IN THE SUPREME COURT OF FLORIDA

NO. 69250

WILLIE JASPER DARDEN, JR.,

Petitioner,

vs.

LOUIE L. WAINWRIGHT,
Secretary, Department of
Corrections, State of Florida,
and RICHARD DUGGER, Superintendent,
Florida State Prison, Starke, Florida,

Respondents.

_____/

**PETITION FOR WRIT OF HABEAS CORPUS
AND OTHER RELIEF**

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Petitioner, Willie J. Darden, an indigent proceediing in forma pauperis, by his undersigned counsel petitions this Court to issue its writ of habeas corpus pursuant to Fla. R. App. P. 9.030(a)(3) and Fla. R. App. P. 9.100.

Mr. Darden states that he was sentenced to death in violation of his rights under the sixth, eighth and fourteenth amendments to the Constitution of the United States and under the Constitution and laws of the State of Florida.

In support of this petition, in accordance with Fla. R. App. P. 9.100(e), Mr. Darden states as follows:

I.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to Article V, sections 3(b)(1), (7), (9), Florida Constitution and Rule 9.030(a)(3), Florida Rules of Appellate Procedure. The issue presented by this petition is one for which habeas corpus proceedings are appropriate because petitioner has no other adequate and effective remedy at law. Dickens v. State, 165 So. 2d 811 (Fla. 2d DCA 1964); State ex rel. Wilkins v. Sinclair, 162 So. 2d 661, 662 (Fla. 1964).

II.

INTRODUCTION

For the first time in the modern history of judicial review of the death penalty in America, the United States Supreme Court has agreed to address the question of whether and when statistical evidence showing that the ultimate penalty is imposed on the basis of race is evidence which must be considered by factfinders when offered by the accused/condemned in support of an eighth or fourteenth amendment challenge. Hitchcock v. Wainwright, 106 S. Ct. 2888 (June 9, 1986) (order granting certiorari) (see petitioner's brief in United States Supreme

Court, App. A.); see also McCleskey v. Kemp, 106 S. Ct. 3331 (July 7, 1986) (order granting certiorari) (see petitioner's brief in United States Supreme Court, App. B.). Stare decisis from this Court on the issue is recent and unequivocal: the claim does not state even a colorable basis for relief, and provides no basis for an evidentiary hearing in Rule 3.850 proceedings. State v. Henry, 456 So. 2d 466 (Fla. 1984). In contrast, recent law in this federal circuit recognizes that a "colorable claim" is established by the race statistics offered herein. Griffin v. Wainwright, ___ F.2d ___ (11th Cir. 1985), cert. denied, ___ S.Ct. ___ (1985) (App. D and E). Through this petition for a writ of habeas corpus, Mr. Darden requests that this Court unleash Florida's trial judges and henceforth allow the taking of statistical evidence on this fundamental question, in line with the law of this circuit, the law of the United States Supreme Court, and in harmony with the grants of certiorari in McCleskey and Hitchcock.

No capital case can be imagined which would more readily succumb to base racial prejudices. Mr. Darden is black. The victims in the case were white. The jurors were asked brazenly if they "could try Mr. Darden as if he was white" (R. 57, 73,115), since, as voir dire questions and answers revealed, the participants believed blacks were more likely than whites to not pay their bills, to populate prisons, and to commit serious violent crimes. (R. 136-138) ("From what you read in the paper this is true.") The State's closing arguments included historically racial slurs, words of encouragement to the jury to vote for death for the Darden black "animal." The prosecutor's closing arguments alone have been repeatedly condemned by this and other courts. See Darden v. State, 329 So. 2d 287, 290 (Fla. 1976) ("the prosecutor's remarks under ordinary circumstances would constitute a violation of the Code of Professional Responsibility"); id. at 291-95 (dissenting opinion); Darden v. Wainwright, 513 F. Supp. 947, 955 (M.D. Fla. 1981) ("Anyone

attempting a textbook illustration of a violation of the Code of Professional Responsibility . . . could not possibly improve upon [prosecutor White's final statement]"); Darden v. Wainwright, 699 F.2d 1031, 1035-36 (11th Cir. 1983); id. at 1040-43 (dissenting opinion). Even the State concedes that prosecutor McDaniel's summation was an "unnecessary tirade," that "[n]o one has ever even weakly suggested that McDaniel's closing remarks were anything but improper," Supplemental Answer 12, 46, Darden v. Wainwright, Case No. 79-566-Civ-TH (MD Fla.) (June 1, 1979), and that much of the summation consisted of "inflammatory irrelevancies, Answer to Petition for Writ of Habeas Corpus, p. 11, Darden v. Wainwright, Case No. 79-566-CivTH (MD Fla.) (May 22, 1979). As saliently put by the federal magistrate,

> In the context of the emotionally charged trial of Darden, a black man, accused of robbery, the brutal murder of a white man, the repeated shooting of a defenseless white teenager, and vile sexual advances on a white woman, I have more than grave doubts that the improper, repeated, prejudicial argument of the prosecution did not affect the jury in its deliberation.

Magistrate's Report and Recommendation (J.A. 215).

The badge of slavery is often hidden by nods and winks, making speed in ferreting out racial discrimination a deliberate and often specious promise. But at the very least, when a person's death at the hands of the State may be the result of genophobia, the constitution must require that evidence which pierces the purposeful veil of pious impartiality be allowed and considered. Luckily, the constitution does prohibit race-motivated capital sentencing decisions:

> Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected. On the facts of this case, a juror who believes that blacks are violence-prone or morally inferior might well be influenced by that belief in deciding whether petitioner's crime involved the aggravating factors specified under Virginia law . . . . More subtle, less consciously held racial attitudes could also influence a juror's decision in this case. Fear of blacks, which could easily be stirred up by the violent

> facts of petitioner's crime, might incline a juror to favor the death penalty.

Turner v. Murray, _____ U.S. ____, slip op. at 6-7 (April 30, 1986) (compare magistrate's report, supra.). The Turner Court found "[t]he risk of racial prejudice infecting a capital sentencing proceeding" especially unacceptable' in light of the complete finality of the death sentence." Id. at 7.

That this Court has not yet, and other courts have only recently, accepted the statistics here offered is no new obstacle for Mr. Darden. His conviction and sentence have upon review been the source for constant new and cutting edge law that has divided and deeply troubled the judiciary. This Court started the splintered reaction with a 5-2 decision on direct appeal. Darden v. State, 329 So. 2d 287 (Fla. 1976). Last term, a bitterly and closely divided United States Supreme Court barely (but effectively) left Mr. Darden on Death Row. Darden v. Wainwright, 106 S. Ct. 2464 (1986) (petition for rehearing pending). In the intervening years, the judicial division has been equally stark. The federal magistrate recommended that the conviction herein be set aside, but the district judge disagreed. Darden v. Wainwright, 513 F. Supp. 947 (MD Fla. 1981). The denial of relief by the district court was appealed to the United States Court of Appeals for the Eleventh Circuit, which affirmed 2-1. 669 F.2d 1031 (11th Cir. 1983). Petition for rehearing en banc was filed in the Eleventh Circuit and the Court by operation of law affirmed the panel decision by a vote of 6-6, 708 F.2d 646 (11th Cir. 1983). Petition for rehearing en banc was filed in the Eleventh Circuit and while rehearing was pending, the Governor of the State of Florida signed a second death warrant. The Eleventh Circuit, on its own motion, vacated the earlier panel decision and the en banc affirmance, granted en banc reconsideration and stayed Petitioner's execution, 715 F.2d 502 (11th Cir. 1983). The Eleventh Circuit, again by en banc decision, voted 7-5 to grant habeas relief to Petitioner, on Witherspoon grounds, 725 F.2d 1526 (11th Cir. 1984). The United

States Supreme Court granted certiorari, 105 S. Ct. 1158, vacated the Eleventh Circuit's 7-5 en banc decision and remanded the case for further consideration in light of Wainwright v. Witt, ____ U.S. ____, 105 S. Ct. 844 (1984). On remand, the Eleventh Circuit affirmed the district court's original denial of habeas corpus relief, in Darden v. Wainwright, No. 81-5590 (11th Cir. July 23, 1985) (en banc) [Clark and Johnson, JJ., dissenting.].

