IN THE SUPREME COURT OF FLORIDA

NO. 72088

WILLIE JASPER DARDEN,

Petitioner,

v.

RICHARD L. DUGGER, Secretary,
Department of Corrections, State of Florida,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS, MOTION FOR STAY OF EXECUTION, AND/OR FOR STAY OF EXECUTION PENDING FILING AND DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

ROBERT AUGUSTUS HARPER
Attorney at Law
317 East Park Avenue
Tallahassee, Florida 32301
(904) 224-5900

LARRY HELM SPALDING
Capital Collateral Representative

MARK EVAN OLIVE
Chief Assistant CCR

OFFICE OF THE CAPITAL COLLATERAL
REPRESENTATIVE
1533 South Monroe Street
Tallahassee, Florida 32301
(904) 487-4376

COUNSEL FOR PETITIONER

IN THE SUPREME COURT OF FLORIDA

NO. _____

WILLIE JASPER DARDEN,

Petitioner,

v.

RICHARD L. DUGGER, Secretary,
Department of Corrections, State of Florida,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS, MOTION FOR STAY OF EXECUTION, AND/OR FOR STAY OF EXECUTION PENDING FILING AND DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

Petitioner, Willie J. Darden, an indigent proceeding 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. Petitioner avers 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 and in accordance with Fla.R.App.P. 9.100(e), Mr. Darden states:

I.

JURISDICTION

This is an original action under Fla.R.App.P. 9.100(a). This Court has original jurisdiction pursuant to Fla.R.App.P. 9.030(a)(3), and Article V, Section 3(b)(9), Fla. Const. The

petition presents issues which directly concern the judgment of this Court on appeal, and in post-conviction, and hence jurisdiction lies in this Court. See, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981). The issues presented were previously ruled upon by this Court in this case, sub silencio on direct appeal with respect to the heinous, atrocious and cruel issue, and expressly, in post-conviction with respect to the Caldwell claim. Petitioner requests that this Court revisit the claims in light of errors of constitutional magnitude in the prior treatment: "[I]n the case of error that prejudicially denies fundamental constitutional rights . . . this Court will revisit a matter previously settled . . . ." Kennedy v. Wainwright, No. 68,264 (Fla. February 12, 1986). Furthermore, the Caldwell claim is cognizable in this habeas corpus action because no remedy is available pursuant to Rule 3.850 -- this Court has rejected the merits of the claim, and has embraced its jurisdiction to do so, Pope v. Wainwright, 496 So. 2d 798, 804-05 (Fla. 1986), which means no relief is available in Florida courts unless this Court changes its mind. See Combs v. State, ___ So.2d ___ (Fla. February 18, 1988); Garcia v. State, 492 So. 2d 360, 367 (Fla. 1986); Aldridge v. State, 503 So. 2d 1257, 1259 (Fla. 1987); Card v. Dugger, 512 So. 2d 829, 831 (Fla. 1987); Delap v. State, 513 So. 2d 1050, 1050-51 (Fla. 1987); Smith v. State, 515 So. 2d 182, 185 (Fla. 1987); Foster v. State, 12 F.L.W. 598 (Fla. 1987). The allocation of some habeas corpus jurisdiction to the trial court under Rule 3.850 does not divest this Court of its constitutionally authorized jurisdiction, if a ruling under Rule 3.850 is unavailable. See, e.g., Mitchell v. Wainwright, 155 So. 2d 868, 870 (Fla. 1963); Tafero v. Dugger, ___ So. 2d ___ (Fla. February 26, 1988)(rejecting Caldwell claim in habeas corpus proceeding).

II.

FACTS UPON WHICH PETITIONER RELIES

Mr. Darden was sentenced to death in January 1974, thirteen months after the new Florida death penalty statute came into being. The trial judge had been on the bench for one year. Mr. Darden's appeal to this Court was concluded upon denial of rehearing in April 1976. Death penalty law was in such an infant stage then that the Florida Supreme Court believed it to be effective assistance for appellate counsel not to raise any challenge to the death penalty on direct appeal. See Darden v. State, 475 So. 2d 214, 217 (Fla. 1985)("clearly counsel had no notice by case law that this issue [heinous, atrocious, or cruel] was open to attack any more than any other issue in the sentencing phase.")

In fact, no issue regarding the propriety of the death penalty in Mr. Darden's case was raised by appellate counsel or addressed by this Court. This Court directly addressed only one point on appeal: whether the prosecutor's closing arguments "were so inflammatory and abusive as to have deprived the Appellant of a fair trial," Darden v. State, 329 So. 2d 287, 289 (Fla. 1976), and that question was limited to determining whether the mean-spirited, inflammatory, and unethical closing arguments affected guilt, not sentence. Two justices, Sundberg, J., and England, J., dissented from this Court's affirmance of Mr. Darden's conviction and sentence of death,[1] without much help

---

[1]Needless to say, this case has had its share of dissenters, and Justices England and Sundberg have been in good company. See Darden v. Dugger, No. 87-6173 (U.S. March 7, 1988)("I am not persuaded . . . that petitioner Willie Jasper Darden received a fair trial in the Florida Courts. A person should not be condemned to die and be executed under any system of justice in this country without a fair trial.")(Blackmun, J., dissenting from denial of petition for writ of certiorari, joined by Brennan, J., and Marshall, J.); see also Darden v. Wainwright, 106 S. Ct. 2464, 2482 (1986)(four dissenters) and Darden v. Wainwright, 699 F.2d 1031, 1043 (11th Cir. 1983)("Darden's due process rights were not well guarded in this case.")(Clark, J., dissenting).

from appellate counsel.[2] Their dissent, in addition to holding that the guilt/innocence determination was fundamentally tainted by prosecutorial misconduct, recognized that primary area of concern not raised by appellate counsel and not addressed by the majority -- namely, whether the procedures employed for sentencing Mr. Darden to death were tainted:

> When one considers that Darden has been sentenced to die by the court which heard these arguments after recommendation of death by the jury to which they were made, it is evident that every assigned error should be given very careful consideration. . . ."

Id., 329 So. 2d at 295. Mr. Darden does not seek to relitigate the prosecutorial misconduct issue. However, the split in this Court over the propriety of the guilt finding is highlighted in order to demonstrate how very fragile is the predicate for the death penalty in this case ab initio.

Three aggravating and two mitigating circumstances were found by the trial court. The Florida death penalty statute requires that this Court determine the appropriateness of the death penalty in every case. See F.S. Sec. 921.141(4). This includes a review of the statutory aggravating, and the statutory and non-statutory mitigating circumstances. Petitioner will demonstrate herein that the trial court's finding of heinous, atrocious, and cruel is totally unsupported, and that this Court should now so hold.

