IN THE SUPREME COURT OF FLORIDA

CASE NO. 76344

ANTHONY BERTOLOTTI,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

APPLICATION FOR STAY OF EXECUTION, REQUEST FOR A REASONABLE TIME PERIOD TO PREPARE AND FILE A BRIEF ADEQUATELY DISCUSSING THE ISSUES FOR THE COURT'S REVIEW, AND REQUEST FOR ORAL ARGUMENT

Appellant, ANTHONY BERTOLOTTI, through counsel, respectfully prays that this Honorable Court allow him to present oral argument and allow a reasonable time period (e.g., 10 days) for his counsel to file a brief meaningfully discussing the claims involved in this action for the Court's review. Oral argument and proper briefing shall be important to an adequate resolution of the claims involved in this action. For example, this case presents a valid and substantial claim pursuant to South Carolina v. Gathers and Booth v. Maryland, a claim that was presented to this Court on direct appeal, pre-Booth, but then denied -- although the Court was then quite troubled by the State's

presentation and argument. As this Court ruled in Jackson v. Dugger, infra, the claim warrants deliberate consideration in these proceedings, since the errors were objected to at trial, presented on direct appeal, but then, pre-Booth, improperly determined. Mr. Bertolotti's prior Rule 3.850 action was litigated and relief was denied by this Court prior to the Court's ruling in Jackson that claims predicated upon Booth would be considered on their merits in Rule 3.850 proceedings. There is no procedural bar. This is a valid claim.[1] It warrants judicious consideration. An opportunity for proper briefing (i.e., ten days to allow Appellant to properly brief this valid claim for relief), oral argument, and a stay of execution are appropriate, and in support of these requests Mr. Bertolotti respectfully submits as follows:

A. THE OTH 'JACKSON CLA

1. This case has persistently troubled members of this Honorable Court. On direct appeal, the Court noted the improprieties in "the prosecutor['s] . . . argument which is a variation on the proscribed Golden Rule argument, inviting the

[1] Mr. Bertolotti also submits that the cruel and unusual punishment claim presented in this action warrants careful and judicious consideration, especially since it involves facts that were not before the Court during the litigation of the Buenoano V. State case.

jury to imagine the victim's final pain, terror and defenselessness . . . . [and f]inally, the prosecutor urged the jury to consider the message its verdict would send to the community at large, an obvious appeal to the emotions and fears of the jurors." Bertolotti v. State, 476 So. 2d 130, 133-34 (Fla. 1985). The Court noted that the argument was improper, castigated the State for attempting to "inflame the minds and passions of the jurors," but did not reverse. This occurred prior to the Court's ruling in Jackson. As in Jackson, the pre-Booth disposition on direct appeal warrants reconsideration at this juncture. In Jackson the Court held that cases such as Mr. Bertolotti's are precisely the type that would warrant full merits review in post-conviction proceedings in light of Booth. This Honorable Court has never so reviewed Mr. Bertolotti's case -- his prior Rule 3.850 appeal was denied by this Court in 1988, prior to the Court's issuance of Jackson in 1989. Thus, there was no mechanism in 1988 for Mr. Bertolotti to seek a post-Booth determination of the merits -- there was no Jackson opinion and thus no vehicle for seeking the Court's review of this claim, one which had been denied on the merits on direct appeal.[2] This case

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[2]What is important about the prior, pre-Jackson, 3.850 ruling in this case is that there too this Honorable Court demonstrated that it was troubled by this case, as reflected by the dissents of Justices Ehrlich, Shaw, and Barkett. See Bertolotti v. State, 534 So. 2d 386 (Fla. 1988).

is in precisely the same procedural posture as Ms. Jackson's. This case presents the same Booth and Gathers violations which warranted relief in Jackson. The opportunity for Mr. Bertolotti to meaningfully brief this issue is warranted.[3] Judicious and careful review is proper.