Neither "the progress of Darden's constitutional challenges to his conviction and death sentence," nor "the fact that th[e United States Supreme Court has granted certiorari three times is . . . a reason for concluding Darden's claims are meritless, or that the undoubted interests in finality should outweigh [the Court's] duty to ensure that Darden received due process." 106 S. Ct. at 2484, n.9 (Blackman, J., dissenting). Darden's claim presented herein, at least as much as the colorable claims he has presented before, is entitled to judicious and unhurried consideration, which should await the imminent decisions in McCleskey and Hitchcock.

II.

FACTS UPON WHICH PETITIONER RELIES

The State's death penalty statutes were striken in 1972 because, inter alia, they were "pregnant with discrimination" and were arbitrarily applied. See Furman v. Georgia, 408 U.S. 238 (1972). When the United States Supreme Court reviewed the legislatures' new death statute efforts in 1976, it held that the statutes were facially valid, Gregg v. Georgia, 428 U.S. 153 (19760; Proffitt v. Florida, 428 U.S. 242 (1975), and rightly refused to accept "the naked assertion that the [legislative] effort is bound to fail" upon actual operation. Gregg, 428 U.S. at 222. "Absent facts to the contrary," id. at 225 (opinion of White, J.), it was believed that arbitrariness and discrimination were facially excised from the laws.

However, when "facts to the contrary" demonstrate that procedures which "seek to assure" fairness have failed, Proffitt, 428 U.S. at 252-53, the Court has stricken the resulting unconstitutional application of the facially valid statute. See, e.g. Skipper v. South Carolina, ___ U.S. ___, 90 L. Ed. 2d 1 (1986); Eddings v. Oklahoma, 455 U.S. 104 (1982); Godfrey v. Georgia, 446 U.S. 420 (1980). Petitioner, upon the proper provision of funds to neutralize the disabling effects of his indigency, is prepared to demonstrate that Florida's facially valid effort to reinstate capital punishment has failed in actual application. Racial discrimination is still a damaging factor in the choice of who the State executes. This Court, however, has held that the proof of "facts to the contrary" which Petitioner wishes to offer is not admissible, is irrelevant, and fails to state a claim. Thus, if state court relief is to be forthcoming, it must come from this Court upon this application, or it will not come at all. Only this Court can change this Court's mind.

Mr. James Franklin Rose recently presented part of this same issue to this Court via a petition for writ of habeas corpus. Mr. Rose is represented by the same office that represents Mr. Hitchcock before the United States Supreme Court. Because of undersigned counsel's deference to the expertise of these attorneys, and with their permission, much of the following argument comes directly and verbatim from the Rose petition for writ of habeas corpus (see Appendix C) and the Hitchcock brief in the United States Supreme Court (see Appendix A). The McCleskey brief to the United States Supreme Court is included as Appendix B. The statistics and arguments in App. A, B, and C, not specifically included in the text of this petition, are nevertheless incorporated herein by reference.

Petitioner will in this section first demonstrate the static rejection of this claim in this forum, and show how recent developments should prompt a reevaluation. Second, Petitioner will outline the facts which he would prove before a master or

magistrate if this Court were to determine that a factfinder is appropriate.

A. Only This Court Can Provide Relief

This Court has rejected the claim presented here in a string of cases. The claim is based upon statistical evidence which this Court has rejected summarily when it was presented as early as 1979 based upon the then available evidence, Henry v. State, 377 So. 2d 692 (Fla. 1979), wherein the Court relied upon Spinkellink v. Wainwright, 587 F.2d 582 (5th Cir. 1978), and when it was presented more recently upon much more comprehensive data. See Adams v. State, 449 So. 2d 819, 820-21 (Fla. 1984); Ford v. Wainwright, 451 So. 2d 471, 474-75 (Fla. 1984); Jackson v. State, 452 So. 2d 533, 536 (Fla. 1984); State v. Washington, 453 So. 2d 389, 391-92 (Fla. 1984); Dobbert v. State, 456 So. 2d 424, 429 (Fla. 1984); State v. Henry, 456 So. 2d 466, 468 (Fla. 1984); Smith v. State, 457 So. 2d 1380, 1381 (Fla. 1984); Sireci v. State, 469 So. 2d 119, 120 (Fla. 1985); Bundy v. State, ___ So. 2d ____, 11 FLW 294 (Fla. 1984). See Adams v. State, 380 So. 2d 423, 425 (Fla. 1980); Meeks v. State, 382 So. 2d 673, 676 (Fla. 1980); Thomas v. State, 421 So. 2d 160, 162-63 (Fla. 1982); Hitchcock v. State, 432 So. 2d 42, 44 (Fla. 1983); Riley v. State, 433 So. 2d 976, 979 (Fla. 1983). The state trial courts are bound by this Court's precedent rejecting this claim, holding that the same evidence presented below is insufficient to warrant evidentiary consideration.

Thus, if Petitioner presented this claim to the trial court, it would be summarily denied as "conclusively show[ing] that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850. This Court said so in State v. Henry, 456 So. 2d 466 (Fla. 1984), holding that a trial court had no discretion to hear this claim. The trial judge in Henry had issued a stay of execution in order to hold an evidentiary hearing on the claim. Id. at 46. This Court found there to be "no colorable issue" and "no theory upon

which Henry may proceed which would entitle him to relief." Id. (emphasis supplied). Accordingly, there is no theory upon which relief could be granted by the state trial court on post-conviction relief. State post-conviction proceedings are thus foreclosed, except by "procedural formality," id. Since the trial court by this Court's order has no discretion to give any plenary consideration to this claim, Petitioner's only forum for review is this Court.

A petition for writ of habeas corpus is proper. The writ of habeas corpus is a constitutionally guaranteed right, Article I, section 13, Florida Constitution. A procedural rule allowing judgments to be collaterally attacked is not an exclusive post-conviction remedy, and does not suspend the Court's authority to issue writs of habeas corpus. See generally Roy v. Wainwright, 151 So. 2d 825 (Fla. 1963). "The availability of an effective post-conviction remedy by motion constitutes no intrusion on the organic assurance of the availability of habeas corpus." Mitchell v. Wainwright, 155 So. 2d 868 (Fla. 1963). If the post-conviction procedure provided by rule will not lie or is inadequate, habeas corpus is appropriate. The post-conviction "procedure must be adequate and effective, for, if it is not, the remedy of habeas corpus may be employed." Dickens v. State, 165 So. 2d 811 (Fla. 2d DCA 1964). Habeas corpus is necessary where "it shall appear that the remedy . . . [under the rule] is inadequate and ineffective to test the legality of their conviction." State ex rel. Wilkins v. Sinclair, 162 So. 2d 661, 662 (Fla. 1964).

