IN THE SUPREME COURT OF FLORIDA

NO.

DARRYL BRIAN BARWICK,

Petitioner,

v.

WALTER A. McNEIL,
Secretary, Florida Department of Corrections,

Respondent.

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. Barwick 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. Barwick' trial is referred to as "Vol. R.", followed by the appropriate page number.

The transcript of the postconviction evidentiary hearing is referred to as "T.", followed by the appropriate page number.

Defense exhibits introduced at the evidentiary hearing

are referred to as "D-Ex."

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

INTRODUCTION

Significant errors which occurred at Mr. Barwick' 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. Barwick' right to a fair and individualized sentencing, as well as other Eighth Amendment errors, are presented in this petition for writ of habeas corpus. Furthermore, Mr. Barwick' fundamental rights to a fair trial were violated.

Appellate counsel's failure to present the meritorious issues discussed in this petition demonstrates that his representation of Mr. Barwick 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. Barwick. "[E]xtant legal principle[s] . . . provided a clear basis for . . . compelling appellate argument[s]," which should have been raised in Mr.

Barwick' 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. Barwick 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. Barwick is entitled to habeas relief.

REQUEST FOR ORAL ARGUMENT

Due to the seriousness of the issues involved, Mr. Barwick 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. Barwick 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. Barwick 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. Barwick 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.

ARGUMENT I

THE EXECUTION OF DARRYL BARWICK, A BRAIN DAMAGED, MENTALLY IMPAIRED INDIVIDUAL, WOULD CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT UNDER THE CONSTITUTIONS OF THE STATE OF FLORIDA AND THE UNITED STATES.

Mr. Barwick suffers from brain damage, mental impairment, and a mental and emotional age of less than eighteen years, which renders the application of the death penalty in his case cruel and unusual. His execution would therefore offend the evolving standards of decency of a civilized society, See Trop v. Dulles, 356 U.S. 86 (1958), would serve no legitimate penological goal, See Gregg v. Georgia, 428 U.S. 153, 183 (1976), and would violate the Eighth and Fourteenth Amendments to the United States Constitution. See Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). As the Supreme Court held in Simmons,

> Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, . . . "[a] lack of maturity and an underdeveloped sense of responsibility are found in

> youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." * * * The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment. * * * The third broad difference is that the character of a juvenile is not as well formed as that of an adult. * * * These differences render suspect any conclusion that a juvenile falls among the worst offenders. * * * **From a moral standpoint i**t **would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.**

Simmons at 569.(Emphasis added).

During the postconviction proceedings, expert psychological testimony was presented which would establish that Mr. Barwick falls within the differences the Supreme Court outlined between juveniles and adults. As Dr. Eisenstein stated:

> Well he's functioning at the, the 12 to 14 year

> range linquistically, emotionally. Clearly, he does not have the, he does not have the maturity level that's required to, to be able to make decisions and to be able to make mature decisions and control impulses, um, in a, in a healthy and law-abiding manner. EH 98.[1]

In Mr. Barwick's case, the abuse suffered, coupled with Mr. Barwick's brain damage, resulted in him operating at a mental and emotional age significantly below his chronological age at the

[1] Additionally, Mr. Barwick is affected by underlying neurological involvement (EH 40-41, 73-74).

time of the homicide.

In this case, it is mental and emotional age that warrants Eighth Amendment relief. "There is no dispute that a defendant's youth is a relevant mitigating circumstance that must be within the effective reach of a capital sentencing jury if a death sentence is to meet the requirements of Lockett and Eddings." Johnson v. Texas, 113 S. Ct. 2658, 2668 (1993) (citations omitted). The kind of characteristics attributed to youthful offenders, "a lack of maturity and an underdeveloped sense of

responsibility" Id. at 2668-2669, are precisely those characteristics attributable to Mr. Barwick. And it is these very same traits that "often result in impetuous and ill-considered actions and decisions." Id. at 2669. Dr. Eisenstein observed the following as to Mr. Barwick's impulsivity and lack of volition when discussing his suffering from Intermittent Explosive Disorder:

> Okay. Well the first criteria is that his failure to resist aggressive impulses that result in the serious assault of acts. It is my clinical opinion that because of the trauma, the sexual, physical, emotional trauma, the way he dealt with it and the father's response, the father also had this explosive tendencies (sic). The learned behavior of the blocking of the sexual, highly sexual nature behavior, and holding in the humiliation, the insults, which led to a tremendous amount of rage and anger, uncontrolled rage and anger, and therefore the impulses were basically there. There was an inability to control that. It was disproportionate to, obviously to any situation. And, um, it took on a form that he was unable to control.
>
> (EH 84).

Capital punishment should not be imposed where a defendant lacks the requisite "highly culpable mental state." Tison, 107 S. Ct. at 1684. Mr. Barwick lacked such a mental state. The background of the defendant reflects "factors which may call for a less severe penalty," Lockett v. Ohio, 438 U.S. 586, 605 (1978). An individual with neurological handicaps, such as Mr.

Barwick, is the very opposite of the kind of offender whose "highly culpable mental state" has been held to warrant imposition of the death penalty. Simmons; Tison. During his testimony regarding Mr. Barwick's inability to conform his conduct to the law, Dr. Eisenstein observed the following:

> Yes. He also meets that criteria because he was unable to conform his behavior, that's clear, due to the Intermittent Explosive Disorder, the brain impairment. Again, what appears to have been volitional and premeditated was really not.
>
> Now one can go through the acts and one can look like it's planned, but it's not planned. It's so, the behavior and the outcome is so inconsistent with the overall pattern of thinking, um, that it's not something that, it's volitional in nature but it's, again it's robatic (sic) in nature, it's like an automaton, not someone that is consciously deliberately planning and thinking and wanting and knowingly committing this act.
>
> (EH 99-100).

The Eighth Amendment prohibits "all punishments which by their excessive length or severity are greatly disproportionate to the offenses charged." Weems v. United States, 217 U.S. 349, 371 (1910) (citation omitted). In furtherance of this principle, the Supreme Court's Eighth Amendment decisions have

made clear that "a criminal sentence must relate directly to the personal culpability of the criminal offender." Tison v. Arizona, 107 U.S. 1676, 1685 (1987). These decisions have also considered "a defendant's intention -- and therefore his moral guilt -- to be critical to the degree of criminal culpability." Enmund v. Florida, 458 U.S. 782, 800 (1982); accord Tison, 107 S. Ct. at 1687("Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and therefore, the more severely it ought to be punished").

Because capital punishment is our society's ultimate sanction, "unique in its severity and irrevocability," Gregg, 428 U.S. at 187, it may be imposed only when a defendant is found to have "a highly culpable mental state." Tison, 107 S. Ct. at 1684; see also id. at 1687 ("A critical facet of the individualized determination of culpability required in a capital case is the mental state with which the defendant commits the crime"); Godfrey v. Georgia, 446 U.S. 420, 443 (holding capital punishment is inappropriate unless the crime "reflected a consciousness materially more depraved than that of any person guilty of murder").

Because Eighth Amendment proportionality principles forbid the imposition of capital punishment where a defendant lacks the requisite "highly culpable mental state," the Constitution requires an individualized inquiry into the defendant's background and character combined with the circumstances of the offense to determine whether there exist "factors which may call for a less severe penalty." Lockett v. Ohio, 438 U.S. 586, 605 (1978). As Justice O'Connor explained:

> [E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, **or to emotional and mental problems**, may be less culpable than defendants who have no such excuse.

