IN THE SUPREME COURT OF FLORIDA

ROBERT IRA PEEDE,

Petitioner,

v.

JAMES V. CROSBY,
Secretary, Florida Department of Corrections,

Respondent.

Case No. SC05-1885

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

This is Petitioner's first habeas corpus petition in this Court. Article 1, Section 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is being filed to address substantial claims of error, which demonstrate Mr. Peede was deprived of his right to a fair, reliable, and individualized sentencing proceeding and that the proceedings which resulted in his conviction and death sentence violated fundamental constitutional imperatives.

Citations shall be as follows:

The record on appeal from Mr. Peede's trial is referred to as "R." followed by the appropriate page number.

All other references will be self-explanatory or otherwise explained herein.

INTRODUCTION

Significant errors which occurred at Mr. Peede's capital trial and sentencing were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel. For example, significant errors regarding Mr. Peede's fundamental right to a fair trial in violation of his Fifth, Fourth, Eighth and Fourteenth Amendment rights are presented in this petition for writ of habeas corpus.

Appellate counsel's failure to present the meritorious issues discussed in this petition demonstrates that his representation of Mr. Peede involved "serious and substantial" deficiencies. Fitzgerald v. Wainwright, 490 So. 2d 938, 940 (Fla. 1986). The issues which appellate counsel neglected to raise demonstrate that his performance was deficient and the deficiencies prejudiced Mr. Peede. "[E]xtant legal principle[s] . . . provided a clear basis for . . . compelling appellate argument[s]," which should have been raised in Mr. Peede's appeal. Fitzpatrick, 490 So. 2d at 940. Neglecting to raise such fundamental issues, as those discussed herein, "is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome." Wilson v. Wainwright, 474 So. 2d 1162, 1164 (Fla. 1985).

Had counsel presented these issues, Mr. Peede would have received a new trial, or, at a minimum, a new penalty phase. Individually and "cumulatively," Barclay v. Wainwright, 444 So. 2d 956, 969 (Fla. 1984), the claims omitted by appellate counsel establish that "confidence in the correctness and fairness of the result has been undermined." Wilson, 474 So. 2d at 1165 (emphasis in original).

As this petition will demonstrate, Mr. Peede is entitled to relief.

REQUEST FOR ORAL ARGUMENT

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

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla. R. App. P. 9.100(a). See Art. 1, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Fla. R. App. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents issues which directly concern the constitutionality of Mr. Peede's conviction and sentence of death.

Jurisdiction in this action lies in the Court, see, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Peede's direct appeal. See Wilson, 474 So. 2d at 1163; Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969). The Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Peede asserts that his capital conviction and sentence of death were obtained and then affirmed, by this Court, in violation of his rights guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

CLAIM I

THE COURT ERRED IN ALLOWING THE INTRODUCTION OF EVIDENCE OF MR. PEEDE'S THREATS TO KILL OTHER PEOPLE AND OTHER MATTERS TO PROVE THAT MR. PEEDE KIDNAPPED HIS WIFE AND PREMEDITATED TO KILL HER. THE INTRODUCTION OF THE EVIDENCE VIOLATED MR. PEEDE'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS. APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO PRESENT THIS ISSUE.

A. Appellate Counsel Was Ineffective For Failing To Raise the Claim That The Trial Court Permitted The Presentation Of Irrelevant, Highly Prejudicial Evidence At Mr. Peede's Capital Trial.

On direct appeal, appellate counsel was ineffective for failing to raise the issue that the court erred in admitting

evidence of Mr. Peede's allegedly threatening to kill other people in North Carolina and other matters because these issues had no relevance, or if they did have any relevance, it was "outweighed by the prejudicial impact".

Over defense counsel's objection, the State was permitted to introduce testimony from multiple witnesses regarding threats Mr. Peede allegedly made against his former wife, Geraldine Peede, and Calvin Wagner.[1] Mr. Peede's threats against Geraldine Peede and Calvin Wagner became a "feature" of the State's case against him for Darla Peede's murder.

1. The State's Case- the irrelevant, highly prejudicial evidence.

a. Tanya Bullis

Tanya Bullis, the victim's daughter, testified, over defense objection, that Darla Peede told her that "she was afraid of being put with the other people [Mr. Peede] had threatened to kill. And he'd kill them all on Easter" (R. 679-

[1] The State elicited testimony that Mr. Peede's threats were based on his belief that Geraldine Peede and Calvin Wagner had a sexual relationship and were posing nude in swinger magazines. However, Mr. Peede's beliefs were based on his delusional thoughts.

80). Ms. Bullis went on to explain to the jury that she was referring to Geraldine Peede and "a friend of somebody's that was accused of sleeping with her." Id.

b. Rebecca Keniston

Rebecca Keniston, Darla Peede's other daughter, later testified that she informed the Hillsboro, North Carolina police that her "mother was gone, and that she had been worried that Robert was going to kill Geraldine and a male person who I don't know who he is" (R. 614).

c. Geraldine Peede

The court also allowed the State to elicit irrelevant, highly prejudicial testimony from Geraldine Peede, Mr. Peede's ex-wife over defense counsel's objection based on the State's argument that the testimony was relevant "to show Robert's motives and intents against Geraldine" (R. 624). Ms. Peede described "hostile contact" that she had with Mr. Peede:

> A: Robert came to my house.
>
> Q: When, best can you remember?
>
> A: Maybe the third week in March. He sat down, he came in, seemed to be calm. He sat down, he started talking. He says, "I know who your friend is." I said, "Robert, what are you talking about?" He looked at me and he says, "Don't lie to me." I said, "Robert, I don't know what you're talking about."

> He says, “I know who your friend is.” He says, “I’m going to call him, and you’ll be getting a phone call in a few minutes.”