2. This case presents a stark example of prosecutorial overreaching in an attempt to obtain a death sentence. From the very beginning, the atmosphere surrounding Mr. Bertolotti's capital trial was rife with prejudice and with the potential for the unrestrained expression of passion and emotion. That potential was realized as a result of the prosecutor's persistent efforts during the penalty phase to arouse passions, engender prejudice, and inflame emotions. This Honorable Court was concerned about this during Mr. Bertolotti's pre-Booth direct appeal. But, without the benefit of the standards discussed in Booth, Gathers, and Jackson (for example, that the State bears the burden of establishing that the error is harmless beyond a reasonable doubt), the Court then did not reverse. As the Court

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[3] That there has been no such opportunity is a fact which should be obvious to this Honorable Court. The circuit court denied relief on the afternoon of Monday, July 23, 1990. Mr. Bertolotti's execution is scheduled for 7:00 a.m. tomorrow, Tuesday, July 24, 1990. Complicated under-warrant proceedings in the Squires, Stewart, Hamblen, and White cases have been litigated by the CCR office during the last 15 days. Appellant's counsel have had no time to prepare an appropriate brief for this Honorable Court's consideration.

held in Jackson, the standards are now different. And as the Court held in Jackson, Appellant is entitled to meaningful review of the merits in these post-conviction proceedings in light of these different standards of review.

3. As a result of the State's efforts, Mr. Bertolotti was sentenced to death in proceedings which allowed for the unchecked exercise of passion, prejudice and emotion. Here, as in South Carolina v. Gathers and Booth v. Maryland, the prosecutor's efforts were intended to and did "serve no other purpose than to inflame the jury [and judge] and divert [them] from deciding the case on the relevant evidence concerning the crime and the defendant." Booth v. Marvland, 107 S. Ct. 2529, 2535 (1987). Since a decision to impose the death penalty must **"be,** and appear to be, based on reason rather than caprice or **emotion,"** Gardner v. Florida, 430 U.S. 349, 358 (1977)(opinion of Stevens, J.), such efforts to fan the flames are "inconsistent with the reasoned decision making" required in a capital case. Booth, 107 S. Ct. at 2536. Mr. Bertolotti's death sentence stands in stark violation of the eighth and fourteenth amendments.

4. As noted, this Court recently found that claims based upon Booth v. Maryland, 107 S. Ct. 2529 (1987), are proper for consideration in Florida post-conviction proceedings:

> At the time of Jackson's direct appeal, the United States Supreme Court had not yet decided Booth v. Maryland, in which the Court held that presentation of victim impact

> evidence to a jury in a capital case violates the eighth amendment of the United States Constitution. The Court reasoned that evidence of victim impact was irrelevant to a capital sentencing decision because this type of information creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner . . .
>
> Under this Court's decision in Witt v. State, 387 So.2d 922 (Fla.), cert. denied, 449 U.S. 1067 (1980), Booth represents a fundamental change in the constitutional law of capital sentencing that, in the interests of fairness, requires the decision to be given retroactive application.

Jackson (Andrea) v. Dugger, 547 So. 2d 1197, 1198-99 (Fla. 1989). Mr. Bertolotti's claim is ripe for review at this juncture, in light of Jackson.

5. At Anthony Bertolotti's capital trial, the State presented evidence and arguments regarding the victim's personal characteristics, and worth and suffering, and made pointed comparisons between the worth of the victim and the worth of Mr. Bertolotti, urging the jury and court to sentence Mr. Bertolotti to death on the basis of precisely the types of unconstitutional victim impact evidence and argument condemned in Booth, South Carolina v. Gathers, 109 S. Ct. 2207 (1989), and Jackson, supra. The eighth and fourteenth amendments were violated in this case, as the record makes abundantly clear.