Furthermore, Petitioner will demonstrate that the question of guilt/innocence was of fundamental importance at sentencing, and that it necessarily contributes to the required sentencing

---

[2]Mr. Darden challenged appellate counsel's failure to raise the issue of heinous, atrocious, and cruel on appeal, in Darden v. State, 475 So.2d 214 (Fla. 1985). This Court rejected that claim by finding no unreasonable omission, and so the Court did not address prejudice in a sixth amendment context. That sixth amendment ruling is not a rejection of the eighth amendment claim presented here -- that there was insufficient evidence of heinous, atrocious, or cruel.

balancing of aggravating and mitigating circumstances. The Petitioner spoke to the jury three times professing his innocence, in the face of cross-racial identification of him as the perpetrator, and the trial judge found Petitioner's exculpatory testimony to be a mitigating circumstance:

> In mitigation, after conviction, the Defendant again emotionally and with what appeared on its face to be sincerity, proclaimed his innocence
>
> . . .
>
> In mitigation I find the following mitigating circumstances: . . . . The defendant repeatedly professed his complete innocence of the charges.

Without "heinous, atrocious and cruel," there are two statutory aggravating circumstances and two mitigating circumstances remaining which were "found" by the trial judge. With that balance, resentencing is required under Florida law. See Elledge v. State, 346 So.2d 998 (Fla. 1977).

The second issue raised in this petition involves prosecutor/judge reduction of sentencer responsibility, see Caldwell v. Mississippi, 105 S. Ct. 2633, an issue raised previously and which this Court found to be without merit. See Darden v. State, 475 So. 2d 217, 221 (Fla. 1985). The issue should be revisited in light of Dugger v. Adams, No. 87-121 (U.S. March 7, 1988)(state's petition for writ of certiorari granted). See also, Mann v. Dugger, 828 F.2d 1498 (11th Cir. 1987), 817 F.2d 1471 (11th Cir. 1987), vacated and rehearing en banc granted, and Harich v. Wainwright, 813 F.2d 1082 (11th Cir. 1986), vacated and rehearing en banc granted, 828 F.2d 1497 (11th Cir. 1987).

A. This Crime Was Not Heinous, Atrocious, or Cruel

> Where, as here, a single fatal shot is fired and the victim dies shortly thereafter, [that] simply cannot support a finding of an especially heinous, atrocious, or cruel murder.

Jackson v. State, 502 So. 2d 409, 411-12 (Fla. 1987).

Petitioner will thoroughly discuss this Court's law in section IV, infra. Jackson is quoted here only to place the facts of Mr. Darden's case in context, and to show the current state of the law in Florida regarding heinous, atrocious, or cruel. "There have been multiple restrictions and refinements in the death sentencing process, by both the United States Supreme Court and this Court, since this matter was first tried . . . and affirmed . . . and we are bound to fairly apply those decisions." Proffitt v. State, 570 So. 2d 896, 897 (Fla. 1987). The facts of this case, under today's law, require resentencing.

The trial judge recited the facts regarding Mr. Turman's death: "When her husband suddenly appeared at the back door of the store, the Defendant coldly, immediately, and without warning, shot and killed him in the door. Mr. Turman . . . did not even have an opportunity to flee." (R. 206) From this, the trial court found "[t]he capital felony was especially heinous, atrocious and cruel." Id. While the quoted judge's sentencing order on its face sufficiently reveals that this aggravating circumstance is not supported by the record, Petitioner will nevertheless outline the testimony and proof which further demonstrates that the crime against the victim Mr. Turman was not accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- it was not a crime "unnecessarily torturous to the victim." State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973).

The facts in this case are that the victim was shot in the head instantaneously with his appearance at the scene of a robbery, that he did not know of his precarious position before he was shot, that he was rendered immediately unconscious, and that he died shortly thereafter from extensive brain damage caused from the shot. Mrs. Turman, the victim's wife and only witness to the actual shooting, described the manner of death:

Q. Mrs. Turman, your husband came through the back door in -- or did he come in the back door?
A. He did not come in the door. He started in. He opened the door and started in. He did not get in.
Q. He opened the door?
A. He opened the door.
Q. All right, was the shot instantaneously at that point?
A. It was.

(R. 268)(emphasis added).

A. . . . And about that time, my husband opened the door. When [the assailant] reached across my right shoulder and I screamed, "No, Jim, don't come in," but it was too late. He had already fired the gun and shot my husband. My husband did not have a chance to say a word . . . .

Q. And your husband did not respond?
A. He did not respond.
Q. Did [the assailant] say anything to him?
A. No, sir.

(R. 207-208)(emphasis added). Ms. Turman further testified that after the assailant left, she went to her husband:

"Q. What was your husband's condition at that time, Mrs. Turman?
A. At that time, I tried to talk to him and there was no response; and the blood was running from his head, his mouth, and his nose; and I also saw his brains coming out.
Q. Mrs. Turman, was he alive at that time?
A. Yes, sir.
Q. Did he ever respond?
A. He never responded.

(R. 278)(emphasis added).

Immediately after Mr. Turman was shot, Phillip Arnold kneeled down over him. He testified that Mr. Turman's body was just lying in water outside the back door of the store, and that "his head was bleeding real bad and all." (R. 432) A pathologist testified that Mr. Turman had been shot one time "between the eyes and the forehead," that this was the cause of death, and that the bullet "had extensively damaged the brain" (R. 415) He testified that there were no other bruises or injuries, and that another physician had declared Mr. Turman dead at 11:05 p.m., the night of the incident. (R. 416-417)

The State's very theory was that Mr. Turman was killed without warning. In a highly objectionable argument, the State stressed the instantaneous killing of Mr. Turman:

> "Mr. Turman, not knowing anything happened, not knowing what was going on. I wish he [Turman] had had a shotgun in his hand when he walked in the back door and blown his face off. I wish that I could see him sitting there with no face, blown away by a shotgun, but he didn't. He had no gun. He had no chance. . . . [he] opened the door and he shoots him between the eyes.
>
> . . .
>
> [H]er husband was already lying there with the bullet in his forehead between his eyes. She knew, or should have known it was murder on the spot.

(R. 759-60). These facts do not support heinous, atrocious or cruel. See Section IV, infra.

B. The Judge and Prosecutor Impermissibly Reduced Juror Sense of Responsibility

The Court and prosecutor repeatedly stressed to the jurors that their function at Florida capital sentencing was de minimis. During preliminary Instructions to the Jury the Court stated:

> In either event the final decision is not the jury's. The final decision is restedly solely with the Court. It will be my decision in the event of a verdict of guilty of first degree murder it will be my decision to whether or not, my determination alone, as to whether or not this defendant should go to the electric chair. I do want you to understand though that the law intends and I certainly would give great weight to what the advisory sentence would be. So you should not take your duties lightly. However, I would not be obligated to follow it. The jury might return a recommendation, advisory sentence of the death penalty and I might reduce it to life imprisonment and the jury might recommend life imprisonment and I would feel that they were wrong and sufficiently strongly to go ahead and administer the death penalty anyway. Both have been done in this state under the law, the new law.

(R. 26-27)(emphasis added). The Court further stated:

> I have explained to you already the basic procedure. How we have a two section trial and how although the final determination in the event of a verdict of guilty of first degree murder the final determination as to penalty will be mine. But that you, if you are selected on the

jury, would be called upon to listen to further testimony and to advise me by advisory sentence.

