IN THE SUPREME COURT OF FLORIDA

DAVID JOSEPH PITTMAN,

Petitioner,

v. **CASE NO. SC08-___**

BILL McCOLLUM,
Attorney General of the
State of Florida,

and,

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

Respondents.
_____/

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. Pittman 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.

The following abbreviations will be utilized to cite to the record in this appeal, with appropriate page number(s) following the abbreviation:

"R. __." – record on direct appeal to this Court;

"PC-R. __." – record on appeal from the denial of postconviction relief;

"PC-RE. __." - separately paginated record containing exhibits admitted during the evidentiary hearing.

Other references will be self-explanatory or explained herein.

INTRODUCTION

Significant errors which occurred at Mr. Pittman'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. Pittman's fundamental right to a fair trial in violation of his Fourth, Fifth, Sixth, 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 her representation of Mr. Pittman 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. Pittman. "[E]xtant legal principle[s] . . . provided a clear basis for . . . compelling appellate argument[s]," which should have been raised in Mr. Pittman's direct 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. Pittman 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. Pittman is entitled to relief.

REQUEST FOR ORAL ARGUMENT

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

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

The petition presents issues which directly concern the constitutionality of Mr. Pittman's conviction and sentence of death. This Court has jurisdiction to entertain a petition for a writ of habeas corpus, an original proceeding governed by Fla. R. App. P. 9.100. This Court has original jurisdiction under Fla. R. App. P. 9.030(a)(3) and Article V, § 3(b)(9), Fla. Const. The Constitution of the State of Florida guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." Art. I, § 13, Fla. Const.

In its jurisdiction to issue writs of habeas corpus, this Court has an obligation to protect Mr. Pittman's right under the Florida Constitution to be free from cruel or unusual punishment and it has the power to enter orders assuring that those rights are protected. Allen v. State, 636 So. 2d 494, 497 (Fla. 1994)(holding that the Court was required under Article I, § 17 of the Florida Constitution to strike down the death penalty for persons under sixteen at time of crime); Shue v. State, 397 So. 2d 910 (Fla. 1981)(holding that this Court was required under Article I, § 17 of the Florida Constitution to invalidate the death penalty for rape); Makemson v. Martin County, 491 So. 2d 1109 (1986)(noting that "[t]he courts have authority to do things that are essential to the performance of their judicial functions. The unconstitutionality of a statute may not be overlooked or excused"). This Court has explained: "It is axiomatic that the courts must be independent and must not be

subject to the whim of either the executive or legislative departments. The security of human rights and the safety of free institutions require freedom of action on the part of the court." Rose v. Palm Beach City, 361 So. 2d 135, 137 n.7 (1978).

This Court must protect Mr. Pittman's Eighth Amendment rights under the federal Constitution. Contemporary Eighth Amendment jurisprudence upholds the authority of the courts to review a state legislature's decision generally, and specifically to review a legislature's enactments regarding criminal punishment. Rummell v. Estelle, 455 U.S. 288, 304 (1980); Coker v. Georgia, 433 U.S. 591, 602 (1977). See also Ralph v. Warden, Maryland Penitentiary, 438 F.2d 786 (4th Cir.), cert. denied, 408 U.S. 942 (1972). The fact that a state statute authorizes capital punishment does not conclusively establish the punishment's constitutionality because the Eighth Amendment is a limitation on both legislative and judicial action. Robinson v. California, 370 U.S. 660 (1962). Where constitutional rights - whether state or federal - of individuals are concerned, this Court may not abdicate its responsibility in deference to the legislative or executive branches of government. Instead, this Court is required to exercise its independent power of judicial review. Ford v. Wainwright, 477 U.S. 399 (1986).

This Court has consistently maintained an especially vigilant control over capital cases, exercising a special scope of review. Elledge v. State, 346 So. 2d 998, 1002 (Fla. 1977); Wilson v. Wainwright, 474 So. 2d 1162, 1165 (Fla. 1985). This Court has not hesitated in exercising its inherent jurisdiction

to review issues arising in the course of capital post-conviction proceedings. State v. Lewis, 656 So. 2d 1248 (Fla. 1995). This petition presents substantial constitutional questions concerning the administration of capital punishment in this State consistent with the United States and Florida Constitutions. The fundamental constitutional errors challenged herein in the context of a capital warrant habeas relief. See Wilson, 474 So. 2d at 1163; Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969). The issues presented are of the type classically considered by this Court pursuant to its original jurisdiction. The reasons set forth herein demonstrate that the Court's exercise of its jurisdiction, and of its authority to interpret and apply the "cruel *or* unusual" provision of the Florida Constitution, is warranted in this action.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Pittman 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
APPELLATE COUNSEL FAILED TO RAISE ON APPEAL NUMEROUS MERITORIOUS ISSUES WHICH WARRANT REVERSAL OF MR. PITTMAN'S CONVICTION AND SENTENCE OF DEATH.

Mr. Pittman had the constitutional right to the effective assistance of counsel for purposes of presenting his direct appeal to this Court. Strickland v. Washington, 466 U.S. 668 (1984). "A first appeal as of right [] is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." Evitts v. Lucey, 469 U.S. 387, 396 (1985). The Strickland test applies equally to ineffectiveness allegations of trial counsel and appellate counsel. See Orazio v. Dugger, 876 F.2d 1508 (11th Cir. 1989). Most recently, while finding appellate counsel rendered ineffective assistance, this Court explained:

> The issue of appellate counsel's effectiveness is appropriately raised in a petition for writ of habeas corpus. However, ineffective assistance of appellate counsel may not be used as a disguise to raise issues which should have been raised on direct appeal or in a postconviction motion. In evaluating an ineffectiveness claim, the court must determine
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> 1. whether the alleged omissions are of such magnitude as to constitute a serious error or

> substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.
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> *Pope v. Wainwright*, 496 So. 2d 798, 800 (Fla. 1986). The defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based. *See Knight v. State*, 394 So. 2d 997 (Fla. 1981). [*37] "In the case of appellate counsel, this means the deficiency must concern an issue which is error affecting the outcome, not simply harmless error." *Id.* at 1001.
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> *Freeman*, 761 So. 2d at 1069 (some citations omitted).

Williamson v. State, 2008 Fla. LEXIS 1915, *36-37 (Fla. October 8, 2008).

In Mr. Pittman's direct appeal, appellate counsel failed to raise the sufficiency of the evidence supporting the guilty verdict in Mr. Pittman's case. Because this constitutional violation was "obvious on the record" and "leaped out upon even a casual reading of transcript," it cannot be said that the "adversarial testing process worked in [Mr. Pittman's] direct appeal." Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). The lack of appellate advocacy on Mr. Pittman's behalf is identical to the lack of advocacy present in other cases in which this Court has granted habeas corpus relief. Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985).

In Wilson, this Court wrote:

Appointment of appellate counsel for indigent defendants is the responsibility of the trial court. We strongly urge trial judges not to take this responsibility lightly or to appoint appellate counsel without due recognition of the skills and attitudes necessary for effective appellate representation. A perfunctory appointment of counsel without consideration of counsel's ability to fully, fairly, and zealously advocate the defendant's cause is a denial of meaningful representation which will not be tolerated. The gravity of the charge, the attorney's skill and experience and counsel's positive appreciation of his role and its significance are all factors which must be in the court's mind when an appointment is made.

