courts do than in what they say.' However, in expounding upon this point to prove that Tedder has not been applied with the force suggested by its language, the dissent draws entirely from cases occurring in 1984 or earlier. **This is not indicative of what the present court does**, as Justice Shaw noted in his special concurrence to Grossman v. State, 525 So. 2d 833, 851 (Fla. 1988) (Shaw, J., specially concurring):
>
> > During 1984-85, we affirmed on direct appeal trial judge overrides in eleven of fifteen cases, seventy-three percent. By contrast, during 1986 and 1987, we have affirmed overrides in only two of eleven cases, less than twenty percent. This current reversal

> rate of over eighty percent is a strong indicator to judges that they should place less reliance on their independent weighing of aggravation and mitigation . . .
>
> **Clearly, since 1985 the Court has determined that Tedder means precisely what it says,** that the judge must concur with the jury's life recommendation unless `the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ.' Tedder, 322 So. 2d at 910.

Cochran, 547 So. 2d at 933 (emphasis added).

In the words of this Court, in cases decided after 1985, "Tedder means precisely what it says." However, at the time of Mr. Mills' direct appeal, by this Court's own admission, Tedder did not mean what it says.[57] That this is correct is established in this Court's opinion affirming the denial of Mr. Mills' motion for postconviction relief in 1992, where the majority, faced with the argument that Tedder had not been properly applied on direct appeal, held that "even though the jury override might not have been sustained today, it is the law of the case." Mills v. State, 603 So. 2d 482, 486 (Fla. 1992). This statement establishes the arbitrary nature of Tedder's application in this case.[58]

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[57]Of note is the fact that between 1981 and 1984, when Mr. Mills' case was pending on direct appeal, this Court issued forty (40) opinions addressing override death sentences. **Not one** of these cases is cited or addressed in this Court's opinion affirming Mr. Mills' override.

[58]Five Justices on this Court have, at one time or another, agreed that the override in this case was improper. On direct appeal, Justices Overton and McDonald found the presence of mitigating evidence in the record, and concluded that under

3. Keen Establishes the Arbitrary Application of Tedder to Mr. Mills' Override Death Sentence.

a. Mr. Mills' Override. On August 20, 1979, a Seminole County, Florida, jury recommended that Gregory Mills be sentenced to life imprisonment. On April 18, 1980, the trial court overrode the jury's recommendation. Some eight (8) months later, on December 31, 1980, the appellate briefing of Mr. Mills' case was completed by the filing of the Reply Brief by Mr. Mills' direct appeal counsel. On February, 1981, less than sixty (60) days later, oral argument was conducted in this Court. ***Four years and six months later***, on August 30, 1985, a divided Court issued its opinion affirming the conviction and override death sentence. The five-year period between briefing and final decision in this case, quite possibly a record for this Court,

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Tedder, the override should not be sustained. Mills, 476 So. 2d at 180 (Overton and McDonald, JJ., dissenting in part). In an appeal from the summary denial of post-conviction relief, Justice McDonald, in dissenting from the granting of an evidentiary hearing, again reiterated that "counsel presented a substantial amount of mitigating evidence and secured a jury recommendation of life imprisonment." Mills v. Dugger, 559 So. 2d at 580 (McDonald, J., dissenting in part). He went on to conclude, however, that "the override sentence is the law of the case." Id. Then-Justice Barkett, concurring in the grant of an evidentiary hearing, would also have granted habeas relief to Mr. Mills. Id. at 579 (Barkett, J., concurring in part and dissenting in part). In this Court's 1992 postconviction opinion, then-Justice Barkett again dissented from the affirmance of the jury override. Mills v. State, 603 So. 2d at 486 (Barkett, J., dissenting). Then-Chief Justice Shaw concurred in Justice Barkett's dissenting opinion. Id. Justice Kogan would also reduce Mr. Mills' sentence to life. Id. at 487 (Kogan, J., dissenting).

illustrates the troublesome nature of Gregory Mills' case.[59] The result that was reached after a five-year deliberation simply cannot be reconciled with any other similar case decided by the Court since the reinstatement of the death penalty in the State of Florida. In Mr. Mills' case, the Court engaged in one of the longest, if not the longest, direct appeal deliberations in its history to affirm the only jury override involving a conviction for felony-murder since the reinstatement of the death penalty in this state. The result in Mr. Mills' case could not be more arbitrary, capricious, and therefore violative of the Eighth and Fourteenth Amendments.