This Court has held specifically that a trial court in proceedings under Rule 3.850 is powerless to grant any plenary consideration of the claim herein presented, so Rule 3.850 procedure is categorically "inadequate and ineffective." If Petitioner were to present this claim by way of a Rule 3.850 motion, the trial court would be required to summarily deny the claim with no evidentiary consideration. However, "the

acknowledged purpose of Rule 1.850 [now 3.850] [is] to facilitate factual determinations." State v. Wooden, 246 So. 2d 755, 756 (Fla. 1971). Since the very purpose of the rule is abrogated by binding precedent, only habeas corpus proceedings are presently available to Petitioner for this claim. Of course, were Petitioner to be successful here in persuading this Court that a prima facie case has been presented, then the Rule 3.850 procedure would no longer be "inadequate and ineffective" and he could and would seek relief under that procedure. Alternatively, the Court could appoint the trial judge as a commissioner to hear the factual allegations presented by this petition. State v. Wooden, 246 So. 2d at 756. This procedure would permit this Court to retain the ultimate resolution of this issue, while providing the Court with the facts necessary to make an informed decision. Beyond these legalities, the scope of this claim makes it one that is most appropriate for resolution by the State's highest court as the ultimate leader of the justice system, and in that role the Court has a compelling interest in the fairness of the system it administers.

There are several recent developments in the law that provide impetus for reevaluation of this Court's prior holdings on this question. First is the Eleventh Circuit Court of Appeals' decision in McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985) (en banc) setting forth new standards governing the evaluation of claims concerning the discriminatory application of the death penalty. These new standards disapprove of the reasoning of Spinkellink v. Wainwright, 578 F.2d 582, 605 (5th Cir. 1978) -- that the Supreme Court's finding of facial constitutionality of the Florida statute means that as a matter of law "the arbitrariness and capriciousness condemned in Furman have been conclusively removed" -- which, as we will show infra, lies at the base of this Court's rejection of the claim. The intervention of these new standards caused the Eleventh Circuit to reconsider its holdings concerning the application of the

death penalty in Florida. The court of appeals remanded a Florida case for reconsideration in light of McCleskey standards. Griffin v. Wainwright, 760 F.2d 1505, 1518 (11th Cir. 1985); cert. denied, 106 S. Ct. 1992, vacated on other grounds, 106 S. Ct. 1964 (1986). (App. D and E)

The Supreme Court of the United States has granted certiorari to review McCleskey (see 106 S. Ct. 3331 (order of July 7, 1986, granting certiorari)) and the Florida case of Hitchcock v. Wainwright, 106 S. Ct. 2888 (June 9, 1986) (order granting certiorari). The question presented by Hitchcock's certiorari petition is

> IV. Whether Mr. Hitchcock should be provided the opportunity to prove at an evidentiary hearing his claim that the death penalty is being arbitrarily applied in Florida on the basis of race and other impermissible factors in violation of the Eighth and Fourteenth Amendments especially in view of the new standards for evaluating such claims announced by the Court of Appeals?

See also 54 U.S.L.W. 3832 (summarizing certiorari issues). Oral arguments are scheduled in these cases for October 15, 1986. Accordingly, the constitutional standards governing the discriminatory application of the death penalty are under active consideration by the nation's highest court.

There is one further intervening decision that effects the consideration of the present case. In Bazemore v. Friday, 106 S. Ct. 3000 (1986), an action under the federal Civil Rights Act concerning employment discrimination, the Court disapproved of the lower court's treatment of multivariate or multiple regression statistical analysis. Id. at 3008-10. The lower court's view in Bazemore of statistical proof of discrimination was the same as the court of appeals in McCleskey and Hitchcock -- that to allege a prima facie claim of discrimination, multivariate analysis must account for all possible variables. This reasoning, by adoption, also has been the reasoning of this Court. See, e.g., Sullivan v. State, 441 So. 2d 609, 614 (Fla. 1983). It is now apparent that such reasoning is erroneous.

Due to these recent developments in the law, this Court should reconsider its prior holdings as to this claim. While these recent developments do not specifically meet the "change of law" test set out in Witt v. State, 387 So. 2d 922 (Fla. 1980), so as to require this Court to change its prior holdings, the developments are significant enough in scope to permit this Court to revisit its prior rulings. Moreover, rulings by the Supreme Court in favor of McCleskey or Hitchcock would most certainly qualify to require reconsideration of the issue under the Witt test. At least, the active consideration of the issue by the Supreme Court counsels for this Court to hold this case pending those decisions, for they will most certainly establish the constitutional principles governing the resolution of the claim presented here. This is so because this Court has relied upon the standards set by the federal courts in determining whether an evidentiary hearing is necessary.

In an early case raising this claim of arbitrary application of the death penalty, though recognizing its appropriateness for post-conviction hearing, this Court ruled that under the court of appeals' rationale of Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), an insufficient preliminary showing had been made under constitutional standards to require an evidentiary hearing. Henry v. State, 377 So. 2d 692 (Fla. 1979). Since that time, by citation and incorporation of prior opinions, this Court has continued to adhere to that reasoning. For example, in the recent decision in Harvard v. State, 486 So. 2d 537 (Fla. 1986), the Court relied upon its prior decision in Sullivan v. State, 441 So. 2d 609 (Fla. 1983). The Sullivan decision had in turn relied upon Spinkellink. Sullivan, 441 So. 2d at 614 (also citing Henry v. State, supra). In its decision in Harvard, the Court also relied upon Adams v. State, 449 So. 2d 819 (Fla. 1984), which relied in turn upon Sullivan. Accordingly, at bottom, the Florida resolution of this claim is based upon the federal court's reasoning in Spinkellink, and will depend for its

resolution upon the constitutional standards to be considered by the Supreme Court in Hitchcock and McCleskey for the showing of a prima facie case.

The question to be resolved in this case is not whether Mr. Darden has proven discrimination in the application of the death penalty in Florida. Rather, the question at this stage of the proceedings is whether he has hereinafter alleged a prima facie case. In post-conviction proceedings under Rule 3.850, the governing standard cannot be dismissed without evidentiary consideration unless allegations "conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850. The Florida standard for summary dismissal, which is based upon the federal standard, Roy v. Wainwright, 151 So. 2d 825, 828 (Fla. 1963), is the same as the federal standard. Since the federal courts have defined the summary dismissal standards in more detail than have the courts of this state, it is appropriate to look to those standards for guidance. Id. And under those standards, summary denial would be unwarranted. Mr. Darden sets out a prima facie case herein.

B. The Death Penalty Is Imposed In Florida On The Basis Of Race Of The Defendant, Race Of The Victim, Sex Of The Defendant And Place Of The Crime, In Violation Of The Eighth And Fourteenth Amendment.

One of the remaining "badges and . . . incidents of slavery," Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968), that still infects contemporary American society is the devaluation of the lives and rights of black people in relation to the lives and rights of white people. In the latter 19th and early 20th centuries, the degradation of black people led to open tolerance for violence committed by whites against blacks. "With no legal or social restraints, white ruffians and sometimes ordinary citizens angered by some incident assaulted blacks without fear of reprisal." Shofner, Custom, Law and History: The Enduring Influence of Florida's "Black Code", Fla.

Hist. Q. 277, 291 (1977). Indeed, this was one of the evils that Congress sought to remedy when it enacted the Civil Rights Act of 1866 and the Ku Klux Klan Act of 1871. See Briscoe v. LaHue, 460 U.S. 325, 337-40 (1983) ("[i]t is clear from the legislative debates that, in the view of the [Ku Klux Klan] Act's sponsors, the victims of Klan outrages were deprived of 'equal protection of the laws' if the perpetrators systematically went unpunished").