The role of an advocate in appellate procedures should not be denigrated. Counsel for the state asserted at oral argument on this petition that any deficiency of appellate counsel was cured by our own independent review of the record. She went on to argue that our disapproval of two of the aggravating factors and the eloquent dissents of two justices proved that all meritorious issues had been considered by this Court. It is true that we have imposed upon ourselves the duty to independently examine each death penalty case. However, we will be the first to agree that our **judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate. It is the unique role of that advocate to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deviations from due process. Advocacy is an art, not a science. We cannot, in hindsight, precisely measure the impact of counsel's failure to urge his client's best claims. Nor can we predict the outcome of a new appeal at which petitioner will receive adequate representation**. We are convinced, as a final result of examination of the original record and appeal and of petitioner's present prayer for relief, that our *confidence* in the correctness and fairness of the result has been undermined.

Wilson, 474 So. 2d at 1164-65 (emphasis added).

The specific issue in Wilson v. Wainwright concerned ineffective assistance of appellate counsel in failing to challenge the sufficiency of the evidence supporting the guilty verdict. This Court explained:

Petitioner's meritorious allegations involve the inadequacy of research and briefing of the appeal and the gross ineffectiveness of oral argument. Appellate counsel, R.E. Conner, briefed only five issues in the initial brief on the merits. At no time did he raise or discuss any issue relating to the sufficiency of the evidence to support the jury's finding of premeditation in either death.

* * *

The decision not to raise this issue cannot be excused as mere strategy or allocation of appellate resources. This issue is crucial to the validity of the conviction and goes to the heart of the case. If, in fact, the evidence does not support premeditation, petitioner was improperly convicted of first degree murder and death is an illegal sentence. To have failed to raise so fundamental an issue is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome.

Wilson, 474 So. 2d at 1163-64.

This Court in Wilson concluded:

It is true that we have imposed upon ourselves the duty to independently examine each death penalty case. However, we will be the first to agree that our judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate. It is the unique role of that advocate to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deviations from due process. Advocacy is an art, not a science. We cannot, in hindsight, precisely measure the impact of counsel's failure to urge his client's best claims. Nor can we predict the outcome of a new appeal at which petitioner will receive adequate representation. We are convinced, as a final result of examination of the original record and appeal and of petitioner's present prayer for relief, that our *confidence* in the correctness and fairness of the result has been undermined.

We therefore grant petitioner's request for writ of habeas corpus and grant him a new direct appeal on the merits of his convictions and sentence.

Wilson, 474 So. 2d at 1165.

Here, Mr. Pittman's direct appeal counsel did not challenge the sufficiency of the evidence to support his conviction of three counts of first degree murder. This, as in Wilson, was deficient performance that prejudice Mr. Pittman. It is a bedrock principle of the constitutional due process guarantee that a criminal conviction cannot stand when supported by insufficient evidence. Jackson v. Virginia, 443 U.S. 307 (1979). The Supreme Court explained the proper analysis as follows:

After *Winship* the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. But this inquiry does not require a court to "ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." *Woodby* v. *INS*, 385 U.S., at 282 (emphasis added). Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Jackson v. Virginia, 443 U.S. at 318-19 (footnote omitted).

A careful examination of the record in Mr. Pittman's case establishes that no rational trier of fact could have found the essential elements of first degree murder beyond a reasonable doubt.[1] As the trial record shows, it was at or about 3:10 AM on May 15, 1990, that David Hess, a newspaper distributor, first saw a burst of red light in the distant sky while making his rounds delivering newspapers (R. 1144-5, 1152). He believed that it was the glow of a large fire.[2] He was later able to determine that he had been some distance from the fire, may be two miles.

The Mulberry Fire Department was dispatched to the fire at 3:32 AM (R. 1263). They arrived at the scene of the fire at 3:46 AM (R. 1264).[3] At that time, "the living room area that was pretty much what we considered fully involved" (R. 1265). A minute or two

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[1]The deliberations were lengthy and dragged out over two days (PC-R. 4124).

[2]Mr. Hess testified that he was "pretty sure it was right around ten minutes after three" that he first saw a flash of red light in the sky (R. 1152). Mr. Hess said that he was "[p]robably two miles or less" from the scene of the fire when he first noticed it (R. 1145).

[3]The structure burning was located at 500 NE 4th Street in Mulberry (R. 1263). It was "a wood frame, single story, single family" residence (R. 1265).

after the firefighters arrived "we encountered an explosion that took part of the living room roof down and blew out the front part of the wall" (R. 1267). Once the fire was under control, a search of the house began. During this search, three bodies were discovered (R. 1269-72). They were the remains of Clarence and Barbara Knowles and their 20-year old daughter, Bonnie.[4] All three were dead before the fire started (R. 1521).

After examining the scene that the fire, the state fire marshal's office determined that the fire was incendiary in nature. "A flammable liquid [was] poured on the floor" of the residence (R. 1462).[5] The length of time that the fire burned before it was visible in the night sky could not be determined. According to the deputy fire marshal who investigated, "[i]f the fire was started shortly before discovery, the amount of damage done would indicate there was a substantial amount of flammable

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[4]David Pittman was at the time the estranged husband of the Knowles' older daughter, Barbara Marie. David and Barbara Marie were the parents of three young children who normally were living with their maternal grandparents, Clarence and Barbara Knowles at 500 NE 4th St. (R. 2074; PC-R. 3977; PC-RE. 850, 857). The children were Cindy Pittman - DOB 1/13/86, Robin Pittman - DOB 3/17/87, and Wendy Pittman - DOB 12/27/88 (PC-RE 678).

[5]A detective with the Polk County Sheriff's Office opined that a flammable liquid was poured throughout the living room and into a hallway (R. 1384). It was determined that there was a good "possibility" that the flammable liquid was poured on furniture in the living room (R. 1384). There was also a fire trail that came out of the residence (R. 1472). This trailer extended "[a]pproximately 15 feet" (R. 1400). The bedroom in which Bonnie Knowles was found contained the heaviest damage (R. 1386). This was because "an automobile tire had been placed under the approximate center" of the bed (R. 1387). This caused the fire to burn very hot in that bedroom.

liquid poured. If the fire was started a half hour before discovery, then there may have just been enough flammable liquid used to get the normal combustibles in the living room burning." (R. 1469).[6] Thus, the longer the time taken to obtain and pour a large quantity of the flammable liquid, the faster the fire. Conversely, the less time taken to obtain and the flammable liquid, the slower the fire progressed.

A medical examiner examined the bodies and found that Bonnie Knowles had been fatally stabbed eight times. Six of the wounds were sufficiently serious to have caused death on their own. Together they caused massive bleeding and a rapid death (R. 1515-16). The burning of Bonnie's body occurred postmortem (R. 1511).

In his examination of Barbara Knowles' body, the medical examiner found three stab wounds - one to the neck and two in the chest. The two wounds to the chest "were fatal" (R. 1519). Death would have been fairly rapid, "maximum five minutes", because they hit the aorta (R. 1519). The burning of Barbara's body also occurred postmortem (R. 1517).