As demonstrated by the recent decision in Keen, Mr. Mills' consistent complaints that Tedder was not consistently applied to his case have come to fruition. The record in this case could not be more clear that the trial judge failed to conduct the proper analysis under Tedder, and that the majority decision on direct appeal similarly failed to apply a proper Tedder analysis.

At the oral pronouncement of sentence, the trial court stated as follows:

> THE COURT: Gregory Mills, the Court has gone through the aggravating and mitigating provisions as set forth in 921.141, and the Court finds then, under all but . . . let's see, (G), that there was aggravating circumstances under each of those except (G).

[59]The fact that five justices of the Supreme Court of Florida have at various times expressed that Mr. Mills' sentence should be reversed is further manifestation that this death sentence has troubled many jurists since the jury's life recommendation was overridden in 1980.

> The Court differs from your attorney as to the mitigating circumstances as I consider that you're above the age of majority and the Court does not consider the age of the Defendant at the time of the crime.
>
> [The] Court finds that you're above the age of majority. So, I do not consider your age as any mitigating circumstances. The Court also considered the fact that the Jury, having recommended the sentence of life imprisonment, the Court considered that in the sentence that it decided to impose upon you.
>
> The finding as the Court has written up an Order of Judgment and Sentence that the aggravating circumstances far outweigh any mitigating circumstances in that the Court did not find any mitigating circumstances at all in this particular case.
>
> So, it's the Judgment and Order and Sentence of this Court that you be electrocuted until dead in the manner directed by the laws of the State of Florida.

(Transcript of Sentencing, April 18, 1980, at 45-46). At no time did the Court indicate that it was required to and in fact did give "great weight" to the jury's recommendation of life; he merely stated that he "considered" the fact that the jury recommended life.[60]

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[60]Defense counsel did properly tell the trial judge that the jury's life recommendation had to be given great weight by the court:

> MR. GREENE: I think as the Court is well aware that the Jury in this case, same jury that heard the case, made a recommendation to this Court, did recommend that Mr. Mills be sentenced to life in prison.
>
> I think the Court should take that into consideration and give that recommendation great weight. I think the Court should note that the Jury only deliberated approximately thirty minutes after hearing the arguments by Counsel before arriving at that recommendation of life.

The trial court's written sentencing order merely listed the aggravators and mitigators that he found or rejected and concluded:

> IT IS the finding of the Court after weighing the aggravating and mitigating circumstances that there are sufficient aggravating circumstances as specified in 921.141 and insufficient mitigating circumstances therein that a sentence of death is justified.

(R. at 642) (Attachment A). The judge never discussed or made any findings regarding whether the jury's life recommendation could have been reasonably supported by the record. Instead, the trial judge's order reflects that he thought the jury got it wrong and as a result he inserted his own view of the facts. In fact, in the court's four page order, Tedder is never mentioned.

On direct appeal, Mr. Mills' appellate counsel raised a number of challenges to the constitutionality and propriety of the override, including an argument that "[t]he standards for overruling the jury have not been met in the present case. There

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> I think the Court remembers that during the trial itself, the Jury deliberated more than four hours, and I'm asking the Court to speculate, but I think there's also the possibility that the Jury may have made up its mind about the sentencing recommendation that [it] was gonna [sic] make to the Court possibly during the trial and maybe that's an explanation for why the sentencing recommendation was made to the Court in this case was arrived at so rapidly.
>
> I think the Court can consider the fact that twelve citizens that sat on this case were citizens of Seminole County, were very familiar with the case. I think their recommendation does carry great weight.

(Transcript of Sentencing, April 18, 1980, at 31-32).

was no `clear and convincing' reason, . . . no `compelling' reason, . . . and no `reasonable basis' . . . for rejecting the jury's life recommendation (Initial Brief of Appellant at 40) (citing cases). Appellate counsel further argued that

> a reading of the transcript and the trial court's written findings in support of the death sentence makes it clear that the trial court, although recognizing that the jury had recommended life, completely disregarded that recommendation without stating any specific reason for doing so, contrary to the Tedder standard.