6. Defense counsel objected, and the claim was addressed on direct appeal, pre-Booth. This case is in the same posture as

Jackson, supra. In light of Jackson, the claim should now be reviewed. Counsel's objections to the improper evidence and arguments were overruled, and the State's unconstitutional presentation was allowed to continue. When the issue was raised on direct appeal, the Court declined to reverse. See Bertolotti v. State, 476 So. 2d 130, 133-34 (Fla. 1985). Under Jackson, this issue should now be revisited, for, as in Jackson, the errors appear of record and have been previously presented to the Florida Supreme Court. See Jackson, 547 So. 2d at 1199 n.2. Under Booth, Gathers, and Jackson, the constitutional errors discussed below require relief.

7. The eighth amendment violation first arose from the testimony of the victim's husband. He had testified at the guilt phase of the proceedings but had been precluded from testifying regarding the victim's fear of strangers (R. 748-50). However, evidence of the victim's poor health was permitted over objection (R. 739, 753-54, 755).

8. During the penalty phase the victim's husband was recalled. Defense counsel objected (R. 1281), but the judge ruled that during the penalty phase the evidentiary rules were relaxed and the evidence of the victim's inordinate fear of strangers was admissible (R. 1282). Thereafter, the victim's husband testified as follows on direct examination:

> A If I was home, my wife would open a door, although she would prefer I do so.

> Throughout our marriage she often was upset if I opened the door to strangers, mentioning the danger there might be. I did not feel that danger, but my wife did.
>
> Q All right, sir. Now, was she particularly concerned with black strangers?
>
> MR. KENNY: Your Honor, I'm going to object to leading the witness and suggesting the answer.
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> THE COURT: Sustained. Reframe your question.
>
> BY MR. SHARPE:
>
> Q Did she have any particular concerns about who the strangers were that would come to the door?
>
> A All strangers upset my wife if they were young and male.

(R. **1356-67).**

9. During closing argument, the State emphasized that it was not the victim's "habit to let strangers **in"** (R. **1447).** The State then called attention back to the guilt phase evidence portraying the victim, Carol Ward, as a sickly and frightened White woman. Mr. Bertolotti is a Black male. The prosecutor culminated the argument with an impassioned plea that the jury impose death on the basis of the victim's characteristics and that the jury exercise unrestrained emotion:

> There is one thing about capital cases, cases where the death penalty is involved; and that is, <u>when we aet to this stase of the trial, the victim is kind of off in the backsround. forsotten</u>. We keep emphasizing that person sitting over there, a defendant

convicted of murder in the first degree. And Carol Ward is just kind of an abstract person. Everybody's forsotten about her.

Well, in this situation Carol Ward was robbed of her life. She was robbed of her money. But Carol Ward is not the only person that demands justice in this case. The state demands justice. The state demands justice for Anthony Bertolotti.

If this business of the death penalty and the law is to be respected, if it's to have any meaning whatsoever, if Carol Ward is to receive justice and if Anthony Bertolotti is to receive justice, the only appropriate sentence that you can return here is to come right back in this courtroom, to look Anthony Bertolotti right in the eye and say, "Anthony Bertolotti, for what you did and for what you are, death is the appropriate penalty under the law."

Anything less in this case would only confirm what we see running around on the bumper stickers of these cars, and that is that only the victim gets the death penalty.

Thank you.

THE COURT: Is the defense prepared to present argument?

MR. KENNY: May we approach the bench a moment, Your Honor?

THE COURT: Yes.

(Whereupon, the following proceedings were had at the bench.)

MR. KENNY: Your Honor, at this time, once again, I move for a mistrial on the grounds that Mr. Sharpe is now claiming that in essence we don't have the death penalty in this case, which is totally untrue. And he's claiming that only the victim gets the death penalty, which I think is improper argument

by the state.

Both on that ground and also on the grounds that he is now appealing to the sympathy of the jury, and both that and the cumulative effect of the other two statements he made, I would move for a mistrial.

THE COURT: None of which do I find to be objectionable, certainly not to the point of a mistrial. Denied.

(Whereupon, the bench conference was concluded.)