In his examination of Clarence's body, the medical examiner found five stab wounds (R. 1521). One wound was superficial; the other four penetrated the pleural cavity and were lethal (R. 1521). As with Barbara, Clarence would have died from massive bleeding "within minutes" (R. 1522). The burns to the body would

[6]The "half hour before discovery" reference by the deputy fire marshal would place the start of the fire at 2:40 AM.

have been postmortem because there was no "soot in his airways, and blood test was negative" (R. 1521).[7]

From his observations of the lividity in the bodies of Barbara and Clarence, the medical examiner was able to determine that the time of death was probably after 7:15 PM on May 14th (R. 1526). Barbara's stomach contents included semi-digested rice and green beans (R. 1558). The medical examiner indicated that the food found in Barbara's stomach was of the kind that should be digested within two to four hours of its consumption (R. 1558). So her death would have occurred within two to fours hours of the time that she ate the rice and green beans still identifiable in her stomach at the time of her death.[8]

No physical evidence linking David Pittman to the crime scene or to Bonnie's Toyota was found. His fingerprints did not match the latent prints recovered from Bonnie Knowles' car (R. 3766-70). Mr. Pittman's prints were not found anywhere in the Knowles' house (R. 2707). Mr. Pittman's clothes did not have any burns on them nor was there blood on his pants, shirt, socks, shoes or pocketknife (R. 3345, 3357-8, 3361, 3364).

At trial, the witnesses called by the State established that Mr. Pittman was in the presence of others who could vouch for his

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[7]Since soot was not found in the victims' airways nor elevated levels of carbon monoxide detected, none of the victims were alive at the time of the fire (R. 1539). Each had stopped breathing by the time the fire was set. However, there was no way to determine how long they had been dead when the fire began.

[8]That means that if Barbara Knowles was murdered at 2:45 AM, she had eaten a meal that included rice and green beans sometime after 10:45 PM.

whereabouts up until 2:30 AM on the morning of May 15, 1991. From 2:30 AM until 3:30 AM, no one was with David and able to vouch for his whereabouts. It was in that one hour period that the State argued that Mr. Pittman committed the murders. Since the red glow from the fire was seen two miles away at 3:10 AM, this left a forty minute window according to the State for Mr. Pittman to walk from his father's house to the Knowles' home, enter the house, stab three people to death, get a flammable liquid, pour it through the house, set the fire, and have it grow so large as to be visible two miles away.

The State called Bobbie Jo Pittman, David Pittman's step-sister who testified that before 3:00 PM on May 14, 1990, David called her (R. 2061). He asked her to come pick him up in Plant City, where he had been staying, so he could spend the night at his step-dad's house in Mulberry where she stayed. She picked him up and they got back to their dad's house at around "4:00 or 4:30" (R. 2063). Later, they went to a Majik Market to call Barker and invite him to "party" with them (R. 2033).[9] Between 7:00 and 8:00, Tammy Davis arrived (R. 2065). The threesome were together until Tammy left at around midnight (R. 3156). Then, David went inside to help Bobbie Jo get her baby to sleep (R.

[9]It was 1/2 mile (a 13 minute walk) from the Pittman's to the Knowles' (R. 2179). From Eugene Pittman's house to where Bonnie Knowles' car was abandoned was 1/10 of a mile (a 4 minute walk) (R. 2180). It was three miles from Prairie Mine Road to the Majik Market (a 4 minute drive). The Majik Market was seven miles (or 8 minutes) from Barker's. From the Knowles house to Prairie Mine Road was a 4 to 6 minute drive (R. 2696-9).

2069). After the baby was asleep, Bobby Jo and David watched TV until 2:30 AM.

At no time during her testimony did the trial prosecutor advise anyone (the court, defense counsel, or the jury) that the testimony that the State elicited from Bobbie Jo Pittman was false. The prosecution has a duty to alert the court, the defense, and the jury when a State's witness gives false testimony. Napue v. Illinois, 360 U.S. 264 (1959). Thus, the testimony from Bobbie Jo must be accepted as true. It was presented by the State as truthful testimony.

Eugene Pittman, David's stepfather, testified that he got home from work at about 3:00 AM on May 15th (R. 2087-8). He did not see David (R. 2094). The door to the bedroom where David was staying was locked (R. 2113). Eugene did not knock or otherwise check to see if David was in the bedroom. Eugene went to bed, but he was unable to sleep (R. 2095). He kept hearing noises in the house. At about 3:30 AM, he got up and saw "David coming out of this back bedroom" (R. 2097, 2099). David looked tousled-up, like he had been asleep (R. 2116). David said that he had an upset stomach, and Eugene went back to bed (R. 2099).

Soon thereafter, fire "sirens went off" (R. 2118). Then, he heard the phone ringing, so he got up. David was on the phone in the kitchen (R. 2101). Carmen Alton had called and was telling David that the Knowles' house was on fire (R. 3841). David screamed: "Oh, no" (R. 2120). When he hung up, he told Eugene that the Knowles' house was on fire. David then woke his sister at 4:00 or 4:30 AM (R. 2041). As she explained, "He just come in

there yelling at me" (R. 2073). David was crying and upset and wanted Bobby Jo to "find out if his kids were okay" (R. 2074). As Bobby Jo noted, this was because his kids usually stayed at the Knowles' (R. 2074).[10]

At no time during his testimony did the trial prosecutor advise anyone (the court, defense counsel, or the jury) that the testimony that the State elicited from Eugene Pittman was false. The prosecution has a duty to alert the court, the defense, and the jury when a State's witness gives false testimony. Napue v. Illinois, 360 U.S. 264 (1959). Thus, the testimony from Eugene Pittman must be accepted as true. It was presented by the State as truthful testimony.

Because of the evidence presented by the State as part of its case which it did not advise anyone was untruthful, the period of time in which Mr. Pittman could have committed the murders was at most 2:30 AM to 3:30 AM.[11] Of this one hour period, David Hess' testimony that he was able to see the red

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[10]Bobby Jo's mom, Francis Pittman, called after learning of the fire. She was upset and crying because she was also afraid that David's kids were in the house (R. 2075). Francis indicated that she would go to the Knowles' house and "see if the kids were in the fire" (R. 2076). Francis testified that David's kids lived with their grandparents (Barbara and Clarence Knowles) "90 percent of the time" (R. 3191).

[11]The principle that the evidence is to be taken in the light most favorable to the State when evaluating the sufficiency of the evidence cannot constitutionally permit inconvenient evidence presented by the State that can presumed to be false. Under due process, if the State believed that Bobbie Jo and Eugene Pittman were not testifying truthfully, it had an obligation to either not present the evidence or advise the court, the defense, and the jury that the testimony was false. *See* Napue v. Illinois.

glow from the fire in the night sky about two mile away at 3:10 AM means that in order for Mr. Pittman to be guilty, he would have had to do all the acts involved in the murders and the arson between 2:30 AM and 3:10 AM, and that includes sufficient time after the fire started for it to grow big enough to be visible 2 miles away. Unless Mr. Pittman carried several gas cans into the house in order to pour enough gasoline to create an instant bonfire, the fire had to have been started by 3:00 AM.

The case the State presented at trial was circumstantial, but for Hughes and Pounds. The narrow window of time for Mr. Pittman to have committed the murder was impossibly small. Hughes' testimony contained the details that were the essence of the State's case. Through him, the State argued that while the window of opportunity was small, Mr. Pittman told Hughes that he was able to do it nonetheless.

