IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-15

ANTHONY WASHINGTON

Appellant,

v.

STATE OF FLORIDA

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT FOR PINELLAS COUNTY,
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

Richard E. Kiley
Florida Bar No. 0558893
James V. Viggiano, Jr.
Florida Bar No. 0715336
CAPITAL COLLATERAL REGIONAL
COUNSEL - MIDDLE REGION
3801 Corporex Park Drive
Suite 210
Tampa, FL 33619
(813) 740-3544
COUNSEL FOR APPELLANT

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REQUEST FOR ORAL ARGUMENT

The resolution of the issues in this action will determine whether Mr. Washington lives or dies. This Court has allowed oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims involved and the fact that a life is at stake. Mr. Washington accordingly requests that this Court permit oral argument.

STATEMENT OF THE CASE AND FACTS

I. PROCEDURAL HISTORY

1. On April 12, 1990, a Pinellas County grand jury

returned a three count indictment against Mr. Washington for first degree murder, burglary of a dwelling, and sexual battery.

2. After a jury trial on July 14-16 1992, before the Honorable Susan F. Schaeffer, Mr. Washington was found guilty, by a predominantly white jury, on all counts.

3. At Mr. Washington's penalty phase, July 17, 1992, the jury recommended that Mr. Washington be sentenced to life imprisonment.

4. On the burglary and sexual battery counts, the Court sentenced Mr. Washington as a habitual violent felony offender and sentenced him to consecutive life sentences, with a 15-year minimum. As to Mr. Washington's murder conviction, the Court overrode the jury's life recommendation and sentenced Mr. Washington to death.

5. On direct appeal, the Florida Supreme Court affirmed Mr. Washington's convictions and sentences. On April 25, 1995, the Florida Supreme Court revised its opinion and affirmed Mr. Washington's convictions and sentences. Washington v. State, 653 So.2d 362 (Fla. 1995). The United States Supreme Court denied certiorari on October 30, 1995. Washington v. Florida, 116 S.Ct. 387 (1995).

6. On March 1, 1999, pursuant to Fla. R. Cr. P. 3.850,

Mr. Washington filed his amended Motion to Vacate Judgements of Conviction and Sentence. A hearing was held on August 12, 1999, in accordance with Huff v. State, 622 So.2d 982 (Fla. 1992). On October 5, 1999, the circuit court issued an order granting an evidentiary hearing on claims I(c), I(d) and I(g), as they pertained to the penalty phase of the trial. The remainder of the claims were summarily denied. An evidentiary hearing was held on November 18-19, 1999. The trial court entered an order on June 5, 2000, denying all claims of Appellant's 3.850 motion . Timely notice of appeal was filed on July 5, 2000. Mr. Washington was denied relief on November 14, 2002. A motion for rehearing was filed on December 2, 2002, and was denied on January 10, 2003.

7. On February 19, 2003, Mr. Washington through his counsel Capital Collateral Regional Counsel - Middle, filed an Amended Motion to Vacate Judgments of Conviction and Sentences with Special Request For Leave to Amend. The trial court denied said motion on November 18, 2003. This appeal follows.

II. SUMMARY OF THE ARGUMENT

SUBSEQUENT DEVELOPMENTS AND CLARIFICATION IN THE LAW CLEARLY INDICATE THAT BASED UPON THE UNIQUE FACTS AND CIRCUMSTANCES OF MR. WASHINGTON'S CASE HE IS ENTITLED TO RELIEF.

A.1 Keen establishes that Tedder was not properly

applied to Mr. Washington's case. The trial court erred in a misapplication of the Tedder standard. The trial court disagreed with the jury life recommendation based on its view of the mix of aggravators and mitigators, rather than through the prism of a Tedder analysis.

A.2 An overview of the jury override cases in Florida from 1974 until 2000, the year Keen was decided, and the intent of the override provision indicate that the majority of the override cases were reversed on direct appeal. A significant remainder of the cases found relief in post-conviction proceedings and through the federal courts. The disparate treatment of Mr. Washington's case should now be addressed due to developments in the law which were unavailable to Washington at the time his pleadings were filed.

B. The trial court erred because it was under a misapprehension of fact and law in overriding the jury recommendation of a life sentence and in ignoring non-statutory mitigation which the jury found in recommending a life sentence but which the trial court overrode. The trial court did not have the benefit of the clarification of Keen when it improperly applied the Tedder standard.

C. The 3.850 court erred in affirming the jury override

in Mr. Washington's case. Trial counsel's ineffectiveness in the investigation and presentation of additional non-statutory mitigation prejudiced his case in the penalty phase of the trial and Mr. Washington is entitled to relief under the cumulative holdings of Eutzy, (1989), Torres-Arboleda, (1994), Keen, (2000), Williams, (2000), Ragsdale, (2001)and Wiggins, (2003). Had the 3.850 court had the benefit of the recent cases the override would have been reversed on ineffectiveness grounds.

D. In 1994, the year of Mr. Washington's direct appeal, the Tedder standard was applied in an arbitrary manner, depriving Washington of his rights under the Sixth, Eighth, and Fourteenth Amendments and in violation of the holding in Ring and the concurring opinions in Bottoson and King. Of the eight jury override cases before the Florida Supreme Court in 1994, six were reversed based upon an improper application of the Tedder standard. Although the same improper application existed in Mr. Washington's case, the 1994 Court did not have the benefit of Keen. Logic dictates that if under Ring, the aggravation cannot be presumed to have been proven beyond a reasonable doubt, the trial court cannot second guess the jury recommendation and presume to determine which mitigation was relied upon by the jury and which was not in an override case.

E. Justice Stevens' concurring opinion in Ring indicate that the highest court in the country is aware that the jury is better able to determine in a particular case the need for retribution, rather than the trial court, particularly in the case of jury overrides. In the Scalia concurring opinion, he expressed the opinion that precedents are not sacrosanct and there are instances where overruling prior decisions are both necessary and proper.

Justice Lewis' concurring opinion in Bottoson call in to question the continuing validity of the concept of trial court's overriding jury recommendations of life imprisonment. Justice Quince in her concurring opinion in Bottoson, states that the issue of a trial court overriding a jury's life recommendation was not properly before the Bottoson Court. Mr. Washington's case was not ripe for review at the time of King and Bottoson. The unique facts and circumstances of his case should be considered by this Court.

ARGUMENT I

SUBSEQUENT DEVELOPMENTS AND CLARIFICATION IN THE LAW CLEARLY INDICATE THAT BASED UPON THE UNIQUE FACTS AND CIRCUMSTANCES OF MR. WASHINGTON'S CASE HE IS ENTITLED TO RELIEF

A. 1. Keen establishes that Tedder was not properly applied to Mr. Washington's case

In the direct appeal of Mr. Washington's case the court affirmed the jury override based upon Tedder v. State, 322 So.2d 908 (Fla. 1975). See Washington v. State, 653 So.2d 362, 365 (Fla. 1994). At the time of the decision, neither the trial court nor this Court had the benefit of the clarification of the Tedder standard set forth in Keen v. State, 775 So.2d 263 (Fla. 2000).

A. 2. 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.[1] As is seen from the discussion in this brief, 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., dissenting from the denial of petition for writ of

certiorari).

In 1974, one override case was reviewed by this Court,

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

and it was reversed,[2] 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[3] and two were affirmed,[4] resulting in a 60% reversal rate. In 1976, five capital override cases were reviewed; three were reversed[5] and two affirmed,[6] again a 60% reversal rate. In 1977, four cases were reviewed; two were reversed[7] and two affirmed,[8] a 50% reversal rate. In 1978, two cases reached the Court, and both were reversed[9]– - a 100% reversal rate. In 1979, three cases were reviewed; two were

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

[3] 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)

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

[5] 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)

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

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

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

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

reversed[10] and one affirmed,[11] a reversal rate of 66%. In 1980, six override cases were reviewed; five were reversed[12] and one affirmed,[13] an 83% reversal rate. In 1981, fourteen override cases reached the Court; eleven were reversed,[14] and three were affirmed,[15] resulting in a 78% reversal rate. In 1982, seven cases reached the Court; four were reversed[16] and three were

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

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

[12] 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 So.2d 881 (Fla. 1980); Hall v. State, 381 So.2d 683 (Fla. 1980).

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

[14] 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. 1981); 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).

[15] 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).

[16] McCampbell v. State, 421 So.2d 943 (Fla. 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).

affirmed[17] a 57% reversal rate. In 1983, ten cases were appealed, seven were reversed[18], and three affirmed,[19] a 70% reversal rate. In 1984, nine cases reached the Court; two were reversed,[20] and seven were affirmed,[21] a 22% reversal rate. In 1985, seven cases were reviewed, two were reversed,[22] and five were affirmed,[23] a 28% reversal rate. In 1986, six

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[17] 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).

[18] 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 So.2d 44 (Fla. 1983); Webb v. State, 433 So.2d 496 (Fla. 1983); Cannady v. State, 427 So.2d (Fla. 1983)

[19] 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).