(Id. at 46). Appellate counsel further discussed the mitigation that was presented below and which served as a reasonable basis for the jury's life recommendation, including the fact that the co-defendant, Ashley, received complete immunity:

> Additionally, the role of Vincent Ashley in the perpetration of the offense is evidence in mitigation. Ashley received complete immunity for his trial testimony at the defendant's trial. His credibility and role in the offense were certainly at issue. Although Ashley testified that the defendant was with him and committed the shooting, his testimony is extremely suspect since the only person the victim's wife saw running from the house was Ashley (R 6-7, 10, 11-12, 15, 29-30, 33, 39-44). Certainly, such testimony was relevant in mitigation. See Malloy v. State, 382 So. 2d 1190 (Fla. 1979), wherein this Court held that the jury's action in recommending life imprisonment for the defendant was reasonable because of conflict in evidence as to who was the actual perpetrator and because of the plea bargains of the defendant's accomplices.

(Id. at 50-51).

On direct appeal, a fractured Court first vacated Mr. Mills' aggravated battery conviction because "we do not believe it proper to convict a person for aggravated battery and simultaneously for homicide as a result of one shotgun blast."

Mills v. State, 476 So. 2d 172, 177 (Fla. 1985). The Court also struck three (3) of the aggravating circumstances found by the trial court. The "great risk of death to many persons" aggravating factor was struck because "[t]he finding that Mills knowingly created a great risk of death to many persons was, as the state conceded, erroneous." Id. at 178. The pecuniary gain factor was struck due to improper doubling with the felony murder aggravating factor. Id. Lastly, the Court struck the "heinous, atrocious, or cruel" aggravator as inapplicable to the facts of the case. Id. Despite striking the aggravators, the Court purportedly conducted a harmless error analysis:

> We conclude that the court's finding that there were no mitigating circumstances was correct. 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.

Id. at 179. As for the override, the entirety of the Court's analysis is as follows:

> We hold that the trial judge's findings in support of the sentence of death even without the finding of especially heinous, atrocious, and cruel, meet the Tedder standard. We find that the facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ. There are three valid statutory aggravating circumstances, and the trial judge has found that there are no valid mitigating circumstances. The purported mitigating circumstances claimed by Mills, but not found by the trial judge, are not sufficient to outweigh the aggravating circumstances nor do they establish a reasonable basis for the jury's recommendation. We conclude that the imposition of a sentence of death after a jury recommendation of life was proper in this case.

Id.

Justice Overton dissented from the affirmance of the sentence, writing "the jury recommendation of life should have been followed for the reasons expressed by Justice McDonald in his dissent." Id. at 180 (Overton, J., concurring in part and dissenting in part). In dissent, Justice McDonald wrote:

> I dissent only from the affirmance of the death sentence. Were it not for the jury's recommendation, I would have little difficulty in upholding the death sentence. Valid aggravating circumstances existed, and the defense established the existence of no statutory mitigating circumstances.
>
> The jury, however, recommended life imprisonment. In such instances we have stated that "the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). We should, therefore, review Mills' sentence in light of Tedder.
>
> The jury's recommendation must have been predicated on the circumstances of this homicide and on nonstatutory mitigating evidence. The chief testimony against Mills came from Ashley. As previously indicated, Ashley received immunity from prosecution for this crime and other crimes in exchange for his testimony. Ashley said that Mills did the killing, but Mills has always denied this. The jury could have found the evidence sufficient to convict but still have had doubts about whether Mills intended to kill the victim. It could also have concluded that Mills and Ashley were being treated so disparately when their involvement was substantially the same that any such doubt should be weighed in Mills' favor. Mills was employed at the time of the crime and his employer thought well of him. Mills had a harsh and deprived youth, but his grandmother and sister were supportive of him. During prior incarceration he completed studies to the extent that he passed his G.E.D. tests.
>
> Are these circumstances, considered collectively, adequate to find that reasonable persons could recommend life imprisonment? I think so. As previously indicated, adequate and reasonable grounds existed for the trial judge to impose death. For the death penalty to prevail when there is a jury

> recommendation of life, however, more than a disagreement with the jury's recommendation must be shown. "[T]he facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Id. This is a difficult test, and it has not been met in this case.

Id. at 180 (McDonald, J., concurring in part and dissenting in part).

b. Keen Establishes that Tedder was Not Properly Applied to Mr. Mills' Case.