Ms. Peede informed the jury that Robert seemed “angry” and that she was “afraid” of him because he accused her of having her picture taken in a “nudity” magazine (R. 624-26). Ms. Peede testified that Mr. Peede made “threatening statements” to her and told her that he “would take care” of her if she did not admit to appearing in nude photos in a magazine (R. 631).

d. Special Agent Kent Wilson

The court permitted Kent Wilson, Special Agent with the Georgia Bureau of Investigation, to relay a statement made by Mr. Peede to him to the jury over defense objection (R. 714). The witness informed the jury that after Mr. Peede killed Darla he went back to his home in Hillsboro, North Carolina, where he “sat down and thought about it a, it awhile, and decided that the only way to kill the other people now would be to kill them on their way to work. At that point he loaded up his shotgun and placed it beside the door” (R. 720). The witness continued to explain to the jury that Mr. Peede informed the police that he believed Geraldine, Darla and Calvin Wagner posed nude in swinger magazines together. Mr. Peede “decided to kill Calvin Wagner and Geraldine Peede. But he said he knew they were

afraid of him, wouldn't be able to get close enough to do it without Darla's help" (R. 722). The witness told the jury, "He mentioned ... killing them (sic) numerous occasions. It was really all that, every other sentence had something to do with that. He said at one point he intended to use Darla to lure them to a motel where he could kill them" (R. 723).

e. Detective Ross Frederick

Ross Frederick, detective with the Hillsboro, North Carolina police department, testified over defense counsel's objection, that he confiscated weapons from Mr. Peede's residence:

> A: There was an Ithaca .12-gauge pump shotgun taken.
>
> Q: Where was it taken from?
>
> A: In the room right off the living room as you go in the front.
>
> Q: How close to the front door?
>
> A: In the back of the room, right around the corner of the door.
>
> Q: Was it fully loaded or unloaded?
>
> A: Fully loaded, with a round in the chamber (R. 702-03).

Defense counsel objected to this testimony on the basis that it was "irrelevant" and had nothing to do with the facts of

the case. Defense counsel further argued that the State was "trying to elicit testimony about other matters that don't pertain to this case" (R. 702). The record does not reflect the arguments presented by the State as the court held a bench conference off the record.

f. Pornographic Magazines And Photos

The court permitted the State to admit pornographic magazines with photos cut out of them and in some instances with the letter's "C", "D" and "P" handwritten next to some of the magazine photos over defense objection (R. 800-803). The arguments made by the parties are not reflected in the record as a bench conference was held off the record (R. 801).

2. The Prosecutor's Closing Argument

The prosecutor relied upon the above irrelevant, highly prejudicial evidence to confuse and inflame the passions of the jury. For example, the prosecutor argued that Darla Peede's knowledge of Mr. Peede's plan to kill other people demonstrated premeditation (R. 877). The prosecutor discussed Mr. Peede's plan to kill other people numerous times throughout

her closing argument (R. 881, 882, 884, 885, 886). The prosecutor made Mr. Peede's alleged plan to kill Geraldine Peede and Calvin Wagner in North Carolina a feature of her closing argument and a feature of the trial. This was improper as Mr. Peede was on trial for the murder of Darla Peede, not for attempted murder of Geraldine Peede and Calvin Wagner. The focus on these other alleged planned crimes would be confusing for the jury and was inappropriately used as evidence of Mr. Peede's premeditated murder of Darla Peede.

3. Defense Counsel's Objections

Prior to trial, defense counsel sought to exclude the State from presenting this testimony through a Motion in Limine (R. 1102). Defense counsel argued that "the State had not shown that the Williams Rule evidence is relevant to the plan or scheme" and that it is "prejudicial" (R. 600). The Defense further argued "that the issue is going to be confusing to the

jury, and it's going to require or is going to cause them to accept the case on evidence that's not relevant to these proceedings. Robert Peede is on trial for trying to kill Darla and not two other people" (R. 600). The Court denied defense counsel's motion based on the State's cursory argument that the testimony is "admissible under felony murder theory" and "independently" (R. 321).

The court noted that the record should reflect that the defense made a timely objection to the admission of "felony murder or Williams Rule evidence" (R. 584). Defense counsel again renewed his objection to the admission of the Williams Rule evidence and the Court again overruled defense counsel's objection (R. 600-01). Thus, the issue was properly preserved by trial counsel.

B. The Admissibility Of Uncharged Bad Acts

1. The Statutory Scheme

The legislature and the courts of this state have given special attention to the dangers of admitting evidence of uncharged bad acts or crimes the Defendant may have committed. For purposes of this argument, the pertinent statutes are sections 90.402, 90.403 and 90.404(2)(a). They provide:

90.402. Admissibility of relevant evidence

All relevant evidence is admissible, except as provided by law.

90.403. Exclusion on grounds of prejudice or confusion

> Relevant evidence is admissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. This section shall not be construed to mean that evidence of the existence of available third-party benefits is inadmissible.

90.404. Character evidence; when admissible

* * *

> (2) Other crimes, wrongs or acts.--
>
> (a) Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

2. Relevancy And Limits On Admissibility Of Relevant Evidence

The fundamental principle underlying any discussion of relevancy comes from this Court's decision in Ruffin v. State, 397 So. 2d 277 (Fla. 1981):

> In Williams v. State, [110 So. 2d 654 (Fla. 1959)] we announced a broad rule of admissibility based upon relevancy ... [W]e declared that any fact relevant to prove a fact in issue is admissible into evidence even though it points to a separate crime unless its admissiblity is precluded by a specific rule of

> exclusion. We further held that evidence of collateral offenses is inadmissible if its sole relevancy is to establish bad character or propensity of the accused. We emphasized that the question of relevancy of this type of evidence should be cautiously scrutinized before it is determined to be admissible, but that nonetheless relevancy is the test. Evidence of other crimes is relevant if it casts light on the character of the crime for which the accused is being prosecuted. For example, this evidence is relevant when it shows either motive, intent, absence of mistake, common scheme or plan, identity, or a system or general pattern of criminality.

Ruffin, 279-280. This prohibition is also applicable to "allegations" of other criminal acts. McClain v. State, 516 So. 2d 53 (Fla. 2d DCA 1987).

Relevancy, then, controls the admissibility of evidence. Of course, there are limits, some discretionary, and some absolute, that prevent the jury from hearing all relevant evidence. Section 90.403, for example, prohibits introducing pertinent proof of some fact where the prejudice it would create outweighs its probative value. While parties usually want evidence admitted because it prejudices its opponents, this Court had held that "[o]nly where the unfair prejudice substantially outweighs the probative value of the evidence should it be excluded." Amoros v. State, 531 So. 2d 1256, 1260 (Fla. 1988). This most often occurs when proving the collateral

crimes become a feature of a trial instead of an incident to it. Heiney v. State, 447 So. 2d 210, 213 (Fla. 1984); State v. Richardson, 621 So. 2d 752, 758 (Fla. 5th DCA 1993). Such evidence tends to confuse the jury because it distracts them from the issues before them, the guilt or innocence of the Defendant for the crime **charged**, and trying him or her from some **uncharged** collateral offenses. Steverson v. State, 695 So. 2d 687 (Fla. 1997).