(R. 1457-59)(emphasis added). The record reflects even further errors, errors noted by the Court on direct appeal. Given the time constraints, counsel cannot discuss them herein, but respectfully urges that this Honorable Court allow proper briefing.

10. The prosecutor's victim impact evidence and closing arguments violated the eighth and fourteenth amendments. See Booth; Gathers; Jackson; Rushing v. Butler, 868 F. 2d 800, 804 (5th Cir. 1989)(noting, "the admission of emotionally charged, live testimony regarding the victim's character, demeanor and reputation . . . were altogether irrelevant" to the sentencing decision and thus violated the eighth amendment). See also Wilson v. Kemp, 777 F.2d 621 (11th Cir. 1985); Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985)(in banc); Newlon v. Armontrout, 885 F. 2d 1328, 1338 (8th Cir. 1989), quoting Coleman v. Brown, 802 F. 2d 1227, 1239 (10th Cir. 1986)("'[a] decision on the propriety of a closing argument must look to the Eighth Amendment's command

that a death sentence be based on a complete assessment of the defendant's individual circumstances . . . and the Fourteenth Amendment's guarantee that no one be deprived of life without due process of law"') (citations omitted). The evidence and arguments contaminated the proceedings with irrelevant, inflammatory, and prejudicial appeals to the jury's sympathy for the victim.

11. When presented with this issue on direct appeal, this Court found the prosecutor's arguments thoroughly improper,[4] but -- pre-Booth and pre-Jackson -- did not analyze the eighth amendment implications of the arguments:

> Later, the prosecutor made an argument which is a variation on the proscribed Golden Rule argument, inviting the jury to imagine the victim's final pain, terror and defenselessness. This violation has been addressed recently in Jennings v. State, 453 So.2d 1109 (Fla. 1984), vacated on other grounds, ___ U.S. ___, 105 S.Ct. 1351, 84 L.Ed.2d 374 (1985), but the prohibition of such remarks has long been the law of Florida. Barnes v. State, 58 So.2d 157 (Fla. 1951). Finally, the prosecutor urged the jury to consider the message its verdict would send to the community at large, an obvious appeal to the emotions and fears of the jurors. These considerations are outside the scope of the jury's deliberations and their injection violates the prosecutor's

[4] As noted, Mr. Bertolotti's prior 3.850 application was denied by the Court in 1988, well-before Jackson was decided in 1989.

duty to seek justice, not merely "win" a death recommendation. ABA Standards for Criminal Justice 3-5.8 (1980).

In State v. Murray, 443 So.2d 955 (Fla. 1984), this Court held that prosecutorial error alone does not warrant automatic reversal of a conviction. In the penalty phase of a murder trial, resulting in a recommendation which is advisory only, prosecutorial misconduct must be egregious indeed to warrant our vacating the sentence and remanding for a new penalty-phase trial. But see, Teffeteller v. State, 439 So.2d 840 (Fla. 1983), cert denied, 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 754 (1984). We do not find the misconduct here to be so outrageous as to taint the validity of the jury's recommendation in light of the evidence of aggravation presented.

Nonetheless, we are deeply disturbed as a Court by the continuing violations of prosecutorial duty, propriety and restraint. We have recently addressed incidents of prosecutorial misconduct in several death penalty cases. Bush v. State, 461 So.2d 936, 942 (Fla. 1984) (Ehrlich, J., specially concurring), Jennings; Teffeteller v. State. As a Court, we are constitutionally charged not only with appellate review but also "to regulate ... the discipline of persons admitted" to the practice of law. Art. V, sec. 15, Fla. Const. This Court considers this sort of prosecutorial misconduct, in the face of repeated admonitions against such overreaching, to be grounds for appropriate disciplinary proceedings. It ill becomes those who represent the state in the application of its lawful penalties to themselves ignore the precepts of their profession and their office. Nor may we encourage them to believe that so long as their misconduct can be characterized as "harmless error," it will be without repercussion. However, it is appropriate that individual professional misconduct not be punished at the citizens' expense, by

> reversal and mistrial, but at the attorney's expense, by professional sanction. State v. Murray, 443 So.2d at 956.
>
> The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Conversely, it 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.
>
> Moreover, we commend to trial judges the vigilant exercise of their responsibility to insure a fair trial. Where, as here, prosecutorial misconduct is properly raised on objection, the judge should sustain the objection, give any curative instruction that may be proper and admonish the prosecutor and call to his attention his professional duty and standards of behavior.