(R. 42)(emphasis added).

Under certain circumstances if you find the aggravating circumstances are sufficient they are not outweighed by mitigating then it would be proper under the law your correct verdict would be to recommend the death penalty.

Now I am going to ask each of you individually the same question so listen to me carefully, I want to know if any of you have such strong religious, moral or conscientious principles in opposition to the death penalty that you would be unwilling to vote to return an advisory sentence recommending the death sentence even though the facts presented to you should be such as under the law would require that recommendation? Do you understand my question?

(R. 43)(emphasis added). Each jurur was so asked. See R. 44, 46, 49, 88, 109, 111, 112, 131-132, etc.

During closing argument in guilt phase, the prosecutor argued:

[T]he Court will impose a sentence on Count No. 2 and 3, which is robbery and assault with intent to murder, and then you will be asked at that time to go back and retire and advise the Court whether or not he gets the death sentence or whether he should get life.

That is an advisory opinion on your part, and it has nothing to do with this trial, and Mr. Maloney knows that.

(R. 753)(emphasis added). The Court instructed at the guilt phase:

As I shall tell you later in these instructions, the determination of the proper punishment in the event you should find the Defendant guilty of one or more of the offenses charged, is my responsibility. Except as you might be called upon for a special advisory sentence in the event of a first degree murder conviction, you are not to be concerned with the penalty. However, in order that you might fully understand the offense, I shall now tell you the maximum penalty for each of them.

(R. 849)(emphasis added).

You are not to be concerned at this time with the imposition of any penalty in the event you reach a verdict of guilty. Just as the determination of the guilt or innocence of the accused rests solely and absolutely with you, so also does the determination of the extent of punishment, within the limits prescribed by the law, rest solely with the Court.

(R. 863)(emphasis added).

The Court instructed the jury at penalty phase:

In serving now, you act as advisors to the Court which has the final discretion and the responsibility in the matter, and I have the power of independent judgment.

Under these procedures, it is now your duty to determine, by majority vote, whether or not you advise the imposition of the death penalty based upon . . . .

(R. 898)(emphasis added).

The proceeding shall be conducted by the trial Judge before the trial Jury as soon as practicable. After hearing all of the evidence, the Jury shall deliberate and render an advisory sentence to the Court based upon the following matters and they're the ones that I just read to you, whether sufficient aggravating circumstances exist, whether sufficient mitigating circumstances exist, which outweigh aggravating circumstances, and based on these considerations, whether the Defendant should be sentenced to death or life.

Notwithstanding the recommendation of the majority of the Jury, the Court, after weighing the aggravating and mitigating circumstances shall enter sentence of life imprisonment or death.

(R. 900)(emphasis added).

Whatever your recommendation may be, it must be approved by a majority of you. In the prior verdict of guilt or innocence, it had to be unanimous. This verdict must be approved only by a majority of you. The appropriate form should be signed by your foreman and then returned to me.

Ladies and gentlemen, as I told you at the beginning and I will repeat here, it is my determination, I do not wish to lighten in any way the weight of your advice. This is an advisory proceeding to me.

But I assure you, I shall give very great weight to what your recommendation might be. This was the intent of the statute

> and even if it was not intended by the statute, I certainly would because I would put great weight in what you think and what you would recommend.

(R. 905)(emphasis added). These comments and instructions at best could lead a reasonable juror to conclude his or her responsibility at sentencing was minimal.

III.

NATURE OF RELIEF SOUGHT

Petitioner requests a new sentencing hearing, before a jury that is not misled or confused regarding its awesome sense of responsibility, and before a jury and judge that are not allowed to consider heinous, atrocious, or cruel as a statutory aggravating circumstance. Inasmuch as these are non-frivolous issues meriting judicious review, petitioner requests a stay of execution pending this Court's resolution of the issues in the petition.

IV.

ARGUMENT IN SUPPORT OF RELIEF SOUGHT

A. Because This Offense Was Not Heinous, Atrocious, or Cruel, Mr. Darden Must Be Resentenced

Petitioner demonstrates in this argument: 1) that the offense was not heinous, atrocious, and cruel, under this Court's case law; 2) that if the heinous, atrocious, or cruel statutory aggravating circumstance is sustained, then the Florida death penalty statute as applied to petitioner is arbitrary, and does not provide legitimate criteria for narrowing the class of death-sentenced persons, a matter which the United States Supreme Court is presently considering in Maynard v. Cartwright, No. 87-519 (see Petitioner's brief in Cartwright, submitted herewith as Appendix A.); and 3) that resentencing is required.

1. This Offense Was Not Heinous, Atrocious, or Cruel

In Zant v. Stephens, 103 S.Ct. 2733 (1983), the United States Supreme Court recognized that "statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: to circumscribe the class of persons eligible for the death penalty." Id. at 2743. In order to "minimize the risk of wholly arbitrary and capricious action," id. at 2741, "aggravating circumstances must genuinely narrow the class of persons eligible for the death penalty," id. at 2742-43.

Thus, if Fla. Stat. Sec. 921.141(5)(h) ("heinous, atrocious, or cruel") does not, in application, genuinely narrow, its application violates the eighth and fourteenth Amendments. Godfrey v. Georgia, 446 U.S. 420 (1980). In Godfrey, Georgia's similar statutory aggravating circumstance ("outrageously or wantonly vile, horrible, or inhuman . . . involv[ing] depravity of mind or an aggravated battery to the victim"), while valid on its face, Gregg v. Georgia, 428 U.S. 153 (1976), was found unconstitutional in application because there was in fact no narrowing accomplished through its application in Mr. Godfrey's case: "There is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." 446 U.S. at 433. Mr. Godfrey, like Mr. Darden, had been convicted of a crime involving a single gunshot wound to the head. Id. at 425.

Section (5)(h) of the Florida Statute must "genuinely narrow the class of persons eligible for the death penalty." Zant v. Stephens, 103 S.Ct. at 2742-43. Petitioner will show that one of two constitutional errors exist herein with regard to Section (5)(h). Either (1) heinous, atrocious and cruel does not apply to the killing of Mr. Turman, and thus its "finding" impermissibly and prejudicially infected the jury's and the trial

judge's balancing of aggravation and mitigation, as will be argued in this subsection, or (2) if heinous, atrocious and cruel does apply to this victim's death, then the Florida Supreme Court has failed to narrow Section (5)(h)'s application, and the section is unconstitutional as written and as applied, as will be argued in subsection 2, infra. See Mello, M., Florida's 'Heinous, Atrocious or Cruel' Aggravating Circumstance: Narrowing the Class of Death Eligible Cases Without Making it Smaller, 13 Stet.L.Rev. 523, 528 (1984)(submitted herewith as Appendix C)(hereinafter "Mello").