Evidence that only exhibits the Defendant's bad character or propensity to commit crimes likewise is inadmissible. Section 90.404(2)(a), Florida Statutes (1996). Such proof encourages the jury to disregard the presumption of innocence and vote for guilt because "once a crook always a crook." Straight v. State, 397 So. 2d 903, 908 (Fla. 1981); Holland v. State, 636 So. 2d 1289, 1293 (Fla. 1994); Bolden v. State, 543 So. 2d 423 (Fla. 5th DCA 1989)("On appeal, the State argues that the testimony was admissible to show a 'pattern of conduct' by Bolden. That is exactly why the evidence was inadmissible."). Finally, unless the collateral crimes evidence tends to prove a contested or material issue it is excluded.

Hence, while relevancy remains the test of admissibility, this court and the legislature have placed significant

restrictions on admitting all evidence that might bear on the defendant's guilt. Because of the extraordinary corrosive strength bad acts evidence has, this court has adopted a "strict standard of relevancy." Huering v. State, 513 So. 2d 122, 124 (Fla. 1987).

C. The Trial Court Should Have Excluded The "Similar Fact Evidence" As The Evidence's Unfair Prejudice Outweighed It's Probative Value.

1. Balancing Test

In weighing the probative value against the unfair prejudice, it is proper for the court to consider the need for the evidence; the tendency of the evidence to suggest an improper basis to the jury for resolving the matter, e.g., an emotional basis and the chain of inference necessary to establish the material fact. State v. McClain, 525 So. 2d 420 (Fla. 1988). When the unfair prejudice of the above evidence is balanced against its probative value it is clear that the evidence is not admissible.

2. The Evidence Was Irrelevant.

At trial, the State argued that Mr. Peede's threats towards Geraldine Peede and Calvin Wagner were relevant to prove premeditation and felony murder. This argument must fail. The State's argument that the plan against Geraldine and Calvin

demonstrates Mr. Peede's premeditation to murder Darla Peede is not logical under the facts of this case. If Mr. Peede planned to use Darla Peede to execute his plan to murder Geraldine Peede and Calvin Wagner, he would not premeditate to kill her in Florida. The State's argument that Darla's knowledge of Mr. Peede's plot is relevant to prove felony murder because it demonstrates that Darla Peede would not have gone willingly with Mr. Peede to North Carolina also must fail. In Carter v. State, the court specifically found that the "'state of mind' hearsay exception to the hearsay rule does not apply to make otherwise improper character evidence admissible." 687 So. 2d 327, 329 (Fla. 1st DCA 1997).

Even if this Court were to find that the testimony from Darla Peede's daughters was admissible to prove felony murder, the testimony from Geraldine Peede, Agent Wilson, Detective Frederick and the photos are not relevant. Geraldine Peede's "hostile contact" has nothing to do with Darla Peede's "state of mind" nor does is demonstrate Mr. Peede's alleged plot; Agent Kent Wilson's and Detective Frederick's testimony went to Mr. Peede's actions **after** he killed Darla Peede and did not have any bearing on her murder; and similarly, the pornographic photos do not go to a material fact in issue surrounding Mr. Peede's

murdering Darla Peede. None of this testimony has a logical tendency to prove a material fact at issue in the murder of Darla Peede.

Despite the State's contention, none of the above testimony bears any relevance to the State's felony murder theory or to premeditation to kill Darla Peede and only served to unfairly portray Mr. Peede in a negative light to the jury. Further, when irrelevant evidence is admitted there is a presumption that the error was harmful, because of "the danger that the jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged." Strait v. State, 397 So. 2d 903, 908 (Fla. 1981).

3. The Evidence Distracted the Jury And Suggested An Improper Basis For The Jury's Verdict.

The prejudice to Mr. Peede caused by the admission of similar fact evidence substantially outweighed its probative value and the trial court should have excluded it. This is due to the fact that this evidence became a feature of Mr. Peede's capital trial as opposed to an incident to it. A collateral offense becomes a feature, instead of an incident, of a trial:

> [W]here it can be said that similar fact evidence has so overwhelmed the evidence of the charged crimes to be considered an impermissible attack on the defendant's character or propensity to commit crimes.

> The admission of excessive evidence of other crimes to the extent that it becomes a feature of the trial has been recognized as fundamental error. ... [T]he danger is that evidence that the defendant committed a similar crime will frequently prompt a more ready belief by the jury that the defendant might have committed the charged offense, thereby predisposing the mind of the juror to believe the defendant guilty.

Bush v. State, 690 So. 2d 670, 673 (Fla. 1st DCA 1997)(citations omitted).

The extent of the testimony presented at Mr. Peede's capital trial regarding Mr. Peede's alleged plans to kill other people in North Carolina alone establishes that it was a feature of his trial. The State presented five witnesses who provided extensive testimony regarding Mr. Peede's alleged plans and this was a key feature of the prosecutor's closing argument. The instant case is similar to the scenario in Bush where much stolen property was recovered from the defendant's home during the investigation of a burglary. Id. At trial on theft charges, the trial court permitted the state to introduce evidence of other property stolen from other people in the defendant's possession. Id. The court found that evidence regarding other stolen property found in the defendant's home became a "feature of the trial" due to both the "quantum of evidence" and the "arguments of counsel." Id. In making this finding the court stated:

> It is evident from the instant record that the state's extensive utilization of the evidence of other stolen items found in appellant's home was to emphasize appellant's involvement in these other crimes, thereby implicating her with a criminal propensity and having the effect of making her involvement in the collateral offense a main feature or theme of the trial. As can be gleaned from the prosecutor's closing arguments, the state's case hinged on the element of appellant's guilty knowledge that stolen property was in her home.

Id.

As in Bush, "the State's presentation of evidence of collateral offenses ... transcend[ed] the bounds of relevancy to the offense being tried" in Mr. Peede's trial. Id. Further, the emotional, scandalous nature of the evidence presented in Mr. Peede's trial created an even greater prejudice against him than did the evidence of stolen property presented in Bush.

The focus of the State's case against Mr. Peede on his alleged plot to kill others in North Carolina and on the other collateral matters confused the jury and distracted them from the issue at hand– Mr. Peede's innocence or guilt in murdering Darla Peede. The State unfairly used the collateral evidence to present Mr. Peede as a person with a propensity to commit violent crimes by presenting a picture of a jealous husband with unusual sexual practices who sought to kill numerous people. When balancing the probative value of this evidence against the

danger of unfair prejudice to Mr. Peede, it is clear that the unfair prejudice wins out.