California v. Brown, 107 S. Ct. 837, 841 (1987)(O'Connor, J., concurring)(emphasis added).

Generally, the proportionality required by the Eighth Amendment has been understood to require individualized, case-by-case assessment of the factors that may diminish culpability. See Eddings; Lockett. The Supreme Court has, however, made several categorical Eighth Amendment judgments about situations

in which culpability is automatically insufficient to justify imposition of the death penalty. Some of these judgments have turned on finding categories of criminal acts insufficiently blameworthy to justify a death sentence. See, e.g., Kennedy v. Louisiana, 124 S.Ct. 2641 (June 25, 2008) (rape of a child); Coker v. Georgia, 433 U.S. 584 (1977)(rape); Eberheart v. Georgia, 433 U.S. 917 (1977)(armed robbery). In other instances the judgment has turned on the level of the defendant's mental state as it relates to the crime: Tison and Enmund, for example,

make clear that a defendant may not be sentenced to death unless he has at least been shown to have "a reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death." Tison, 107 S. Ct. at 1688. Further, judgments have turned on the defendant's mental capacity. See Ford v. Wainwright, 106 S. Ct. 2595 (1987)(execution of the insane violates the Eighth Amendment).

When one considers Mr. Barwick' mental capacity and level of functioning, there is no sustainable rationale for imposing the death penalty upon him and not upon the class of individuals outlined in Simmons.

ARGUMENT II

THE STATE VIOLATED THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION WHEN IT USED A PRIOR CONVICTION BASED ON ACTS COMMITTED BY MR. BARWICK WHEN HE WAS A JUVENILE TO ESTABLISH THE AGGRAVATING CIRCUMSTANCE PREVIOUSLY CONVICTED OF A CRIME OF VIOLENCE.

At the penalty phase proceeding In Mr. Barwick's case, the State introduced a prior conviction of sexual battery arising from acts committed by Mr. Barwick when he was a juvenile. The State placed emphasis upon the prior convictions as aggravating circumstances by arguing the prior established 1)he was a sexual deviant; and 2) that he killed the victim because he previously made the mistake of allowing a victim to see him and live. R. 49-54 and 58.

In *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), the United States Supreme Court declared:

> The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability. An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death. **In some cases a defendant's youth may even be counted against him.** In this very case, as we noted above, the prosecutor argued Simmons' youth was aggravating rather than mitigating.

Simmons at 572-573(emphasis added).

Accordingly, the Supreme Court concluded that the Eighth Amendment precluded reliance upon criminal acts committed before the age eighteen from serving as a basis for the imposition of a sentence of death.

> Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, as any parent knows and as the scientific and sociological studies respondent and his *amici* cite tend to confirm, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." [Citation] * * * In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent.
>
> The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer

pressure. [Citation] This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment. * * *

The third broad difference is that the character of a juvenile is not as well formed as that of an adult. * * *

These differences render suspect any conclusion that a juvenile falls among the worst offenders. * * * From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.

Simmons at 569-570.

As the Supreme Court in *Roper v. Simmons* also explained:

> Capital punishment must be limited to those offenders who commit "a narrow category of most serious crime" and whose culpability makes them "the most deserving of execution." [Citation} This principle is implemented throughout the capital sentencing process. States must give narrow and precise definition to the aggravating factors that can result in a capital sentence.

Id. at 568.

Using criminal acts committed by a juvenile render a defendant death eligible and to urge constitutes an aggravating

circumstances that warrants a sentence of death must violate the Eighth Amendment principle announced in *Roper v. Simmons*.

ARGUMENT III

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE AGAINST THE AVOID ARREST AGGRAVATING FACTOR AND FAILING TO APPEAL THE JURY RECEIVING INSTRUCTIONS ON THIS INAPPLICABLE AGGRAVATOR.

Appellate counsel failed to raise any arguments regarding the avoid arrest aggravator, which could not have properly been found in this case.

During the charge conference, trial counsel objected to the court instructing the jury on the aggravating circumstance of avoiding the arrest. (R. 904-05) Had counsel been prepared to argue against the aggravator, he would have asserted that the facts of this case nor the caselaw suggested that the avoid arrest aggravator could be properly found. Moreover, he could have informed the court that the case cited by the prosecution, McKinnon v. State, 547 So. 2d 1254 (Fla. 4th DCA 1989) is not even a death case and thus has absolutely nothing to do with

aggravating circumstances.

> However, counsel's objection was overruled and the jury was instructed to consider that [t]he crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or affecting an escape from custody.
>
> R. 956)

Appellate counsel could have argued that the State had not presented evidence sufficient to find this aggravator. "[T]he proof must demonstrate beyond a reasonable doubt that the victim was murdered solely or predominately for the purpose of witness elimination." Urbin v. State, 714 So. 2d 411, 416 (Fla. 1998). In instances where the Court upheld a finding of the avoid arrest aggravator, the Court found something more than just that the defendant and the victim knew one another. See Jennings v. State, 718 So. 2d 144, 151 (Fla. 1998) (upholding the avoid arrest aggravator on the grounds that the victims knew the defendant and the defendant "used gloves, did not use a mask, and [had previously] stated that if he ever committed a robbery, he would not leave any witnesses); see also Riley v. State, 366 So. 2d 19, 22 (Fla. 1978) (holding that the aggravator existed, because the

victim was "executed after one of the perpetrators expressed a concern for subsequent identification"); Hertz v. State, 803 So. 2d 629, 648 (Fla. 2001) (upholding the avoid arrest aggravator, as the defendants discussed the need to eliminate all witnesses and subsequently set a fire to destroy evidence).

This Court "cannot assume [Mr. Barwick's]'s motive; the burden was on the state to prove it." Menendez v. State, 386 So. 2d 1278, 1282 (Fla. 1979). On numerous occasions, the Court has struck the avoid arrest aggravator when the State failed to prove the motive. See Robertson v. State, 611 So. 2d 1228, 1232 (Fla. 1993) (concluding that the court erred in finding the aggravator when the defendant shot the victim "instinctively and without a plan to eliminate her as a witness"); Hansbrough v. State, 509 So. 2d 1081, 1086 (Fla. 1987) ("Instead of an intended witness elimination murder, it is more likely that this robbery simply got out of hand.").

An invalid aggravating factor was erroneously entered into Mr. Barwick's sentencing calculus. See Archer v. State, 613 So. 2d 446 (Fla. 1993); Kearse v. State, 662 So.2d 677 (Fla. 1995). In Florida, neither the judge or the jury is permitted to weigh invalid aggravating factors. See Espinosa v. Florida, 112 S. Ct. 2926, 2929 (1992). As the Supreme Court has explained, the jury

is unlikely to disregard a flawed legal theory and therefore instructing the jury to consider an invalid aggravating circumstance is not harmless error. See Sochor, 112 S. Ct. at 2122.