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

[21] 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).

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

[23] 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).

override cases reached the Court; one was reversed for a new trial[24] and one was reversed because no written findings were entered by the trial judge in violation of Florida Law.[25] Of the four remaining cases where the override was analyzed, all were reversed, for a 100% reversal rate.[26] In 1987, of the six cases reviewed, five were reversed,[27] and one was affirmed,[28] for an 83% reversal rate. In 1988, nine override cases were analyzed, eight were reversed[29] and one affirmed,[30] for an 89% rate of reversal. In 1989, six override cases were analyzed;

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

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

[26] 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).

[27] Wasko v. State, 505 So.2d 1314 (Fla. 1987); Masterson v. State, 516 So.2d 256 (Fla. 1987); Fead v. State, 512 So.2d 32 (Fla. 1987); Hansbrough v. State, 509 So.2d 1081 (Fla. 1987); Ferry v. State, 507 So.2d 1373 (Fla. 1987).

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

[29] 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).

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

five were reversed[31] and one was affirmed,[32] for an 83% reversal rate. In 1990, five override cases were reviewed by the Court, all were reversed.[33] In 1991, eleven overrides reached the high court; ten were reversed[34] and one case, on appeal from a Hitchcock resentencing, was affirmed,[35] for a 91% reversal rate. In 1992, of the seven overrides appealed, four were reversed[36] and three affirmed,[37] for a 57% reversal rate. In

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[31] 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).

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

[33] 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).

[34] Bedford v. State, 589 So.2d 245 (Fla. 1991); Savage v. State, 588 So.2d 975 (Fla. 1991); Craig v. State, 585 So.2d 223 (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 165 (Fla. 1991); Douglas v. State, 575 So.2d 127 (Fla. 1991).

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

[36] 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).

[37] 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).

1993, the one override decided by the Court was affirmed.[38] In 1994, eight cases were decided on direct appeal, including Mr. Washington's case; six were reversed[39] and two affirmed.[40] In 1995, one override case was decided and it was reversed,[41] for a 100% reversal rate. In 1996, three override cases were decided, and all were reversed,[42] for a 100% reversal rate. In 1997, three override cases were decided, and all were reversed,[43] for a 100% reversal rate. In 1998, three override cases were decided, one was affirmed[44] and two reversed.[45] In

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[38] 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.

[39] 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).

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

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

[42] 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).

[43] 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).

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

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

1999, no override cases were decided by the Court. In 2000, one override case was decided, and it was reversed,[46] 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.), 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

[46] Keen v. State, 775 So.2d 263 (Fla. 2000). Keen was also afforded a new trial, but the Court's opinion makes clear that the override was also improper.

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 post conviction 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). This identical issue was raised by Mr. Washington in his motion for rehearing filed on December 2, 2002, and denied on January 10,2003. Mr. Washington's federal pleadings have been held in abeyance pending the resolution of this appeal from his 3.851 motion. 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-Arboleda 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). Torres-Arboleda is also cited in Mr. Washington's motion for rehearing. 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). From the overview, it is apparent that the Florida Supreme Court, in direct appeal and post conviction and the federal courts are in favor of respecting the jury recommendation.

The original intent of the legislature in including a judge's power to override a jury's recommendation of life imprisonment was to prevent inflamed juries from handing down improper death sentences. The Court in State v. Dixon, 283 So.2d 1, 8 (Fla. 1973) stated the function of the override provision in preventing improper death sentences:

> The third step added to the process of prosecution for capital crimes is that the trial judge actually determines the sentence to be imposed - - guided by, but not bound by, the findings of the jury. To a layman, no capital crime might appear to be less than heinous, but a trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard criminal activity which can only be developed by involvement with the trials of numerous defendants. Thus the inflamed emotions of jurors can no longer sentence a man to die; the sentence is viewed in the light of judicial experience.

Clearly, the intent of the jury override was to preclude the inflamed emotions of jurors from improperly sentencing a

defendant to death. Unfortunately, the intent of the legislature has had an unintended effect as the override is used overwhelmingly to impose death over jury recommendations of life.

The jury override provision should be applied such that only recommendations of death can be overidden by the judge. Overrides by the judge of life recommendations by the jury should not be permitted. The dissent in Spaziano v. Florida, 468 U.S. 447, 468 (U.S. 1984), by Justices Stevens demonstrates that the decision as to whether a sentence of death is excessive in a particular case is best left to a jury:

> Because it is the one punishment that cannot be prescribed by a rule of law as judges normally understand such rules, but rather is ultimately understood only as an expression of the community's outrage - - its sense that an individual has lost his moral entitlement to live - - I am convinced that the danger of an excessive response can only be avoided if the decision to impose the death penalty is made by a jury rather than a single governmental official. This conviction is consistent with the judgment of history and the current consensus of opinion that juries are better equipped than judges to make capital sentencing decisions. The basic explanation for that consensus lies in the fact that the question whether a sentence of death is excessive in the particular circumstances of any case is one that must be answered by the decision maker that is best able to "express the

> conscience of the community on the ultimate question of life or death."

(Footnotes omitted)

Where a jury concludes that a sentence of death is excessive, that decision should not be overridden by the judge because the jury has expressed "the conscience of the community on the ultimate question of life or death." Id. at 468.

B. The trial court erred because it was under a misapprehenion of fact and law in overriding the jury recommendation of a life sentence and in ignoring non-statutory mitigation which the jury found in recommending a life sentence but which the trial court overrode

The trial court was under a misapprehension of fact and law when it denied Mr. Washington's Amended Motion to Vacate Judgments of Conviction and Sentences. The trial court also erred in ignoring non-statutory mitigation found by the jury in support of a life recommendation. After ignoring the non-statutory mitigation, the trial court overrode the jury life recommendation and sentenced Mr. Washington to death.

At Mr. Washington's penalty phase, defense counsel presented as witnesses Mr. Washington's mother, Willie Mae Washington, and Dr. Sidney J. Merin. The witnesses presented non-statutory mitigation to the jury. The State did not present any evidence or testimony to contradict the defense witnesses.

Willie Mae Washington testified that Mr. Washington had

been gainfully employed by his father and was a good worker. (ROA. Vol. V - 1727) Mrs. Washington also testified that her son had three children and supported them when he was able. (ROA. Vol. V - 1727) When in high school he played football and wrestled. (ROA. Vol. V - 1730) He also completed high school. (ROA. Vol. V - 1729) She further testified that her son was good and respectful with whom she enjoyed a loving relationship. (ROA. Vol. V - 1728) Mrs. Washington also testified that her son never disobeyed her or caused her any problems. (ROA. Vol. V - 1729) She also recognized and acknowledged her son's drug abuse. (ROA. Vol. V - 1730)

Dr. Merin testified that Mr. Washington was capable of being rehabilitated and he was not a psychopath or sociopath. (ROA. Vol. V - 1708, 1711, 1714) Dr. Merin also testified that based on his testing, Mr. Washington is not the type of person that would plan to kill someone and it is improbable that Mr. Washington planned to kill Berdat. (ROA. Vol. V - 1715) The State presented no expert to contradict the testimony of Dr. Merin.

At the conclusion of the penalty phase, the trial court read the following instruction:

> If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without

> possibility of parole for 25 years.
>
> Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances. Among the mitigating circumstances you may consider, if established by the evidence, are:
>
> 1. The age of the defendant at the time of the crime;
>
> 2. *Any other aspect of the defendant's character or record or background, and any other circumstances of the crime.*

(ROA. VOL. 9-1520) (emphasis added)

The jury made a life recommendation which the trial court overrode and sentenced Mr. Washington to death. In making a life recommendation the jury evidently relied on those aspects of Mr. Washington's character or background, and the other circumstances of the crime which were presented by defense counsel in the penalty phase. Specifically, the jury must have relied upon the uncontroverted mitigation testimony of Willie Mae Washington and Dr. Sydney Merin.

In the Sentencing Order and in the Order Denying Amended Motion To Vacate Judgments Of Conviction And Sentences, the trial court erroneously rejected the non-statutory mitigation presented by defense counsel. The trial court was under a misapprehension of fact in rejecting the non-statutory mitigation that Mr. Washington was a father of three children and supported them when he was able. The court erroneously

concluded that Mr. Washington had been in prison for most of his adult life, when he had not been in prison for as long as the trial court believed.

The trial court, in the Sentencing Order, stated that "this Defendant has been in custody as of August 31, 1992, for ten years and 216 days." Actually, Mr. Washington, as of that date, was in custody for 10 years, 2 months, and 20 days - a difference of 5 months and 14 days. Furthermore, the date the trial court used to calculate the time Mr. Washington was incarcerated included the 3 years and 14 days since the date of the offense. Thus, as of August 17, 1989, the date of the offense, Mr. Washington was incarcerated for 7 years, 1 month, and 22 days. As of August 17, 1989, Mr. Washington, with a birth date of September 27, 1956, was an adult for 14 years, 10 months, and 20 days. Actually, of the time Mr. Washington was an adult, he was out of jail for 7 years, 9 months, and 2 days.