4. The Evidence Of The Collateral Bad Acts Was Not Reliable.

The hearsay statements offered by the State to prove that Mr. Peede committed these collateral bad acts did not meet the requisite reliability standard under Huddleston v. United States or under Florida law. The State is required to prove that Mr. Peede committed these uncharged bad acts by "clear and convincing evidence." CHARLES W. EHRHARDT, FLORIDA EVIDENCE 189-90 (West Books 2000). The hearsay testimony at issue does not meet this standard.

5. Conclusion

The above testimony has no bearing on the issue of Darla Peede's murder, rather it created a sideshow about Mr. Peede's alleged plan to murder Geraldine Peede and Calvin Wagner that was not relevant to the issue at hand and confusing for the jury. The State's portrayal of Mr. Peede as a person with a propensity to commit violent acts was unfairly prejudicial and outweighed the limited, if any, probative value of the evidence. This is particularly true when considering that the State did not meet the clear and convincing burden of proof in presenting

this testimony. Relief is proper.

CLAIM II

MR. PEEDE'S RIGHT OF CONFRONTATION WAS VIOLATED AT HIS GUILT PHASE WHEN THE TRIAL COURT PERMITTED THE STATE TO CALL WITNESSES TO TESTIFY TO STATEMENTS MADE BY THE VICTIM. MR. PEEDE'S RIGHTS UNDER THE FIFTH, SIXTH, EIGTH AND FOURTEENTH AMENDMENTS WERE VIOLATED.

A. Testimonial Hearsay Was Presented At he Guilt Phase.

The proceedings conducted in 1984 were not in conformity with the Sixth Amendment guarantee to a criminal defendant that he will have the opportunity to confront his accusers.

1. The State's Case - the testimonial hearsay.

a. Tanya Bullis

The State elicited testimony from Tanya Bullis, the victim's daughter, relating statements made by the victim. The court permitted this testimony over defense counsel's hearsay objections (R. 598, 599, 600). Ms. Bullis testified that before her mother left to pick Mr. Peede up from the airport she told her that "she was nervous about going, and she thought she might be in some sort of danger" (R. 599). Ms. Bullis went on the testify that her mother told her "[i]f she wasn't back by midnight to call the police, she said she may have been forced into the car. She was afraid of being taken to North Carolina"

and that Mrs. Peede said “she was afraid of being put with the other people he had threatened to kill. And he’d kill them all on Easter” (R. 599-600). Ms. Bullis further testified that her mother instructed her to “telephone the police and give them the license plate number of the car” “if she wasn’t back by midnight” and to “phone Geraldine” (R. 601).

b. Rebecca Ann Keniston

Rebecca Ann Keniston, the victim’s daughter, testified that she telephoned the Hillsboro, North Carolina police and told them “that [her mother] had been worried that Robert was going to kill Geraldine and a male person who I don’t know who he is” (R. 614).

c. Geraldine Peede

Geraldine Peede, Mr. Peede’s ex-wife, provided the following hearsay testimony regarding an argument she witnessed between Mr. Peede and Darla Peede:

> A: They were talking about her taking typing classes at night. And Robert got real angry because he said she wasn’t taking typing classes, accused her of being with someone else.
>
> Darla got upset and went upstairs.
>
> Q: When she went upstairs, did Robert seem to remain angry?

A: He looked at me and says see, I have not changed. He says she's lied to me. And that was basically it.

Geraldine Peede later provided the following additional hearsay testimony:

Q: Ms. Peede, did Robert ever make any threatening statements to you concerning the, your appearing in photographs?

A: Yes.

Q: What was the statement that he made to you?

A: If I didn't admit to being in a magazine, he would take care of me.

Defense Counsel failed to raise a hearsay objection to this testimony, however, the admission of this testimony constitutes fundamental error, therefore the issue is preserved.

2. The Prosecutor's Closing Argument

The prosecutor relied upon this testimonial hearsay evidence in closing argument. For example, the prosecutor argued that Darla Peede's statements to her daughter demonstrated that the killing was a premeditated plan to use her to kill Geraldine Peede and Calvin Wagner (R. 876-878). The prosecutor argued that in the alternative, Darla Peede's statements to her daughter support Mr. Peede's felony murder conviction because it is "not reasonable to believe that she left willingly and did not contact them when she gave them such

specific instructions" (R. 878-880). This whole argument was premised upon the hearsay evidence not subject to confrontation.

The testimonial hearsay was specifically used to establish the following aggravating factors:

1. That the crime was committed while he was engaged in the commission of the crime of kidnapping of the victim; and

2. That the crime was committed in a calculated and premeditated fashion without any pretense of moral or legal justification (R. 980).

3. On Appeal, the Use of Testimonial Hearsay Was Approved.

Mr. Peede asserted on appeal to this Court that his Sixth Amendment right of confrontation had been violated by the admission of hearsay evidence through Tanya Bullis. Mr. Peede argued:

> Over objection, the victim's daughter was permitted to testify that her mother stated that she was going to the airport to pick up the defendant, and that she [the victim] had stated she was nervous and scared that she might be in danger. (R. 598-599). The daughter testified that her mother told her to call the police if she had not returned by midnight, and that the mother related that the defendant had threatened to kill the other people up on North Carolina on Easter (R. 600).
>
> The testimony is pure hearsay. §§90.801, .802, Fla.Stat. (1983). Therefore the testimony should have been excluded because of its extremely prejudicial effect. Pursuant to Hunt v. State, 429 So. 2d 811

(Fla. 2d DCA 1983), Bailey v. State, 419 So. 2d 721 (Fla. 1st DCA 1982), and Kennedy v. State, 305 So.2d 1020 (Fla. 5th DCA 1980), reversible error has occurred.

... [S]uch testimony had no relevance. Darla Peede's state of mind at the time she went to pick up her husband hours before she was killed is irrelevant. Extreme prejudice accrues to Mr. Peede because this hearsay interjects a motive into the case that cannot be effectively challenged through cross-examination of the declarant.

Initial Brief at 24-25.

This Court rejected the argument, saying:

The state, in response, correctly points out that two of the statements relating to the victim's telling her to call the police if she did not return and that Peede had threatened to kill others in North Carolina were given at trial without any hearsay objection, and therefore the issue with reference to those statements was not preserved. Insofar as the other statements are concerned , the state contends, there is no basis for reversal. Peede's own statement presented to the jury established that he arranged for the victim to pick him up at the airport. Furthermore, the state urges that the daughter's testimony that her mother seemed nervous and scared. Moreover, the state argues, those statements challenged below were properly admitted under the hearsay exception to show the declarant's state of mind which was relevant to the kidnapping charge which formed the basis for the state's felony murder theory.