The jury, a co-sentencer, is presumed to have considered an aggravating circumstance that, as a matter of law, did not apply here. See Espinosa, 112 S. Ct. at 2928. The sentencing court was in turn required to give weight to the jury's recommendation. See Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975); Walton v. Arizona, 497 U.S. 639, 653 (1990). Thus, an extra thumb was placed on the death side of the scale. See Stringer v. Black, 112 S. Ct. 1130 (1992). As a result, Mr. Barwick's sentence of death must be vacated. See Espinosa v. Florida; Sochor v. Florida, 112 S. Ct 2114 (1992).

ARGUMENT IV

MR. BARWICK WAS DENIED A PROPER DIRECT APPEAL FROM HIS JUDGMENTS OF CONVICTION AND SENTENCES OF DEATH IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ART. 5, SEC. 3(b)(1) OF THE FLORIDA CONSTITUTION, AND SECTION 921.141(4) OF FLORIDA STATUTES, DUE TO OMISSIONS IN THE RECORD. MR. BARWICK IS BEING DENIED EFFECTIVE ASSISTANCE OF POSTCONVICTION COUNSEL BECAUSE THE RECORD

IS INCOMPLETE.

The due process constitutional right to receive trial transcripts for use at the appellate level was acknowledged by the Supreme Court in Griffin v. Illinois, 351 U.S. 212 (1956). A death sentence cannot stand unless there has been complete, meaningful appellate review. See Parker v. Dugger, 498 U.S. 398 (1991). An accurate trial transcript is crucial for adequate appellate review. The Sixth Amendment also mandates a complete transcript.

Complete and effective appellate advocacy requires a complete trial record. A trial record should not have missing portions. Portions of the record were missing from Mr. Barwick's record on appeal, including a large portion of the charge conference[2] (R. 903) and several bench conferences. (R. 17 (occurring during jury selection), 56 (occurring during jury selection), 299 (occurring during the testimony of the lead detective on this case), 598 (occurring during the instructions to the jury in the guilt phase), 937 (occurring during the defense's penalty phase closing argument)). The transcript also omits the general jury qualification.

In Entsminger v. Iowa, 386 U.S. 748 (1967), the Court held that appellants are entitled to a complete and accurate record.

Lower courts rely upon Entsminger. See, e.g., Mylar v. Alabama,

> **Mr. Adams:** . . . The court will note that we have had a preliminary discussion and I do object to the deletion of those mitigating instructions.

(R. 903) The record does not include any discussion on instructions prior to the discussion that begins on page 902 of the record.

671 F.2d 1299, 1301 (11th Cir. 1982). For example, the concurrence in Commonwealth v. Bricker, 487 A.2d 346, 356 (Pa. 1985) cites Entsminger as support for its condemnation of the trial court's failure to record and transcribe the sidebar conferences so that appellate review could obtain an accurate picture of the trial proceedings. In Commonwealth v. Shields, 383 A.2d 844 (Pa. 1978), the Supreme Court of Pennsylvania reversed a second-degree murder and statutory rape conviction solely because

a tape of the prosecutor's closing argument became lost in the mail. "[I]n order to assure that a defendant's right to appeal will not be an empty, illusory right we require that he or she be furnished a full transcript." Id. at 846. The court went on to say that meaningful appellate review is otherwise impossible.

The Supreme Court in Evitts v. Lucey, 105 S. Ct. 830 (1985), also cited in Entsminger and reiterated that effective appellate review begins with giving an appellant an advocate, and the tools necessary to do an effective job. See id. at 834. Finally, in Gardner v. Florida, 430 U.S. 349 (1977), where the defendant was not allowed to view a confidential presentence report, the Supreme Court held that even if it was proper to withhold the report at trial, it had to be part of the record for appeal. The record must disclose considerations which motivated the imposition of the death sentence. "Without full disclosure of the basis for the death sentence, the Florida capital sentencing

procedure would be subject to defects under Furman v. Georgia [408 U.S. at 361]." Id. at 361.

The circuit court is required to certify the record on appeal in capital cases, Fla. Stat. § 921.141(4), Fla. Const. art. 5, sec. 3(b)(1). When errors or omissions appear, re-examination of the complete record in the lower tribunal is

required. See Delap, 350 So. 2d at 463. The record in this case is incomplete, inaccurate, and unreliable. Confidence in the record is undermined. Mr. Barwick was denied due process, a reliable appellate process, effective assistance of counsel on appeal, and a meaningful and trustworthy review of his conviction and sentence of death. Mr. Barwick's statutory and constitutional rights to review his sentence by the highest court in the State upon a complete and accurate record, under the Sixth, Eighth and Fourteenth Amendments have been violated.

ARGUMENT V

MR. BARWICK'S SENTENCING JURY WAS MISLED BY COMMENTS AND INSTRUCTIONS WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED ITS SENSE OF RESPONSIBILITY FOR SENTENCING IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE ISSUE.

A capital sentencing jury must be properly instructed as to their role in the sentencing process. See Hitchcock v. Dugger, 481 U.S. 393 (1987); Caldwell v. Mississippi, 472 U.S. 320 (1985); Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988) (en banc), cert denied, 109 S.Ct. 1353 (1989). The Florida Supreme Court has reversed instructional error under Hitchcock even where no objection to the inadequate instructions was asserted at trial,

because at the time Hitchcock was decided, the importance of penalty phase jury instructions had not been recognized. See Meeks v. Dugger, 576 So. 2d 713 (Fla. 1991); Hall v. State, 541 So.2d 1125 (Fla. 1989).

In Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988) (en banc), relief was granted to a capital habeas corpus petitioner presenting a claim involving prosecutorial and judicial comments and instructions which diminished the jury's sense of responsibility and which violated the Eighth Amendment in the same way in which the comments and instructions discussed below violated Mr. Barwick's Eighth Amendment rights. Mr. Barwick is entitled to relief under Mann. A contrary result would result in the totally arbitrary and erratic imposition of the death penalty in violation of the Eighth Amendment. See Furman v. Georgia, 408 U.S. 238 (1972).

Caldwell involved prosecutorial/judicial diminution of a capital jury's sense of responsibility which was far surpassed by the jury-diminishing statements made during Mr. Barwick's trial. See Caldwell, 472 U.S. at 325. In Mann, and again in Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988), the Eleventh Circuit determined that Caldwell applies to Florida capital sentencing

proceedings, and that when either judicial instructions or prosecutorial comments minimize the jury's sentencing role, relief is warranted. See Mann, 844 F. 2d at 1454. Caldwell involves the most essential Eighth Amendment requirements of any death sentence, namely that such sentences be individualized and reliable. See Caldwell, 472 U.S. at 340-41.

At all trials, there are only a few occasions when jurors learn of their proper role. At voir dire the prospective jurors are informed by counsel and the judge what is expected of them. When counsel address the jurors at the close of the trial or a segment of the trial, they are allowed to give insights into the jurors' responsibility. Finally, the judge's instructions inform the jury of its duty. In Mr. Barwick's case, as in Mann, at each of those stages, the jurors heard statements from the judge which diminished their sense of responsibility for the awesome capital sentencing task that the law would call upon them to perform. See generally Mann, 844 F.2d at 1455-56. For instance, before deliberations on Mr. Barwick's sentence began, the Court told the jury that

> . . . it is no[w] your duty to advise the court as to what punishment should be imposed upon the defendant for his crime of murder in the first degree. As you have 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 you by the court and render

> to the court an advisory sentence based upon your determination . . ..