During the 7 years, 9 months, and 2 days that Mr. Washington was not in jail, he supported his children. This uncontroverted testimony was presented by the defense during Mr. Washington's penalty phase. (ROA VOL 10 - 1727) The trial court denigrated this mitigating evidence - which the jury evidently relied on in making their life recommendation -

first, by erroneously concluding that Mr. Washington spent greater time in prison than he actually did, and second, by boldly dismissing the support that he provided his children by saying that "he is not what could be called a good or financially responsible father." The point is not whether Mr. Washington was financially responsible; it is whether the jury found the evidence to be mitigating in support of a life recommendation. The jury found the evidence to be mitigating and it is not the province of the trial court to engage in an exercise of re-evaluation.

The trial court erred by rejecting the uncontroverted mitigating evidence which the jury found in support of their life recommendation. As held in Nibert v. State, 574 So.2d 1059, 1061 (Fla. 1990):

> Thus, when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is present, the trial court must find that the mitigating circumstance has been proved. A trial court may reject a defendant's claim that a mitigation circumstance has been proved, however, provided that the record contains "competent substantial evidence to support the trial court's rejection of these mitigating circumstances." (Quoting Kight v. State, 512 So.2d 922,933 (Fla.1987), cert. denied, 485 U.S. 929, 108 S.Ct. 1100, 99 L.Ed.2d 262 (1988)

The trial court did not rely on any competent substantial evidence in rejecting the non-statutory mitigation that

Washington had been a hard worker, a good provider for his family, and a good father. There was nothing provided in the record that would support the court's rejection of these mitigating circumstances. The reason there was nothing in the record to support the rejection of these mitigating circumstances is because the State presented no evidence to counter the testimony of the witnesses. Furthermore, the State did not challenge the mitigation testimony on cross examination - the testimony simply went unrefuted. Because the testimony went unrefuted, the trial court had no competent substantial evidence to support rejecting the mitigation.

The trial court, in overriding the jury's life recommendation, committed error that went beyond rejecting the mitigation that served as the basis for the jury's decision. The trial court engaged in a faulty and impermissible weighing process.

In Tedder v. State, 322 So.2d 908, 910 (Fla. 1975) the Court set the standard by which jury overrides are reviewed and held that "to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that no reasonable person could differ."

In Tedder's penalty phase, no additional evidence was

presented other than his age - which was 20 years old. The Tedder jury returned a recommendation of life imprisonment after deliberating for only 16 minutes. The following day the trial judge conducted a hearing on which to base his recommendation for Tedder's sentence. At that hearing, a pre-sentence investigation report was introduced showing that Tedder had been convicted on one prior occasion of breaking and entering with intent to commit a misdemeanor. Three aggravating circumstances identified by the trial judge were: (1) that defendant knowingly created a great risk of death to many persons; (2) that the crime was committed while the defendant was engaged in the commission of kidnapping; and (3) that the crime was especially heinous, atrocious or cruel. After the hearing, the judge overrode the jury recommendation and sentenced Tedder to death. On the facts and circumstances, the Court found no reason to override the jury's advisory sentence. Id at 910.

In Mr. Washington's case, much more mitigation existed than in Tedder yet Washington was denied a life sentence. Although Washington presented his age at the time of the crime - he was 32 - this mitigator was rejected by the trial court, unlike in Tedder. But also unlike in Tedder, Washington presented additional mitigation evidence. Washington

presented evidence that he was a good worker, that he worked for his father, he supported his three children when he could, he wrestled and played football in high school, and he enjoyed a loving relationship with his mother. Washington also presented evidence that he was addicted to drugs. Through Dr. Merin, Washington presented expert testimony that he could be rehabilitated, that he was not a psychopath or sociopath, and that he lacked the intent to kill Berdat. All of Washington's mitigation evidence was uncontroverted and went unchallenged by the state. The aggravating circumstances found by the trial court in Mr. Washington's case were: (1) a capital felony committed by a person under sentence of imprisonment; (2) previous conviction of another felony involving the use or the threat of violence; (3) a capital felony committed while engaged in the crimes of burglary and sexual battery, and (4) heinous, atrocious or cruel.

Even though Washington presented much more mitigation than did Tedder, and two of the aggravators in both cases were the same, Washington's life recommendation was overridden and upheld whereas Tedder's override was reversed. Based upon Tedder, Washington's sentence should have been reduced to a life sentence.

In Mills v. Moore, 786 So.2d 532, 539 (Fla. 2001) the

Court addressed the application of Tedder. The Court stated, "[i]n applying Tedder we emphasized the fact that a trial court's analysis in an override situation should focus on *the record evidence* supporting the jury's recommendation and should not be the same weighing process that is used when the jury recommends death." (emphasis added) In Mr. Washington's case, the trial court should have focused only on the record evidence which supported the jury's recommendation. The jury's recommendation had to be based on the testimony of Willie Mae Washington and Dr. Sidney J. Merin as their testimony was the only evidence of mitigation presented on the record. It is only the record that the trial court should have relied upon in conducting a Tedder analysis. The trial court should not have gone outside the record in search of evidence to support an override.

Furthermore, the trial court, in rejecting the mitigation relied upon by the jury, engaged in an impermissible weighing process forbidden by Keen v. State, 775 So.2d 263 (Fla., 2000). The Court found "that 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." Id. at 283. As in Keen, the trial court applied the standards for weighing

aggravators and mitigators in this jury life recommendation case. The trial court transposed a weighing process into the analysis:

> Mrs. Washington said her son had been kind and loving toward her. (R. 59). He had never been disobedient to her (R. 60) She said and the PSI verifies that he has a high school diploma, and that he wrestled and played football in high school. (R. 61) These facts are uncontroverted and therefore are found to be positive character traits, a mitigating circumstance. ***They will be given weight by this Court, although in light of the "negative" character traits discussed above, the weight to be given this "positive" evidence is minimal.***

(ROA Vol. 9 -1587) (emphasis added)

The trial court transposed the weighing process later in the order again violating the dictates of Keen:

> This Court has now evaluated each category of mitigating evidence the Defendant has asked her to consider. This Court has found each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence. The last step of the ***Campbell*** formula is to weigh the aggravating circumstances found against the mitigating circumstances found. The Court found four aggravating factors (See Aggravating Factors, ***supra***)and a very small part of one category as a mitigating factor. (See Category 2 discussion, ***supra***) ***This Court finds the aggravating factors far outweigh the non-statutory mitigating factor,*** and they do so beyond all reasonable doubt.

(ROA Vol. 9 - 1591) (emphasis added)

The last line emphasized above indicates that the wrong standard was ultimately applied in consideration of the jury's life recommendation. Keen at 283. Finally, the trial court, at the conclusion of the order, demonstrated error by stating both that a weighing process was done and that the trial court went outside the record:

> But, today the law and the evidence in this case compel me to find that the aggravating circumstances present in this case so far outweigh the mitigating circumstances that a sentence of death for ANTHONY WASHINGTON is so clear and convincing that virtually no reasonable people, armed with all the facts and all the law, could differ.

(ROA. Vol. 9 - 1594)

The reasoning and process used by the trial court in overriding the jury 's life recommendation is nearly identical to the reasoning by the trial court in Keen:

> The Court finds the evidence in mitigation is minimal compared to the magnitude of the crime that has been committed by the defendant. In the final analysis, the mitigating circumstances found to exist have no relationship to the crime committed to such a degree that the jury could reasonably conclude life is a proper penalty. Furthermore, the jury's decision during the guilt phase of this proceeding essentially disregards any theory that the death of Anita Keen was accidental. If the jury believed that the victim's death was the result of premeditated murder, then the cold and calculated plan to kill her must necessarily outweigh the mitigating

> circumstances presented by the defense. This Court can only conclude that the jury's hasty recommendation of life indicates that it was based on something other than the sound judgment required in such cases. Had the jury considered the aggravating and mitigating circumstances, the facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ. The mitigating evidence is wholly insufficient to outweigh the aggravating circumstances in support of a life sentence.

Keen at 283.

Clearly, the trial court in Mr. Washington's case conducted the same faulty analysis as did the court in Keen in overriding the jury life recommendation. The result in Mr. Washington's case should be the same as that in Keen. Keen should be applied in Mr. Washington's case based on the criteria set forth in Witt v. State, 387 So.2d 922 (Fla. 1980). The Supreme Court of Florida held:

> To summarize, we today hold that an alleged change of law will not be considered in a capital case under Rule 3.850 unless the change: (a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c)constitutes a development of fundamental significance. Id. at 931.