Race discrimination in this form and in other forms "'still remain[s] a fact of life, in the administration of justice as in our society as a whole.'" Vasquez v. Hillery, ____ U.S. ___, 106 S. Ct. 617, 624 (1986) (quoting Rose v. Mitchell, 443 U.S. 545, 558-59 (1979)). As the allegations presented by this case demonstrate, it has continued to inform the decision to impose the death sentence for homicide in Florida. Society's most severe criminal sanction is still imposed -- as it historically has been -- significantly less often when the victim of the homicide is black than when the victim is white, and more disparately when the defendant is black, rather than white.

Had this Court's prior rejections of this claim in prior cases been on the basis of evidentiary hearings in the circuit courts, its rulings might have been unremarkable. However, its previous rulings were solely on the basis of the allegations set forth in the pleadings, for the claim has always been summarily denied.

Summary dispositions of this sort are allowed only in two circumstances: if, assuming the truth of the allegations, the petitioner is not legally entitled to relief, Rule 3.850, Fla. R. Crim. P. See also Machibroda v. United States, 368 U.S. 487, 495-96 (1962); Townsend v. Sain, 372 U.S. 293, 307, 312 (1963); or if the allegations are "wholly incredible," see Machibroda v. United States, 368 U.S. at 495-96; Blackledge v. Allison, 431 U.S. 63, 74, 76 (1977). Given the longstanding condemnation of racial discrimination in criminal proceedings, it is not likely

that this Court has approved the summary dismissals of this claim on the basis of not being entitled to relief as a matter of law. Surely if the allegations are true -- that death sentences in Florida are imposed in significant part on the basis of racial considerations -- Mr. Darden is entitled to relief. See, e.g., Zant v. Stephens, 462 U.S. 862, 885 (1983); Rose v. Mitchell, 443 U.S. 545, 555 (1979); Gregg v. Georgia, 428 U.S. 153, 212 (1976) (White, J., concurring); Furman v. Georgia, 408 U.S. at 310 (Stewart, J., concurring); id. at 249-51 (Douglas, J., concurring); id. at 364-66 (Marshall, J., concurring). Just last term, the Supreme Court emphasized that the Constitution cannot tolerate even the "risk of racial prejudice infecting a capital sentencing proceeding. . . ." Turner v. Murray, ____ U.S. ___, 106 S. Ct. 1683, 1688 (1986) (emphasis supplied). Thus, this Court's previous approval of the summary dismissals of this claim must have been based upon a view that the "statistical study" relied on was wholly incredible.

In this light, the Court's prior rulings raise the following question for determination: Can the claim that there is systematic race-of-victim and race-of-defendant based discrimination in the imposition of death sentences in Florida be summarily dismissed as "wholly incredible" when the statistical analysis alleged in support of the claim has shown a large race-based disparity, and to a significant extent, has "eliminate[d] the most common nondiscriminatory reasons" for it, Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981)?

The question presented here goes to the allegations necessary to state a prima facie case of discrimination or arbitrariness, not to whether that case has been proved by a preponderance of the evidence in light of all the evidence adduced by both parties in an evidentiary hearing. Whether a claimant has stated a prima facie case depends solely upon the allegations made by the claimant. If the unrebutted allegations

would permit a rational trier of fact to find discrimination or arbitrariness, they are not "wholly incredible" and must be considered in the adversarial testing process of an evidentiary hearing. Burdine, 450 U.S. at 254 n.7 ("[t]he phrase 'prima facie case' . . . describe[s] the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue"). In contrast, whether a claimant has proved discrimination by a preponderance of the evidence in such a hearing "will depend in a given case on the factual context of each case in light of all the evidence presented by both the [claimant] and the [respondent]." Bazemore v. Friday, 106 S. Ct. at 3009.

Mr. Darden will discuss the allegations presented in support of his claim and will then show why these allegations must not be dismissed without appropriate evidentiary consideration. In the appendix to this petition, Mr. Darden has set out the specific allegations upon which he relies and asserts his claim.

Four years after Furman v. Georgia, 408 U.S. 238 (1972), the Supreme Court referred to Furman as having

> mandate[d] that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

Gregg v. Georgia, 428 U.S. 153, 189 (1976). Four years after Gregg, the Court held that sentencing discretion is "suitably directed and limited" only if a death penalty statute

> channel[s] the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'

Godfrey v. Georgia, 446 U.S. 420, 428 (1980). In accord with these principles, the Florida death penalty statute has enumerated aggravating and mitigating circumstances to provide the "'specific and detailed guidance'" of sentencing discretion which must be provided. To this end, the statutorily enumerated

aggravating circumstances are the only factors which can be considered in support of the imposition of the death penalty. Cooper v. State, 336 So. 2d 1133, 1139 n.7 (Fla. 1976); Purdy v. State, 343 So. 2d 4, 6 (Fla. 1977).

Despite the eighth amendment's requirement that sentencing discretion be suitably directed and limited, and the Florida death penalty statute's attempt to comply with that mandate through the use of an exclusive list of aggravating circumstances, the death penalty is still imposed in Florida for reasons other than those aggravating circumstances. Death sentences are still imposed in Florida, for example, because the victim was a white person instead of black person, because defendant is black instead of white, because the homicide was committed by chance in a county where the death penalty is much more frequently imposed rather than in a county which seldom imposes the death penalty, or because the defendant is a man instead of a woman.

Not only does the imposition of death sentences on the basis of these factors violate the eighth amendment's requirement of carefully channeled sentencing discretion, but it also violates the thirteenth amendment and the due process and equal protection guarantees of the fourteenth amendment by its reliance upon constitutionally impermissible, irrelevant factors. See Zant v. Stephens, 462 U.s. 862, 885 (1983). Certainly there can be no dispute that the consideration of race (of the defendant or the victim) in the course of deciding a capital sentence violates the thirteenth and fourteenth amendments' mandates abolishing slavery and all badges of slavery and requiring the equal treatment of all people without regard to considerations of race. Likewise, the fourteenth amendment's requirement of equal protection indisputably forbids the differential treatment of people on the basis of their sex, race or on the basis of totally irrelevant considerations such as geography.

That death sentences are imposed on the basis of these

factors is not typically a simple matter to demonstrate. Not all cases are as starkly susceptible to racial influences as Mr. Darden's. Juries and judges do not usually tell us that the real reason they have recommended or imposed death in particular cases is one or more of these constitutionally impermissible factors. Accordingly, circumstantial evidence must be relied upon to demonstrate the determinative role played by these factors in the course of capital sentencing decisions in this state. Statistical evidence is, therefore, the form of circumstantial evidence which must be examined in relation to this claim.

The best developed statistical evidence available at this time with respect to the imposition of the death penalty in Florida has focused upon only one of the constitutionally impermissible factors: the race of the victim. Other well developed evidence focuses on the race of the defendant. Taking into account all publicly available data respecting the imposition of the death penalty in Florida, this evidence persuasively demonstrates that the race of the victim and the defendant is a determinative factor in the imposition of the death sentence in Florida.

(1) This evidence is drawn primarily from a study by Professors Samuel R. Gross and Robert Mauro, published as Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicidal Victimization, 37 Stanford L. Rev. 27 (Nov. 1984). As will be seen, however, a number of other well designed studies have reached the same conclusions, and they are also taken into account herein.