(R. 955) The court also repeatedly classifies the jury's sentence as a "recommendation" or as "advisory." (R. 4, 6, 7, 955, 958, 959, 960, 961) For instance, in the penalty phase instructions, the trial court explained the jury's role:

> [T]he sentence that you recommend to the court must be one based upon the facts as you find them from the evidence and the law. [¶] You should weigh the aggravating circumstances, the mitigating circumstances. Your advisory verdict must be based on these considerations.
>
> (R. 958-59)

In addition to the court's improper statements on the jury's responsibilities, throughout the proceedings, the prosecutor frequently made statements about what sentence the jury can recommend that the judge impose:

> Basically it boils down to that you have two options. You have an option to recommend that the judge impose the sentence of death or you have an option to recommend that the judge impose a life sentence without the possibility of parole for 25 years. Those are your two choices. [¶] Also, the jury instructions will tell you that only a majority of you need to vote to make the recommendation that the judge impose a sentence of death. That means seven or more of your number is required by law to make that recommendation. If there is another fifty-fifty vote, six to six, then the recommendation is automatically, to the judge, the imposition of a life sentence. [¶] So, it takes seven

or more of your number to make that recommendation.

(R. 906-07)

Moreover, throughout Mr. Barwick's trial, the State repeatedly refers to the jury's verdict as a "recommendation." (R. 76, 908, 909, 910, 911, 912, 922, 927, 934, 935)

In the two instances where the State beings to inform the jury of the true nature of their duty, the State only gives a confusing and contradictory description to the jury. For example, during the jury selection, the State explains that

> [t]he same jury that determines guilt and also makes a recommendation. Your recommendation is not binding on the judge, but the judge certainly gives it great, great weight. He is the one that actually imposes the sentence, whatever sentence it might be if the defendant's found guilty.
>
> (R. 76)

Remarks to the jury that their recommendation will be given great weight were automatically negated by the State also telling the jury that their recommendation is not binding and that the judge is the one who "actually" imposes the sentence. A similar, contradictory description was given during the State's penalty phase closing:

> Don't be lulled into the false belief that your recommendation doesn't mean anything to this judge. That jury verdict has a blank there and he wants to make sure that more than six of you recommend that he impose the death penalty. He will take your recommendation and give it great weight.
>
> (R. 910)

Although the State did tell the jury that their decision would be given "great weight," this message was diluted by the State's simultaneous remark that the judge wants the jury to recommend

death, implying that the judge wants to impose death and thus

desires that the jury recommend death.[3]

Mann makes clear that proceedings such as those resulting in Mr. Barwick's sentence of death violate Caldwell and the Eighth Amendment. See Mann, 844 F.2d at 1457 ("When a trial court does not correct misleading comments as the jury's sentencing role, the state has violated the defendant's eight amendment rights because the court has given the state's imprimatur to those comments; the effect is the same as if the trial court had actually instructed the jury that the prosecutor's comments represented a correct statement of the law."). As the above exchanges show, in Mr. Barwick's case, as in Mann, the prosecutor sought to lessen the jurors' sense of responsibility during voir dire. Since the prosecutor continually and throughout the trial referred to the jury's sentence as only "advisory" and as a mere "recommendation" the judge's instructions during the penalty phase closing arguments did not remove the error. The judge failed to tell the jury that their recommendation would carry such great weight that it would only be overridden in circumstances where no reasonable person could agree with it. See

[3]Mr. Barwick's trial attorney ALSO rendered deficient performance by failing to object to the State as well as the court's comments that diminished the jury's sense of responsibility. Even worse, trial counsel was ineffective by his own references to the jury's sentence

as a "recommendation." (R. 938, 941, 942, 944, 946, 953) Consequently, the jurors received inaccurate descriptions of their duty from all the key players at trial - the judge, the prosecutor, and the defense attorney.

Tedder v. State, 322 So.2d 908, 910 (Fla. 1975).

" [T]he Florida [sentencing] jury plays an important role in the Florida sentencing scheme." See Mann, 844 F.2d at 1454.

> Because the jury's recommendation is significant . . . the concerns voiced in Caldwell are triggered when a Florida sentencing jury is misled into believing that its role is unimportant. Under such circumstances, a real danger exists that a resulting death sentence will be based at least on part on the determination of a decision maker that has been misled as to the nature of its responsibility. Such a sentence, because it results from a formula involving a factor that is tainted by an impermissible bias in favor of death, necessarily violates the eighth amendment requirement of reliability in capital sentencing.

Id. at 1454-55. See also Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993) (explaining that a Florida penalty phase jury is a co-sentencer and must therefore be constitutionally instructed). The significant role of the jury in Florida's capital sentencing scheme was recently underscored by the United States Supreme Court in Espinosa v. Florida, 505 U.S. 1079 (1992). The improper comments and arguments provided to Mr. Barwick's jurors were at least as egregious as those in Mann and went far beyond those condemned in Caldwell and appellate counsel was ineffective for failing to raise the issue.

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, 472 U.S. at 332-33. Consequently, the comments and instructions provided to Mr. Barwick's jurors, and like those condemned in Mann, served to diminish the jurors' sense of responsibility; the State cannot show that the comments at issue had "no effect" on their deliberations. See Caldwell, 472 U.S. at 340-41.

The comments here were not isolated, but were made by prosecutor and judge at every stage of the proceedings. They were heard throughout, and they formed a common focused theme: the judge had the final and sole responsibility and the jury's sentence was only a recommendation. The prosecutor's and the judge's comments allowed the jury to attach less significance to its sentencing verdict, and therefore enhanced the unacceptable risk of the imposition of an unreliable death sentence. See generally Mann, 844 F. 2d at 1457; Caldwell, 472 U.S. at 332.

Under Caldwell, the central question is whether the prosecutor's comments minimized the juror's sense of responsibility. See Mann, 844 F.2d at 1456. If so, the reviewing court must determine whether the trial judge sufficiently corrected the prosecutor's misrepresentation. See id. Applying these questions to Mann, the Eleventh Circuit found that the prosecutor misled, or at least confused, the jury and that the

trial court did not correct the misapprehension. See Mann, 844 F.2d at 1458. Applying these same questions to Mr. Barwick's case, it is obvious that the jury was equally misled by the prosecutor, and the prosecutor's persistent misleading and jury minimizing statements were not adequately remedied by the trial court.

The effect of the conflicting instructions to the jury from the prosecutor and the judge cannot be overestimated. On the one hand they were being told, on numerous occasions, that their sentence was only a recommendation which the judge was free to disregard and that they were not responsible in any way for Mr. Barwick's ultimate fate and on the other hand they were told, on few occasions, that in fact the judge had to give their recommendation great weight.

Petitioner does not have to show that the effect of the inconsistent instructions was to unconstitutionally dilute the jury's sense of responsibility. In Boyde v. California, 110 S.Ct. 1190, the United States Supreme Court held that where there was a reasonable likelihood that a jury had understood an instruction to preclude them from considering mitigating evidence in violation of the Lockett line of cases then relief was warranted. Clearly, in this case there was much more than a reasonable likelihood that Mr. Barwick's jury misunderstood the effect of its decision in the Florida sentencing calculus. On numerous

occasions in both phases of Mr. Barwick's trial, the prosecutor and/or the trial judge had referred to their sentencing determination as being merely a "recommendation," or as being "advisory." Against this, on few occasions the jury was told that the judge was bound to give their verdict great weight. The effect of this conflict could only have been to hopelessly confuse the jury as to the precise status of their sentencing determination and its possible effects. The overall effect of this was to create a grave danger that the sentence which emerged from Mr. Barwick's trial did not represent "a decision that the State had demonstrated the appropriateness of the defendant's death." See Caldwell, 472 U.S. at 332.