The standard in Keen emanated from the Florida Supreme Court and Ring emanated from the United States Supreme Court. The standards in both cases are constitutional in nature in that the defendants' rights under the Fifth, Sixth and Fourteenth

amendments were violated. It constitutes a development of fundamental significance because both cases preclude a trial court from depriving a defendant from his rights under the Fifth, Sixth, and Fourteenth amendments. It should be noted that the impact of the jury override issue will apply to approximately eight people currently residing on death row in Florida.

C. The 3.850 court erred in affirming the jury override in Mr. Washington's case. In light of recent case law, Mr. Washington is entitled to relief.

At the evidentiary hearing, held on November 18-19, 1999, post conviction counsel called nine witnesses including relatives, friends, a psychiatrist, and Mr. Washington's trial counsel.

> In Williams v. Taylor, 529 U.S. 362, 395, 120 S. Ct. 1495, 1514 (2000), the Supreme Court of the United States addressed the failure of trial counsel to call mitigation witnesses in this manner: They failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records. Had they done so, the jury would have learned that Williams' parents had been imprisoned for the criminal neglect of Williams and his siblings, [FN19] that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for

> two years during his parents' incarceration (including one stint in an abusive foster home), and then after his parents were released from prison, had been returned to his parents' custody . Id. at 395,*1514.

Trial counsel stated that failing to investigate and call witnesses who could testify about Mr. Washington's childhood was not a strategic decision (PC-R 829). The trial court's contention on page 20 of the ORDER DENYING MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCES (ORDER DENYING DEFENDANT'S MOTION FOR POST CONVICTION RELIEF, dated June 5, 2000, that "He knew about the defendant's drug use he simply elected not to explore and exploit it because he didn't want to go there", is a misapprehended point of fact. It would have been impossible for trial counsel to know the extent of Mr. Washington's drug use, (a valid non statutory mitigator), because trial counsel did not investigate Mr. Washington's childhood in the Liberty City area. Trial counsel did not call these witnesses regarding Mr. Washington's childhood because he did not know of them. Eldridge v. Atkins, 665 F.2d 228, 232 (8th Cir. 1981) ("[i]t is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty"). It is certainly not unreasonable to expect counsel to seek out and present

testimony on the life history of their client. Counsel could have presented these witnesses at the sentencing hearing. In Ragsdale v. State, 798 So.2d 713 (Fla. 2001), this Court held:

> In sum, Ragsdale has clearly established that counsel deficiently handled the penalty phase, and when the evidence which was available is measured against the evidence presented at the penalty phase, there is a reasonable probability of a different result. See Rose, 675 So.2d at 572 (counsel ineffective at penalty phase for failing to present evidence of severe mental disturbance and for failing to present evidence of defendant's alcoholism and mistreatment as a child); *Hildwin*, 654 So.2d at 110 (ineffective assistance where counsel failed to present evidence of defendant's mental mitigation and several categories of nonstatutory mitigation including defendant's abuse and neglect as a child and his history of alcohol abuse) *Phillips v. State,* 608 So.2d 778, 783 (Fla. 1992) (ineffective assistance of penalty phase counsel where, although counsel presented some evidence in mitigation, he did not present a large amount of evidence concerning defendant's childhood riddled with abuse and testimony of experts describing defendant's mental and emotional deficiencies); *Stevens v. State,* 552 So.2d 1082, 1087 (Fla. 1989) (counsel's failure to investigate defendant's background, failure to present mitigating evidence during the penalty phase, and failure to argue on defendant's behalf rendered his conduct at penalty phase ineffective). This is especially compelling when considered with the relative culpability evidence presented at the penalty phase by counsel for Ragsdale's co-defendant, Illig,

> who pled nolo contendere in exchange for a life sentence. Id. at 720

In Mr. Washington's case, trial counsel made no effort to investigate Mr. Washington's childhood. Mr. Washington had grown up in crime ridden Liberty City, he was not known as a troublemaker, and his decline in life was due to drug addiction. Due to the fact that the jury recommended life, it was critical for trial counsel to present as much mitigation as he possibly could, either before the jury, or to the trial court at the Spencer hearing. Since trial counsel did not investigate the extent of Mr. Washington's drug use, the idea that he would not have used these witnesses had he known of them is vitiated by the holding in Wiggins v. Smith, 123 S.Ct. 2527 (2003). The unreasonableness of counsel's investigation and the subsequent attempt to rationalize this conduct is indistinguishable from the facts in Wiggins regarding the investigation of Wiggins' past. The Supreme Court of the United States held:

> The record of the actual sentencing proceedings underscores the unreasonableness of counsel's conduct by suggesting that their failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment. Counsel sought, until the day before sentencing, to have the proceedings bifurcated into a retrial of guilt and a mitigation stage. On the eve of sentencing, counsel represented to the

> court that they were prepared to come forward with mitigating evidence, App.45, and that they intended to present such evidence in the event the court granted their motion to bifurcate. In other words, prior to sentencing, counsel never actually abandoned the possibility that they would present a mitigation defense. Until the court denied their motion, then they had every reason to develop the most powerful mitigation case possible... Far from focusing exclusively on petitioner's direct responsibility, then, counsel put on a halfhearted mitigation case, taking precisely the type of "shotgun" approach the Maryland Court of Appeals concluded counsel sought to avoid. Wiggins v. State, 352 Md., at 609, 724 A.2d at 15. When viewed in this light, the "strategic decision" the state courts and respondents all invoke to justify counsel's limited pursuit of mitigating evidence resembles more *post-hoc* rationalization of counsel's conduct than an accurate description of their deliberations prior to sentencing. Id. at 2537,2538.

In Mr. Washington's case, at the conclusion of penalty phase the jury returned a recommendation of life. The trial court then "telegraphed" its intention of overriding the jury recommendation (See FSC-R- Vol. XV-2751-52). On August 14, 1992, a hearing was held regarding aggravation and mitigation. (See FSC-R- Vol. XI-1881-1917). During the hearing the trial court gave defense counsel an opportunity to offer additional evidence. (See FSC-R-Vol. XV-1894). Trial counsel responded in the negative. Mr. Washington contends that effective counsel would have investigated further by going to Miami and

interviewing people who knew Anthony Washington and could have produced witnesses who would have bolstered the already sufficient record non-statutory mitigation which the jury had relied upon when rendering their recommendation for life. On page 12 of the trial court's order denying defendant's post conviction motion dated June 5, 2000, the trial court stated:

> "At the evidentiary hearing, several witnesses were called to testify that the defendant had been a substantial user of various types of illegal drugs since attending high school. They knew about his drug use in Miami, when he was not in prison. (Exhibit D, pp. 14-17; 19-20; 41; 44; 59-68; 81 89-93; 101-102; 194-195; 197-200). None of them testified of any knowledge of the defendant's drug use at the Largo Work Release Center, where he was in custody when the murder, rape, and burglary were committed. I will accept their testimony about defendant's drug use as true."

On page 13 of the order the trial court accepts the testimony of Dr. Sprehe regarding the emotional disorders that resulted from this drug abuse. In Eutzy v. Dugger, 746 F. Supp. 1492,1500 (N.D. Fla. 1989), the court held:

> In Florida, in order for a judge to reject a sentencing jury's recommendation of life imprisonment, the facts justifying a death sentence must be so clear and convincing that virtually no reasonable person could differ as to the appropriateness of the death penalty. *Tedder v. State,* 322 So.2d 908,910 (Fla. 1975). Eutzy argues that, had trial counsel prepared and presented a reasonable case in mitigation, had he

> focused properly on the individualized characteristics of petitioner, the trial judge could not have concluded that the jury's recommendation of life imprisonment lacked support or that the facts were "so clear and convincing that virtually no reasonable person could differ" as to the appropriateness of the death penalty. *Id*. Further, even if the judge were to make the same decision, Eutzy argues that the Florida Supreme Court on appeal would have been obliged to find that the jury override was improper under the *Tedder* standard.
>
> Recognizing that prejudice is more easily shown in jury override cases because of the deference shown to the jury recommendation, *Harich v. Wainwright,* 813 F.2d 1082, 1093 n. 8 (11th Cir. 1987)), *cert. denied,* 489 U.S. 1071, 109 S.Ct. 1355, 103 L.Ed.2d 822 (1989), the court finds petitioner's arguments persuasive. Id. at 1500.

Mr. Washington contends that his drug use and the disorders that resulted from his drug use, *were* an important part of the "individualized characteristics of petitioner" and should have been investigated and developed. It clearly showed the decline of Washington as a human being. It should have been presented as a mitigating circumstance pursuant to the court's instruction to wit:

"Any other aspect of the defendant's character or record or background, and any other circumstances of the offense." (See FSC-R. Vol. VIII-1520). At the 3.850 hearing, during the court examination of trial counsel Louderback, the court engaged in

pure speculation as to whether drug usage as a mitigator was a two edged sword. (See FSC PCR- Vol V-814-815). During the examination of trial counsel McCoun, trial counsel admitted that no one went to Miami to interview potential witnesses although his normal practice was to actually go to Miami and do it himself. (See FSC PCR-Vol. V-827-28). Thus the testimony of the drug usage witnesses presented at the 3.850 hearing went undiscovered. The court's statement in its order that "he knew about the drug usage, he simply elected not to go there" is faulty because no one went there,(Miami),to fully investigate the extent of Washington's drug problem. This conduct resembles the conduct prohibited in Wiggins*:*

> When viewed in this light, the "strategic decision" the state courts and respondents all invoke to justify counsel's limited pursuit of mitigating evidence resembles more *post-hoc* rationalization of counsel's conduct than an accurate description of their deliberations prior to sentencing. *Id.*

Undersigned counsel respectfully submits that the trial court did not have the benefit of the Wiggins opinion at the time the order denying relief was written.