With respect to the first error, it is apparent that the heinous, atrocious, or cruel aggravating circumstance does not and should not apply in Petitioner's case. In 1973, this Court examined and interpreted section (5)(h), and, in language foreshadowing the United States Supreme Court's opinion in Zant v. Stephens, noted "[t]he most important safeguard presented in Fla. Stat. section 921.141, F.S.A., is the propounding of aggravating. . . circumstances which must be determinative of the sentence imposed." State v. Dixon, 283 So. 2d 1,8 (Fla. 1973). Section (5)(h), acording to Dixon, includes only "those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily tortuous to the victim." Id. at 9. The focus is on what the victim experienced, and "the defendant's mindset is [never] at issue." Pope v. State, 441 So.2d 1073 (Fla. 1983).

In Tedder v. State, 322 So. 2d 908 (Fla. 1975), this Court, citing and building on Dixon, 322 So. 2d at 910, recognized that while "it is apparent that all killings are atrocious, and that appellant exhibited cruelty. . . [s]till, we believe the legislature intended something 'especially' heinous, atrocious, or cruel when it authorized the death penalty for first degree

murder." Tedder, 322 So. 2d at 910 n.3. This court described the offense:

> On January 17, 1974, appellant's wife and mother-in-law were laying a sidewalk outside the trailer where they resided. Appellant and his wife had recently separated. Without advance warning of any sort, appellant stepped from behind a tree and fired a shot in the direction of the women and the appellant's infant son. All fled toward the trailer, where appellant's wife ran with the baby to a back bedroom in order to obtain a shotgun. She succeeded in locking the bedroom door behind her, but while loading the shotgun she heard more shots and the scream of her mother. Appellant then broke open the bedroom door and, gun in hand, took away the shotgun and told his wife to bring the baby and come with him. As they left, his wife saw her mother lying on the floor in a hallway.

Id. at 909 (emphasis added). Tedder involved a victim well aware of her impending death, who "fled toward the trailer." Her daughter was actually cognizant of the treachery, heard her mother being shot and screaming, and saw her body after the shots. On the heels of Tedder came Halliwell v. State, 323 So. 2d 557 (Fla. 1975), and this Court again invalidated a finding of heinous, atrocious, and cruel, because "we see nothing more shocking in the actual killing than in the majority of murder cases reviewed by this Court." Id. at 561. The description of the murder was graphic:

> [T]he appellant flew into a rage after the husband of the woman he loved had beaten her. Appellant grabbed a 19-inch breaker bar and beat the husband's skull with lethal blows and then continued beating, bruising, and cutting the husband's body with the metal bar after the fatal injuries to the brain.

Id. at 561.

Certainly a single fatal shot to the head, unsuspected by the victim, as in Mr. Darden's case, was less heinous than the crimes in Tedder and Halliwell, and is undeniably less "shocking in the actual killing than in the majority of murder cases reviewed by this Court." Id. at 561. In addition, events after the victim's death were deemed irrelevant to the determination of

heinous, atrocious, or cruel. The Halliwell assailant attained "a new depth in what one man can do to another, even in death." Id. at 561.

> [S]everal hours after the killing. . . Appellant used a saw, machete and fishing knife to dismember the body of his former friend and placed it in Cypress Creek. It is our opinion that when Arnold Tresch died, the crime of murder was completed and that the mutilation of the body many hours later was not primarily the kind of misconduct contemplated by the legislature in providing for the consideration of aggravating circumstances. If mutilation had occurred prior to death or instantly thereafter it would have been more relevant in fixing the death penalty.

Id. (emphasis added).

Without doubt, the death of Mr. Turman epitomizes a non-heinous, atrocious, or cruel killing, as that statutory aggravating circumstance has since been interpreted by this Court.[3] Death resulting from an unsuspected gunshot, where the victim is killed instantly or is rendered unconscious and dies without regaining consciousness, is not a heinous, atrocious, or cruel offense. Craig v. State, 510 So. 2d 857, 868 (1987)(not heinous, atrocious or cruel because "although fully premeditated, the murders were carried out quickly by shooting"); Jackson v. State, 502 So. 2d 409, 411-412 (1987)("where, as here, a single fatal shot is fired and the victim dies shortly thereafter simply cannot support [sic] a finding of an especially heinous,

---

[3]Acts committed against Phillip Arnold or Mrs. Turman are not relevant here. The Florida Court established in Riley v. State, 366 So.2d 19, 21 (Fla. 1979) that evidence concerning surviving victims cannot be considered in ruling upon heinous, atrocious or cruel aggravating circumstance. See also Lucas v. State, 376 So.2d 1149, 1153 (Fla. 1979) (error to consider nature of other offenses as heinous, atrocious or cruel). If such evidence is presented, resentencing is required before a new jury. Trawick v. State, 473 So.2d 1235, 1240-41 (Fla. 1985)("We further find that because the jury heard evidence and argument that did not properly relate to any statutory aggravating circumstance the jury recommendation is tainted. Appellant is entitled to a new sentencing trial.") This is true also for other similar prosecutorial argument presenting unauthorized aggravating aspects of the case. E.g., Tefftellar v. State, 439 So.2d 840 (Fla. 1983) (possibility of parole); Robinson v. State, 13 FLW 63 (Fla. 1988) (possible race bias).

atrocious or cruel murder"); Jackson v. State, 498 So. 2d 906, 910 (1986)(not heinous, atrocious or cruel where victim kiled by single bullet in his side and "there were no additional acts indicative of . . . cruelty"; "lifestyle, character traits and community standing of the victim are not relevant to the determination of whether a given homicide was especially heinous, atrocious or cruel"); Melendez v. State, 498 So. 2d 1258, 1261 (1986)(not heinous, atrocious or cruel where "gunshot to the head would have caused instantaneous death"); Way v. State, 496 So. 2d 126, 128 (1986)(not heinous, atrocious or cruel if "victims were totally incapacitated at the time of" death); Kokal v. State, 492 So. 2d 1317, 1319 (1986)(not heinous, atrocious or cruel where "death was instantaneous"); Philips v. State, 476 So. 2d 194, 196-197 (1985)("mindset or mental anguish of the victim is an important factor in determining whether [heinous, atrocious or cruel] applies"); Parker v. State, 476 So. 2d 134, 139 (1985)("a pistol shot to the head of the victim does not establish this aggravating circumstance [heinous, atrocious or cruel]"); Trawick v. State, 473 So. 2d 1235, 1240 (1985)("acts committed independently from the capital felony for which the offender is being sentenced are not relevant to question of whether the capital felony itself was especially heinous, atrocious or cruel"); Bundy v. State, 471 So. 2d 9, 21-22 (1985)(where there was no clear evidence to show victim struggled with abductor, "experienced extreme fear and apprehension, or was sexually assaulted before her death," no heinous, atrocious or cruel); Henderson v. State, 463 So. 2d 196, 201 (1985)(not heinous, atrocious or cruel where "victims died instantaneously from single gunshots to their heads"); Randolph v. State, 463 So. 2d 186, 193 (1985)("finding that the murder was heinous, atrocious or cruel as an aggravating circumstance cannot be supported by the evidence in this case," where state's chief witness testified she overhead defendant tell victim not to try anything and he