Under Florida's capital statute, the jury has the primary responsibility for sentencing. Its decision is entitled to great weight. See McCampbell v. State, 421 So.2d 1072, 1075 (Fla. 1982); Espinosa v. Florida, 505 U.S. 1079 (1992). Thus, intimations and instructions that a capital sentencing judge has the sole responsibility for the imposition of sentence, or is free to impose whatever sentence he or she sees fit irrespective of the sentencing jury's decision, is inaccurate and is a misstatement of Florida law. See Mann, 844 F.2d at 1450-55 (discussing critical role of jury in Florida capital sentencing scheme); Espinosa, 505 U.S. at 1082 ("[A] Florida trial court . . . must give 'great weight' to the jury's recommendation . . .."). The judge's role, after all, is not that of the "sole" or "ultimate" sentencer. See Espinosa, 505 U.S. at 1082 ("Florida has essentially split the weighing process in two."). The jury's sentencing verdict may be overturned by the judge only if the facts are "so clear and convincing that virtually no reasonable person could differ." See Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). Mr. Barwick's jury, however, was led to believe that its determination meant very little and that the judge was free to impose whatever sentence he wished.

In Caldwell, the Court held "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 lies elsewhere," and that therefore prosecutorial arguments which tended to diminish the role and sense of responsibility of a capital sentencing jury violated the Eighth Amendment. See Caldwell, 472 U.S. at 328-29. Because the "view of its role in the capital sentencing procedure" imparted to the jury by the improper and misleading argument was "fundamentally incompatible with the eighth amendment's heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case,'" the Court vacated Caldwell's death sentence. See id. at 340. The same vice is apparent in Mr. Barwick's case, and Mr. Barwick is entitled to the same relief.

The constitutional vice condemned by the Caldwell court is not only the substantial unreliability that comments such as the ones at issue in Mr. Barwick's case inject into the capital sentencing proceeding. There is also the unacceptable risk of bias in favor of the death penalty which such "state-induced suggestions that the sentencing jury may shift its sense of responsibility" creates. See id. at 330. A jury which is unconvinced that death is the appropriate punishment might nevertheless vote to impose death as an expression of its "extreme disapproval of the defendant's acts" if it holds the mistaken belief that its deliberate error will be corrected by

the 'ultimate' sentencer, and is thus more likely to impose death regardless of the presence of circumstances calling for a lesser sentence. See id. at 331-32. Moreover, a jury "confronted with the truly awesome responsibility of decreeing death for a fellow human," McGautha v. California, 412 U.S. 183, 208 (1971), might find a diminution of its role and responsibility for sentencing attractive. See Caldwell, 472 U.S. at 332-33. As the Caldwell Court explained:

> In evaluating the prejudicial effect of the prosecutor's argument, we must also recognize that the argument offers jurors a view of their role which might frequently be highly attractive. A capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument on the issue of whether another should die, and they are asked to decide that
>
> issue on behalf of the community. Moreover, they are given only partial guidance as to how their judgment should be exercised, leaving them with substantial discretion. 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 its role. Indeed, one could easily imagine that in a case in which the jury is divided on the proper sentence, the presence of appellate review [or judge sentencing] could effectively be used as an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless give in.

Id. at 332-33 (emphasis supplied). When this occurs, as it did in this case, the unconstitutionally unacceptable risks of

unreliability and bias in favor of the death penalty also unconstitutionally infect the trial judge's sentence. The Supreme Court in Espinosa v. Florida held that "if a weighing state decides to place capital-sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances." Espinosa, 505 U.S. at 1082.

> It is true that, in this case, the trial court did not directly weigh any invalid aggravating circumstances. But, we must presume that the jury did so, just as we must further presume that the trial court followed Florida law, and gave "great weight" to the resultant recommendation. By giving "great weight" to the jury recommendation, the trial court indirectly weighed the invalid aggravating factor that we must presume the jury found. This kind of indirect weighing of an invalid aggravating factor creates the same potential for arbitrariness as the direct weighing of an invalid aggravating factor, and the result, therefore, was error.

Id. (internal citations omitted).

By the same logical process, when comments and instructions diminishing the role and responsibility of the jury create a constitutionally unacceptable risk of unreliability and bias in favor of the death penalty directly affecting the jury's decision, then the trial court's decision is also indirectly infected with the error because the court gives great weight to the jury's recommendation. Cf. Espinosa, 505 U.S. at 1082. Thus,

Eighth Amendment error occurs at both levels of Florida's sentencing scheme.

Caldwell and Mann teach that, given comments such as those provided to Mr. Barwick's capital jury, the State must demonstrate that the statements at issue had "no effect" on the jury's sentencing verdict. See Caldwell, 472 U.S. at 341; Mann 844 F. 2d at 1456. This the State cannot do. Here the significance of the jury's role was minimized and the comments at issue created a danger of bias in favor of the death penalty. Had the jurors not been misled and misinformed as to their proper role, had their sense of responsibility not been minimized, and had they consequently voted for life, such a verdict, for a number of reasons, could not have been overridden. See generally Tedder v. State, 322 So. 2d 908 (Fla. 1975). The Caldwell violations here assuredly had an effect on the jurors, an error infecting the sentencing judge as well because of the great weight he must give the juror's verdict. See Espinosa, 505 U.S.

at 1082. This case, therefore, presents the very danger discussed in Caldwell: that the jury may have voted for death because of the misinformation it had received concerning is role and responsibility. See Caldwell 505 U.S. at 333. This case also presents a classic example of a case where Caldwell error cannot be deemed to have had "no effect" on the verdict or upon the

court's sentence. See Espinosa, 505 U.S. at 1081-82.

ARGUMENT VI

MR. BARWICK WAS DENIED A FAIR TRIAL AND A FAIR, RELIABLE AND INDIVIDUALIZED CAPITAL SENTENCING DETERMINATION IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, BECAUSE THE PROSECUTOR'S ARGUMENTS PRESENTED IMPERMISSIBLE CONSIDERATIONS TO THE JURY. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE ISSUE OF THE STATE'S IMPROPER ARGUMENT.

During the State's penalty phase closing argument, the prosecutor made several improper comments and appellate counsel was ineffective for failing to appeal the issue raised by those comments. Specifically, the State encouraged the jury to consider sympathy for the victim and simultaneously instructed the jury not to consider sympathy for Mr. Barwick. The State's argument was contrary to the law and prejudiced the jury's consideration of the evidence in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16, 17 of the Florida Constitution.