(2) The study by Professors Gross and Mauro focused upon all homicides in Florida during the 5-year period, 1976-1980. The data for the study were drawn from two sources: Supplementary Homicide Reports (SHR's) that local police agencies file with the Uniform Crime Reporting Section of the FBI, and the Death Row, U.S.A., a periodic publication of the NAACP Legal Defense and Educational Fund (LDF) which has become the standard

reference source for current data on death row inmates. See Enmund v. Florida, 458 U.S. 782, 795 nn.18, 19 (1982); id. at 818 n.34 (O'Connor, J., dissenting); Godfrey v. Georgia, supra, 446 U.S. at 439 nn. 7, 8; Greenberg, Capital Punishment As A System, 91 Yale L.J. 908, 909 n.7 (1982). The Supplementary Homicide Reports provided data on virtually all homicides which occurred during the 1976-1980 period -- 3501 homicides -- while Death Row U.S.A. provided data on the homicides for which someone was eventually sentenced to death -- 130 death sentences. Florida's reporting rate for known homicides was over 98% for this period. The data available for each homicide through these sources were the following: (a) the sex, age and race of the victim(s); (b) the sex, age and race of the suspect(s) or defendant(s); (c) the date and place of the homicide; (d) the weapon used; (e) the commission of any separate felony accompanying the homicide; and (f) the relationship between the victim(s) and suspect(s) or defendant(s).

(3) Because of the previous documentation that the race of the victim was a determinative factor in capital sentencing decisions in Florida, see, e.g., Bowers and Pierce, Arbitrariness and Discrimination Under Post-Furman Capital Statutes, 1980 Crime and Delinquency 563 (October 1980), Gross and Mauro analyzed whether the race of the victim was on the basis of the data they had gathered, a determinant of capital sentencing.

(a) Initially Gross and Mauro determined that a large proportion of homicide victims in Florida during this 5-year period were black -- 43%. On this basis, one would expect that nearly half of the death sentences imposed for homicides -- approximately four out of every ten death sentences -- would be imposed for homicides involving black victims. However, the data dramatically contradicted this expectation. Instead, only one out every nine death sentences imposed was imposed for a black-victim homicide; the other eight were imposed for white victim

homicides. Based upon this extremely strong correlation between white victim homicides and death sentences, Gross and Mauro examined the data to determine whether any nonracial factor might explain the strength of this relationship.

(b) Six nonracial factors were examined for their individual and cumulative impact upon the death sentencing determination: (1) the commission of a homicide in the course of another felony; (2) the killing of a stranger; (3) the killing of multiple victims; (4) the killing of a female victim; (5) the use off a gun; and (6) the geographical location of the homicide. While five of these six factors were correlated -- with varying degrees of strength -- with the imposition of the death sentence, none explained away the consistently high correlation between white victims and death sentences. Regardless of the presence of one or more of the nonracial factors highly correlated with the death sentence, the homicides which involved, in addition, white victims, were much more likely to result in death sentences.

(i) The commission of a separate felony accompanying the homicide was highly predictive of an eventual death sentence: 22.0% of felony homicides resulted in death sentences, while only 0.9% of nonfelony homicides resulted in death sentences. The felony circumstance thus increased the likelihood of a death sentence by a factor of nearly 24. Within either of these categories of homicide, however, white victim homicides were far more likely to result in death sentences. Of the felony homicides involving white victims, 27.5% resulted in death sentences, while only 7.0% of such homicides involving black victims resulted in death sentences. Of the nonfelony homicides involving white victims, 1.5% resulted in death sentences, while only 0.4% of such homicides involving black victims resulted in death sentences. Thus, whether the homicide involved a felony or not, a person killing a white victim was nearly four times more likely to be sentenced to death than a person killing a black victim.

(ii) The killing of a stranger was also highly predictive of an eventual death sentence: 9.7% of the homicides in which the defendants and victims were strangers to each other resulted in death sentences, while only 2.3% of the homicides in which the the defendants and victims were acquainted with each other resulted in death sentences. The "stranger" factor thus increased the likelihood of a death sentence by a factor of four. Within either of these categories, however, white victim homicides were far more likely to result in death sentences, particularly when the "stranger" factor was present. Of the "stranger" homicides involving white victims, 14.5% resulted in death sentences, while only 1.2% of such homicides involving black victims resulted in death sentences. Of the "nonstranger" homicides involving white victims, 3.7% resulted in death sentences, while only 1.0% of such homicides involving black victims resulted in death sentences. Thus, when the "stranger" aggravating factor was present, a person killing a white victim was 12 times more likely to be sentenced to death than a person killing a black victim. When the "stranger" factor was not present, a person killing a white victim was nearly four times more likely to be sentenced to death than a person killing a black victim.

(iii) The killing of multiple victims was also highly predictable of an eventual death sentence: 18.3% of the homicides in which there were multiple victims resulted in death sentences, while only 3.2% of the homicides in which there were single victims resulted in death sentences. The multiple victim factors thus increased the likelihood of a death sentence by a factor of nearly six. Within either of these categories, however, white victim homicides were more likely to result in death sentences. Of the multiple victim homicides involving white victims, 20.4% resulted in death sentences, while only 11.1% of such homicides involving black victims resulted in death sentences. Of the single victim homicides involving white

victims, 5.5% resulted in death sentences, while 0.7% of such homicides involving black victims resulted in death sentences. Thus, when the multiple victim aggravating factor was present, a person killing white victims was two times more likely to be sentenced to death than a person killing black victims. When this factor was not present, a person killing a white victim was eight times more likely to be sentenced to death than a person killing a black victim.

(iv) The killing of a female victim was also predictive of an eventual death sentence: 7.2% of the homicides in which a woman was killed resulted in death sentences, while only 2.5% of the homicides in which a man was killed resulted in death sentences. The female victim factor thus increased the likelihood of a death sentence by a factor of nearly three. Within either of these categories, however, white victim homicides were far more likely to result in death sentences. Of the female victim homicides involving white victims, 19.8% resulted in death sentences, while only 1.6% of such homicides involving black victims resulted in death sentences. Of the male victim homicides involving white victims, 4.4% resulted in death sentences, while 0.6% of such homicides involving black victims resulted in death sentences. Thus, whether the homicide involved a female or male victim, a person killing a white victim was eight times more likely to be sentenced to death than a person killing a black victim.

(v) The killing of a victim in a rural county was also predictive of an eventual death sentence: 5.1% of the rural homicides resulted in death sentences, while only 3.4% of the urban homicides resulted in death sentences. The geography factor thus increased the likelihood of a death sentence by a factor of nearly two. Within either of these categories, however, white victim homicides were far more likely to result in death sentences. Of the rural homicides involving white victims, 8.5% resulted in death sentences, while only 0.7% of such

homicides involving black victims resulted in death sentences. Of the urban homicides involving white victims, 5.8% resulted in death sentences, while 0.8% of such homicides involving black victims resulted in death sentences. Thus, where the rural factor was present, a person killing a white victim was 12 times more likely to be sentenced to death than a person killing black victims. When this factor was not present, a person killing a white victim was seven times more likely to be sentenced to death than a person killing a black victim.

(vi) Unlike the other nonracial factors, the killing of a person with a gun was not predictive of an eventual death sentence: 3.0% of the homicides in which the victim was killed with a gun resulted in death sentences, while 5.1% of the homicides in which the victim was killed by another means resulted in death sentences. The "gun" factor thus made it somewhat less likely for the defendant to be sentenced to death. Within either of these categories, however, white victim homicides were far more likely to result in death sentences. Of the "use of a gun" homicides involving white victims, 5.3% resulted in death sentences, while only 0.7% of such homicides involving black victims resulted in death sentences. Of the "other means" homicides involving white victims, 8.7% resulted in death sentences, while 1.1% of such homicides involving black victims resulted in death sentences. Thus, whether the homicide was committed by use of a gun or other means, a person killing a white victim was nearly eight times more likely to be sentenced to death than a person killing a black victim.