would not shoot, then heard two gunshots); Parker v. State, 458 So. 2d 750 (Fla. 1985)(victim shot in head after being shown body of previously murdered boyfriend); Gorham v. State, 454 So. 2d 556 (Fla. 1984)(victim killed instantly by two gunshots in back after being forced at gunpoint to face wall during robbery); Kennedy v. State, 455 So. 2d 351 (Fla. 1984)(victims killed in shootout while attempting to recapture escaped convict); James v. State, 453 So. 2d 786 (Fla. 1984)(physically handicapped victim shot in head while husband pleaded for her life); Jackson v. State, 451 So. 2d 458 (Fla. 1984)(victim shot in back, wrapped in plastic and placed in trunk, shot again while still alive); Blanco v. State, 452 So. 2d 520 (Fla. 1984)(victim shot after stumbling upon intruder in house and attempting to take away gun; six additional gunshots inflicted after original); Herzog v. State, 439 So. 2d 1372 (Fla. 1983)("when the victim becomes unconscious, the circumstances of further acts contributing to his death cannot support a finding of heinousness"); Oats v. State, 446 So. 2d 90 (Fla. 1984)("a pistol shot straight to the head of the victim does not tend to establish this aggravating circumstance"); Clark v. State, 443 So. 2d 973, 977 (Fla. 1983)("Directing a pistol shot to the head of the victim does not establish a homicide as especially heinous atrocious, or cruel. . ."), cert. denied, 104 S.Ct. 2400 (1984); Maxwell v. State, 443 So. 2d 967, 971 (Fla. 1983)("[s]ince the death was instantaneous following a single shot, this crime cannot be considered especially heinous, atrocious, or cruel."); Middleton v. State, 426 So. 2d 548, 552 (Fla. 1982)(no (5)(h) because "the victim died instantly from a shotgun blast to the back of her head from close range. She had just awakened from a nap, was facing away from appellant, and had no awareness that she was going to be shot."), cert. denied, 103 S.Ct 3573 (1983); Simmons v. State, 419 So. 2d 316,319 (Fla. 1982)(no (5)(h) because "[t]here was evidence that the victim was subjected to repeated

blows while living; death was most likely instantaneous or nearly so."); McCray v. State, 416 So. 2d 804, 805, 807 (Fla. 1982)(no (5)(h) because three shots to abdomen); Odom v. State, 403 So. 2d 936, 942 (Fla. 1981)("[a]n instantaneous death caused by gunfire, however, is not ordinarily a heinous killing.") cert. denied, 456 U.S. 925 (1982); Maggard v. State, 399 So. 2d 973, 977 (Fla. 1981)(no (5)(h) because "the victim died quickly from a single gunshot blast fire through a window, and there is no evidence that the victim was aware that he was going to be shot."), cert. denied, 454 U.S. 1059 (1981); Lewis v. State, 398 So. 2d 432, 434, 434 (Fla. 1981)("a murder by shooting, when it is ordinary in the sense that it is not set apart from the norm of premeditated murder, it as a matter of law is not heinous, atrocious, or cruel; here, the victim died instantaneously."); Williams v. State, 386 So. 2d 538, 543 (Fla. 1980)("appellant's crime does not rise to the level of 'especially heinous, atrocious, or cruel', [because the victim] died almost 'instantaneously' from her gunshot wounds."); Fleming v. State, 374 So. 2d 954, 958, 959 (Fla. 1979)("the murder was committed by a single shot . . . the victim was killed instantaneously and painlessly, without additional facts which make the killing 'heinous' within the statutorily-announced aggravating circumstance."); Kampff v. State, 371 So. 2d 1007, 1010 (Fla. 1979)("directing a pistol shot straight to the head of the victim does not tend to establish [(5)(h)] . . . We hold that the trial judge erred in finding that the murder was especially heinous, atrocious or cruel."); Riley v. State, 366 So. 2d 19, 21 (Fla. 1978)("[t]here was nothing atrocious done to the victim, however, who died instantly from a gunshot to the head.") cert. denied, 459 U.S. 981 (1982); Cooper v. State, 336 So. 2d 1133, 1140-41 (Fla. 1978)("this murder was not in [the (5)(h)] category. Deputy Wilkerson was killed instantaneously and painlessly, without additional acts which make the killing 'heinous. . .'"),

cert. denied, 431 U.S. 925 (1977); Sims v. State, 444 So. 2d 922 (Fla. 1983)((5)(h) improper; apparently instantaneous death).

Here, the evidence shows that Mr. Turman entered the store while a robbery was occurring, he began to push the door open, he was immediately shot, and he fell. (R. 49, 284). There is no evidence indicating that he was aware of the presence of the intruder or of the danger to his life. The bullet entered his forehead between the eyebrows, causing extensive brain damage (R. 415). Mrs. Turman went to her husband after the intruder had left and observed that he was severely injured, and he would not respond to her ministrations. (Id.).

This Court has "upheld application of [the heinous, atrocious and cruel] factor where victims were killed instantaneously or nearly instantaneously when, before the death occurred, the victims were subject to agony over the prospect that death was soon to occur," Preston v. State, 444 So. 2d 939, 949 (Fla. 1984), such as in the classic "execution style" murder, but here there is no evidence whatsoever that the victim was cognizant of the events then taking place inside the store. To the contrary, it is apparent that the victim had absolutely no expectation of danger (as the prosecutor argued), much less of his own impending death, when he approached the doorway.

This Court has refused to uphold findings of heinous, atrocious, or cruel even in situations where the victim has been confronted by the killer with the murder weapon, and the victim is keenly aware of the imminent possibility of death. In Gorham v. State, 454 So. 2d 556 (Fla. 1984), the appellant forced his victim, at gunpoint, to stand with his face to the wall during a robbery. During the course of the robbery, the victim was shot twice in the back and died within seconds as a result. The trial court based its finding of heinous, atrocious, or cruel on the fact that the victim had been in apprehension of death and had been shot in the back, indicating a lack of resistance. This

Court reversed that finding, holding that "[w]hile the murder was of course a cruel and unjustifiable deed, there is nothing about it to 'set the crime apart from the norm of capital felonies.'" Id. at 554, quoting Dixon v. State, 283 So. 2d at 9. Darden's victim, unlike Gorham's, had absolutely no presentiment of his death nor any awareness of the presence of a gun, and had no opportunity to resist. See also Tedder and Halliwell, supra.

In Blanco v. State, 452 So. 2d 520 (Fla. 1984), on facts remarkably similar to the instant case, this Court refused to uphold the trial court's finding of heinous, atrocious, or cruel where the victim had appeared by chance in the room where the intruder was menacing another resident of the house, the victim's niece. The victim was shot and killed in the ensuing scuffle. There, the victim was aware of the presence of the gun, as it was the subject of the struggle which ultimately lead to his death, and consequently must have been "subject to the agony of the prospect that death would soon occur," Preston, supra, or at least was very likely to soon occur, yet this Court still found that the murder was not within the ambit of Dixon's requirement that the "capital felony . . . [be] . . . accompanied by such additional acts as to set the crime apart from the norm of capital felonies," id. at 9, before a finding of heinous, atrocious, or cruel is appropriate. The victim sub judice had no notice of his fatal position.