When explaining to the jury the aggravating factor of heinous, atrocious, and cruel, the State said that "[i]t is really the only time we really get close to sympathy of the

victim . . ..” (R. 919) The State continued his argument of sympathy and its connection to the heinous, atrocious, and cruel aggravator:

> Again, I appreciate your patience but I don’t want you to fall into sympathy, I can’t argue sympathy. It’s improper. I can’t sit here and show you the photograph and say, feel sorry for this young lady right here. But the reason I can show you this photograph in life and death is for the one right down here, which is particularly heinous, atrocious, and cruel. That’s the reason the photographs are there. That’s the reason you can look at them. It is because of the pain that he inflicted, put upon her, and the joy that he may have gotten out of it that I can talk about or I can even get close to these photographs or even point to these photographs or show these photographs to you.
>
> Don’t get me wrong. I am not arguing sympathy, but do not let the defense attorney sway you or inflame you with any sort of argument for sympathy.
>
> The reason we’re here, there’s no money. It sort of falls in the category, poor fellow. He can’t help himself, poor fellow. Psychologists and psychiatrists can’t help him. Poor fellow. Mr, the defense lawyer, I can’t help him. Poor fellow. All boils down to money, because that’s why we can’t cure him. It is lack of ability is why we can’t cure him. Poor fellow. Everybody has given up on him, poor fellow, don’t y’all give up on him.
>
> Don’t fall into that category. Don’t fall into that sympathy. Sympathy has no place in this courtroom. You are to follow the law. . . . And if you have any sympathy or if sympathy just comes in there, tell yourselves, no, Mr. Paulk told me we can’t have sympathy for that lady or that, the fact that she endured pain and she was being tortured. We can take that into consideration, but don’t fall into that

> category that this man, that just on the basis of
>
> sympathy, sympathy alone that you are going to vote, to recommend to the judge that he be sentenced to life in prison with the possibility of parole after 25 years in prison. Don't let sympathy make you vote that way.
>
> (R. 933-34)

The State also argued that the evidence that Mr. Barwick was abused as a child constitutes a mitigating factor but that the jury should not find it "because of sympathy." (R. 930) From the State juxtaposing comments about the pain the victim suffered and the disclaimer that he was not arguing sympathy, the State effectively communicated a sympathy argument to the jury.

Furthermore, the State tried to scare the jury into convicting Mr. Barwick and sentencing him to death.

> He then eyes two women who are sunbathing as if to select his victim.. [¶] Both of them in bathing suits, sunbathing. . . . [H]e could have certainly picked the unoccupied dwellings to commit a burglary if he just wanted to steal something. [¶] . . . Suzanne Capers or Rebecca Wendt. . . . [W]hat did Suzanne Capers tell you. He stared at me and I got this eerie feeling. It was spooky, it was strange, it was creepy. That's evidence you can take into consideration as to how he was staring, selecting.
>
> (R. 560-61)[4]

Although the State told the jury that they could consider Mr. Barwick "staring" and "selecting," those are not permissible jury

[4] Because Capers's testimony in the 1986 trial was largely innocuous to Mr. Barwick, the State only touched on it in closing argument. (IR. 1288, 1289, 1290)

considerations. This argument was for the sole purpose of frightening the jury and portraying Mr. Barwick as a an assailant who studied possible victims before making his choice.

This Court has repeatedly condemned prosecutorial argument that invites the jury to base its decision on such emotions. See, e.g., King v. State, 623 So. 2d 486 (Fla. 1993); Rhodes v. State, 547 So. 2d 1201 (Fla. 1989); Garron v. State, 528 So. 2d 353 (Fla. 1988); Bertolotti v. State, 476 So. 2d 130, 134 (Fla. 1985) ("[Closing argument] must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law.").

The State was allowed to argue these impermissible factors,

misstate the law, and attempt to inflame the passions of the jury. The cumulative effect of the prosecutor's comments was to "improperly appeal to the jury's passions and prejudices." See Cunningham v. Zant, 928 F.2d 1006, 1020 (11th Cir. 1991). Such remarks prejudicially affect the substantial rights of the defendant when they "so infect the trial with unfairness as to make the resulting conviction a denial of due process." See Donnelly v. DeChristoforo, 416 U.S. 647 (1974); See also United States v. Eyster, 948 F.2d 1196, 1206 (11th Cir. 1991). In Rosso v. State, 505 So. 2d 611 (Fla. 3rd DCA 1987) the court defined a proper closing argument:

> The proper exercise of closing argument is to review the evidence and to explicate those inferences which may be reasonably drawn from the evidence. Conversely, it must not be used to inflame the minds and passions of the jurors so their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law.
>
> Rosso, 505 So. 2d at 614.

The prosecutor's argument went beyond a review of the evidence and permissible inferences. He intended his argument to overshadow any logical analysis of the evidence and to generate an emotional response, a clear violation of Penry v. Lynaugh, 109

S. Ct. 2934 (1989). He intended that Mr. Barwick's jury consider factors outside the scope of the evidence.

The Florida courts have held that "a prosecutor's concern 'in a criminal prosecution is not that it shall win a case, but that justice shall be done.' While a prosecutor 'may strike hard blows, he is not at liberty to strike foul ones.'" Rosso, 505 So. 2d at 614. This Court has called such improper prosecutorial commentary "troublesome." See Bertolotti, 476 So. 2d at 132.

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

See Wilson, 777 F.2d at 626. In such circumstances, "[w]hen core Eighth Amendment concerns are substantially impinged upon . . . confidence in the jury's decision will be undermined." Id. at 627. Consideration of such errors in capital cases "must be guided by [a] concern for reliability." Id. The Florida Supreme Court has held that when improper conduct by the prosecutor "permeates" a case, as it has here, relief is proper. See Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990).

Improper argument by a prosecutor reaches the threshold of fundamental unfairness if it is "so egregious as to create a reasonable probability that the outcome was changed." See Brooks v. Kemp, 762 F.2d 1383, 1403 (11th Cir. 1985). A reasonable probability is a probability sufficient to undermine confidence in the outcome. See generally Strickland, 466 U.S. 668. Appellate counsel was ineffective for the failure to raise the issue. Well-established Florida law has condemned such impermissible argument. Starting with Bertolotti, 476 So. 2d at 134, this Court sounded an alarm that instances of prosecutorial misconduct were improper: "We are deeply disturbed [sic] as a Court by the continuing violations of prosecutorial duty, propriety and restraint. Later, in Jackson v. State, 522 So. 2d

802 (Fla. 1988), the Court agreed that "the prosecutor's comment that the victims could no longer read books, visit their families, or see the sun rise in the morning as Jackson would be able to do if sentenced to life in prison was improper because it urged consideration of factors outside the scope of the jury's deliberations." Id. at 809. Clearly, the improper conduct by the prosecutor "permeated" the trial, therefore, relief is proper. See Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990).

Accordingly, Mr. Barwick was denied a fair, reliable and individualized capital sentencing determination as result in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and corresponding Florida law. Appellate counsel's failure to raise these issues was deficient. Mr. Barwick was prejudiced as a result.

ARGUMENT VII

MR. BARWICK WAS DENIED HIS RIGHTS UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, WHEN THE COURT

FOUND ONE OF THE AGGRAVATING FACTORS IN SUPPORT OF A DEATH SENTENCE TO BE THAT THE MURDER OCCURRED DURING THE COMMISSION OF A FELONY. THAT FINDING WAS DUPLICATIVE OF THE BASIS FOR THE DEATH PENALTY, I.E., FELONY-MURDER, AND THIS WAS AN AUTOMATIC AGGRAVATING FACTOR.