According to the State's case, Mr. Pittman had to walk from Eugene Pittman's house to the Knowles' residence after Bobbie Jo left him alone at 2:30 AM. The State established that it was 1/2 mile (a 13 minute walk) from the Pittman's to the Knowles' (R. 2179). According to Hughes, the first step was for Mr. Pittman walked to the Knowles' house. According to Hughes, this was just to talk, so there was no indication that he would made any effort to hurry any faster than the police officer who walked the distance and reported that it took 13 minutes at a brisk pace.

Step 2 according to Hughes was when after Mr. Pittman had to climb over a fence beside a shed in the back of the house, come

around to try the side door (R. 225), he tapped on Bonnie's window in order to wake her up so she could let him in (R. 2253).

Step 3 according to Hughes was when Bonnie let him through the front door (R. 2256) and they went into the bedroom and began to talk (R. 2253).

Step 4 according to Hughes was when Mr. Pittman decided to sit down and "pulled a chair up beside to her bed and started talking about the problems he was having" (R. 2253).

Step 5 according to Hughes was when Mr. Pittman asked Bonnie "why she had told her family that he raped her" in 1985 (R. 2253).

Step 6 according to Hughes was when Bonnie and Mr. Pittman talked about all the times that "they had had sex numerous times" in the past and that it wasn't rape (R. 2253).

Step 7 according to Hughes was when Mr. Pittman started to talk to Bonnie about "her mental problems and stuff" (R. 2253).

Step 8 according to Hughes was when the topic turned to whether they should have sex then (R. 2253).

Step 9 according to Hughes was when she told him that it was not a good idea because she was having her period (R. 2253).

Step 10 according to Hughes was when they talked about having oral sex instead and Mr. Pittman had a couple of stories on that (R. 2253).

Step 11 according to Hughes was when something happened and Bonnie "started trying to holler and stuff" (R. 2253).

Step 12 according to Hughes was when Mr. Pittman tried to quiet her by putting his hand over her mouth (R. 2253).

Step 13 according to Hughes was when Mr. Pittman "end[ed] up hitting her (R. 2253).

Step 14 according to Hughes was when Mr.Pittman "lost it, cut her throat, stabbed her" (R. 2253).[12]

Step 15 according to Hughes was when Bonnie's mother heard something, opened her bedroom door and came running down the hall to the girl's bedroom (R. 2253).

Step 16 according to Hughes was when Mr. Pittman opened the door, stepped out of the bedroom and stabbed Barnara Knowles (R. 2253).

Step 17 according to Hughes was when Bonnie's father woke up, heard a commotion and went to the telephone (R. 2254).

Step 18 according to Hughes was when Mr. Pittman went over and grabbed the phone away, "hit him and knocked him down and he kicked him and he killed him by the telephone in the hallway (R. 22543).

Step 19 according to Hughes was when Mr. Pittman tried to find some gasoline, walked outside to the shed looking for gasoline (R. 2254).

Step 20 according to Hughes was when Mr. Pittman grabbed some gasoline he found in the shed and carried it inside the house (R. 2254).

Step 21 according to Hughes was when Mr. Pittman "poured it on the girl's bed" (R. 2254).[13]

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[12]Hughes provided no indication of where the knife came from or how long it took to get it.

Step 22 according to Hughes was when Mr. Pittman placed a tire under Bonnie's bed to make the fire burn hotter there (R. 2254).[14]

Step 23 according to Hughes was when Mr. Pittman poured gasoline all over the house and threw what was left outside (R. 2254).

Step 24 according to Hughes was when Mr. Pittman, having spread the gasoline, decided that he had too much blood on himself and his clothes (R. 2254).

Step 25 according to Hughes was when Mr. Pittman went into the bathroom next to Bonnie's bedroom (while the house reeked of gasoline) and washed. He washed himself and cleaned his clothes to get rid of the blood (R. 2254).

Step 26 according to Hughes was when Mr. Pittman carried the gasoline can to Bonnie's car and put it inside (R. 2254).

Step 27 according to Hughes was when Mr. Pittman got Bonnie's car keys from some undescribed location (R. 2253).[15]

Step 28 according to Hughes was when Mr. Pittman "set the house fire" in some undescribed fashion (R. 2254).

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[13]However, the deputy fire marshal in his testimony indicated that he found no sign of a liquid accelerant in the bedroom.

[14]Hughes was uncertain where the tire came from. He did not know if Mr. Pittman went outside to get it out of a car or if he just found the tire in the bedroom (R. 2254).

[15]In Hughes testimony he actually had Mr. Pittman setting the fire before getting the car keys, presumably out of the house somewhere (R. 2254).

Step 29 according to Hughes was when Mr. Pittman started the car and drove away (R. 2254).

Step 30 according to Hughes was when Mr. Pittman drove the car close to his father's house and parked the car (R. 2254).

So according to the State's case after Bobbie Jo left Mr. Pittman alone at 2:30 AM, he walked to the Knowles' house in about 13 minutes. Between 2:43 and 3:00 AM, the State's case was that Mr. Pittman with no pre-existing plan or advance planning, committed steps 2 through 28. No rational trier of fact could or can believe that these steps could have been committed in that time frame, or that Hughes' story was true, or that Mr. Pittman committed the offenses beyond a reasonable doubt.

Under Jackson v. Virginia, there was insufficient evidence to sustain Mr. Pittman's convictions. Under Wilson v. Wainwright, it was ineffective assistance of appellate counsel to fail to challenge the sufficiency of the evidence under Jackson v. Virginia on direct appeal. Accordingly, habeas relief must issue.

CLAIM II

UNDER THE DUE PROCESS CLAUSE, THIS COURT ERRED IN AFFIRMING MR. PITTMAN'S CONVICTION WHEN EVIDENCE THAT A THIRD PARTY HAD CONFESSED TO THE MURDER WAS EXCLUDED FROM HIS TRIAL. TO THE EXTENT THAT APPELLATE COUNSEL INADEQUATELY RAISED OR BRIEF THE ISSUE, HIS PERFORMANCE WAS INEFFECTIVE OF APPELLATE COUNSEL.

At Mr. Pittman's trial he was precluded from presenting evidence that a third party, unrelated to Mr. Pittman, admitted committing the murders in the case. As this Court explained in its direct appeal opinion, "[e]arly in the trial, the prosecution received an unsolicited letter" reporting that the author's stepson had committed the murders. Pittman v. State, 646 So. 2d 167, 171 (Fla. 1994). This Court rejected Mr. Pittman's direct appeal challenge to the exclusion of this evidence relying solely on the hearsay rule: "We find that the trial judge correctly excluded Hodges' testimony as substantive evidence under the hearsay rule and that there is no applicable hearsay exception." Pittman, 646 So. 2d at 172.

Despite Mr. Pittman's reliance on Chambers v. Mississippi, 410 U.S. 284 (1973), as requiring hearsay rules to bend to the constitutionally guaranteed right to present a meaningful and complete defense, this Court ignored the due process component of Mr. Pittman's challenge. This Court did not address Chambers or any constitutional limitation upon the scope of the hearsay rule.

Since this Court's ruling in Mr. Pittman's case, the United States Supreme Court has made it clear that the result reached by this Court failed to honor the constitutionally guaranteed right to present a meaningful and complete defense.