Bertolotti, 476 So. 2d at 133-34. Now, post-Booth and post-Jackson, this issue should be revisited, and Mr. Bertolotti's unconstitutional death sentence should be reconsidered.

12. The very matters paraded before the sentencing court and jury in Mr. Bertolotti's case -- the victim's family's "sense of loss," Booth, 107 S. Ct. at 2534; the victim's personal worth, id. at 2534, the victim's value to the community and to her family, id. -- were the matters which the Supreme Court in Booth and Gathers determined to be impermissible considerations at the penalty phase of a capital trial. The eighth amendment was violated here, as it was in Jackson, Booth and Gathers.

13. This record is replete with Booth and Gathers error.

Mr. Bertolotti was sentenced to death on the basis of the very constitutionally impermissible "victim impact" and "worth of victim" evidence and argument which the Supreme Court condemned in Booth and Gathers. The Booth court concluded that "the presence or absence of emotional distress of the victim's family, or the victim's personal characteristics are not proper sentencing considerations in a capital case." Id. at 2535. These are the very same impermissible considerations urged on (and urged to a far more extensive degree) and relied upon by the jury and judge in Mr. Bertolotti's case. Here, as in Booth, the victim impact information "serve[d] no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant." Id. Since a decision to impose the death penalty must "be, and appear to be, based on reason rather than caprice or emotion," Gardner v. Florida, 430 U.S. 349, 358 (1977)(opinion of Stevens, J.), such efforts to fan the flames are "inconsistent with the reasoned decision making" required in a capital case. Booth, 107 S. Ct. at 2536. See also Penry v. Lynaugh, 109 S. Ct. 2934, 2951 (1989)(death sentence cannot be premised on "an unguided emotional response").

14. Here, as in Gathers, "evidence" introduced at the guilt phase was then used as the basis for improper arguments at the penalty phase. See Gathers, 109 S. Ct. at 2211. In Gathers, the

Supreme Court held that a prosecutor's reliance upon evidence properly admitted for another purpose to make improper victim impact or worth of victim arguments violates the eighth amendment. Id. Here, the "evidence" -- the victim's poor health, etc. -- was not even properly admitted, and then formed the basis of unconstitutional comparable worth and Golden Rule arguments. As Gathers held, "purely fortuitous" circumstances such as the victim's personal characteristics "cannot provide any information relevant to the defendant's moral culpability," and thus violate the eighth amendment. Id.; Booth. Comparable worth arguments such as the prosecutor presented here have been soundly condemned by Booth and Gathers. Such arguments are totally irrelevant to the defendant's "personal moral culpability," Penry, and thus serve only to divert the capital sentencer from making a sentencing decision based upon reason and the individual characteristics of the capital defendant. Both; Gathers; see also Rushing, supra. Comparable worth, however, was the focus of the prosecutor's argument for death in Mr. Bertolotti's case, in flagrant disregard for the eighth amendment.

15. The prosecutor's arguments also violated the fourteenth amendment. Here, as in Newlon, supra, the due process violation requires relief:

> Considering the prosecutor's penalty argument in light of the totality of the circumstances, we find that Newlon was unfairly prejudiced by the prosecutor's

improper argument. As the district court concluded, the prosecutor's argument:

> infect[ed] the penalty proceeding with an unfairness that violates due process. The remarks were neither isolated nor ambiguous * * * By contrast, the jury was subjected to a relentless, focused, uncorrected araument based on fear, premised on facts not in evidence. and calculated to remove reason and responsibility from the sentencing process. This constitutional error requires that the sentence of death be vacated.