In Torres - Arboleda v. Dugger, 636 So.2d 1321 (Fla. 1994), the Court held:

> However, we do find merit to Torres-Arboleda's claim in issue three that

> defense counsel rendered ineffective assistance of counsel during the penalty phase. The original sentencing court found two aggravating circumstances and no mitigating circumstances. The only mitigating evidence that counsel presented during the penalty phase was the expert testimony of clinical psychologist Dr. Mussenden, who testified that Torres-Arboleda was very intelligent and an excellent candidate for rehabilitation. Id at 1325.

Mr. Washington contends that this testimony of Dr. Mussenden was much like the expert testimony given by Dr. Merin regarding the potential for rehabilitation in his trial. The Torres - Arboleda Court went on to hold:

> During the 3.850 hearing, collateral counsel presented substantial mitigation evidence that trial counsel could have discovered if he had conducted a reasonable investigation of Torres - Arboleda's background. Documentary evidence showed that Torres - Arboleda had a history of good behavior during his incarceration in California, had no police record in Colombia, and had attended a university in Colombia. These documents should have been considered in mitigation as such factors may show potential for rehabilitation and productivity within the prison system. *See Stevens v. State*, 552 So.2d 1082, 1086 (Fla. 1989); *Holsworth v. State*, 522 So.2d 348, 354 (Fla. 1988). Additionally, these documents could have provided independent corroborative data for Dr. Mussenden's opinion that the defendant had a good potential for rehabilitation. Instead, Dr. Mussenden relied upon the defendant's self-report and some psychological test as the basis for his opinion. Testimony at the

> postconviction proceeding also revealed that Torres-Arboleda grew up in abject poverty in Colombia, was a good student and child, and supported his family after his father's death.
> Such evidence of family background and personal history may be considered in mitigation. Id at 1325.

In Mr. Washington's case, evidence of his family background and his drug addiction was never investigated by trial counsel. The Court further held:

> During testimony at the post conviction proceeding, trial counsel admitted that he had no strategic reason for failing to present this mitigating evidence during the penalty phase. Counsel considered some of the evidence to be irrelevant or inadmissible (police report of no prior criminal history; State's contract of immunity with suspected co-perpetrator) and was unaware that he could obtain other evidence (California prison records). Counsel made no attempt to investigate Torres-Arboleda's family history and background, work history, or school record in Colombia. In fact, he never even made an application to the court for funds to investigate in Colombia because he did not think the court would approve such a request. Notwithstanding counsel's belief that the trial judge would impose a death sentence, he failed to present any mitigating evidence to the jury other than Dr. Mussenden's testimony and testing because "I felt that that's all I had. That's all that I could go with." At sentencing, counsel offered nothing other than legal argument that the jury's recommendation should be given great weight. Based upon the testimony and documentary evidence presented during the post-conviction proceeding, Torres-Arboleda

> has shown "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland* 466 U.S. at 694, 104 S. Ct. at 2068. This mitigating evidence, which existed at time of trial, "might have provided the trial judge with a reasonable basis to uphold the jury's life recommendation. *Heiney v. State,* 620 So.2d 171, 174 (Fla. 1993). Had these factors been discovered and presented to the court at Torres-Arboleda's original sentencing, there would have been a reasonable basis in the record to support the jury's recommendation and the jury override would have been improper. *See Ferry v. State,* 507 So.2d 1373, 1376 (Fla. 1987). Thus counsel's failure to investigate and present mitigating evidence prejudiced Torres-Arboleda. Accordingly, we find that the 3.850 court erred in determining that counsel was not deficient in failing to investigate and present mitigating evidence during the penalty phase and in finding that Torres-Arboleda was not prejudiced by this failure. Thus, we vacate Torres-Arbloeda's sentence of death and remand for a resentencing hearing before the judge. It is unnecessary to conduct the hearing before a jury as Torres-Arboleda is entitled to the benefit of the previous jury's life recommendation. Id. at 1326.

Mr. Washington's mitigation investigation would not have entailed obtaining funding from the court in order to travel to South America to conduct a background investigation. If the Court found that not traveling to Colombia to obtain background information on Torres-Arboleda was ineffective and prejudicial, surely, trial counsel's failure to travel to

Liberty City to obtain background information is ineffective and prejudicial. Excluding the two trial attorneys, seven out of the nine witnesses called at the evidentiary hearing could have been called at the Spencer hearing. In addition to the non statutory mitigation that was presented in the penalty phase of the trial, mitigation which was unrebutted by the State and mitigation which the jury used to return a recommendation of life, evidence of Mr. Washington's family background and drug addiction would have bolstered the reasonable basis in the record to support the jury's recommendation of life.

In Keen v. State, 775 So.2d 263 (Fla. 2000), the Court held:

> The appropriate standard in analyzing a jury override is well known: "To sustain a jury override, this Court must conclude that the facts suggesting a sentence of death are 'so clear and convincing that virtually no reasonable person could differ.'" *San Martin v. State,* 717 So.2d at 462, 471 (Fla. 1998) (quoting *Tedder v. State* 322 So.2d 908, 910 (Fla. 1975). "In other words, we must reverse the override if there is a reasonable basis in the record to support the jury's recommendation of life." *San Martin*, 717 So.2d at 471 (citations omitted). In that manner, the narrow inquiry to which we are bound honors the underlying principle that this jury's advisory sentence reflected the "conscience of the community" at the time of this trial. *See Strausser v. State,* 682 So.2d 539, 542 (Fla. 1996) *Dolinsky v. State,* 576 So.2d 271, 274 (Fla. 1991); *Richardson v.*

State, 437 So.2d 1091, 1095 (Fla. 1983). The trial judge's sentencing order is thoughtful and well written; he obviously considered his decision in a very deliberative, serious manner. Reasonable arguments can certainly be presented to support his order. However, we find that 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. The following passage from the sentencing order illustrates the trial judge's reasoning:

> The Court finds the evidence in mitigation is minimal compared to the magnitude of the crime that has been committed by the defendant. In the final analysis, the mitigating circumstances found to exist have no relationship to the crime committed to such a degree that the jury could reasonably conclude life is a proper penalty. Furthermore, the jury's decision during the guilt phase of this proceeding essentially disregards any theory that the death of Anita Keen was accidental. If the jury believed that the victim's death was the result of premeditated murder, then the cold and calculated plan to kill her must necessarily outweigh the mitigating circumstances presented by the defense. *This Court can only conclude that the jury's hasty recommendation of life indicates that it was based on something other than the sound reasoned judgment required in such case.* Had the jury considered the aggravating and mitigating circumstances, the facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ. *The mitigating evidence is wholly insufficient to outweigh the aggravating circumstances in support of a life sentence.* (Emphasis added.) The last line emphasized above

> indicates that the wrong standard was ultimately applied in consideration of the jury's life recommendation. The singular focus of *Tedder* inquiry is whether there is a "reasonable basis in the record to support the jury's recommendation of life. *San Martin,* 717 So.2d at 471, rather than the weighing process which a judge conducts after a death recommendation. Id. at 282-83.

The trial court used almost identical wording in its order denying Mr. Washington's 3.850 motion following the evidentiary hearing:

> My conclusion would be the same as it was in my original sentencing order, for all the reasons stated herein and therein: *The aggravating circumstances in this case so far outweigh the mitigating circumstances that a sentence of death is so clear and convincing that virtually no reasonable people, armed with all the facts and all the law could differ.* (FSC PCR- 306) (emphasis added.)

Had the trial court applied the correct standard in Tedder, it would not have overridden the jury recommendation. Instead,

> 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.

Keen, 775 So.2d at 284.

The penalty phase jury heard all the aggravation. The penalty phase jury also heard the un-rebutted mitigation presented by defense counsel. By their recommendation of life, they have determined that the mitigation outweighed the aggravation in this case. The trial court's weighing process violated the underlying principle that this jury's advisory sentence reflected the "conscience of the community" at the time of this trial. The trial court's opinion of the aggravators and the record non- statutory mitigation was an interesting exercise, but it was not necessary. The jury had done its duty.