In Williamson v. United States, the U.S. Supreme Court, while addressing the federal hearsay rule, explained:

Moreover, whether a statement is self-inculpatory or not can only be determined by viewing it in context. Even statements that are on their face neutral may actually be against the declarant's interest. "I hid the gun in Joe's apartment'" may not be a confession of a crime; but if it is likely to help the police find the murder weapon, then it is self-inculpatory. "Sam and I went to Joe's house" might be against the declarant's interest if a reasonable person in the declarant's shoes would realize that being linked to Joe and Sam would implicate the declarant in Joe and Sam's conspiracy. And other statements that give the police significant details about the crime may also, depending on the situation, be against the declarant's interest. The question under Rule 804(b)(3) is always whether the statement was sufficiently against the declarant's penal interest "that a reasonable person in the declarant's position would not have made the statement unless believing it to be true," and this question can only be answered in light of all the surrounding circumstances.

Williamson, 512 U.S. at 603-04. The Supreme Court in Williamson further explained "that the very fact that a statement is genuinely self-inculpatory - - which our reading of Rule 804(b)(3) requires - - is itself one of the 'particularized guarantees of trustworthiness' that makes a statement admissible under the Confrontation Clause." Williamson, 512 U.S. at 605.[16] Thus, the Court was very clear that the scope of the hearsay rule must be construed in light of constitutionally protected rights of a criminal defendant.

Most recently, the U.S. Supreme Court issued it opinion in Holmes v. South Carolina, 547 U.S. 319 (2006). Therein, it overturned a capital conviction where the defendant sought to present evidence that a third party had admitted to the crime. In pretrial proceedings the third party had appeared and had denied making the incriminating statements and provided an

[16]The self-inculpatory statement in Williamson was made to law enforcement. However, an individual is no more likely to falsely incriminate himself to his own lawyer than he is to falsely incriminate himself to a police officer. The purpose of the attorney-client privilege is to encourage individuals to truthfully advise their attorneys of the facts and circumstances when seeking legal advise. Thus, an individual is more likely to lie to a police officer and falsely exculpate himself than he is to falsely exculpate himself to his lawyer (though it should go without saying that many individuals do falsely exculpate themselves to their own lawyers). Nevertheless, here the issue concerns the reliability of a self-inculpating statement, not exculpating statements.

alibi for the time of the crime, which another witness refuted. The Supreme Court held that South Carolina had wrongfully excluded the evidence from the Defendant's trial. A state may not use an evidence rule to thwart s Defendant's Sixth Amendment right to present a meaningful and complete defense.[17]

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[17]In a case virtually identical to Mr. Pittman's, the 1st DCA relied upon the jurisprudence detailed in Holmes to conclude a new trial was required. Curtis v. State, 876 So. 2d 13, 18 (Fla. 1st DCA 2004). There, another individual's confession had been excluded from evidence because it "did not meet the formal requirements of the declaration against penal interest exception to the hearsay rule." This was because the declarant had not been shown to be unavailable. Yet, the 1st DCA found that the rule could not applied "mechanistically to defeat the ends of justice":

> If the directions we have received from the state legislature regarding the admission of evidence were all that we had to consider, the argument made here would be at an end. But the courts must also consider the constitutional effect of excluding evidence in a criminal trial. In some cases, judges have a duty to admit evidence that does not fit neatly within the confines of the Evidence Code in order to protect the defendant's right to a fair trial.

Curtis, 876 So. 2d at 19.

Accordingly, the 1st DCA analysis is instructive as to the implications of the Due Process Clause as enunciated in Chambers v. Mississippi, 410 U.S. at 302 ("the hearsay rule may not be applied mechanically to defeat the ends of justice"), wherein reversible error was found in the exclusion of another's confessions to the crime for which the defendant stood trial. Under Chambers, "the exclusion of the confessions denied Chambers the right to due process of law, as well as the right to confront the witnesses against him." Curtis, 876 So. 2d at 20. This was because there were "circumstances that provided considerable assurance of their reliability." Id. The 1st DCA found that the analysis under §90.804(2)(c) had largely merged with the Chambers analysis: "Indeed, the Florida courts have consistently applied the constitutional analysis in Chambers, despite the exception in *section 90.804(2)(c), Florida Statutes*, for

Here, this Court's decision affirming on direct appeal failed to address Mr. Pittman's Sixth Amendment challenge and consider whether the mechanical application of the hearsay rule deprived Mr. Pittman of his right to present a meaningful and complete defense. Habeas relief is warranted.

CLAIM III

DURING THE DIRECT APPEAL, THE STATE OF FLORIDA FAILED TO DISCLOSE PERTINENT FACTS WHICH WERE NECESSARY TO THIS COURT'S CONSIDERATION OF THE ISSUES RAISED BY MR. PITTMAN, AND AS A RESULT, THE DIRECT APPEAL DID NOT COMPORT WITH THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The State of Florida having given Mr. Pittman a state law right to a direct appeal was obligated to afford Mr. Pittman with an appeal that comported with due process and provided Mr. Pittman with a fair opportunity to vindicate his constitutional rights. Hewitt v. Helms, 459 U.S. 460 (1983). As the United States Supreme Court has held: "A first appeal as of right [] is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney."

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declarations against penal interest." Id. Thus, the 1st DCA concluded, "the confession in this case was made under circumstances that provided an assurance of reliability." Id.

In essence, the analysis that the 1st DCA engaged in was the analysis that the United States Supreme Court found to be required in Williamson for the admission of statements against penal interest. Again in Williamson, the United States Supreme Court said "that the very fact that a statement is genuinely self-inculpatory - - which our reading of Rule 804(b)(3) requires - - is itself one of the 'particularized guarantees of trustworthiness' that makes a statement admissible under the Confrontation Clause." Williamson, 512 U.S. at 605.

Evitts v. Lucey, 469 U.S. 387, 396 (1985). Certainly, the same principle applies when the State withholds pertinent and exculpatory information regarding the factual circumstances underlying the issues raised in the appeal.

The United States Supreme Court has recognized that a prosecutor is:

> the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in acriminal prosecution is not that it shall win a case, but that justice shall be done.

Berger v. United States, 295 U.S. 78, 88 (1935). As a result, the United States Supreme Court has forbidden "the prosecution to engage in 'a deliberate deception of court and jury.'" Gray v. Netherland, 518 U.S. 152, 165 (1996), quoting Mooney v. Holohan, 294 U.S. 103, 112 (1935). That principle applies even on appeal. "Truth is critical in the operation of our judicial system and we find such affirmative misrepresentations by any attorney, but especially one who represents the State of Florida, to be disturbing." The Florida Bar v. Feinberg, 760 So.2d 933, 939 (Fla. 2000).