In Keen, this Court was faced with a lower court overriding a jury recommendation of life and purporting to conduct a proper Tedder analysis. The Court concluded that the lower court had erred because "the standards for weighing aggravators and mitigators in a death recommendation case have been transposed with those applicable to consideration of a jury recommendation of life imprisonment." Keen, 2000 WL 1424523 at *18. For example, the lower court's order had found that "[t]he mitigating evidence is wholly insufficient to outweigh the aggravating circumstances in support of a life sentence." Id. at *19. It was this sentence that the Court concluded demonstrated that "the wrong standard was ultimately applied in consideration of the jury's life recommendation." Id. As the Court acknowledged:

> The singular focus of a Tedder inquiry is whether there is "a reasonable basis in the record to support the jury's recommendation of life," rather than the weighing process which a judge conducts after a death recommendation.

Id. (citations omitted). Because the trial court applied the wrong standard, the Court in Keen found error under Tedder:

> Consequently, the focus of the analysis was not upon

> finding support for the jury's recommendation, *i.e.*, determining if a reasonable basis existed for the jury's decision, but rather toward proving that the jury got it wrong and lacked any reasonable basis to recommend life. In other words, the trial judge disagreed with their recommendation based on his view of the mix of aggravators and mitigators, rather than through the prism of a Tedder analysis. This was error, because just as a Tedder inquiry has no place in a death recommendation case, the reciprocal holds true when a jury life recommendation is independently analyzed by the trial court and independently reviewed by this Court. In other words, the jury's life recommendation changes the analytical dynamic and magnifies the ultimate effect of mitigation on the defendant's sentence.

Id. at *19 (footnotes and citations omitted). As a result, the Court reversed the override, concluding that "[w]hile any of us might or might not have come to the same conclusion with regard to the imposition of a death sentence based upon the evidence presented in this case had we been jurors, **that is not the legal standard by which we must evaluate the override of the jury's recommendation**." Id. at *22 (emphasis added).

The Court's analysis in Keen simply cannot be squared with its analysis of Mr. Mills' override on direct appeal. Mr. Mills' trial judge engaged in precisely the same Tedder error as did the judge in Keen. In fact, the error in Mr. Mills' case was even more egregious. In his sentencing order, all the trial court in this case wrote with respect to this issue was the following:

> IT IS the finding of the Court after weighing the aggravating and mitigating circumstances that there are sufficient aggravating circumstances as specified in 921.141 and insufficient mitigating circumstances therein that a sentence of death is justified.

(R. 642). NO mention of Tedder was made. NO mention was made

that the jury's recommendation of life was entitled to great weight. NO mention was made of why the jury's recommendation was unreasonable under Tedder.[61] The remainder of the court's sentencing order consists simply of findings of aggravating and mitigating circumstances, with no mention of Tedder. Cf Keen at *23 n.20 ("Indeed, the second page of the sentencing order contains details of the aggravators, the mitigators, and supporting evidence as in a death recommendation case. It was not until the twelfth page of the sentencing order that Tedder is mentioned, which is the appropriate standard that should have guided the inquiry from the outset. In short, the analysis was concluded backwards"). From the face of the order in Mr. Mills' case, one would think that the jury had recommended death as opposed to life, since the trial court engaged in the weighing process that, as the Court made clear in Keen, does not apply when analyzing a jury life recommendation under Tedder.

This Court's analysis of Mr. Mills' override on direct appeal is also fatally flawed under Keen and Tedder. As the Court noted in Keen, the Court's focus of appellate review in override cases is a "narrow" one and focuses solely on whether there is a reasonable basis in the record on which the jury could have relied in recommending life. Keen at *18. In Mr. Mills' direct appeal, the majority decision did the exact opposite, also

[61]Even the order found lacking in Keen made some attempt to set forth why the judge believed the jury's recommendation to be lacking in a reasonable basis. Keen, 2000 WL 1424523 at *18-*19. No such attempt was made by the trial court in Mr. Mills' case.

addressing the issue as if it were a death recommendation. The Court sustained the override because

> [t]here are three valid statutory aggravating circumstances, and the trial judge has found that there are no mitigating circumstances. The purported mitigating circumstances claimed by Mills, but not found by the trial judge, are not sufficient to outweigh the aggravating circumstances nor do they establish a reasonable basis for the jury's recommendation.