(vii) In order to account for the possibility that some combination of the nonracial aggravating factors might explain away the strong race of the victim pattern they were seeing -- which had not been explained by an examination of the factors individually -- Gross and Mauro examined Florida death cases on a "scale of aggravation." This scale examined the cumulative effects of the three aggravating factors which Gross

and Mauro had found most strongly predicted death sentences: the commission of the homicide in the course of a felony, the commission of the homicide against a stranger, and the commission of a multiple victim homicide. Their results can best be shown by the following table showing the percentage of death sentences in each category:

	Number of Major Aggravating Circumstances		
	0	1	2-3
White Victim	1.0% (10/1044)	7.0% (36/511)	28.2% (68/241)
Black Victim	0.3% (4/1251)	1.4% (5/363)	7.5% (5/67)

Cases with two or three aggravating circumstances were combined into one category because there were too few cases with all three aggravating circumstances to provide meaningful analysis of a distinct category. The pattern of racial disparities displayed in this table (as in the previous analyses) is consistent and strong. The magnitude of these disparities can be evaluated, in part, by considering the right-hand column, which includes the most aggravated homicides. The majority of the death sentences, almost 60%, were among those cases. Death sentences were not the rule for these homicides, but they were given in a fair proportion of those cases that had white victims -- in over 25% of such cases. But even within this highly aggravated set of cases, death sentences for black victim homicides were quite rare: they occurred about one-fourth as often as among white victim homicides -- in only 7.5% of such cases.

(viii) Gross and Mauro further examined the possibility that some combination of the nonracial aggravating factors might explain away the strong race of the victim pattern they had seen in examining individual nonracial factors by conducting a multiple regression analysis. As Gross and Mauro described it,

> Multiple regression is a statistical technique for sorting out the simultaneous effects of several causal or "independent" variables on an outcome or "dependent"

> variable. Multiple regression analysis produces a mathematical model of the data that includes estimates of the effects of each independent variable on the dependent variable, controlling for the effects of the other independent variables. This technique can be used to test for racial discrimination in a set of sentencing decisions by designating the sentencing choice as the outcome variable in a model that includes the racial characteristic of interest as a causal variable along with the legitimate variables that might explain these decisions. If the racial variable has a statistically significant effect on the outcome variable in this model (that is, an effect that would be unlikely to occur by mere chance), that demonstrates that the racial characteristic is associated with these outcomes in a way that cannot be explained by the legitimate variables that are included in the model.

37 Stanford L. Rev. at 75-76. The results of the regression analysis confirmed in every respect the pattern previously shown by the data: "Multiple logistic regression (or "logit") analysis reveals large and statistically significant race-of-victim effects on capital sentencing in . . . Florida. . . . After controlling for the effects of all the other variables in our data set, the killing of a white victim increased the odds of a death sentence by an estimated factor of . . . about five in Florida. . . ." Id at 83.

(c) Because of the critical role of appellate review in the capital sentencing process -- "to avoid arbitrariness and to assure proportionality," Zant v. Stephens, 462 U.S. at 890 -- there is at least the possibility that the racially discriminatory sentencing patterns which Gross and Mauro found at the trial level could be rooted out by careful appellate review. To examine this possibility, Gross and Mauro compared the racial patterns of death sentences that have been affirmed by the Florida Supreme Court to the racial patterns of all reported homicides. As with all reported homicides, however, Gross and Mauro found the race of the victim emerged in just as strong a pattern among affirmed death sentences as it had among homicides for which death was imposed in the trial courts. As before, affirmed death sentences were far more likely for white victim

homicides, 2.2% (39/1803), than for black victim homicides, 0.4% (6/1683) -- a ratio of nearly six to one. Also, as before, this disparity persisted when controlling for three aggravating factors most highly predictive of death sentences:

Percentage of Death Sentences
by Race of Victim
Affirmed Death Sentences Only

	Felony Circumstance		Relationship of Suspect to Victim		Number of Victims	
	Felony	Non-Felony	Stranger	Non-Stranger	Multiple Victims	Single Victim
White Victim	10.1% (35/346)	0.3% (4/1272)	4.9% (23/469)	1.3% (16/1227)	7.1% (7/98)	1.9% (32/1705)
Black Victim	3.9% (5/128)	0.1% (1/1468)	0% (0/257)	0.4% (6/1337)	7.4% (2/27)	0.2% (4/1656)

Again, as before, the race-of-victim disparity persisted when Gross and Mauro controlled for the cumulative and simultaneous effects of the nonracial aggravating factors:

Percentage of Death Sentences by
Level of Aggravation and Race of Victim
Affirmed Death Sentences Only

Number of Major Aggravating Circumstances

	0	1	2-3
White Victim	0.1% (1/1044)	2.7% (14/511)	10.0% (24/241)
Black Victim	0.1% (1/1251)	0.8% (3/363)	3.0% (2/67)

Accordingly appellate review has not eliminated, or even diminished in a significant way, the racially-based imposition of the death sentence in Florida.

(4) The Supreme Court has recently made clear that "a regression analysis that includes less than 'all measurable variables' may serve to prove a plaintiff's case. A plaintiff in a[n] [intentional discrimination] lawsuit need not prove discrimination with scientific certainty; rather, his or her burden is to prove discrimination by a preponderance of the evidence." Bazemore v. Friday, ___ U.S. ___, 54 U.S.L.W. 4972,

4975-76 (July 1, 1986). Thus, "[w]hile the omission of variables from a regression analysis may render the analysis less probative than it otherwise might be, it can hardly be said, absent some other infirmity, that an analysis which accounts for the major factors 'must be considered unacceptable as evidence of discrimination.'" Id. at 4975. Gross and Mauro have addressed the matter of "omitted variables" as well.

> For a legally permissible sentencing variable that is absent from our data to substantially change the estimated size of the effect of the victim's race on capital sentencing the variable would have to satisfy three conditions: (1) it must be correlated with the victim's race; (2) it must be correlated capital sentencing; and (3) its correlation with capital sentencing must not be explainable by the effects of the variables that are already included in our analysis. For example, let us assume that it is appropriate to consider homicides that are committed at night as more aggravated than those committed during the day. For this variable to explain the victim-based homicides are more likely to have occurred at night than black-victim homicides, that night-time homicides are in fact more likely to result in the death penalty than day-time homicides, and that the effect of the time of the homicide on capital sentencing persists after controlling for the felony circumstance of the homicide, the number of victims, the relationship of the victim to the killer, and the other variables that we have already considered. Moreover, the magnitude of the effect of the time of the killing on capital sentencing would have to be quite large -- comparable to the magnitude of the racial effect it is offered to explain.
>
> Given these requirements it is reasonable to accept the observed patterns as valid descriptions of the systems of capital sentencing that we studied unless some plausible alternative hypothesis can be stated that explains how some legitimate sentencing variable that we did not consider, or some combination of such variables, could account for these patterns. No such hypothesis is apparent. It is true that in the period that we studied white-victim homicides in each state were generally more aggravated than black-victim homicides, but we have considerable data on the level of aggravation, and the racial pattern that we observed is apparent in each state after controlling for the several aggravating factors in our data. Data on omitted aggravating factors could only explain the observed racial disparities if they were to show that black-victim cases were

> systematically less heinous that white-victim cases within the categories defined by the included variables, for example, among felony killings of strangers, using guns. This does not seem likely. Similarly, it is almost certain that homicides with weak evidence of the suspect's guilt are less likely to result in death sentences than those with strong evidence. But for data on the strength of the evidence to undercut our findings they would have to show that, within the levels of aggravation identified by our analysis, black-victim cases had systematically weaker evidence than white-victim cases. In the absence of any empirical evidence of such a pattern, and there is none, it must be considered improbable -- especially considering the magnitudes of the racial effects we found.
>
> Finally, the criminal record of the suspect undoubtedly has an effect on the chances of a death sentence. Moreover, we know that black defendants in general are more likely to have serious criminal records that white defendants, and we can safely assume that this general relationship applies to the homicide suspects in our study. This association, however, explains very little. after controlling for level of aggravation, the race of the suspect is not a significant predictive variable, and the principal racial pattern that we did find -- discrimination by race of victim -- persisted when we controlled for the race of the suspect. Indeed, we were careful to make sure that the effect of the race of the victim could be determined separately from any possible race-of-suspect effect. To assert that the criminal records of the suspects might account for determination by the race of the victim one would have to suppose that, controlling for the nature of the homicide and for their relationship to the victims, the killers of whites, regardless of their own race, were more likely to have serious criminal records than the killers of blacks. We know of no empirical or logical basis for such a supposition, and it seems unlikely that any unforeseen effect of this type could be large enough and consistent enough to have the power to explain the racial patterns that we have reported.
>
> In sum, we are aware of no plausible alternative hypothesis that might explain the observed racial patterns in capital sentencing, in legitimate non-discriminatory terms.