For example, when this Court was considering Mr. Pittman's direct appeal it was unaware that Carl Hughes had an incentive to testify against Mr. Pittman and had received consideration. This Court was left in the dark because the State withheld the information. We now only know the information because Mr. Pittman discovered it and presented it. Kathleen Anders, Hughes' wife, testified in 2006 (PC-R. 3539). She was married to Hughes

between 1980 and 1994, and had three children with him (PC-R. 3540-1). After he went to jail in late 1989, she spoke to him often. In one call, Hughes wanted some money. When she balked, "he became very angry and told [her] that he was trying to keep me from being arrested along with him and that he had been asked by FDLE to obtain information regarding this case that had been in the newspapers, which, in fact, was Mr. Pittman's case" (PC-R. 3542). Hughes told her that "the FDLE had [her] and the house under surveillance and that they were watching [her] coming and going" (PC-R. 3543).[18] In order to protect her and their three young children, Hughes said, "He was to - - the way it was told to me is that he was to gather information for them by way of befriending Mr. Pittman while they were both incarcerated" (PC-R. 3543).[19] When asked if she had a clear recollection of this, Ms. Anders responded: "Absolutely, That I know, because it involved me specifically being arrested, so, yes, I do" (PC-R. 3549).[20] She explained that he told her that "he had kept her from being

[18]Ms. Anders testified that she was interviewed by the prosecutor on her husband's case, David Bergdoll (PC-R. 3545). Bergdoll asked her "to come in and they asked me, you know, how I paid the bills and financial things like that" (PC-R. 3549). A polygraph examination was even administered (PC-R. 3549). She found the experience very frightening (PC-R. 3549).

[19]As Ms. Anders remembered it, Hughes was sent in as an agent for the State to get evidence from Mr. Pittman. Had this been disclosed, Hughes' testimony would have been inadmissible.

[20]Ms. Anders' testimony revealed that Hughes lied at Mr. Pittman's trial when he claimed to have no incentive to gather evidence against Mr. Pittman and testify for the State.

arrested" by agreeing "to obtain information regarding the Pittman case" (PC-R. 3549-50).[21]

Ms. Anders also explained that Hughes "was always concerned about how much time he would have to spend in jail, if any. He was pretty much, as related to me by him, that if he did certain things, that they could, in fact, possibly lower that time in jail. He was going to do some time in jail, but it wouldn't be as much if during this time he cooperated doing other things" (PC-R. 3546). According to Ms. Anders, Hughes' involvement in the Pittman case was in order to reduce the amount of time that he, Hughes, faced in prison, and to protect Ms. Anders, who had custody of his three young children, from prosecution.

This Court was unaware of this withheld information when it considered Hughes' testimony in its direct appeal analysis. Instead, all it had was Hughes' false assertions vouching for himself:

> So I haven't got any rewards that you're going to be able to convince this jury I got. I haven't got any incentives to sit here today and do this, I wasn't going to do this. I'm facing a situation where I had -- I was going to be brought back anyway, ultimately I was. But you talk with my fiancee who thinks it's the right thing to do, the reasons I told you.

---

[21]Ms. Anders frequently relayed messages back and forth between Dey and Hughes while he was incarcerated in 1990. However, she did not remember that any of these messages were related to Mr. Pittman's case (PC-R. 3544). She remembered that Hughes asked her to find out from Dey if he could stay in the State of Florida. Occasionally, he would tell her to tell Dey that he needed to talk to him about paperwork he had received (PC-R. 3544). From what he told his wife, Hughes was in frequent direct contact with Dey (PC-R. 3550).

(R. 2336-7).[22] He reiterated this several times:

> But I don't think it's fair that you try to persuade this jury I have some motive. I was given no favors as a result even up to the day of sentencing of doing that, contrary to what you're trying to lead them to believe. It didn't happen that way.

---

[22]David Bergdoll testified at Mr. Pittman's trial. Bergdoll acknowledged handling the prosecution of Hughes. Bergdoll indicated that Hughes was being prosecuted as a career criminal (R. 2981-2). He indicated that Hughes had pled straight up. This meant that Hughes was facing a potential maximum of an 85 year sentence (R. 3004). However, the controlling sentencing guidelines called for Hughes to get "three or four years in prison" (R. 3011). Bergdoll indicated that his office's policy was to back off of seeking the hard-line approach of no negotiations where "the person provides evidence for the State against other defendants" (R. 3004). At Hughes' sentencing, Bergdoll did not seek the maximum, but he did ask for a sentence above the guidelines – a six year sentence (R. 3011). Bergdoll testified that Hughes actually got a sentence above the recommended range when he received a four and a half year sentence (R. 3011). Bergdoll did acknowledge that he would have sought a greater sentence than six years had he not been aware of Hughes' cooperation with law enforcement (R. 3007).

Hughes' PSI was introduced into evidence at the hearing as Def. Ex. 30. It showed that his sentencing in state court was scheduled for May 29, 1990. Mr. Pickard testified that a copy of Hughes' PSI would have been in the State Attorney's Office, and that he could have accessed it (T. 437). Hughes federal sentencing occurred on August 3, 1990 (R. 2321). His state court sentencing occurred on September 26, 1990 (R. 2323).

(R. 2337).[23]

> Q: And still, despite what happened through the court proceedings, you're telling this jury that you didn't receive any benefits, is that what you're saying?
>
> A: That's what I maintain. Still, I think you failed to show me or anybody else how I got any special favors. I don't understand that.

[23]Contrary to his trial testimony, Ms. Anders' testimony shows that Hughes clearly did have a motive in cooperating with the State and coming up with evidence against Mr. Pittman.

(R. 2357).[24]

When the State presents false evidence or hides evidence impeaching its case, this Court's consideration of a defendant's direct appeal is harmed. This Court cannot properly resolve issues presented to it when the State is withholding vital information.

CLAIM IV

MR. PITTMAN'S DEATH SENTENCE IS PREDICATED ON AN AUTOMATIC AGGRAVATING CIRCUMSTANCE, CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE FOR FAILING TO RAISE THIS ISSUE OF FUNDAMENTAL ERROR.

Mr. Pittman's jury was instructed that it could find and consider the "prior conviction of a violent felony" aggravator. In Mr. Pittman's case, each of his contemporaneous convictions served as an aggravator for the others. This led to the illogical and unfair result that the last homicide was considered a "previous offense" for the purposes of aggravating the first and second. Had the State been unable to use Mr. Pittman's contemporaneous convictions to aggravate each other, this aggravator would have been entitled to very little weight.

The use of Mr. Pittman's contemporaneous convictions to aggravate each other resulted in the application of an automatic aggravating circumstance. Mr. Pittman thus began his penalty

[24]In fact, Hughes asserted that because the State did not what to create an appearance that he received any benefit, he was treated worse by the State than "everybody else" (R. 2357).

phase facing a default sentence of death, before any evidence was presented to the jury. This was a violation of the Eighth and Fourteenth Amendments of the United States Constitution: an automatic aggravator fails to narrow the class of persons for whom death is an appropriate penalty.

In addition, appellate counsel failed to raise the issue of the error that occurred in presenting Mr. Pittman's only previous felony conviction involving the use of threat of violence. That conviction was an aggravated assault Mr. Pittman pled guilty to in 1985. The State introduced the conviction from the 1985 case by having an Assistant State Attorney read the charging document aloud. There was no indication to the jury that the conviction was the result of a guilty plea rather than a jury trial.

In arguing the amount of weight the aggravated assault aggravator should receive, defense counsel stated: "With respect to the aggravated assault, it's important that you realize there was no physical violence that was inflicted on another person, that no one was hurt, that there was no intent to kill by the very nature of the allegation" (R. 4575). However, no instruction on aggravated assault was ever requested or given. The only judicial comment on Aggravated Assault was contained within the instructions on the prior violent felony aggravator, "The crime of Aggravated Assault is a felony involving the use or threat of violence to another person" (R. 4613).