Mr. Barwick was convicted of premeditated murder and felony-murder. Since the State did not prove the element of intent, a required element of premeditated murder, it must be assumed that the jury's verdict rests on felony murder.[5] The court found as an aggravating circumstance in support of a death sentence that the capital felony was committed while Mr. Barwick was engaged in the course of a felony. In the penalty phase, the jury was instructed as follows, no other instruction was given:

> The crime for which the defendant is to be sentenced was committed while he was engaged in the commission of, attempt to commit or flight after committing or attempting to commit the crime of sexual battery with great force.
>
> (R. 956)

Although the jury was only instructed on the sexual battery in regards to this aggravator, the trial court's sentencing order included much broader findings:

> The jury found the defendant guilty of an Attempted Sexual Battery, Burglary and Robbery. The evidence

On Mr. Barwick's direct appeal, the Florida Supreme Court

struck the aggravating factor of cold, calculated, and premeditated. See Barwick v. State, 660 So. 2d 685, 696 (Fla. 1995) ("We conclude that the evidence presented does not demonstrate that Barwick had a careful plan or prearranged design to kill the victim. . . . [T]he trial court erred in finding the heightened premeditation necessary to establish this aggravator.") (citations omitted).

> clearly established that the Murder was committed while the defendant was attempting to commit a sexual battery. Although the defendant denied in his confession the sexual battery, his modus operandi in this case is the same as it was in the 1983 sexual battery case for which he was convicted. In addition, the defendant by his confession, admitted arming himself with a knife and gloves and entering the victim's residence to commit a burglary or robbery. This aggravating circumstance is established beyond a reasonable doubt.
>
> (R. 1282-83)

Mr. Barwick's sentence of death was imposed in violation of his rights guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Aggravating factors must channel and narrow sentencer's discretion. A state cannot use aggravating "factors which as a practical matter fail to guide the sentencer's discretion." See Stringer v. Black. The use of this automatic aggravating circumstance did not "genuinely narrow the class of persons eligible for the death penalty," Zant v. Stephens, 462 U.S. 862, 876 (1983), and therefore the sentencing process was rendered unconstitutionally unreliable. See id. "Limiting the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for

sufficiently minimizing the risk of wholly arbitrary and capricious action." Maynard v. Cartwright, 486 U.S. 356, 362 (1988).

The Stringer Court emphasized, "if a State uses aggravating factors in deciding who shall be eligible for the death penalty or who shall receive the death penalty, it cannot use factors which as a practical matter fail to guide the sentencer's discretion." Stringer, 112 S. Ct. at 1139. The Supreme Court then explained that use of an improper aggravating factor in a weighing scheme (like Florida's) has the potential for creating greater harm than it does in an eligibility scheme:

> Although our precedents do not require the use of aggravating factors, they have not permitted a State in which aggravating factors are decisive to use factors of vague or imprecise content. A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion. A vague aggravating factor used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance. Because the use of a vague aggravating factor in the weighing process creates the possibility not only of randomness but also of bias in favor of the death penalty, we cautioned in *Zant* that there might be a requirement that when the weighing process has been infected with a vague factor the death sentence must be invalidated.

Stringer, 112 S. Ct. at 1139.

Stringer thus also teaches that in a weighing state, reliance upon an invalid aggravating factor is constitutional error requiring a harmless error analysis, even if other aggravating factors exist.

In Arave v. Creech, 113 S. Ct. 1534 (1993), the United States Supreme Court held, "If the sentencer fairly could conclude that an aggravating circumstances applies to every defendant eligible for the death penalty the circumstance is constitutionally infirm." Arave, 113 S. Ct. at 1542 (emphasis in original). The constitutional infirmity arises because the function of aggravating factors is to "genuinely narrow the class of defendants eligible for the death penalty." See id. (quoting Zant, 462 U.S. at 877). Thus, an aggravating circumstance "must provide a principled basis" for determining who deserves capital punishment and who does not. See Arave,113 S. Ct. at 1542 .

Stringer and Arave establish the validity of Mr. Barwick's claim that the felony murder aggravating factor is an unconstitutional automatic aggravating factor which does not

provide the requisite narrowing. Under Florida law, capital sentencers may reject or give little weight to any particular aggravating circumstance. A jury may return a binding life recommendation because the aggravators are insufficient. See Hallman v. State, 560 So. 2d 233 (Fla. 1990). The sentencer's understanding and consideration of aggravating factors may lead to a life sentence.

A state cannot use aggravating "factors which as a practical matter fail to guide the sentencer's discretion." See Stringer, 112 S. Ct. at 1139. In Mr. Barwick's case, the sentencer was entitled automatically to return a death sentence upon a finding of first degree felony murder. Every felony murder would

involve, by necessity, the finding of a statutory aggravating circumstance, a fact which, under the particulars of Florida's statute, violates the eighth amendment. See Arave, 113 S. Ct. at 1542 . This is so because an automatic aggravating circumstance is created, one which does not "genuinely narrow the class of persons eligible for the death penalty," Zant, 462 U.S. at 76, and one which therefore renders the sentencing process unconstitutionally unreliable. See id. "Limiting the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action."

Maynar, 486 U.S. at 362. If Mr. Barwick was convicted of felony murder, he then automatically faced statutory aggravation for felony murder. These aggravating factors were "illusory circumstance[s]" which "infected" the weighing process; these aggravators did not narrow and channel the sentencer's discretion as they simply repeated elements of the offense. See Stringer, 112 S. Ct. at 1139. This Court has recognized that aggravating factors do not perform the necessary narrowing if they merely repeat elements of the offense. See Porter v. State, 564 So. 2d 1060, 1063-64 (Fla. 1990). Yet the trial court did not instruct the jury on and did not apply this limitation in imposing the death sentence.

Compounding this error is the fact that this Court has held that the aggravating circumstance of "in the course of a felony" is not sufficient by itself to justify a death sentence in a felony-murder case. See Rembert v. State, 445 So. 2d 337, 340 (Fla. 1984) (explaining that there is no way of distinguishing death cases from other felony murder cases in which defendants "receive a less severe sentence"); Proffitt v. State, 510 So. 2d 896, 898 (Fla. 1987) ("To hold, as argued by the State, that these circumstances justify the death penalty would mean that every murder during the course of a burglary justifies the imposition of the death penalty."). However, here, the jury was

instructed on this aggravating circumstance and told that it was sufficient for a recommendation of death unless the mitigating circumstances outweighed the aggravating circumstance. The jury did not receive an instruction explaining the limitation contained in Rembert and Proffitt.

There is no way at this juncture to know whether the jury relied on this aggravating circumstance in returning its death recommendation. "[I]t is constitutional error to give weight to an unconstitutionally vague aggravating factor, even if other, valid aggravating factors pertain." Richmond, 113 S. Ct. at 534. In Maynard, 486 U.S. at 461-62, the Supreme Court held that jury instructions must "adequately inform juries what they must find to impose the death penalty." Similarly, Espinosa v. Florida, 112 S. Ct. 2926 (1992), held that Florida sentencing juries must be accurately and correctly instructed regarding aggravating circumstances in compliance with the Eighth Amendment.