37 Stanford L. Rev. at 100-02 (footnotes omitted).

(5) The reliability of the Gross-Mauro study is confirmed not only by its own design and results, as the preceding discussion shows, but in two other ways as well.

First, confirmation is by a comparison of the results found in Florida with those of the other seven states included in the Gross-Mauro study; these were Georgia, Illinois, Oklahoma, North Carolina, Mississippi, Virginia, and Arkansas. A similar pattern of race-of-victim based discrimination was found in each state. Second, confirmation is by a comparison of the Gross-Mauro study to other studies of Florida's imposition of the death penalty.

(6) Gross and Mauro make the comparison to other Florida studies extensively, at pages 43-45 and 102 of their article, and are able to demonstrate the strength of their study thereby. No matter the methodology of the study or the number of variables the study has examined, each has come to the same conclusion in Florida as well as other states: the race of the victim is unquestionably a major determinant of the decision to impose death.

(a) In a study examining an earlier period of the application of the death penalty statute in Florida -- in its first five years -- William Bowers and Glenn Pierce focused upon the probability of receiving the death sentence in Florida by race of offender and victim. Bowers and Pierce, Arbitrariness and Discrimination Under Post-Furman Capital Statutes, 1980 Crime and Delinquency 563 (October 1980). The following table illustrates their findings:

Probability of Receiving the Death Sentence in Florida, for Criminal Homicide, by Race of Offender and Victim (from effective date of post-Furman death statute through 1977)

Offender/Victim Racial Combinations	(1) Estimated Number of Offenders	(2) Persons Sentenced to Death	(3) Overall Probability Of Death Sentence
Black kills white	240	53	22.1%
White kills white	1,768	82	4.6%
Black kills black	1,922	12	.6%
White kills black	80	0	0%

The authors analyze this data as follows:

In Florida, the difference by race of victim

> is great. Among Black offenders, those who kill Whites are nearly 40 times more likely to be sentenced to death than those who kill Blacks. The difference by race of offender, although not as great, is also marked.

Id. at 595. To attempt to account for legitimate factors which might explain these results, Bowers and Pierce examined the data at specific, discretionary stages within the judicial process and examined a specific kind of murder (felony-murder). The strength of the race-of-victim discrimination remained:

(i) In examining the likelihood of moving from one stage to the next in the judicial process for the various offender/victim racial categories, Bowers and Pierce again found the racial pattern to be clear and consistent. The table below shows that the racial patterns identified in the over-all probability of receiving a death sentence (shown in the preceding table) also exist at the significant decision-making stages of the criminal justice process.

Charges, Indictments, Convictions, and Death Sentences in Florida for Criminal Homicides, by race of Offender and Victim (from effective date of post-Furman statute through 1977)

Conditional Probability of Moving between Successive Stages

Offender/Victim racial combinations:	First Degree Indictment Given Indictment	First Degree Charge Given First Degree Indictment	Death Sentence Given First Degree Charge	Overall Probability of a Death Sentence Given Indictment
Black kills whites	92.5%	43.0%	47.0%	18.7%
White kills white	66.6%	37.0%	29.0%	7.1%
Black kills black	36.6%	19.4%	19.6%	1.4%
White kills black	42.9%	15.0%	0%	0%

Id. at 578.

(ii) In evaluating the processing of felony and non-felony type murder cases by race of the offender and the victim, Bowers and Pierce found the results of this analysis as well to be consistent with those disproportionate racial patterns previously identified. Thus, even in a felony-type murder, a white can kill a black with zero probability of

receiving the death sentence.

Probability of Receiving the Death Sentence in Florida
Felony and Non-felony Murder by Race of Offender and Victim
(from effective dates of post-Furman death statutes through 1977)

	Felony-Type Murder			Nonfelony-Type Murder		
	(1)	(2)	(3)	(4)	(5)	(6)
Offender/ Victim Racial Combination	Estimated Number of Offenders	Persons Sentenced to Death	Probability of Death Sentence	Estimated Number of Offenders	Persons Sentenced to Death	Overall Probability of Death Sentence
Black kills white	143	46	32.3%	97	7	7.2%
White kills white	303	65	21.5%	1,465	17	1.2%
Black kills black	160	7	4.4%	1,762	5	0.3%
White kills black	11	0	0.0%	69	0	0.0%

Id. at 599.

(b) The conclusions reached in other studies of the racially-biased application of Florida's death sentence concur with those described above:

(i) M. Radelet and G. Pierce, Race and Prosecutorial Discretion in Homicide Cases, 19 Law & Soc. Rev. 587 (1985), in which the authors studied data on 1,419 defendants indicted for homicide in Florida between 1973 and 1977, and concluded that "the criminal justice system is disproportionately severe on homicides against whites and by blacks, and this bias is evident at every stage of the criminal justice process."

(ii) L. Foley and R. Powell, The Discretion of Prosecutors, Judges and Juries in Capital Cases, 7 Crim. J. Rev. 16 (Fall 1982), analyzed all first-degree murder indictments in 21 Florida counties during 1972-78, and concluded that "defendants in capital cases in Florida receive differential treatment due to their attributes and the attributes of their victims."

(iii) L. Foley, Florida After the Furman Decision: Discrimination in the Processing of Capital Offense Cases (unpublished study), concluded that "males and offenders accused of murder of a white victim were . . . much more likely to receive the death penalty than females and those accused of murder of a black victim."

(iv) M. Radelet, Racial Characteristics and the Imposition of the Death Penalty, 46 am. Sociological Rev. 918 (1981), examined the homicide indictments in 20 Florida counties between 1976 and 1977, and concluded that "relative equality in the imposition of the death penalty appears mythical as long as prosecutors are more likely to obtain first-degree murder indictments for those accused of murdering white strangers than for those accused of murdering black strangers."