In the 3.850 order the trial court wrote:

> "Counsel made a judgment call not to investigate and present to the jury defendant's drug abuse and possible emotional disorders because of that abuse. His judgment was sound. It was reasonable. It should not be second-guessed. (See FSC PCR Vol. II-302)

Mr. Washington contends that by stating that trial counsel's judgment was sound and reasonable and should not be second-guessed, the un-rebutted record mitigation was also sound and reasonable and should not be second guessed. The trial court actually ratifies the presentation of the penalty phase

evidence when it wrote:

“Trial counsel were not ineffective in the way they decided to present the evidence in the penalty phase. To the contrary, they were quite effective in their choice of mitigation to be presented. It resulted in a life recommendation from the jury.” (See FSC PCR Vol. II-304)

Elsewhere in the 3.850 order, the trial court went on to state: “The trial jury heard only uncontroverted testimony that he was a good worker. (This court refuted this in her sentencing order, and the evidence presented at the evidentiary hearing causes this previously uncontroverted evidence to be quite controverted). (See FSC PCR Vol. II-303). In other words, the penalty phase jury was presented with uncontroverted, unrebutted, record evidence with which the jury relied upon in following the instructions of the court itself in returning a recommendation of life. It was the job of the prosecutor to rebut the record mitigation evidence. The trial court had the right to question the witnesses in front of the jury in an effort to “clarify” matters and then give the attorneys, both the State and defense, an opportunity to ask further questions based upon the court’s questioning of the witnesses. Instead, the trial court contested the mitigation in the peace of a quiet chamber and did the

prosecutor's job for him out of the presence of the jury. The penalty phase jury heard competent, sound, unrebutted record mitigation and the evidence and the subsequent recommendation of life resulting from the jury evaluation of said evidence should not be "second guessed."

The trial court's misapplication of Tedder is obvious from a reading of the conclusion of the 3.850 order:

> My conclusion would be the same as it was in my original sentencing order, for all the reasons stated herein and therein: The aggravating circumstances in this case so far outweigh the mitigating circumstances that a sentence of death is so clear and convincing that virtually no reasonable people, armed with all the facts and all the law could differ. (Exhibit A, PP 22-23). (See FSC PCR Vol. II-306).

Although the Tedder standard, "In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ"; lacks the additional underlined wording which the trial court added, Mr. Washington contends that the jury was armed with all the facts. They were armed with the un-rebutted mitigation presented by trial counsel in the penalty phase. The penalty phase jury was armed with all the law. The trial court gave it to them when the court instructed the penalty phase jury that they could consider in mitigation "Any other

aspect of the defendant's character or record or background, and any other circumstances of the offense."

Just because the trial court did not agree with how the jury applied the facts to the law, does not mean that the recommendation of life should not be respected.

Further, this Court in its de novo review, (See Stephens v. State, 748 So.2d 1028 (Fla. 1999)), should apply Tedder as clarified in Keen.

ARGUMENT II

BASED UPON RING V. ARIZONA AND THE CONCURRING OPINIONS IN KING AND BOTTOSON, MR. WASHINGTON SHOULD BE SENTENCED TO LIFE IMPRISONMENT

In light of this Court's decision on October 24, 2002 in Bottoson v. Moore, 833 So.2d 693 (Fla. 2002), and King v. Moore, 831 So.2d 143 (Fla. 2002), based on Ring v. Arizona, 536 U.S. 584 (2002), Mr. Washington is entitled to relief.

In Ring the United States Supreme Court held that the Arizona statute pursuant to which, following a jury adjudication of a defendant's guilt of first-degree murder, the trial judge, sitting alone, determines the presence or absence of the aggravating factors required by Arizona law for imposition of the death penalty, violates the Sixth Amendment right to a jury trial in capital prosecutions; receding from Walton v. Arizona, 497 U.S. 639, 110 S.Ct.

3047, 111 L.Ed.2d 511. If a State makes an increase in a defendant's authorized punishment contingent on the finding of fact, that fact - - no matter how the State labels it - - must be found by a jury beyond a reasonable doubt. A defendant may not be exposed to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone. The court noted that the "right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished" if it encompassed the fact-finding necessary to increase a noncapital defendant's sentence by a term of years, as was the case in Apprendi, but not the fact-finding necessary to put him to death.

An application of Ring to Mr. Washington's case entitles him to relief. At Mr. Washington's trial, on July 17, 1992, the jury returned a recommendation of life imprisonment. The jury was not polled. (R. Vol. XV - 2750) On September 4, 1992 the trial court overrode the jury recommendation and sentenced Mr. Washington to death. (R. Vol. XI - 1975) The trial court found aggravating circumstances of:

1. A capital felony committed by a person under sentence of imprisonment,

2. Previous conviction of another felony involving the use or threat of violence,

3. A capital felony committed while engaged in the crime of burglary and sexual battery, and,

4. Heinous, atrocious or cruel.

The trial court found no statutory mitigating circumstances, and found the non-statutory mitigating circumstances of Mr. Washington's love for his mother, his high school diploma, and his sports activities during high school. See Washington v. State, 653 So.2d 362, 364 (Fla.1994)

In Bottoson and King, the Court, for the first time, addressed the impact of Ring on Florida's sentencing scheme. In both Bottoson and King, each justice wrote separate opinions explaining his or her reasoning for denying petitioners relief. In both decisions, a *per curiam* opinion announced the result. In neither case does a majority of the sitting justices join the *per curiam* opinion or its reasoning. In both cases, four justices (Chief Justice Anstead, and Justices Shaw, Pariente, and Lewis) wrote separate opinions explaining that they did not join the *per curiam* opinion, but concurred in result only.

In addition to the opinions in Bottoson and King, Mr.

Washington finds an unexpected ally in the State of Florida[47]

In Bottoson, several members of the Court implicitly and explicitly raised serious questions about the continuing validity of Florida's scheme allowing a trial judge to override a jury's recommendation of life imprisonment. In his opinion concurring in result only, Justice Lewis provided the most explicit discussion as to his concerns of the ongoing vitality of the jury override in Florida in light of Ring:

> Blind adherence to prior authority, which is inconsistent with Ring, does not, in my view, adequately respond to, or resolve the challenges presented by, the new constitutional framework announced in Ring. For example, we should acknowledge that although decisions such as Spaziano v. *Florida*, 468 U.S. 447 (1984), have not been expressly overruled, at least that portion of Spaziano which would allow trial judges

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[47]Mr. Washington also brings to the Court's attention the recent position of the State of Florida regarding the applicability of Ring and Apprendi to jury overrides. In Ault v. State, No. SC 00-863, a capital case pending on direct appeal, the State has taken the position that "[i]n Florida,*"only a defendant in a jury override case has any basis to raise an Apprendi challenge to Florida's death penalty statute"* (Answer Brief of Appellee, Ault v. State, SC00-863, at p.63) (emphasis added). Certainly this presents a change in position from that which was espoused by the State in the litigation in Mills v. Moore, 786 So.2d 532 (Fla. 2001), a change due no doubt, to the decision in Ring. Given its position in Ault, the state would be hard-pressed to argue in Mr. Washington's case that there is no basis for a challenge to the statute in light of the facts of his case.

> to override jury recommendations of life imprisonment in the face of Sixth Amendment challenges must certainly now be of questionable continuing vitality. Bottoson v. State, 2002 WL 31386790 (Fla.) At p, 725.

Although Bottoson did not involve a jury recommendation of life and thus "we are not required to face this issue directly today," Justice Lewis unequivocally concluded that "we should not suggest the continuing validity of the concept of trial courts overriding jury recommendations of life imprisonment in these cases."Id. at 726. This is so because, in Justice Lewis' view, "a logical reading and comparison of the texts of Spaziano and Ring opinions produces an inescapable conflict." Id. at 726. The fundamental reason underlying Justice Lewis' concern about the validity of the override in light of Ring is the language in Ring which "counsels that this Court cannot allow a sentencing judicial officer to find aggravating factors contrary to the specific findings of a jury on those aggravating factors and override jury recommendations of life imprisonment." Id. at 726.

In other words, in Justice Lewis' view, if Ring stands for the proposition that penalty phase juries must make findings of the aggravating factors,

> "a trial judge may not simply dismiss the jury's recommendation based upon these findings and do precisely what Ring

> prohibits. A trial court simply cannot sentence a defendant to death through findings of fact rendered completely without, and in the case of a jury override, directly contrary to, a jury's advice and input. As has been noted by this Court in the past, a "jury's life recommendation changes the analytical dynamic, *Keen*, 775 So.2d at 285, and under *Ring,* this life recommendation must be respected. Thus, this is not only an asserted irreconcilable conflict, in my view it is a conflict we should acknowledge." Id. at 727.

The underlying concern in Justice Lewis' opinion about the lack of requisite fact findings made by Florida penalty phase juries is also reflected in the opinions of several other members of the Court.