693 F.Supp. at **808** (emphasis added).

Newlon, **885** F.2d at **1338,** quoting Newlon V. Armontrout, **693** F. Supp. **799, 808** (W.D.Mo. **1988).** This **"relentless, focused,"** Newlon, argument exceeded all bounds of propriety and fairness, and violated due process. Newlon; Wilson, supra; Drake, supra.

16. Booth and Gathers set the parameters establishing the unconstitutionality of the victim impact evidence and the prosecutor's arguments, and the consequent unreliability of Mr. Bertolotti's death sentence. In Booth, the Supreme Court discussed the proper focus of a capital sentencing proceeding:

> It is well-settled that a jury's discretion to impose the death sentence must be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." . . . Although this Court normally will defer to a state legislature's determination of what factors are relevant to the sentencing decision, the Constitution places some limits on this discretion. . . . Specifically, we have said that a jury must make an **"individualized determination"** of whether the defendant in

> question should be executed, based on "the character of the individual and the circumstances of the crime." And while this Court has never said that the defendant's record, characteristics, and the circumstances of the crime are the only permissible sentencing considerations, a state statute that requires consideration of other factors must be scrutinized to ensure that the evidence has some bearing on the defendant's "personal responsibility and moral guilt." To do otherwise would create the risk that a death sentence will be based on considerations that are "constitutionally impermissible or totally irrelevant to the sentencing process."

Booth, supra, 107 S. Ct. at 2532-33 (citations omitted)(emphasis added). The constitutionally required focus on the defendant cannot occur when impermissible considerations such as victim impact are urged as a basis for a death sentence:

> [W]e cannot agree that [the impact upon the victim's family] is relevant in the unique circumstance of a capital sentencing hearing. In such a case, it is the function of the sentencing jury to "express the conscience of the community on the ultimate question of life or death." When carrying out this task the jury is required to focus on the defendant as a "uniquely individual human bein[g]." The focus of [the impact evidence], however, is not on the defendant, but on the character and reputation of the victim and the effect on his family. These factors may be wholly unrelated to the blameworthiness of a particular defendant. As our cases have shown, the defendant often will not know the victim, and therefore will have no knowledge about the existence or characteristics of the victim's family. Moreover, defendants rarely select their victims based on whether the murder will have an effect on anyone other than the person murdered. Allowing the jury to rely on a VIS

> therefore could result in imposing the death sentence because of factors about which the defendant was unaware, and that were irrelevant to the decision to kill. This evidence thus could divert the jury's attention away from the defendant's backaround and record, and the circumstances of the crime.

Booth, supra, 107 S. Ct. at 2533-34 (footnote and citations omitted)(emphasis added).

17. The same analysis applies to a prosecutor's victim impact argument. Gathers, supra. Of course, "divert[ing] the jury's attention away from the defendant's background and record" was precisely the intent of the prosecutor's improper evidence and arguments in Mr. Bertolotti's case. As his penalty phase closing makes clear, the improper evidence and arguments were intended to divert the jury's attention away from proper considerations. Here, as in Rushing, 868 F.2d at 804, "[i]t is painfully apparent that this eulogistic articulation of grief . . . served one purpose and one purpose only -- to provide the jury with emotionally charged and inflammatory [argument regarding the victim's] admirable personal characteristics and the extent of emotional distress suffered by [the victim's] family and friends."