We agree. The daughter's testimony in this regard established Darla's state of mind. Under the 'state of mind' hearsay exception, a statement demonstrating the declarant's state of mind when at issue in a case is admissible. [Citation]. In the present case, the victim's mental state was at issue regarding the elements of the kidnapping which formed the basis for the state's felony murder theory. Under

> *section 787.01 (1)(a), Florida Statutes* (1983), it was necessary for the state to prove that the victim had been forcibly abducted against her will, which was not admitted by defendant. The victim's statements to her daughter just prior to her disappearance all serve to demonstrate that the declarant's state of mind at that time was not to voluntarily accompany the defendant outside of Miami or to North Carolina. We hold that the trial did not abuse its discretion in admitting the testimony at issue.

Peede v. State, 474 So.2d at 816.

A. Appellate counsel was ineffective for failing to raise the issue of Rebecca Ann Keniston's hearsay testimony.

Crawford v. Washington Establishes A Confrontation Clause Violation.

In Crawford v. Washington, 124 S. Ct. 1354 (2004), the United States Supreme Court considered the contours of the right guaranteed by the Confrontation Clause. In Crawford, the defendant's wife had provided law enforcement with a tape-recorded statement. Because of the marital privilege, she was not an available witness at the defendant's trial for assault and attempted murder. The State sought to introduce the taped statement. The defendant argued that the statement's admission would violate his right to confrontation. On the basis of Ohio v. Roberts, 448 U.S. 56 (1980), the trial court found that the statement bore "particularized guarantees of trustworthiness." The defendant was convicted of assault. The United States Supreme Court reversed, announcing that the test in Ohio v.

Roberts permitting the introduction of hearsay evidence that falls under a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness" "departs from the historical principles" underlying the Confrontation Clause. Crawford at 1369. The Supreme Court explained:

> Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law–as does [Ohio v.] Roberts[, 448 U.S. 56 (1980)], and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. **Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination**. We leave for another day any effort to spell out a comprehensive definition of "testimonial." Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with the closest kinship to the abuses at which the Confrontation Clause was directed.

Crawford v. Washington, 124 S. Ct. 1354 at 1374 (emphasis added). The Supreme Court reached this conclusion after exploring at length "the original meaning of the Confrontation Clause." Id. at 1359. The Court examined the history of the Confrontation Clause and concluded, "Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless." Id. at 1364. Thus, the Confrontation Clause "applies to 'witnesses' against the

accused--in other words, those who 'bear testimony.'" Id. This definition of "*ex parte* testimony" encompasses "[s]tatements taken by police officers." Id.

Reviewing the history of the Confrontation Clause also led the Supreme Court to a second conclusion: "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." Crawford, 124 S. Ct. 1354 at 1365. This is the only exception to the Confrontation Clause, and there are no "open-ended exceptions from the confrontation requirement to be developed by the courts." Id.

The Supreme Court concluded that the hearsay exceptions and the trustworthiness test described in Ohio v. Roberts, 448 U.S. 56 (1980), "depart[] from the historical principles identified above" because Roberts was both "too broad" and "too narrow." Crawford at 1369. In its "too narrow" application the Roberts test "admits statements that *do* consist of *ex parte* testimony upon a mere finding of reliability. This malleable standard often fails to protect against paradigmatic confrontation violations." Id. (emphasis in original). Thus, the Court held that when a State admits an out-of-court testimonial statement

against a criminal defendant and the defendant has no opportunity to cross-examine the witness who made the statement in front of the trier of fact, "[t]hat alone is sufficient to make out a violation of the Sixth Amendment" because "[w]here testimonial statements are at issue, the only indicum of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." Id. at 1374.

Crawford makes clear several errors in this Court's analysis of Mr. Peede's direct appeal Confrontation Clause claim.

--First, this Court's analysis of Mr. Peede's claim that he was deprived of his right to confrontation engaged in precisely the analysis that the Supreme Court said in Crawford is contrary to the intent of the Framers of the Constitution. This Court's analysis was nothing short of a search for particularized guarantees of trustworthiness:

> Insofar as the other statements are concerned, the state contends, there is no basis for reversal. Peede's own statement presented to the jury established that he arranged for the victim to pick him up at the airport.

Peede v. State, 474 So.2d at 816. This analysis is precisely the kind of analysis condemned in Crawford:

> Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.' Certainly none of the authorities discussed above acknowledges any general reliability exception to the common-law rule. Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. **It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.** The Clause thus reflects a judgment, not only about the desirability of reliable evidence ... , but about how reliability can best be determined.

Crawford, 124 S. Ct. at 1370 (emphasis added).

The Supreme Court clearly concluded that the admission of testimonial hearsay statements "alone is sufficient to make out a violation of the Sixth Amendment." Id. at 1374. The Court explained, "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." Id. at 1371.

Yet, this is what happened here. Mr. PEEDE was denied the right to confront the actual witnesses against him, Darla Peede's statements that were provided to the jury through her daughters. This Court on appeal dispensed with the confrontation right as the Framers defined it.

Second, the Court's reliance on the daughter's testimony establishing Darla Peede's state of mind and is therefore admissible under the 'state of mind' hearsay exception likewise engaged in the analysis that the Supreme Court said in Crawford is contrary to the intent of the Framer's of the Constitution.

> *Roberts* conditions the admissibility of all hearsay evidence on whether it falls under a '**firmly rooted hearsay exception' or bears 'particularized guarantees of trustworthiness.'** [Citation omitted]. This test departs from the historical principles identified above ... . This malleable standard often fails to protect against paradigmatic confrontation violations.

Crawford, 124 S. Ct. 1354 at 1369 (emphasis added).

This Court in Mr. Peede's case simply failed to understand the intent of the Framers of the Constitution and correctly apply the Confrontation Clause in Mr. Peede's case. The Court's denial of Mr. Peede's direct appeal Confrontation Clause claim was incorrect under Crawford. Appellate counsel's failure to raise the issue of Rebecca Ann Keniston's hearsay testimony constituted ineffective assistance of counsel. This Court must revisit that decision in light of Crawford and order a new trial.