The jury was told prior to the guilt and penalty phase that what the attorneys said was not evidence and that the judge, not the attorneys, would instruct them on the law. It was impossible

for the jurors to evaluate the seriousness and aggravating nature of a prior aggravated assault conviction, not knowing the legal definition of aggravated assault. The jurors could not evaluate the defense attorney's assurance on the subject particularly in light of the State's claiming:

> You have before you evidence that back in 1985 Mr. Pittman was charged and convicted of the offense of aggravated assault. Not only is that a felony involving violence, the specifics of that offense, as were read to you, involved pulling a knife on a woman. **Similar to what he did in this case, although in the prior case nobody was killed**. He was charged with threatening a female with a knife. So he has a history of threatening people with knives.

(R. 4545).

There was no basis in the trial record to support the prosecutor's contention that the facts of the aggravated assault were at all similar to the facts of this homicide. This resulted in fundamental error. Appellate counsel's failure to raise this claim was ineffective.

CLAIM V

MR. PITTMAN WAS DENIED A FAIR TRIAL AND A FAIR, RELIABLE AND INDIVIDUALIZED CAPITAL SENTENCING DETERMINATION IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, BECAUSE THE PROSECUTOR'S ARGUMENTS AT THE PENALTY PHASE PRESENTED IMPERMISSIBLE CONSIDERATIONS TO THE JURY, INCLUDING NON-STATUTORY AGGRAVATING FACTORS, MISSTATEMENTS OF THE LAW AND FACTS AND THEY WERE INFLAMMATORY AND IMPROPER. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THESE ERRORS ON APPEAL.

The prosecutor made improper argument throughout his penalty phase closing argument. The prosecutor began by explaining the weighing process as follows:

> What you're going to be asked to do in this phase of the trial is to weigh aggravating circumstances against mitigating circumstances and come to your conclusion based on the law and the evidence as to whether you feel the aggravating circumstances outweigh the mitigating circumstances.

(R. 4544). In doing so, the State impermissibly shifted the burden to the defendant to prove that mitigation outweighed aggravation in order to receive a life sentence. This burden-shifting was compounded by the trial court's erroneous instructions to the jury.

The prosecutor continued to engage in impermissible conduct by making improper "Golden Rule" arguments:

> But what does that allow you to consider in deciding whether the crime is heinous, atrocious or cruel? Well, the law allows you to consider such things as the fear and emotional strain on the victims at time of and prior to their death. In other words, **what sort of fear do you feel that Barbara Knowles experienced** when she was coming down the hallway that night and met David Pittman coming out of Bonnie Knowles' room with a knife in his hand? **What sort of fear do you feel she experienced** when he raised the knife and started bringing it down towards her chest to stab her three times?
>
> The emotional fear and strain put on the person who was killed is a valid consideration.
>
> **What sort of fear do you feel Clarence Knowles experienced** as he picked up the telephone to probably what he though was doing was calling for help or starting to call for help, not knowing that the phone wires had been cut? When he saw Mr. Pittman approaching him, as he is standing there with that telephone and he sees Mr. Pittman approaching him with that knife in his hand after having already killed two people, **what sort of fear and emotional strain was**

> **going through Clarence Knowles** as that knife came up and started coming down towards him?
>
> Dr. Melamud told you that the victims would not necessarily have all died instantly. **What sort of suffering did they feel or did they experience** after the knife went in their body the first time and the knife was withdrawn and it went in again and it was withdrawn and it went in again?
>
> For Bonnie Knowles eight times, for Barbara Knowles three times, and for Clarence Knowles five times.

(R. 4546-8)(emphasis added).

Arguments that invite the jury to put themselves in the victim's shoes are generally characterized as "Golden Rule" arguments and are improper. According to this Court, "the prohibition of such remarks has long been the law of Florida." Bertolotti v. State, 476 So.2d 130, 133 (Fla. 1985), citing Barnes v. State, 58 So.2d 157 (Fla. 1951). Further, this Court emphasized that, "[Closing argument] must not be used to inflame the minds and passions of the jurors so that their verdict reflects and emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law." Berlotti, 476 So.2d at 134. How better to inflame the jurors and get an emotional responsive verdict than to ask them to "feel" the victim's fear and suffering?

The State next argued the premeditated nature of the crime as nonstatutory aggravation (R. 4549-51). Defense counsel objected to the State's remarks but the trial court overrule it.

The State argued facts outside the record and injected an improper element of emotion into the deliberations by arguing:

> There is such a thing as punishment fitting the crime. If you give David Pittman a life sentence,

> David Pittman may be in state prison but David Pittman is still alive. David Pittman can still talk, walk, watch television, read books, eat, have visitors, see friends. Even though he's sitting in state prison he's breathing and he's still alive. Bonnie and Clarence and Barbara Knowles are dead. As I said, a life sentence, even three life sentences in this case, does not fit the crime. Except for Marie Pridgen, who is still alive, David Pittman literally wiped out an entire family. Three of the four members of a family are dead because of his actions.

(R. 4552).

The first portion of the State's argument is virtually indistinguishable from the one found improper in Jackson v. State, 522 So. 2d 802 (Fla. 1988). Trial counsel objections to the argument were overruled (R. 4552-6).

The prosecutor also improperly denigrated the proper statutory and non statutory mitigating factors, literally arguing on several occasions, "So what?" (R. 4556). Moreover, the state impermissibly argued that the defendant, in putting on valid mitigating evidence authorized by statute, was trying to shift the blame for his actions. The prosecutor essentially argued that the defendant exercising his right to put on mitigation in his defense should be considered as nonstatutory aggravation:

> The testimony that you heard yesterday, I'm not sure if the purpose is to make it appear that there are other people or other places or other things that are to some extent at fault in this case besides, Mr. Pittman. Is it the school system that's at fault because they didn't teach him to write correctly, or is it the parents at fault because they abused him and didn't bring him up correctly? Or is someone else at fault in this case besides Mr. Pittman? The only person on trial is David Pittman. The person who committed these crimes is David Pittman. Not his mother, not his father, not his sister, not the school system, and not society. David Pittman is the one who went in that house and killed three people. Not anyone

> else, not any other system or group of people. Let me close by asking you one question. Why are we here today? Are we here today because David Pittman has problems? No. We're here today in a penalty phase of a first degree murder case because David Pittman killed three people. And please don't forget that fact. Don't get caught up in all this peripheral stuff about his "problems" that you forget why we're even here, what caused us to be involved in this particular phase of the trial to begin with.

(R. 4559-60). The State's argument is contrary to established law, highly improper and prejudicial.

Finally, the prosecutor again inflamed the passions of the jurors and made an improper appeal for them to send a message to the community. "This man murdered three people. If we're going to have a death penalty in the State of Florida, let's enforce it" (R. 4560). State courts have consistently held such appeals to be improper. Urbin v. State, 714 So.2d 411 (Fla. 1998); Bertolotti v. State, 476 So.2d 130 (Fla. 1985); Boatwright v. State, 452 So.2d 666 (4th DCA 1984); Harris v. State, 619 So.2d 340 (1st DCA 1993); Pacifico v. State, 642 So.2d 1178, 1185 (1st DCA, 1994); Grey v. State, 727 So.2d 1063 (4th DCA 1999).