18. In Gathers, the Supreme Court applied the same considerations discussed in Booth to prosecutorial argument. The Court held such arguments unconstitutional because the victim's personal characteristics are "purely fortuitous, . . . cannot

provide any information relevant to the defendant's moral culpability[,] . . . [and] cannot be said to relate directly to the circumstances of the **crime."** Gathers, **109** S. Ct. at **2211.**

19. In Penry v. Lynaugh, **109** S. Ct. **2934 (1989),** the Supreme Court again emphasized, albeit in another context, that the focus of a capital penalty phase must be solely on the personal culpability of the defendant:

> **"In** contrast to the carefully defined standards that must narrow a sentencer's discretion to impose the death sentence, the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to decline to impose the death sentence." Indeed, it is precisely because the punishment should be directly related to the personal culpability of the defendant that the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense. Rather than creating the risk of an unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential if the jury is to give a "'reasoned moral response to the defendant's background, character, and crime.'" In order to ensure "reliability in the determination that death is the appropriate punishment in a specific case," the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background, character, or the circumstances of the crime.

Id., **109 S.** Ct. at **2958** (citations omitted).

20. Together, Booth, Gathers, and Penry establish that a capital penalty phase must focus on the personal moral

culpability of the defendant and must provide a jury with a vehicle for making a "reasoned moral response" to the defendant's background and character and to the circumstances of the offense. Factors which divert the jury from that task -- such as improper evidence, Booth, improper argument, Gathers, or inadequate jury instructions, Penry -- are unconstitutional because they are "inconsistent with the reasoned **decisonmaking,"** Booth, 107 S. Ct. at **2536,** required in capital cases. Such impermissible factors create the "'risk that the death penalty will be imposed in spite of factors which may call for a less severe **penalty."** Penry, supra, **109 S.** Ct. at **2952,** quoting Lockett v. Ohio, **438** U.S. **586, 605 (1978).**

21. This is precisely what occurred in Mr. Bertolotti's case. The prosecutor's improper evidence and arguments urged consideration of factors completely unrelated to Mr. Bertolotti's personal moral culpability. The comparison between Mr. Bertolotti and the victim, the appeal to fear resulting from that comparison, and the victim's personal qualities were not factors involved in the **"reasoned** moral **response,"** Penry, supra, to Mr. Bertolotti's background and character or to the circumstances of the offense which the penalty phase should have required the jury to make. Gathers: Booth. Rather, those factors were intended to divert the jury's attention from the proper (and required) considerations and to base its decision on considerations having

nothing to do with Mr. Bertolotti or the offense. The improper evidence and argument in Mr. Bertolotti's case was the same as what was at issue in Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989). Here, as in Jackson, "[r]ather than focusing the jury's attention on the character of the defendant and the circumstances of the crime, the victim impact evidence [and argument] diverted the jurors' [and judge's] attention to the character and reputation of the victim and the effect of his death on [his family]." Jackson, 547 So. 2d at 1199.

22. Under Booth, reliance upon considerations which are "irrelevant to a capital sentencing decision" requires resentencing when such considerations "create[] a constitutionally unacceptable risk that the jury *may* impose the death penalty in an arbitrary and capricious manner." Booth, supra, 107 S. Ct. at 2533 (emphasis added). Booth and Gathers establish that relief under the eighth amendment is required when contamination occurs. Contamination occurred in Mr. Bertolotti's case.

23. A sentence of death cannot stand when it results from prosecutorial comments or judicial instructions which *may* mislead the jury into imposing a sentence of death, Booth; Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633 (1985); Wilson v. Kemp, 777 F.2d 621, 626 (11th Cir. 1985), reh. denied, 784 F.2d 404 (11th Cir. 1986), and a defendant must not be sentenced to

die by a jury which may have "failed to give its decision the independent and unprejudiced consideration the law **requires."** Wilson, 777 F.2d at 21, quoting Drake v. Kemp, 762 F.2d 1449, 1460 (11th Cir. 1985)(in banc); see also Potts v. Zant, 734 F.2d 526 (11th Cir. 1984). In short, a sentencing proceeding is flatly unreliable when the jurors are misled as to their role in the sentencing proceeding or as to the matters which they must consider in making their determination of what is the proper sentence under the circumstances. Wilson; Caldwell.