Mr. Barwick was denied a reliable and individualized capital sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments. The error cannot be harmless in this case:

> [W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale. When the weighing process itself has been skewed, only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence.
>
> Stringer, 112 S. Ct. at 1137.

In light of the weight given the felony murder aggravator and the evidence of mitigation, the erroneous consideration of the felony murder aggravating factor cannot be held harmless beyond a reasonable doubt. In the words of Stringer, an "extra thumb" was placed upon the death side of the scales. Without that "thumb," the weightiest one according to the trial judge, a binding life recommendation may have been returned by the jury. The State cannot meet its burden to prove the error harmless beyond a reasonable doubt.

ARGUMENT VIII

MR. BARWICK'S SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS WERE INCORRECT UNDER FLORIDA LAW AND SHIFTED THE BURDEN TO MR. BARWICK TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE TRIAL COURT EMPLOYED A PRESUMPTION OF DEATH IN SENTENCING MR. BARWICK AND APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE ISSUE.

Under Florida law, a capital sentencing jury must be:

> told that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed . . . [and that] a [death] sentence could be given if the state showed the aggravating circumstances outweighed the mitigating circumstances.

State v. Dixon, 283 So. 2d 1 (Fla. 1973) (emphasis added). See also Mullaney v. Wilbur, 421 U.S. 684 (1975). This straightforward standard was never clearly applied at the penalty phase of Mr. Barwick's capital proceedings and appellate counsel was ineffective for failing to raise the issue.

During the final jury charge, the court shifted to Mr. Barwick the burden of proving whether he should live or die:

> Should you find aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.
>
> (R. 957).

The jury was told again that they needed to assess "whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist." (955) These instructions given to Mr. Barwick's jury were inaccurate and

dispensed misleading information regarding who bore the burden of proof as to whether a death or a life recommendation should be returned.

In Hamblen v. Dugger, 546 So. 2d 1039 (Fla. 1989), a capital postconviction action, this Court addressed the question of whether the standard employed shifted to the defendant the burden on the question of whether he should live or die. The Hamblen opinion reflects that these claims should be addressed on a case-by-case basis in capital postconviction actions. Defense counsel rendered prejudicially deficient assistance where he failed to object to the errors. See Murphy, 893 F.2d at 95.

Shifting the burden to the defendant to establish that mitigating circumstances outweigh aggravating circumstances conflicts with the principles of Mullaney and Dixon, for such instructions unconstitutionally shift to the defendant the burden with regard to the ultimate question of whether he should live or die. In so instructing a capital sentencing jury, a court injects misleading and irrelevant factors into the sentencing determination, thus violating Caldwell v. Mississippi, 472 U.S. 320 (1985), Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), and Maynard v. Cartwright, 108 S. Ct. 1853 (1988).

required that the jury impose death unless mitigation was not only produced by Mr. Barwick, but also unless Mr. Barwick proved that the mitigation he provided outweighed and overcame the aggravation. The trial court then employed the same standard in sentencing Mr. Barwick to death. See Zeigler v. Dugger, 524 So. 2d 419 (Fla. 1988) (explaining that a trial court is presumed to apply the law in accord with manner in which jury was instructed). This standard obviously shifted the burden to Mr. Barwick to establish that life was the appropriate sentence and limited consideration of mitigating evidence to only those factors proven sufficient to outweigh the aggravation. The standard given to the jury violated state and federal law. According to this standard, the jury could not "full[y] consider[]" and "give effect to" mitigating evidence. See Penry v. Lynaugh, 109 S. Ct. 2934, 2951 (1989), overruled on other grounds, Atkins v. Virginia, 122 S. Ct. 2242 (2002). This burden-shifting standard thus "interfered with the consideration of mitigating evidence." See Boyde v. California, 110 S. Ct. 1190, 1196 (1990). Since "[s]tates cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the [death] penalty," McCleskey v. Kemp, 481

U.S. 279, 306 (1987), the instructions provided to Mr. Barwick's sentencing jury, as well as the standard employed by the trial court, violated the Eighth Amendment's "requirement of

individualized sentencing in capital cases [which] is satisfied by allowing the jury to consider all relevant mitigating evidence." Blystone v. Pennsylvania, 110 S. Ct. 1078, 1083 (1990); see also Lockett v. Ohio, 438 U.S. 586 (1978); Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821 (1987). The instructions gave the jury inaccurate and misleading information regarding who bore the burden of proof as to whether a death recommendation should be returned. There can be no doubt that the jury understood that Mr. Barwick had the burden of proving whether he should live or die, especially given the fact that the jury was never properly instructed.

The instructions violated Florida law and the Eighth and Fourteenth Amendments in two ways. First, the instructions shifted the burden of proof to Mr. Barwick on the central sentencing issue of whether he should live or die. Under Mullaney, this unconstitutional burden-shifting violated Mr. Barwick's due process and Eighth Amendment rights. See also Sandstrom v. Montana, 442 U.S. 510 (1979); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988). The jury was not instructed in

conformity with the standard set forth in Dixon. See Dixon, 283 So. 2d 1. Since the ury in Florida is a sentencer it must be properly instructed. See Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993).

Second, in being instructed that mitigating circumstances must outweigh aggravating circumstances before the jury could recommend life, the jury was effectively told that once aggravating circumstances were established, it need not consider mitigating circumstances unless those mitigating circumstances were "sufficient" to outweigh the aggravating circumstances. Cf. Mills v. Maryland, 108 S. Ct. 1860 (1988); Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821 (1987). Thus, the jury was precluded from considering mitigating evidence in violation of Hitchcock, and from evaluating the "totality of the circumstances" in considering the appropriate penalty. See Dixon, 283 So. 2d at 10. According to the instructions, jurors would reasonably have understood that only mitigating evidence which rose to the level of "outweighing" aggravation need be considered. Therefore, Mr. Barwick is entitled to relief in the form of a new sentencing hearing in front of a jury, due to the fact that his sentencing was tainted by improper instructions.

ARGUMENT IX

THE FLORIDA SUPREME COURT ERRED DURING THE DIRECT APPEAL IN MR. BARWICK'S CASE WHEN THE COURT FAILED TO REMAND FOR RESENTENCING AFTER STRIKING AN AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Barwick's trial judge found that the offense "was committed in a cold, calculated, and premeditated manner without any pretense or moral or legal justification." (R. 1285-86). However, this Court determined that the aggravating factor of cold, calculated and premeditated (CCP) was not applicable to the murder for which Mr. Barwick was sentenced to death. See Barwick v. State, 660 So. 2d 685, 696 (Fla. 1995) ("We conclude that the evidence presented does not demonstrate that Barwick had a careful plan or prearranged design to kill the victim. . . . [T]he trial court erred in finding the heightened premeditation necessary to establish this aggravator.") (citations omitted).

This Court did not remand to the trial court for a new sentencing hearing. Id. at 697. This reasoning is erroneous and violated Mr. Barwick's constitutional rights.

Because the trial court did not assess the weight of the aggravators without the improper CCP aggravator, Mr. Barwick's sentencing hearing and the imposition of his death sentence were fundamentally flawed, in violation of his due process rights.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail, postage prepaid, to Meredith Charbula, Office of the Attorney General, The Capitol, PL-01, Tallahassee, FL 32399-6536 this 18th day of July 2008.

CERTIFICATION OF TYPE SIZE AND STYLE

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