Mills, 476 So. 2d at 179. This is plainly incorrect under Keen, which explicitly held that under Tedder, "[t]he singular focus of a Tedder inquiry is whether there is `a reasonable basis in the record to support the jury's recommendation of life, rather than the weighing process which a judge conducts after a death recommendation." Keen at *19. The mere existence of aggravators does not, under Tedder, exclude the possibility of a reversal in an override: "[R]eversal under Tedder is in no way prevented even assuming the presence of several valid aggravators. Indeed, that has been the rule rather than the exception." Keen at *23 n.24.

As Justice McDonald's dissent in Mills set forth, the jury recommendation could have reasonably rested on the disparate treatment between Mr. Mills and Ashley "when their involvement was substantially the same." Mills, 476 So. 2d at 180 (McDonald, J., dissenting). However, the majority determined that this fact, along with the other "purported" nonstatutory mitigation adduced by Mr. Mills, were "not found by the trial judge" and did not establish a reasonable basis. But as the Court noted in

Keen, whether members of the Court believed that Ashley was equally culpable or not "is not the legal standard by which we must evaluate the override of the jury's life recommendation." Keen at *22. As the Court wrote:

> On the issue of disparate treatment, a fundamental distinction exists between a defendant who receives an advisory sentence of death from a jury as opposed to one who receives an advisory sentence of life. In the former, the defendant is left to argue that the jury got it wrong and that the disparate treatment of a codefendant or coperpetrator should have mitigated the offense. **In the latter situation, such as here, it must be assumed that the jury found that disparate treatment mitigates the offense. That is, a majority of a twelve-person jury concluded that based on the record before them, this factor compelled a life recommendation, whether alone or in combination with other mitigation. From that starting point, the trial court must then consider whether disparate treatment could serve as a reasonable basis for a life recommendation. Here, that is an especially powerful finding because the same jury found sufficient evidence to convict the defendant of first-degree murder. Thus, the jury was apparently able to follow the law and apply the appropriate legal standards to the distinct phases of the capital case before them.**

Keen at *23 n.19 (emphasis added). See also Pentecost v. State, 545 So. 2d 861, 863 (Fla. 1989) (override reversed because "the testimony could have raised in the jurors' minds the question of who actually stabbed the victim"); Brookings v. State, 495 So. 2d 135 (Fla. 1986) (override reversed because codefendant walking away "totally free...could reasonably be considered by the jury"); Fuente v. State, 549 So. 2d 652 (Fla. 1989) (override was reversed because "the jury in this case could have reasonably based its recommendation on the fact that [the codefendants] would likely not be prosecuted for their participation in the

murder").

It could not be clearer that Keen and Mills are virtually indistinguishable except for grossly different outcomes. A proper application of Tedder to Mr. Keen's case warranted relief. An erroneous application of Tedder to Mr. Mills' case warranted an affirmance. This arbitrariness must be corrected at this time.

The recent decision in Fiore v. White, 121 S.Ct. 712 (2001), is instructive on whether a court can arbitrarily apply standards to similarly-situated defendants. In Fiore, two defendants, Fiore and Scarpone, were both convicted under a Pennsylvania law of operating a hazardous waste facility without a permit. Id. at 713. Pennsylvania conceded that Fiore had a permit, but argued that Fiore had deviated so dramatically from the permit's terms that he nevertheless violated the statute. Id. The lower Pennsylvania courts agreed, and the Pennsylvania Supreme Court refused to review the case. Id. In the meantime, after Fiore's conviction was final by the Pennsylvania Supreme Court's failure to review the case, the Pennsylvania Supreme Court agreed to review Scarpone's case and awarded him with a new trial "on the ground that the statute meant what it said." Id. Fiore then sought and obtained federal habeas relief; the Third Circuit Court of Appeals reversed the granting of relief, however, holding that "state courts are under no [federal] constitutional obligation to apply their decisions retroactively." Id. at 713-14.

After granting *certiorari*, the United States Supreme Court certified a question to the Pennsylvania Supreme Court, asking whether the interpretation of law it applied to Scarpone's case was the correct interpretation of law at the time of Fiore's conviction. Id. at 714. In response, the Pennsylvania Supreme Court wrote that the decision in Scarpone's case did not announce a new rule of law, but rather "clarified" the plain meaning of the law which also applied at the time of Fiore's conviction. Id. The Supreme Court wrote that "the question is simply whether Pennsylvania can, consistently with the Federal Due Process Clause, convict Fiore for conduct that its criminal statute, as properly interpreted, does not prohibit." Id. The Court resolved the question in the negative, holding that "Fiore's conviction fails to satisfy the Federal Constitution's demands." Id.