The only decision found which upholds a finding of heinous, atrocious, or cruel in a non-execution type killing where death was caused by a single gunshot is Harvard v. State, 375 So. 2d 833 (Fla. 1977). There, the appellant pulled up next to his estranged wife's car and shot her in the face and neck with a shotgun, resulting in her immediate death. Because the appellant had lain in wait outside a bar in the early hours of the morning for this victim and then stalked her for miles, and had engaged in a systematic and ongoing pattern of terror and

harassment against her prior to the killing, the "additional acts [which] set the crime apart from the norm of capital felonies," as per Dixon, were found to exist. In the instant case, the killing of Mr. Turman was clearly spontaneous. If the process of laying in wait for and 'stalking' the victim are indeed those types of "additional acts" contemplated by Dixon, the decision in Harvard upholding a finding of heinous, atrocious, or cruel is entirely consistent with the above cited line of Florida cases and entirely inconsistent with the trial court's instant application of heinous, atrocious, or cruel to Mr. Darden's case.

Petitioner requests the opportunity to present this issue to the court in an orderly, judicious manner. Heinous, atrocious, or cruel should not have figured in the balancing of aggravating and mitigating circumstances.

2. The Application of This Statutory Aggravating Circumstance Is Arbitrary

Should this Court determine that heinous, atrocious or cruel does apply to the facts herein, Petitioner contends that that statutory aggravating circumstance fails to "genuinely narrow the class of persons eligible for the death penalty." Zant v. Stephens, 103 S.Ct. 2733, 2742 (1983). In short, the statute is unconstitutional on its face, because this Court has not "sufficiently narrowed the (5)(h) circumstance so as to bring it within the ambit of constitutional acceptability." Mello, p. 529. Petitioner cannot, under a seven-day warrant, list and discuss the decisions in this Court which apply section (5)(h) in "virtually every type of capital homicide." Id. at 533. Instead, Petitioner has submitted as Appendix C, hereto, and incorporates the exemplary and in-depth analysis of the problem explicated in Mr. Mello's article. Since the time of Mr. Mello's article, Professor Richard A. Rosen has updated the summary and has come to the same conslusions as Mr. Mello: "The incoherency of the standard applied by the Florida Supreme Court is readily evident." Rosen, R., "The 'Especially Heinous'

Aggravating Circumstance in Capital Cases -- The Standardless Standard," 64 N.C.L. Rev. 942,974 (1986)(submitted herewith as Appendix D). Professor Rosen's analysis is likewise incorporated herein by specific reference.

The United States Supreme court is currently considering the very issue raised by petitioner's case and by Mr. Mello's and Professor Rosen's articles. If heinous, atrocious or cruel applies to Mr. Darden's crime, then it is indeed a standardless standard, and it fails genuinely to narrow. In Maynard v. Cartwright, No. 87-519, the petitioner sought and was granted certiorari from the tenth circuit's en banc decision, in which the court had relied heavily on Professor Rosen's article in finding Oklahoma's statutory aggravating circumstance "especially heinous, atrocious or cruel" unconstitutional. That circumstance is just like Florida's. The Cartwright en banc decision is contained in Appendix B, as is the original panel opinion. What is clear from the Cartwright en banc decision is that if Florida finds Mr. Darden's case "heinous, atrocious or cruel," then the eighth amendment has been violated:

> The construction of "especially heinous, atrocious or cruel" employed by the Oklahoma Court of Criminal Appeals in this case is a departure from the construction initially adopted in Eddings. The court no longer limits this aggravating circumstance to murders that are "unnecessarily torturous to the victim," one of the standards adopted in Eddings and previously approved by the Supreme Court in Proffitt. The court now relies upon the definitions of the terms "heinous," atrocious," and "cruel," and upon the manner of the killing, the attitude of the killer, the suffering of the victim, and all of the circumstances surrounding the murder. We must decide whether this construction serves to "channel 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, 446 U.S. at 428, 100 S.Ct. at 1764 (footnotes omitted).
>
> Oklahoma has defined "heinous" as "extremely wicked or shockingly evil" and

"atrocious" as "outrageously wicked and vile." These definitions fail for the same reason that the conclusory statement that the offense was "outrageously wicked and vile, horrible and inhuman' was inadequate in Godfrey: "There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." 446 U.S. at 428, 100 S.Ct. at 1765. A limiting construction of this aggravating circumstance is necessary precisely because adjectives such as "wicked" or "vile" can fairly be used to describe any murder. These terms simply elude objective definition. A state does not channel the discretion of a sentencer or distinguish among murders when "heinous" and "atrocious" are defined only as "extremely wicked and shocking" and "outrageously wicked and vile." "Heinous" and "atrocious" have not been described in terms that are commonly understood, interpreted, and applied. Vague terms do not suddenly become clear when they are defined by reference to other vague terms.

The definition of "cruel" as "designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others" is somewhat more precise, but there are two reasons why this definition does not now serve as an adequate standard. First, the Oklahoma court has clearly rejected the argument that the suffering of the victim is the major factor to be considered under this aggravating circumstance. See Nuckols, 690 P.2d at 472; see also Green v. State, 713 P.2d 1032, 1044 (Okla.Crim.App.1985), cert. denied, ___ U.S. ___, 107 S.Ct. 241, 93 L.Ed.2d 165 (1986). Second, because the Oklahoma court has emphasized that a murder need only be especially heinous, atrocious or cruel, see Cartwright v. State, 695 P.2d at 544, even if the definition of cruel was adequate, the vague definitions of atrocious and heinous would still allow a sentencer to rely upon an unconstitutionally vague standard in determining that a murder satisfies this aggravating circumstance. The court no longer limits the application of the "especially heinous, atrocious or cruel" aggravating circumstance to those crimes that are "unnecessarily torturous to the victim." See id.

Maynard v. Cartwright, 822 F.2d 1477, 1489-90 (10th Cir. 1987).

In this case the court described the events surrounding the murder including the petitioner's motive for the murder, the preparation for the attack, the attack itself, and the petitioner's efforts to conceal his activities. The court then held that these events "adequately supported the jury's finding." Cartwright v. State, 695

> P.2d at 554. This conclusion is no different than the finding that the verdict was "factually substantiated" that was held inadequate in Godfrey. 446 U.S. at 419, 100 S.Ct. at 1760. We therefore hold that the Oklahoma Court of Criminal Appeals failed to apply a constitutionally required narrowing construction of "especially heinous, atrocious, or cruel" in this case.

Id. at 1491.