In the unanimous opinion of the Supreme Court in Sullivan v. Louisiana, 508 US. 275 (1993), the Court said, "the jury

verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt." Sullivan, 508 U.S. at 278. The Court explained that there must be a verdict that decides the factual issues in order to comply with the Sixth Amendment. In doing so, the Court explained:

> It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty, and then leave it up to the judge to determine (as [In re] Winship[, 397 U.S. 358 (1970)] requires) whether he is guilty beyond a reasonable doubt. In other words the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.

508 U.S. at 278. Given the analogy to the right to trial by jury provided by the United States Supreme Court in Crawford,[2] the principle of Sullivan should apply here.

C. Crawford Applies Retroactively Under Witt v. State.

Crawford meets the criteria for retroactive application set forth in Witt v. State, 387 So. 2d 922 (Fla. 1980). Crawford issued from the United States Supreme Court. Witt, 387 So. 2d at

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[2]The Court explained, "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." Crawford, 124 S. Ct. 1354 at 1371.

930. Crawford's Sixth Amendment rule unquestionably "is constitutional in nature." Witt, 387 So. 2d at 931. Crawford "constitutes a development of fundamental significance." Witt, 387 So. 2d at 931.

As to what "constitutes a development of fundamental significance," Witt explains that this category includes "changes of law which are of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of Stovall [v. Denno, 388 U.S. 293 (1967),] and Linkletter [v. Walker, 381 U.S. 618 (1965)]," adding that "Gideon v. Wainwright . . . is the prime example of a law change included within this category." 387 So. 2d at 929.

The rule of Crawford is the kind of "sweeping change of law" described in Witt. In Witt, this Court explained that the doctrine of finality must give way when fairness requires retroactive application:

> The doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications. Thus, society recognizes that a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief is necessary to avoid individual instances of obvious injustice. Considerations of fairness and uniformity make it very "difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no

longer applied to indistinguishable cases."

Witt, 387 So. 2d at 925 (footnote omitted).

Crawford meets the Witt test. First, the purpose of the rule is to return to the intent of the Framers and restore to the law the core values of the Confrontation Clause. When a capital defendant has been subjected to a sentencing proceeding in which he has been denied the right to confront the witnesses against him, the Confrontation clause is robbed of its purpose. "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." Crawford, 124 S. Ct. 1354 at 1371. A radical defect in the process intended by the Framers has been permitted which necessarily "cast[s] serious doubt on the veracity or integrity of the . . . trial proceeding." Witt, 387 So. 2d at 929.

Second, "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." Crawford, 124 S. Ct. 1354 at 1365. Inadvertently but nonetheless harmfully, the United States Supreme Court lapsed for a time and enfeebled the

right of confrontation through its rulings in Ohio v. Roberts. The Court's retrenchment restored the right to jury trial as a "fundamental" guarantee of the United States Constitution. Therefore, Crawford should be applied retroactively.

D. Conclusion

By virtue of Crawford and its application to Florida law, the constitutional error that occurred in the proceedings against Mr. PEEDE is now revealed. Mr. Peede's conviction and sentence of death must be vacated, and a new trial ordered at which Mr. Peede's right of confrontation shall be honored.

CLAIM III

APPELLATE COUNSEL FAILED TO RAISE THE ISSUE OF PREJUDICIAL ERROR CAUSED BY THE ADMISSION OF EMOTIONALLY DISTURBING TESTIMONY FROM THE VICTIM'S DAUGHTER CONCERNING HER IDENTIFYING HER MOTHER'S DEAD BODY AND THE ADMISSION OF VARIOUS NUDE PHOTOGRAPHS THAT VIOLATED MR. PEEDE'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

A. The Prosecutor's Improper Strategy

Throughout Mr. Peede’s capital trial, the State utilized a strategy of evoking an emotional response to emotionally disturbing testimony and nude photographs.

1. The State’s Use of the Victim’s Daughter to Prove the Victim’s Identity.

a. Rebecca Ann Keniston’s Testimony

Over defense counsel’s objection, the State elicited testimony from the victim’s daughter, Rebecca Ann Keniston, about identifying her mother’s body at the funeral home (R. 617).

Mr. Peede's counsel objected to the testimony and argued that the State had not demonstrated its attempt to find other ways of proving the victim’s identity that would be less emotional for the jury and that the daughter’s testimony was prejudicial (R. 585-86).

The State argued Ms. Keniston’s testimony was necessary to establish the identity of the victim (R. 586-87). The court denied defense counsel's motion (R. 588-89).

Appellate counsel was ineffective for failing to raise the claim that Ms. Keniston’s testimony regarding her identifying her mother’s body at the funeral home was highly emotional for the jury, was unnecessary and therefore was overly prejudicial towards Mr. Peede.

b. Impropriety Of Using Victim's Family Members To Identify The Deceased.

It is well-settled law that a member of the murder victim's may not testify for the purpose or identification of the deceased where a non-related witness is available to provide such information. Lewis v. State, 377 So. 2d 640 (1979). The State failed to demonstrate that it made reasonable attempts to identify the victim before resorting to using a family member (R. 586-87). Further, there existed other means by which the State could have proven Darla Peede's identity. Trowell v. State informs that the State may prove a victim's identity using "[c]ircumstantial evidence, such as the contents of the body's billfold, rings and other personal effects, garments, etc." or through "[s]cientific evidence, such as fingerprints, identification of teeth, hair, etc." 288 So. 2d 506, 508 (Fla. 1st DCA 1973). The State did not demonstrate that it was unable to identify the victim through these alternative means. Further, Ms. Keniston's identification of the victim should have been limited to the fact that jewelry belonging to her mother was found on the victim and the court should have prohibited testimony regarding Ms. Keniston's going to the funeral home to identify the body.

2. The State's Use Of Nude Photographs

a. The Photographs

Likewise, prejudicial error occurred, again, when the trial court, over defense counsel's objection, permitted the introduction of nude photographs into evidence. These included nude photos cut out of magazines and other nude photographs. In some instances with the letter's "C", "D" and "P" handwritten next to some of the magazine photos (R. 628, 800-803).

b. Impropriety Of The Introduction of the Photographs

The prejudice of the nude photographs to Mr. Peede greatly outweighed their probative value. Photographs should be excluded when the risk of prejudice outweighs relevancy. Alford v. State, 307 So. 2d 433, 441-42 (Fla. 1975), cert. denied, 428 U.S. 912 (1976). Although relevancy is a key to admissibility of such photographs under Adams v. State, 412 So. 2d 850 (Fla. 1982), limits must be placed on "admission of photographs which prove, or show, nothing more, than a gory scene." Thomas v. State, 59 So. 2d 517 (1952).