The state was permitted to argue these improper factors, misstatements of the law, and inflame the jury. The cumulative effect of the prosecutor's comments was to "improperly appeal to the jury's passions and prejudices." 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." 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. Here, 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 asked Mr. Pittman's jury to consider factors outside the evidence.

It is well recognized that "a prosecutor's concern 'in a criminal prosecution is not that is 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. Arguments such as those made by the prosecutor in Mr. Pittman's case phase 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); Newton v. Armontrout, 885 F.2d 1328, 1338 (8th Cir. 1989); Coleman v. Brown, 802 F.2d 1227 (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." 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." Wilson, 776 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. This Court has held that when improper conduct by the prosecutor "permeates" a case, as it has here, relief is proper. Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990).

The adversarial process in Mr. Pittman's trial broke down when defense counsel failed to object to blatantly improper penalty phase argument by the State. Appellate counsel was ineffective in failing to raise Mr. Pittman's claims.

CLAIM VI

MR. PITTMAN'S SENTENCING JURY WAS MISLED BY COMMENTS, QUESTIONS, AND INSTRUCTIONS THAT UNCONSTITUTIONALLY AND INACCURATELY DILUTED THE JURY'S SENSE OF RESPONSIBILITY TOWARDS SENTENCING IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE OF FUNDAMENTAL ERROR.

Throughout Mr. Pittman's capital proceedings, comments and instructions were made and given to the jury which confused and misled it regarding it's role as co-sentencers. Jurors were left with the impression that their recommendation, either for life or death, was not binding upon the court, and the fact that the

judge could only reject their recommendation if no reasonable juror would agree with it, i.e., the Tedder standard was never fully and adequately explained to them.

This procedure started during the very beginning of voir dire and continued throughout until the last instructions given to the jury. For example, at the beginning of voir dire, the trial court instructed the entire jury pool as follows:

> The Court will give you detailed instructions on each phase of the trial at the appropriate time. And, ladies and gentlemen, for clarification, I think it should be added that should the jury in the penalty phase concluded by the proper weight of the evidence and by the proper number of votes that the death penalty was appropriate based upon the evidence and instructions on the law, the jury must understand that this is a recommendation to the Court. Although the Court must by law place great weight upon the jury's recommendation, **you must clearly understand that it is a recommendation only. The Court has the function of making the final decision, and it is the Court that makes the final decision as to whether or not the death penalty must be imposed or not**.

(R. 100)(emphasis added). The judge never explained what great weight meant or the meaning and import of the Tedder standard.

After the penalty phase testimony was concluded, the trial court excused the jury early to discuss proposed instructions with the attorneys. Prior to releasing the jurors, the trial court delivered a brief explanation of what remained in the trial. The Court explained:

> But with all of those things, and again in fairness to you, I wanted you to understand that all things do come to an end, and it looks predictably like we might be able to resolve this aspect of the trial tomorrow. And the only thing that would be left then would be for the Court to give great weight to your

recommendation **and ultimately resolve the disposition of the case**.

(R. 4512)(emphasis added).

Once again, there was no explanation of "great weight," and the Court emphasized that it (the Court) was the ultimate sentencer. Consequently the jury was left with the impression that the judge could impose whatever sentence it chose.

Mr. Pittman's trial counsel did propose two instruction variations that emphasized the importance of the jury's advisory verdict, but the trial court rejected these, saying:

> THE COURT: All right. Let's move to 11 for a moment and let me consider that. Is 11 a standard?
>
> MR. TROGOLO (DEFENSE): No, sir, 11 is a request just based on the cases cited in there, Tedder v. State of Florida and Caldwell v. Mississippi. It just emphasizes to the jury that although it's an advisory role it's something they should take serious.
>
> THE COURT: Well, somewhere in the standards I believe there is some point made of that, isn't there?
>
> MR. TROGOLO: Yes, sir. I believe that that would be- well, I'm not so sure that-
> MR. PICKARD (STATE): The standards do not say anything about giving great weight to their recommendation. That is not anywhere in the standards.
>
> THE COURT: But in fact that is the law?
>
> MR. PICKARD: That is the law, but the Court is not required to instruct the jury. That has come up before. There's case law on that where the argument has been made that that should be told to the jury because that is the law. The case law says the Court has to give great weight and therefore the Court should tell the jury. Actually, I think the Court has already told them that as a practical matter. But as far as having it written out in the standards, that issue has been raised in the past. And we do have some Supreme Court rulings which indicated that does not have to be told to them in the jury instructions. In fact, the

> Supreme Court on more than one occasion said all that the Court is required to give is what is in the standards.
>
> MR. TROGOLO: I agree that there are cases that say it's not error for the Court to refuse to give that.
>
> THE COURT: As to defendant's 11, the Court will not give that instruction, and I will so rule at this time.
>
> MR. TROGOLO: And 11-b is just a different wording of that. And we would make the same request on the same grounds. It's just worded differently.
>
> THE COURT: Again, for the same reason, I will not give the great weight instruction.

(R. 4520-1).

Instead of defense counsel's proposed instructions, the trial court advised the jury:

> Ladies and Gentlemen of the jury, it is now your duty to advise the Court as to what punishment should be imposed upon the defendant for his crime of First Degree Murder. 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 not be given to you by the Court and to render to the Court an advisory sentence based upon you determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigation circumstances exist to outweigh any

aggravating circumstances exist to outweigh any aggravating circumstances found to exist.

(R. 4612)(emphasis added). Thus, in the instructions delivered by the Court and given to the jury during deliberations, there was no explanation at all of the jury's role as co-sentencer.

Mr. Pittman is entitled to relief because a capital sentencing jury must be properly instructed as to its role in the sentencing process. Espinosa v. Florida, 112 S. Ct. 2926 (1992); 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).

In Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(en banc), a capital habeas corpus petitioner was awarded relief when he presented a claim involving prosecutorial and judicial comments and instructions that diminished the jury's sense of responsibility. Mr. Pittman is entitled to the same relief. Denying relief would result in a totally arbitrary imposition of the death penalty in violation of the Eighth Amendment. Furman v. Georgia, 408 U.S. 238 (1972).

The trial court failed to instruct the jury that its recommendation would only be overridden in circumstances where no reasonable person could agree with it. Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). Mr. Pittman's jury should have been informed of this. It was not.

Under Florida's capital statute, the jury has the primary responsibility for sentencing. It's decision is entitled to great weight. McCampbell v. State, 421 So. 2d 1072, 1075 (Fla.

1982); Espinosa v. Florida, 112 S. Ct. 2926 (1992). Thus suggestions and instructions that a capital sentencing judge has the sole responsibility for the imposition of sentence, or is fee to impose whatever sentence he or she deems appropriate 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 the jury in Florida capital sentencing scheme); Espinosa v. Florida, 112 S. Ct. 2926 (1992). The judge's role, after all, is not that of the "sole" or "ultimate" sentencer. Espinosa, 112 S. Ct. at 2928 ("Florida has essentially split the weighing process in two"). The jury's sentencing verdict can be overturned by the judge only if the facts are "so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). Mr. Pittman's jury, however, was led to believe that the judge was the "ultimate" sentencer. Appellate counsel was ineffective for failing to raise this fundamental error of improper instructions to the jury at Mr. Pittman's sentencing phase. Relief is proper.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Pittman 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 Katherine Blanco, Assistant Attorney General, this___ day of December, 2008.

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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