It is important to note that the Oklahoma courts are intimately tied to the Florida courts on this issue, and consequently the review of Oklahoma by certiorari directly affects Florida. See Cartwright v. Maynard, 802 F.2d 1203, 1217 (10th Cir. 1986)("Oklahoma has clearly adopted the unnecessarily torturous element through its wholesale adoption of the Florida Supreme Court's construction of 'heinous, atrocious or cruel' in State v. Dixon . . . ."). With that in mind, the following question upon which the United States Supreme Court granted certiorari in Cartwright is of critical importance here:

> Whether the Oklahoma Court of Criminal Appeals has been interpreting the aggravating circumstance "especially heinous, atrocious, or cruel" in an unconstitutional manner when that court relies upon the attitude of the murderer, the manner of the killing, and the suffering of the victim in reviewing death sentences in which that aggravating circumstances has been found.

Within this "question presented," petitioner in Cartwright has submitted the following argument:

> The definition of "especially heinous, atrocious, or cruel" should not be limited to those situations where the victim has suffered physical or mental torture; the wording of the phrase itself makes it appropriate for the sentencer to consider the manner of the killing and the attitude of the killer.

(App. A). The pending U.S. Supreme Court's consideration of application of the exact same aggravating circumstance in Cartwright is reason enough for this Court to stay Mr. Darden's execution, should this Court conclude that heinous, atrocious, and cruel does apply in Mr. Darden's case.

3. Resentencing is Required

The trial judge found three statutory aggravating circumstances: 1) the capital felony was committed by a person under sentence of imprisonment (Petitioner was on furlough); 2) the defendant had a prior felony conviction for an offense which involves the use or threat of violence to the person, and 3) heinous, atrocious or cruel. The court found two mitigating circumstances: 1.) that Petitioner was the father of seven children ("I am not standing before you now thinking so much of myself but I am thinking about my seven kids and my wife, whose father has been convicted of a crime and he has no knowledge of, and that's the truth. . . ." (R. 907), and 2.) that Petitioner steadfastly proclaimed his innocence.

In Elledge v. State, 346 So.2d 998 (Fla. 1977), this Court recognized that when mitigating circumstances have been found, the invalidation of the finding of a statutory aggravating circumstance requires resentencing.

> Would the result of the weighing process have been different had the impermissible aggravating factor not been present? We cannot know. Since we cannot know and since a man's life is at stake, we are compelled to return this case to the trial court at which the [impermissible factor] shall not be considered.

346 So.2d at 1003. And so it is here.

Of particular importance is one overriding mitigating circumstance -- innocence -- which the trial court found to be mitigating. The trial court would be left with two statutory aggravating circumstances and two mitigating circumstances, with heinous, atrocious, or cruel eliminated. The sentencing balancing process is not a matter of see-saw equilibrium, but "rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present. . . ." Dixon, 283 So.2d at 10. This trial judge was

impressed with Petitioner's emotion and apparent sincerity in protesting his innocence. Such lingering, or even "whimsical," doubt is a powerful factor in mitigation, or at least it was to this judge. "The fact that jurors have determined guilt beyond a reasonable doubt does not necessarily mean that no juror entertained any doubt whatsoever. There may be no reasonable doubt -- doubt based upon reason -- and yet some genuine doubt exists. . . . [T]he juror [or judge] entertaining doubt which does not rise to reasonable doubt can be expected to resist those who would impose the irremedial penalty of death." Smith v. Balkcom, 660 F.2d 573, 580-81 (5th Cir. Unit B 1981), modified, 677 F.2d 20, cert. denied, 459 U.S. 882 (1982).

Genuine (but not reasonable) doubt is certainly fathomable upon this record. Two justices in this Court were concerned enough about the issue of guilt to dissent, preferring reversal on guilt to the deadly possibility that rancorous closing argument, rather than hard proven facts, may have supplied the impetus for the jurors' verdict. For the trial judge to join these distinguished jurists in expressing concern, not at the guilt phase, but at the sentencing phase, is hardly unreasonable.

Florida law is now firmly settled as to treatment on appeal of errors in sentencing in capital cases. The standard of review for errors occurring before the jury is the harmless beyond a reasonable doubt standard. E.g., Valle v. State, 502 So.2d 1225, 1226 (Fla. 1987). Thus, where an aggravating circumstance is stricken by the appellate court, resentencing is required if mitigating circumstances were considered. See Elledge v. State, 346 So.2d 998 (Fla. 1977) (where trial court may have found mitigation resentencing is required because "[w]e cannot know" whether "the result of the weighing process. . . . [would] have been the same" absent the error); Randolph v. State, 463 So.2d 186 (Fla. 1985) (resentencing required for error in finding an aggravating circumstance because the judge "considered"

mitigation). Resentencing is required.

B. The Jury Was Misled and Confused Regarding its Awesome Sense of Responsibility

This Court rejected this claim on the merits in Darden v. State, 475 So. 2d 217, 221 (Fla. 1985), finding the Mississippi statute to be different from the Florida statute in constitutionally significant ways:

> Darden also attempts to show that as in Caldwell, the jury was misled as to its role in the sentencing process. In Caldwell, the Court interpreted comments by the state to have misled the jury to believe that it was not the final sentencing authority, because its decision was subject to appellant review. We do not find such egregious misinformation in the record of this trial, and we also note that Mississippi's capital punishment statute vests in the jury the ultimate decision of life or death, whereas, in Florida, that decision resides with the trial judge.

Darden v. State, 475 So. 2d 217, 221 (Fla. 1985). Because this very issue is now pending before the United States Supreme Court in Adams v. Dugger, No. 87-121, because the Eleventh Circuit, and the United States District Court for the North District of Florida, have entered stays of execution based specifically upon the grant of certiorari in Adams, and the fact that en banc consideration is pending in Mann and Harich, and because this Court should preserve its jurisdiction to address this claim after the issuance of Adams, a stay of execution is proper. See Stay Orders in Tafero and Johnson, and the pleadings in those cases, contained in Appendices F and G. The following legal argument is the precise argument advanced in Tafero and Johnson, as a comparison with the pleadings contained in Appendices F and G will reveal.

This claim is based upon Caldwell v. Mississippi, 105 S. Ct. 2633 (1985). The Caldwell sentencing jury was incorrectly informed regarding its function, its awesome responsibility, and its critical role in capital sentencing. Consequently, the Mississippi death sentence in Caldwell was vacated. The jury

plays a critical role in Florida's statutory capital sentencing scheme as well. The effect of Caldwell in Florida was addressed by the Eleventh Circuit in Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), modified, 816 F.2d 1493 (11th Cir. 1987), cert. granted, ___ U.S. ___ (March 7, 1988), which holds that "Caldwell represents a significant change in law [which] . . . was not reasonably available to Adams until the Caldwell decision." 804 F.2d at 1530. On rehearing, the Court in Adams wrote:

> The Eighth Amendment argument raised by Adams in the petition is [not] one of which he should have been aware at the time of filing his first petition. The claim is not one which had been raised and considered in a number of other cases at the time of that petition... Nor did Supreme Court precedent at the time of Adams' first habeas petition make it evident that statements such as those made by the trial judge in this case implicated the Eighth Amendment.