24. The prosecutor in this case, however, provided textbook examples of improper argument. He urged the jury and judge to consider matters that are not appropriate for deciding whether a defendant lives or dies, and the consideration of which rendered the sentencing proceeding fundamentally unreliable. That overall improper presentation must not be isolated from the Booth violations herein at issue.

25. Both the jury and judge relied on improper victim impact evidence in sentencing Mr. Bertolotti to death. Mr. Bertolotti's sentence violates Booth. The burden of establishing that the error had **no** effect on the sentencing decision rests upon the State. **See** Booth, supra; Caldwell v. Mississippi, 105 S. Ct. 2633, 2646 (1985). This standard, however, was not applied by the Court during Mr. Bertolotti's pre-Booth, pre-Jackson direct appeal. In Caldwell, the Supreme Court discussed

when eighth amendment error requires reversal: "Because we cannot say that this effort [the prosecutor's improper argument] had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires." Id., 105 S. Ct. at 2646. Thus, the question is whether the errors in this case may have affected the sentencing decision. As in Booth and Gathers, the State here cannot beyond a reasonable doubt show that the improper argument had "no effect" on the jury's or judge's sentencing decision. Mr. Bertolotti presented a substantial case in mitigation, and the prosecutor's improper evidence and arguments served only to deflect the jury's attention away from the mitigating evidence and toward impermissible, irrelevant considerations. Since the prosecutor's arguments "could [have] result[ed]" in the imposition of death because of impermissible considerations, Booth, 107 S. Ct. at 2534, relief is appropriate in Mr. Bertolotti's case.

26. These standards were unavailable to the Court during the pre-Booth direct appeal ruling in this case, and were thus not applied. As in Jackson, the error should now be reconsidered. All that Mr. Bertolotti seeks by this application, however, is the opportunity to meaningfully brief and present this issue to this Court. The relief sought is warranted.

B. THE CRUEL AND UNUSUAL PUNISHMENT CLAIM

27. This is a claim which has troubled many of the jurists which have been called upon to consider it. As the recent rulings of the Eleventh Circuit Court of Appeals demonstrate, it has not been resolved. **See** Hamblen v. Dusser, ___ F.2d ___ (11th Cir. July 18, 1990); White v. Dusser, ___ F.2d ___ (11th Cir. July 19, 1990); see also Squires v. Dusser, ___ F. Supp. ___ (M.D. Fla. July 9, 1990). These opinions are all included in the Appendix to Mr. Bertolotti's 3.850 motion, which was previously forwarded to this Court. As the facts reflected by the 3.850 motion and supporting appendix show, the claim requires discovery, and full and fair evidentiary resolution.

28. This is also a claim which has resulted in the executive's recent actions of conducting a test of the electric chair on this very afternoon, by order of Governor Bob Martinez. In light of the substantiality of the Booth/Gathers claim that this case involves, and given the recent developments in the federal courts and the actions of Governor Martinez and the DOC which are taking place as this pleading is being drafted, a stay of execution is appropriate, particularly in light of the pendency of the executive's review of what the DOC shall be undertaking at the Florida State Prison on this very day.

CONCLUSION

This application seeks ten days to allow for proper briefing and seeks the opportunity for oral argument. In light of the significance of the claims presented, the substantial nature of the Booth/Gathers/Jackson claim, and the quickly developing circumstances attendant to Mr. Bertolotti's cruel and unusual punishment claim, the relief sought is certainly appropriate. We therefore pray that this Honorable Court enter a stay of execution, allow **10** days for proper briefing, and allow oral argument.

Respectfully submitted,

LARRY HELM SPALDING
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By: _____
Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy *of* the foregoing has been furnished by United States Mail, first class, postage prepaid, to Richard Martell, Assistant Attorney General, Department of Legal Affairs, Magnolia Park Courtyard, 111-29 North Magnolia Drive, Tallahassee, Florida 32301, this 13 day of July, 1990.

Attorney