Indeed, a majority of the justices concurring in result only expressed concern that because Florida's statute fails to provide that the jury make the requisite findings of aggravation under Ring and Apprendi, Florida's statute runs afoul of the Sixth Amendment. While this failure in the statute applies to jury recommendations of life or death, the problem is simply highlighted in the context of a jury recommendation of life, where there is no indication that the jury found any aggravating circumstances to exist, much less the additional requirements for death eligibility under Florida's sentencing scheme. Based on the various opinions in

Bottoson and King, it is thus clear that a majority of the Court has expressed doubts about the continuing validity of Florida's statute which permits, and permitted at the time of Mr. Washington's trial, a judge to expressly reject he recommendation of life by the jury.

In Bottoson, Justice Lewis explained in his view that "the validity of jury instructions given in [Bottoson's] case should be addressed in light of [Bottoson's] facial attack upon Florida's death penalty scheme on the basis of the holding in Ring v. Arizona." According to Justice Lewis:

> [I]n light of the dictates of Ring v. Arizona, it necessarily follows that Florida's standard penalty phase jury instructions may no longer be valid and are certainly subject to further analysis under the United States Supreme Court's Caldwell v. Mississippi, 472 U.S. 320 (1985), holding. In *Caldwell*, the Supreme Court concluded "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rest elsewhere." *Id.* at 328-29, 105 S.Ct. 2633.

Pursuant to this view, Justice Lewis proceeded in his opinion to carefully review the voir dire proceedings and the jury instructions, thereby suggesting that a case by case analysis is warranted in determining whether any death sentenced individuals are entitled to post conviction relief

in the light of Ring. In his opinion, Justice Lewis concluded, "there was a tendency to minimize the role of the jury, not only in the standard jury instructions, but also in the trial court's added explanation of Florida's death penalty scheme." Id. at 734*35. However, he found the standard jury instructions and judicial commentary were not so flawed in Mr. Bottoson's case to warrant reversal. Justice Lewis explained, "although the standard jury instructions may not be flawed to the extent that they are invalid or require a reversal *in this case*, such instruction should now receive a detailed review and analysis to reflect the factors which inherently flow from Ring." Id.at 734. (Emphasis added). Clearly, Justice Lewis' position carries with it the unstated inference that a reversal will be required in some cases where the proper analysis is conducted and it is determined that the minimization of the jury's role exceeded that occurring in Bottoson.

In Bottoson, the State argued in its RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS AND APPLICATION FOR STAY OF EXECUTION on page 16, that: "The jury's vote reflects its considered weighing of the aggravating and mitigating circumstances, not whether any particular juror rejected some or all of the aggravating circumstances. Based upon the plain

language of the statute, the only conclusion that can be drawn from the jury's sentencing vote is that two jurors thought that life was a more appropriate sentence than death." In Mr. Washington's case, the jury recommended life and was dismissed by the court, no inquiry was made as to how many jurors recommended life and how many jurors recommended death. Taken in the light most favorable to Mr. Washington, it can be inferred that this was a unanimous recommendation for life otherwise the jury would have specified the split in votes for life over death. Since there is no evidence that the jury did not follow the trial court's instructions, the jury determined that the aggravators were not proven beyond a reasonable doubt and the mitigating factors outweighed the aggravation presented.

To allow a sentencing judicial officer to find aggravating factors contrary to the specific findings of a jury on those aggravating factors and override jury recommendations of life imprisonment is contrary to the spirit of Ring. Mr. Washington contends, along with Justice Lewis, that under Ring, a jury's life recommendation must be respected.

IN 1994, THE YEAR OF MR. WASHINGTON'S DIRECT APPEAL, THE *TEDDER* STANDARD WAS APPLIED IN AN ARBITRARY MANNER, DEPRIVING WASHINGTON OF HIS RIGHTS UNDER THE SIXTH, EIGHTH, AND

FOURTEENTH AMENDMENTS AND IN VIOLATION OF THE HOLDING IN RING AND THE CONCURRING OPINIONS IN BOTTOSON AND KING

In Parker v. State,643 So.2d 1032 (Fla. 1994), The Florida Supreme Court reversed a jury override. The Court held:

> A defendant's capacity to form loving relationships with his family and friends is worthy of a jury's consideration in recommending punishment for capital murder. *See, e.g., Scott v. State,* 603 So.2d 1275,1277 (Fla. 1992); *Bedford v. State,* 589 So.2d 245,253 (Fla. 1991), *cert. denied,* 503 U.S. 1009, 112 S.Ct. 1773, 118 L.Ed.2d 432 (1992). A difficult childhood is valid nonstatutory mitigating evidence upon which a jury is entitled to rely. *See, e.g., Scott* 603 So.2d at 1277. Jurors also may consider remorse or repentance. *See Stevens v. State,* 613 So.2d 402, 403 (Fla. 1992). As we said in *Scott,*"[w]hile some persons may disagree with the weight of this evidence, or may even disbelieve portions of it altogether, clearly other reasonable persons would be convinced by it." 603 So.2d at 1277. We also note that the jury was apparently quite capable of reasonably sorting out the facts and applying the law in the guilt phase, where it distinguished the Dalton murder from the Padgett and Sheppard murders in handing down their guilty verdicts, all of which were supported by the record. *See Parker v. State,* 458 So.2d at 754. There is no reason to believe that the same jury was less capable of reasonably applying the aggravation and mitigating circumstances in the penalty phase of the trial. Thus, we conclude that the override was improper because jurors reasonably could have relied on these nonstatutory factors established

> in the record to recommend a life sentence under the totality of circumstances in this case. Id. at 1035.

In Mr. Washington's trial the jury was apparently quite capable of reasonably sorting out a massive amount of DNA evidence and applying the law in the guilt phase. The Parker court rejected the State's claim that the Florida Supreme Court should defer to a trial judge's discretionary decision regarding the weight of mitigating evidence regardless of the jury's recommendation. *Id*.

The non-statutory mitigation un-rebutted by the State was obviously given great weight by the penalty phase jury. Washington's ability to live within the prison setting, the opinion of Dr. Merin regarding the high improbability of this defendant planning the murder, Mr. Washington's childhood, his good work habits, his support of his children, and the other non-statutory mitigation outlined in defendant's sentencing memorandum and supported by case law, were un-rebutted by the State and in the record for the jury to consider. Since the facts of the Parker penalty issues closely resemble Mr. Washington's mitigation, why did the Florida Supreme Court reverse *Parker* and not Mr. Washington's override?

In Turner v. State, 645 So.2d 444 (Fla. 1994), the Florida Supreme Court reversed the override on the basis that

"there is ample mitigation on which the jury could have relied in making its life recommendation." Id. at 447. The mitigation in Washington's case was more than ample. Again, why the disparate treatment?

In Esty v. State, 642 So.2d 1074 (Fla. 1994), The Florida Supreme Court held:

> For a trial judge to override a jury recommendation of life, "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). An override is improper if there is a reasonable basis in the record to support the jury's recommendation. *Ferry v. State,* 507 So.2d 1373,1376 (Fla. 1987). The record in this case reveals a number of factors that support the jury's recommendation, including Esty's age of eighteen at the time of the murder, his lack of criminal history, his *potential for rehabilitation, and the possibility that he acted in an emotional rage.*(Emphasis added.) Thus, we conclude that jury override was improper because the jurors could have relied on these factors established in the record to recommend a life sentence in this case. Id. at 1080.

In Mr. Washington's case his potential for rehabilitation and lack of intent to kill had been established in the record for the penalty phase jury to rely upon in recommending a life sentence. Why then would the reviewing court disregard its own case precedent and not reverse the override in Mr.

Washington's case?

In Caruso v. State, 645 So.2d 389 (Fla. 1994), after discussing the defendant's age of 21 as a valid mitigator, the Florida Supreme Court noted that he was known by family members as loving, nonviolent, and a good worker, citing Scott and Bedford. The Florida Supreme Court held that there was a reasonable basis for the jury's recommendation and reversed the override. *Id.* at 397. Mr. Washington had similar, among other, un-rebutted record mitigation, yet he was not granted the same relief. Why?

In Barrett v. State, 649 So.2d 219 (Fla. 1994), The Supreme Court of Florida held again that the facts in the record show a reasonable basis on which the jury could have concluded that life imprisonment was the appropriate sentence. After detailing the other mitigation which should have been considered, the Court noted "his potential for rehabilitation and positive personality traits" and "his capacity to form loving relationships with his family and friends" citing Stevens and Scott respectively. Id. at 223. The override was reversed. In Garcia v. State, 644 So.2d 59 (Fla. 1994), "Garcia chose not to present any evidence in the penalty phase." Id. at 61. In Mr. Washington's case he did elect to present evidence of non-statutory mitigation, there was valid

record un-rebutted mitigation which the jury obviously used in its deliberations. The historical overview of jury overrides in Florida from 1974 until 2000, make clear the fact that the jury override has been applied in an arbitrary manner.