Furthermore, a photograph's admissibility is based on

relevancy, not necessity. Pope v. State, 679 So. 2d 710, 713 (Fla. 1996). And, while relevancy is the key to admissibility of photographs, this Court has indicated that courts must also consider the shocking nature of the photos and whether jurors are thereby distracted from fair factfinding. Czubak v. State 570 So. 2d 925, 928 (1990).

The nude photographs were not relevant to the State's case against Mr. Peede and their use were no more than part of the State's strategy of evoking disgust towards Mr. Peede. The prejudice substantially outweighed any probative value. Mr. PEEDE was denied a fair trial in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Duest v. State, 462 So. 2d 446 (Fla. 1985).

The State's use of the photographs distorted the actual evidence against Mr. Peede at the guilt phase and unfairly skewed the weight of aggravating circumstances at the penalty phase. Appellate counsel failed to raise this issue despite objections by trial counsel. Habeas relief is proper.

CLAIM IV

THE SENTENCING PROCEDURES EMPLOYED AGAINST MR. PEEDE VIOLATED MR. PEEDE'S EIGHTH AMENDMENT RIGHTS.

A. Throughout The Course Of The Proceedings Resulting In Mr. Peede's Capital Conviction and Sentence of Death, The Jury

Was Provided With Misinformation Which Served To Diminish Their Sense Of Responsibility For The Awesome Capital Sentencing Task In Violation Of The Eighth And Fourteenth Amendments.

Throughout the course of proceedings resulting in Mr. Peede's capital conviction and sentence of death, prosecutorial comments and judicial statements and instructions diminished the jurors' sense of responsibility in violation of Caldwell v. Mississippi, 105 S.Ct. 2633 (1985), and the eighth and fourteenth amendments. Caldwell established that when a capital sentencing jury is incorrectly informed regarding its function, its awesome responsibility, and its critical role in capital sentencing, the resulting death sentence must be vacated.

1. The Proceedings Resulting In Mr. Peede's Sentence Of Death

At all trials there are few critical occasions when jurors learn of their role. At voir dire, the prospective jurors are informed by counsel and, on occasion, by the judge about what is expected of them. When lawyers address the jurors at the close of the trial or a segment of the trial, they are allowed to provide insight into the jurors' responsibility. Finally, the judge's instructions inform the jury of its duty. In Mr.

Peede's case, at each of those stages the jurors heard statements from the judge and prosecutor which diminished their sense of responsibility for the awesome capital sentencing task that the law would call on them to perform.

Throughout the trial, the prosecutor and the judge told the jury that the **judge**, not the jury, was the one who made the "ultimate decision" about punishment and that the jury's role was to give the judge **advice**, which the judge may accept or reject. These comments went far beyond those condemned in Caldwell and were as egregious as those in Adams and Mann, entitling Mr. Peede to relief.

a. Voir Dire

Here the prosecutor and the court explained repeatedly that the jury recommendation was merely that, a recommendation, and nothing more. The Court told them that "that verdict would be advisory to the Court. That is, I would not be bound to follow the recommendation of the jury" (R. 39).

> [THE COURT]: The jury would consider the evidence concerning the penalty, and then by majority of the vote, by a majority vote would make a recommendation to the Court on whether or not the aggravating factors outweigh the mitigating factors. And if that were the case, if seven or more of the jury reached that conclusion, they could make a recommendation to the Court -- **which is not binding** -- that the death sentence be imposed.

> The Court could, would consider that recommendation but **would not be bound by it.**

(R. 49)(emphasis added).

> [THE COURT]: The Court would then consider that recommendation either way, and would not be bound to follow the recommendation, but would give it serious consideration.

(R. 57).

References to the fact that the jury was only to render a **recommendation** resound in the record. "[T]he court would not be bound by that recommendation" (R. 62-3); BY PROSECUTOR: "the Judge may follow or not follow" (R. 63); THE COURT: "that recommendation is not binding, but I could consider it and give it a binding effect and impose the death penalty" (R. 67); THE COURT: Either way the recommendation is not binding upon the Court" (R. 84); THE COURT: "Do you understand the question of penalty isn't for you to decide anyway?" (R. 101); "THE COURT: You would have the further question of making a recommendation on the death penalty. I might not follow it" (R. 106).

Even the jurors recognized that they would be merely making a recommendation: "JUROR: If it's exclusively the Judge's job, I don't know why the jury would be expected to recommend, except that's part of the process" (R. l76).

The defense attorney reinforced that the judge "[has] got

to have the responsibility of sentencing," but suggested that the jury recommendation reflected the conscience of the community (R. l87).

The Court continued emphasizing throughout voir dire that he "would not be bound by their recommendation" (R. l95). "THE COURT: Do you understand if you were selected in this case your verdict on the second portion of the case, if it went that way, would be just that to the Judge, it would be a recommendation. And I could choose to follow it or I could, within reason, choose to make a different decision. If you recommend life, I could still impose the death penalty" (R. 201); "THE COURT: As the Judge, I could accept or refuse to follow..." (R. 209).

Another juror finally summed up what he had learned from voir dire: "JUROR: In fact, it all seems rather moot to me anyway when you think that you sit and on a jury and make a recommendation that totally is a recommendation, not the final outcome anyway" (R. 230).

b. Instructions in Guilt Phase

In instructing the jury at the close of the evidence in the guilt phase, the court told the jurors:

> I will now inform you of the maximum and minimum possible penalties in this case. <u>The penalty is for the Court to decide</u>. You are not responsible for the penalty in any way because of your verdict. The

> possible results of this case are to be disregarded as you discuss your verdict."

(R. 902)(emphasis added). Following the verdict, the Court informed the jurors that they must return later in order "to make a decision as to the penalty to be recommended to the Court in this case" (R. 915).

c. Closing Argument and Instructions at Penalty Phase

At the penalty phase, the refrain of jury non-responsibility was repeated by the prosecutor and the judge. In its preliminary instructions at sentencing, the court instructed the jurors:

> The final decision as to what punishment shall be imposed rests solely with the Judge of this Court. however, the law requires that you, the jury in this case, render to the Court an advisory sentence as to what punishment should be imposed upon the defendant.

(R. 926).

The prosecutor's closing argument made several references to the "recommendation" that the jury would be making (R. 960, 961, 963).