(7) Finally, the validity of the Gross-Mauro study is confirmed by the results recently made known in a study of the imposition of the death penalty in Georgia. Professors Baldus, Woodworth, and Pulaski have recently completed a massive study of a large sample of Georgia cases (1066) in which the defendants were convicted of murder or manslaughter. The Baldus study was the subject of an evidentiary hearing in the lower court in McClesky v. Kemp, 753 F.2d 877 (11th Cir. 1985 (en banc). The Supreme Court has recently granted certiorari to review this issue in McCleskey. ____ U.S. _____ (July 7, 1986) (No. 84-6811). This study examined the relation between more than 400 factors -- concerned with defendants' and victims' backgrounds, the defendants' criminal records, the circumstances of the homicides, and the strength of the evidence of the defendants' guilt -- and the imposition of the death penalty. Professor Baldus and his colleagues found, as did Gross and Mauro in the Georgia part of their study, that the race of the victim was an extraordinary and strong determinant of death sentences. Two findings of the Baldus study in particular, however, provide strong confirmation of the validity of the study conducted by

Gross and Mauro -- both in Georgia and in Florida. As reported by Gross and Mauro, these findings are the following:

> First, the Baldus study establishes that data on the defendants' criminal records have little or no impact on the pattern of discrimination by race of victim in capital sentencing in Georgia. Second, the study demonstrates that the magnitude of the race-of-victim effect that we found in Georgia would not be reduced if we were able to control for additional variables concerning the level of aggravation of the homicides and the strength of the evidence against the defendants. The study reports a logistic regression model on the odds of a death sentence, which is comparable to several of our own, as well as many larger regression analyses that include numerous additional control variables. Comparisons between these larger models and the smaller one reveals two important facts: (1) the race-of-victim coefficient remains statistically significant regardless of the other variables included in the equations. (2) After controlling for the variables in our study, the introduction of any number of additional control variables either has little impact on the magnitude of the race-of-victim effect, or else it increases the size of the race-of-victim disparities.

37 Stanford L. Rev. at 103-04 (footnotes omitted). Accordingly, while there is no "Baldus-type" study of Florida, it appears that the Gross-Mauro study of Florida, in combination with other Florida studies, is just as reliable as such a study would be if it were available, based on the experience in Georgia.

F. Florida's history of race discrimination also supplements the showing of the statistically disparate imposition of death sentences on the basis of race. If provided the opportunity, Mr. Darden will prove: (a) that Florida has had a longstanding history of de jure racial segregation and discrimination in virtually all areas of public life, which did not completely end, statewide, until 1971, with the end of de jure school segregation; and (b) that the effects of de jure race discrimination continued beyond the end of de jure discrimination, and have continued to be reflected in the present, in the unemployment levels of black people, the disproportionate concentration of black people in lower paid and

lower status jobs, the median level of black family income in comparison to white family income, and the disproportionately low numbers of black students in the institutions of higher education in Florida. These historical facts give rise to an inference of purposeful discrimination as the explanation for the strongly disparate application of the death penalty on the basis of the victim's race, and the defendant's race, a predicate for fourteenth amendment analysis. The fourteenth amendment equal protection claim may be raised by evidence 1) that "[t]he impact of the official action. . . bears more heavily on one race than another. . ." Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266 (1977); 2) that the particular decision made affords state actors broad discretion, which is relevant because of "the opportunity for discrimination [it]. . . present[s] the state, if so minded, to discriminate without ready detection." Whitus v. Georgia, 385 U.S. 545, 552 (1967); and 3) that there has been historical discrimination. One (1) and three (3) have been shown, and it is abundantly clear that capital sentencing systems in general, and Florida's in particular, are characterized by a broad "range of discretion entrusted to a jury," which affords "a unique opportunity for racial prejudice to operate but remain undetected." Turner v. Murray, 90 L. Ed. 2d at 35 (1986).

While race-of-victim and race-of-defendant studies have been much more exhaustively pursued, there have been preliminary studies focusing upon other arbitrary determinants of capital sentencing -- geography, sex of the defendant, and occupation of the victim. These studies have shown precisely what the pre-Gross/Mauro and pre-Baldus studies showed with respect to the race of the defendant and the race of the victim: that these factors also arbitrarily and discriminatorily play a determinative role in the process of capital sentencing. While these studies have not been developed to the same extent as the others, the subsequent experience with race-of-victim studies

indicates that the opportunity should be provided to further develop these studies, in light of the strength of their preliminary figures -- showing a high degree of influence upon the imposition of the death sentence.

(1) With respect to the factor of geography, the death penalty is nearly two and one-half times more likely to be imposed in the panhandle than in the southern portion of the state; the northern and central regions fall about midway between these two extremes. The probability that such differences could occur by chance, given evenhanded disposition of the death penalty and comparable offenses committed across the state, is extremely low, well beyond accepted standards of chance variation -- .002. See Bowers and Pierce, supra. When Bowers and Pierce (the researchers conducting the investigation of geography and the death penalty) controlled for the felony-murder aggravating factor, the geographic disparities not only failed to disappear, but instead, increased -- to a ratio of four to one between the panhandle on the one hand and the northern and souther regions (collectively) on the other, and to a ratio of two to one between the central region on the one hand and the northern and southern regions (collectively) on the other. Id. at 603-05. These regional disparities persisted when potentially capital cases were followed from arraignment through final sentencing, id. at 616-19, and after appellate review by the Florida Supreme Court, id. at 623-25. Disparities such as these simply should not occur and cannot be tolerated under a system which must "assure consistency, fairness, and rationality in the evenhanded operation of state law." Proffitt v. Florida, 428 U.S. 242, 260 (1976). Moreover, there can be no plausible hypothesis to explain this disparity, for it is not plausible that the character of homicides or defendants varies significantly from region-to-region within a state. What plausibly does vary is the attitudes of sentencers from region to region, but that cannot -- under a unitary, evenhanded state law -- be allowed to mean the

literal difference between life and death between defendants.

(2) On the basis of a 21-county study concerning all cases from 1972 through 1978 in which first-degree murder indictments were returned, conducted by Professor Linda A. Foley and Richard Powell, of the University of North Florida (referred to supra), the sex of the offender also appears to determine significantly the imposition of the death penalty in Florida. In this study, Foley and Powell sought to ascertain the variables which have a statistically significant influence on three critical stages of the capital prosecution process in Florida: the prosecutor's decision whether to go to trial or dismiss charges, the jury's sentence recommendation, and the judge's sentencing decision. Their findings demonstrate the influence of the sex of the defendant on the capital sentencing process to a greater degree of statistical significance than the threshold of statistical significance required by the Supreme Court in Castaneda v. Partida, 430 U.S. 482 (1977):

> The fourth factor influencing the trying of a case is an attribute of the defendant: sex (p .0179). A female defendant is much more likely to have her case dismissed than is a male defendant. . . . It should be remembered that the relationships between this attribute and other factors (e.g., circumstances of the case) have been removed statistically. Therefore, this attribute is influencing the prosecutor's decision separately from any of the legal factors which might be related to it (at least those legal factors examined in this study).
>
> * * * * * *
>
> According to the log linear analysis, both the jury and the judge are significantly influenced by the sex of the offender. . . (.0001). In both decisions females . . . are less likely to receive the death penalty. However, the analysis of covariance controls for the impact of many other predictor variables,thus the level of significance for . . . [this] . . . variable[] is reduced. . . . [Nonetheless] the sex of the offender still influences the decision of both parties [to a statistically significant degree (p .0491, p .0255), after the analysis of covariance].

7 Crim. J. Rev. at 19-21.

(3) While the sex of the defendant has not been

studied even to the degree of geography, this factor shows a strong enough correlation with the imposition of death sentences that further opportunity for evidentiary consideration is certainly warranted.

H. On the basis of the foregoing facts, Mr. Darden submits that the imposition of the death penalty in Florida is still in violation of the eighth and fourteenth amendments -- having changed superficially, but not in substance, from the discriminatory, arbitrary imposition of death so firmly condemned in Furman v. Georgia.

III.

NATURE OF RELIEF SOUGHT

Petitioner requests that this Court await the decisions in Hitchcock and McClesky, and then that the Court analyze the claim presented here under the parameters articulated by the United States Supreme Court, and vacate the death sentence herein, after evidentiary development of the claim, if necessary.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition has been forwarded by U. S. Mail to Richard W. Prospect, Assistant Attorney General, 125 North Ridgewood Avenue, Daytona Beach, FL 32014, this 29th day of August, 1986.

Mark Olive