The reversal rate on direct appeal is impressive in the relief granted defendants by the direct appeal Court. The reversal rate in post-conviction and federal proceedings fortify the contention that courts do not believe that trial courts should presume to second guess the penalty phase jury if there is mitigation in the record. To assume that the penalty phase jury did not find certain non-statutory mitigation to be consequential and instead relied upon an "improper mitigator" would require the use of a crystal ball. Neither the trial court nor the reviewing Court had the benefit of the clarification of the Tedder standard in Keen. The trial court used the same weighing process in an override case that should only be used when the jury recommended death.

Mr. Washington's jury override claim is not procedurally barred. In Mr. Washington's initial brief filed August 21, 2001, previous post-conviction counsel asserts that despite adverse rulings, due process and fundamental fairness in the context of a capital case mandate that this claim should be

considered on the merits. (See Appellant's Initial Brief page 60-61). Mr. Washington further preserved the claim in his motion for rehearing filed on December 2, 2002, citing Keen. The cases of Ring, King and Bottoson were decided in 2002. The Supreme Court of Florida rendered its opinion on Mr. Washington's case on November 14, 2002. The motion for rehearing was denied on January 10, 2003. Had the Supreme Court of Florida rendered its opinion subsequent to June 24, 2002, when Ring was decided and prior to October 24, 2002 when King-Bottoson was decided, the Washington case would have been ripe for review. The concurring opinions by Justice Lewis and others in the King-Bottoson opinions regarding jury overrides state that jury overrides "certainly now be of questionable continuing vitality." Bottoson at 725. The trial court's awareness of the opinions quoted in its order on page 22, indicate that Mr. Washington's case should be considered by this Court.

In Christmas v. State, 632 So.2d 1368 (Fla. 1994) the Supreme Court of Florida held:

> In this case, however, we find that the *Tedder* standard has *not* been met given that evidence exists in this record upon which a jury could have recommended life imprisonment. We disagree with the State's contention that the mitigation in this case "pales in significance" against the strong

> aggravating circumstances; especially given that the trial judge erroneously found that the killings were heinous, atrocious, and cruel. Id. at 1371-72.

The trial court in its ORDER DENYING AMENDED MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCES dated November 18, 2003, on page 15 reveals the fatal flaw in its reasoning regarding the denial of defendant's motion. The trial court stated:

> Even if the heinous, atrocious, or cruel aggravating factor, and the murder while under a sentence of imprisonment were to be eliminated completely from this court's consideration, the override should still be sustained based on the two aggravating circumstances that do not violate *Apprendi/Ring*, and "no statutory mitigating circumstances, and inconsequential non-statutory mitigating circumstances." *Washington v. State,* 653 So.2d 362, 366 (Fla. 1994). (See Order at page 15).

Mr. Washington respectfully contends that pursuant to *Apprendi/Ring,* the heinous, atrocious, or cruel aggravating factor, and the murder while under a sentence of imprisonment mandate complete elimination from the court's consideration as the above mentioned aggravating factors had not been proven beyond a reasonable doubt. The trial court's analysis of the aggravation is skewed. The trial court is assuming that aggravation existed when there is no evidence to demonstrate that the aggravation had been proven beyond a reasonable doubt. The fatal flaw in the trial court's reasoning is two

pronged. When the trial court termed the non-statutory mitigation as “inconsequential”, it was expressing the trial court’s opinion, not the penalty phase jury’s. Barring a special verdict form requiring the jury to list both aggravation proven beyond a reasonable doubt *and* requiring the jury to list mitigation proven by a preponderance of the evidence, nobody can speculate as to which evidence was used by the jury in their deliberation of this case. The trial court’s analysis of why the jury recommended a life sentence, although an interesting theory is still just a theory. (See Order pages 17-18). Another special circumstance that this Court should be aware of is that the jury was not polled, nor was the “split” -if there was one -indicated on the verdict form. What is clear from the record is that the penalty phase jury was presented with un-rebutted non-statutory mitigation.

Justice Stevens’ assessment of the jury’s comparative advantage in determining, in a particular case, whether capital punishment will serve that end in Ring addresses the unique responsibility of the jury in capital cases in this manner:

> In respect to retribution, jurors possess an important comparative advantage over judges. In principle, they are more attuned to “the community’s moral sensibility,” *Spaziano,* 468 U.S., at 481,

> 104 S.Ct. 3154 (STEVENS, J., concurring in part and dissenting in part), because they "reflect more accurately the composition and experiences of the community as a whole," *id.,* at 486, 104 S.Ct. 3154. Hence they are more likely to "express the conscience of the community on the ultimate question of life or death," *Witherspoon v. Illinois,* 391 U.S. 510, 519 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), and better able to determine in the particular case the need for retribution, namely, "an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." Id. at 615-16, *2447

In Mr. Washington's case the jurors did express the conscience of the community on the ultimate question of life or death when the penalty phase jury rendered their life recommendation. Their recommendation should be respected. Mr. Washington's plea for mercy was found to have merit by a jury of his peers. In 1994, his plea for justice went unheeded when the 1994 Florida Supreme Court allowed the trial court to improperly weigh un-rebutted record non-statutory mitigation and deem it "inconsequential." The 1994 Court did not have the benefit of Keen when it rendered its decision.

Time passed, the composition of the Court changed, and with it, the courts of this country continued to evolve. Justice Scalia, in his concurring opinion in Ring wrote:

> Although "the doctrine of *stare decisis* is

> of fundamental importance to the rule of law[.]'... [o]ur precedents are not sacrosanct." *Patterson v. McLean Credit Union,* 491 U.S. 164, 172, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989) (quoting *Welch v. Texas dept. of Highways and Public Transp.,* 483 U.S. 468, 494, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987)). "[W]e have overruled prior decisions where the necessity and propriety of doing so has been established." 491 U.S., at 172, 109 S.Ct. 2363. We are satisfied that this is such a case. Id. at 608, *2442-43.

Mr. Washington respectfully contends that the Florida Supreme Court's lengthy concurring opinions in Bottoson and King indicate a willingness to address the override issue. As noted by the trial court in its order on page 22, "we should not suggest the continuing validity of the concept of trial court's overriding jury recommendations of life imprisonment in these cases." Bottoson at 726, and Justice Quince's comments regarding the Bottoson case :

"This case is not the appropriate vehicle to raise the multiple concerns involving a jury override which may result from the Ring decision." Bottoson at 702, Quince, J. concurring. Mr. Washington's case is the appropriate vehicle.

Undersigned counsel is not seeking that this Court declare the override provision invalid. As cited above the override provision was originally drafted to prevent inflamed juries from causing injustice. One of the unique factors to

be considered in the case at bar is that an inflamed trial court indulged in an improper weighing process. Another factor to be considered is that in 1994, there was a disparity in the rulings regarding overrides. This was due to the fact that there was no clarification of the Tedder standard until 2000, when this Court decided Keen. Yet another factor is that the ruling in Ring regarding improper aggravation. It clarifies and bolsters the holding in Christmas, a case decided the same year as the Washington direct appeal. Although undersigned counsel agrees with Justice Lewis' concurring opinion that "we should not suggest the continuing validity of the concept of trial court's overriding jury recommendations of life imprisonment in these cases," these cases should be evaluated on a case by case basis given the totality of the circumstances. Given the totality of the circumstances in this case, and this case only, it is clear that Washington has suffered an injustice. The courts of this state and this country exist to right injustice. May they do so in Mr. Washington's case.

CONCLUSION AND RELIEF SOUGHT

In light of the facts and arguments presented above, Mr. Washington contends the trial court erred in overriding the jury life recommendation. Mr. Washington moves this Honorable Court

to:

1. Vacate the sentence of death, and sentence him to life imprisonment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to all counsel of record on March __, 2004.

_____
Richard E. Kiley
Florida Bar No. 0558893

_____
James V. Viggiano, Jr.
Florida Bar No. 0715336
CAPITAL COLLATERAL REGIONAL
COUNSEL - MIDDLE
3801 Corporex Park Drive, Suite 210
Tampa, FL 33619
(813) 740-3544
Attorneys for Defendant

CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing, Initial Brief of Appellant was generated in a Courier New, 12 point font, pursuant to Fla. R. App. P. 9.210.

_____
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Richard E. Kiley
Florida Bar No. 0558893

_____
James V. Viggiano, Jr.
Florida Bar No. 0715336
CAPITAL COLLATERAL REGIONAL
COUNSEL - MIDDLE
3801 Corporex Park Drive, Suite 210
Tampa, FL 33619
(813) 740-3544
Attorneys for Defendant

Copies furnished to:

The Honorable Susan F. Schaeffer
Circuit Court Judge
545 First Avenue, North, Room 417
St Petersburg, Florida 33701

Robert J. Landry
Assistant Attorney General
Office of the Attorney General
Concourse Center 4
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607-7013

C. Marie King
Assistant State Attorney
Office of the State Attorney
14250 49th Street North
Clearwater, Florida 33762-2800

Anthony Washington
DOC #075465; P5119S
Union Correctional Institution
7819 NW 228th Street
Raiford, Florida 32026