Finally the jury received its final, improper instructions:

> As you've been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge. However, it is your duty to follow the law that will now be given to you by the Court, and render to the Court an advisory sentence.... Your

> advisory sentence in this case should be based on the evidence that you have heard... (R. 968-9).
>
> * * *
>
> If a majority of you, after taking these matters into account, determine that the defendant should be sentenced to death -- your advisory sentence will be a majority of the jury by a vote, and there will be a blank space on this ballot, or this recommendation -- and advise and recommend to the Court that it should impose the death penalty upon Robert Ira Peede.

(R. 968-69, 972).

2. Mr. Peede's Entitlement To Relief

Jurors summoned and selected in capital cases will feel special pressure. They do not know what lies in the realm of the jury and what responsibility rests with the judge. Jurors are told that they are to receive instructions on the law from the judge. Under these circumstances, lay persons listen closely as the lawyers and the judge tell them about the jurors' job.

In a capital case, the jurors are placed "in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice . . . Given such a situation, the uncorrected suggestion that the responsibility for **any ultimate determination** of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role." Caldwell v. Mississippi, 105 S.Ct.

2633, 2641-42 (1985) (emphasis supplied). When we understand these factors, we can appreciate why comments and instructions such as those provided to Mr. Peede's jurors, and condemned in Mann v. Dugger, 844 F. 2d 1446 (1988), served to diminish their sense of responsibility, and why the State cannot show that the comments "at issue" had no effect on the deliberations. Caldwell, 1205 S.Ct. at 2645-46. The comments here at issue were not isolated, but were made by judge and prosecutor throughout the proceedings. They were heard throughout, and they formed a common theme: the judge had the final and sole responsibility for deciding whether Robert Ira Peede would live or die, while the critical role of the jury was substantially minimized.

The gravamen of Mr. Peede's claim is based on the fact that the prosecutor's and judge's comments allowed the jury to attach less significance to their sentencing verdict, and therefore enhanced the risk of an unreliable death sentence. Mann v. Dugger; Caldwell v. Mississippi.

The key to why Mr. Peede is entitled to relief is that the focus of a Caldwell inquiry should not be on how often the jury-minimizing comments were made, nor on the egregiousness of the jury-minimizing comment at issue -- Caldwell held that any comment which minimizes the jurors' sense of responsibility

violates the eighth amendment. As in Caldwell itself, the inquiry must focus on the question of whether the comments at issue could be reasonably said to have had "no effect" on the jury's verdict. In Mr. Peede's case, as discussed below, the jury-minimizing comments cannot be said to have had "no effect": mitigating evidence was elicited throughout the proceedings. Under such circumstances, no jury-minimizing comment can reasonably be said to have had "no effect" on their verdict.

Under Florida's capital statute, the **jury** has the **primary** responsibility for sentencing. At the sentencing phase of a Florida capital trial, the jury plays a critical role. See Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975); Brookings v. State, 495 So. 2d 136 (Fla. 1986); Garcia v. State, 492 So. 2d 360 (Fla. 1986); Wasko v. State, 505 So. 2d 1314 (Fla. 1987); Ferry v. State, 507 So. 2d 1373 (Fla. 1987); Fead v. State, 512 So. 2d 176 (Fla. 1987). Thus, any intimation that a capital sentencing judge has the sole responsibility for the imposition of sentence, or is in any way free to impose whatever sentence he or she sees fit, irrespective of the sentencing jury's own decision, is inaccurate, and is a misstatement of the law. The judge's role, after all, is not that of the "sole" or "ultimate" sentencer. Rather, it is to serve as "buffer where the jury

allows emotion to override the duty of a deliberate determination" of the appropriate sentence. Cooper v. State, 336 So. 2d 1133, 1140 (Fla. 1976).

In Mr. Peede's case, the judge failed to point out that the jury's decision would be reviewed with a presumption of correctness. Thus, the jury was left unaware of the extreme deference and great weight their decision carried in the determination as to whether death would be the proper punishment. See McCampbell v. State, 421 So. 2d 1072, 1075 (Fla. 1982); Ross v. State, 386 So. 2d 1191, 1197 (Fla. 1980); Stone v. State, 378 So. 2d 765, 773 (Fla. 1980); Le Duc v. State, 365 So. 2d 149, 151 (Fla. 1978), cert. denied, 444 U.S. 885 (1979). In explaining the sentencing process to the jury, the judge failed to inform them that a court may override a jury's recommendation only when the facts suggesting a sentence of death are "so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 323 So. 2d 908, 910 (Fla. 1975).

Mr. Peede has been denied his eighth amendment rights. His sentence of death is therefore neither "reliable" nor "individualized." Habeas relief is proper.

B. Cold, Calculated And Premeditated Aggravator

Mr. Peede's sentencing jury was also instructed that they could consider the aggravating circumstance that "the crime for which the defendant is, is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification" (R. 970). This jury instruction was unconstitutionally vague.

The court did not instruct Mr. Peede's jury regarding the cold, calculated, and premeditated aggravating factor in accordance with this Court's limiting construction. Jackson v. State, 648 So. 2d 85 (Fla. 1994). This Court has held that the jury should be instructed on the limiting construction of this aggravating circumstance, whenever they are allowed to consider it. Mr. Peede's jury was given an invalid instruction on the cold, calculated and premeditated aggravating circumstance ®. 1919).

In Jackson, this Court invalidated as unconstitutionally vague a jury instruction on the cold, calculating, and premeditated aggravating circumstance that mirrored the statute. The instruction in Mr. Peede's case is similarly vague and unconstitutional.

The only instruction the jury ever received regarding the definition of "premeditated" was the instruction given at the

guilt phase regarding the premeditation necessary to establish guilt of first degree murder. As this Court has held, this definition does not define the "cold, calculated and premeditated" aggravating factor. See Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987); Gorham v. State, 454 So. 2d 556 (Fla. 1984). It must be presumed that the erroneous instruction tainted the jury's recommendation, and in turn the judge's death sentence, with Eighth Amendment error. Espinosa.

Richmond v. Lewis, 113 S. Ct. 528 (1992), requires not only that states adopt a narrowing construction of an otherwise vague aggravating factor, but also that the narrowing construction actually be applied during a "sentencing calculus."

Defense counsel objected to the instruction (R. 1120). The trial court overruled defense objection (R. 1194). Appellate counsel was ineffective for failing to raise this issue. Habeas relief is proper.

CONCLUSION AND RELIEF SOUGHT

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS has been furnished by United States Mail, first-class postage prepaid to Scott Browne, Office of the Attorney General, 3507 East Frontage Road, Suite 200, Tampa, 33607, this___ day of October, 2005.

CERTIFICATE OF FONT

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

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