Mr. Mills does not assert that Tedder is new law; obviously it has been in existence for some time. Rather, the proper application of Tedder has vacillated over time, culminating in an interpretation set forth in Keen which is irrefutably at odds with the manner in which the Court analyzed Mr. Mills' override on direct appeal (as Justice McDonald's dissent set forth). Failure to apply this interpretation to Mr. Mills' case would be the epitome of the arbitrary application of the death penalty. Cf. Engle v. Florida, 485 U.S. 924, 928 (1988) (Marshall and Brennan, JJ., dissenting from the denial of certiorari) (voicing concern over this Court's "haphazard application of the Tedder

standard in cases in which an accomplice's lesser role may have influenced the jury's recommendation of life imprisonment," a constitutional infirmity which left the justices "convince[d] [] that the Florida sentencing scheme is being applied in a manner inconsistent with the requirements of due process"). See also id. at 925 (this Court's "inconsistent application of the Tedder standard in felony-murder cases has led to the arbitrary imposition of the death penalty").

In light of Keen and Fiore, the Court should now lift the "law of the case" doctrine which it previously erected. Mills v. State, 603 So. 2d 482, 486 (Fla. 1992) ("even though the jury override might not have been sustained today, it is the law of the case"). Under the law of the case doctrine, "it is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice." Arizona v. California, 103 S. Ct. 1382, 1391 n.8 (1983). Florida courts have lifted the "law of the case" and corrected errors made in prior dispositions of issues where justice would be subverted if the court did not do so. See Massie v. University of Florida, 570 So. 2d 963, 974 (Fla. App. 1st DCA 1990); Brown v. Champeau, 537 So. 2d 1120, 1121 (Fla. 5th DCA 1989); Morales v. State, 580 So. 2d 788 (Fla. 3d DCA 1991).

This Court's jurisdiction over an appeal necessarily includes the "authority to change the law of the case previously set forth." Jones v. State, 559 So. 2d 204, 206 (Fla. 1990). See also Brunner Enterprises v. Department of Revenue, 452 So. 2d

550 (Fla. 1984) ("We are the only court that has the power to change the law of the case established by this Court"). In Preston v. State, 444 So. 2d 939, 942 (Fla. 1984), a capital case, the Court reaffirmed that "an appellate court does have the power to reconsider and correct erroneous rulings notwithstanding that such rulings have become the law of the case." The Court lifted application of the "law of the case" because "[t]he interest of justice, substantive due process requirements and Florida's constitutional and statutory scheme of death penalty review jurisdiction support our decision to review this issue." Id. Accord Porter v. State, 723 So. 2d 191 (Fla. 1998).

There is no reasoned basis for failing to lift application of the "law of the case" doctrine in this case. Mr. Mills' unconstitutional execution would classify as a manifest injustice sufficient to apply an exception to the "law of the case." But for the application of this admittedly "amorphous" doctrine, his override would be reversed. Compare Preston, 442 So. 2d at 942 ("law of the case" lifted because "[t]he interest of justice, substantive due process requirements and Florida's constitutional and statutory scheme of death penalty review jurisdiction support our decision to review this issue"). The interest of justice and Florida's death penalty review were sufficient concerns in Preston and Porter to lift the law of the case, and should likewise be so in Mr. Mills' case.

CONCLUSION AND PRAYER FOR RELIEF

In light of the foregoing discussion, Mr. Mills requests:

1. That Respondent be ordered to show cause why this petition should not be granted;

2. That Mr. Mills be permitted to file a Reply to the Respondent's Response;

3. That oral argument be scheduled on this petition;

4. That Mr. Mills's override death sentence be vacated;

5. That any other relief that is just and proper issue from the Court.

I HEREBY CERTIFY that a true copy of the foregoing petition has been furnished by United States Mail, first class postage prepaid, to all counsel of record on February 12, 2001.

TODD G. SCHER
Florida Bar No. 0899641
Litigation Director
CCRC South
101 NE 3d Avenue, Suite 400
Ft. Lauderdale, Florida 33301
(954) 713-1284
Attorney for Defendant

Copies furnished to:

Kenneth Nunnelley, Asst. Attorney General
Office of the Attorney General
444 Seabreeze Boulevard, 5th Floor
Daytona Beach, FL 32118