Adams v. Dugger, 816 F.2d 1493, 1495 (11th Cir. 1987). Indeed, the Court concluded that neither the existence of state-law authority condemning such arguments prior to Caldwell nor federal Due Process Clause cases established either (i) inexcusable neglect by Adams for failing to raise the claims in his first federal petition in 1984, 816 F.2d at 1496 n.2, or (ii) a procedural default by Adams in failing to assert the claim on his direct appeal in 1979. Id. 1497-1500. Adams controls in this circuit, and Caldwell controls in this Court.

On September 10, 1987, the Eleventh Circuit granted rehearing en banc in two cases, both of which involve Caldwell issues: Harich v. Wainwright, 813 F.2d 1082 (11th Cir. 1986), vacated and rehearing en banc granted, 828 F.2d 1497 (11th Cir. 1987) and Mann v. Dugger, 817 F. 2d 1471 (11th Cir. 1987), vacated and rehearing en banc granted, 828 F.2d 1498 (11th Cir. 1987) (oral arguments heard December, 1987). The trial judges and prosecutors in these cases made identical comments which diminished the jurors' sense of responsibility for the sentencing decision in each case. See Harich, 813 F.2d at 1099; Mann, 817

F.2d at 1482. The only material difference in the two cases was the outcome and the inconsistent reasoning by the court that produced the differing outcomes. In Harich, the court held that

> [t]he prosecutorial and judicial comments in this case did not minimize the jury's role . . . . While the trial court did not, as we prefer, explain that the jury's recommendation is entitled to great deference, we cannot say that this jury felt anything but the full weight of its advisory responsibility.

813 F.2d at 1100-01. Thereafter, in Mann, the court found that the same comments, coupled with the very same failure to explain that the jury's sentencing recommendation is entitled to great deference, established a Caldwell violation:

> As in Adams [v. Wainwright, 804 F.2d 1526 (11th Cir. 1986)], the court, having told the jury that their recommendation was advisory, failed to inform the jury that their recommendation would be given great weight. Consequently, the jury was left 'with a false impression as to the significance of their role in the sentencing process.' Id. at 1531 n.7. This false impression, as acknowledged in Adams, 'created a danger of bias in favor of the death penalty.' Id. at 1532.

817 F.2d at 1482. Mr. Darden's case presents the Tafero, Johnson, Adams, Harich, and Mann issue.

Caldwell error occurred here. The trial judge, in voir dire, told the jury that he was the person solely responsible for sentencing, that the jury had no real function at capital sentencing, and that the judge could accept or reject the jury's recommendation rest "solely with the Court," "my determination alone." He never told the jury the test, under this Court's opinion in Tedder, for judge imposition of a death penalty upon a jury recommendation of life (that no reasonable person could agree with the jury). He did twice say that the jury's recommendation was entitled to great weight, which is part but not all of the Tedder test, but even that statement was contradicted repeatedly, which could only have left the jury, at best, confused.

These different instructions could not effectively have cured the Caldwell error which had been building throughout Mr. Darden's trial. A reasonable juror, hearing these instructions in the context of all that had preceded them, could well have been left with an understanding of the law that violated Caldwell. See Sandstrom v. Montana, 442 U.S. 510, 514 (1979)("whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable jury could have interpreted the instructions"). Faced with at odds comments, a reasonable juror could have believed that he or she need not worry, that the judge was the sentencer.

"Perhaps an extraordinarily attentive juror might rationally have drawn [from these instructions] an inference," Washington v. Watkins, 655 F.2d 1346, 1370 (5th Cir. 1981), of what his or her true function was. However, a juror could reasonably have concluded otherwise. There is more than one reasonable interpretation, but that is not the test. The test is whether a reasonable juror could have interpreted the instructions in Mr. Darden's case in a manner so as to violate the constitution. Id. (citing Sandstrom v. Montana, supra); accord Cronin v. State, 470 So. 2d 802, 804 (Fla. 4th DCA 1985)(standard of review is "whether there was a reasonable possibility that the jury could have been misled"). Plainly a reasonable juror could have. See also Godfrey v. Georgia, 446 U.S. 420, 428-29 (1980)(reviewing how a "person of ordinary sensibility could" interpret an instruction and finding that "the jury's interpretation . . . can only be the subject of sheer speculation" (emphasis added)); Andres v. United States, 333 U.S. 740, 752 (1948)(noting "[t]hat [since] reasonable men might derive a meaning from the instructions given other than the proper meaning" relief was required, because "[i]n death cases doubts such as those presented here should be resolved in favor of the accused" (emphasis added)).

Throughout the critical phases of the case concerned with sentencing, the jury was misled and at least provided cross-signals regarding the critical nature of its role under Florida law. This violated Caldwell and requires resentencing before a properly instructed jury. See Mann v. Dugger, 817 F.2d 1471 (11th Cir.) vacated and rehearing en banc granted, 828 F.2d 1498 (1987); Harich v. Wainwright, 813 F.2d 1082 (11th Cir.) vacated and rehearing en banc granted, 828 F.2d 1497 (1987); Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1987).

"The jury's role in an advisory sentencing proceeding is critical." Adams v. Wainwright, 764 F.2d 1356, 1364 (11th Cir. 1985). Their recommendation is entitled to great weight in Florida, Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975), and it must be followed unless the facts are "so clear and convincing that virtually no reasonable person could differ." Id. "This limitation of the judge's exercise of the jury override provides a 'crucial protection' for the defendant." Adams v. Wainwright, 804 F.2d 1526, 1529 (11th Cir. 1987). In this case, the statements by the judge, the prosecutor, and defense counsel, and the absence of a correct instruction, left the jury "with a false impression as to the significance of their role in the sentencing process." Id. at 1531 n.7.

As the Eleventh Circuit recognized in Adams, a death sentence imposed under such a misimpression is constitutionally infirm. Caldwell held that it is "constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 105 S.Ct. 2633, 2639 (1985). Caldwell controls in Florida:

> When the error involves statements that diminish the jury's sense of responsibility for its sentence, Caldwell makes it clear that an impermissible likelihood the jury will be biased in favor of rendering a

> sentence of death is created. 105 S.Ct. at 2640.
>
> Clearly, then, the jury's role in the Florida sentencing process is so crucial that dilution of its sense of responsibility for its recommended sentence constitutes a violation of Caldwell. In fact, the Florida Supreme Court recently has recognized that the concerns expressed in Caldwell apply to the Florida sentencing scheme, stating that "[i]t is appropriate to stress to the jury the seriousness which it should attach to its recommendation" and that "[t]o do otherwise would be contrary to Caldwell v. Mississippi and Tedder v. State." Garcia v. State, 492 So.2d 360, 367 (Fla.1986) (citations omitted).

Adams, 804 F.2d at 1529-30.

CONCLUSION

WHEREFORE, petitioner respectfully requests that this Court grant a stay of execution, and that, upon judicious consideration of the matters contained herein, that the Court order resentencing. If relief is denied, petitioner respectfully requests that this Court enter a stay pending the filing and disposition of a petition for writ of certiorari in the United States Supreme Court.

Respectfully submitted,

ROBERT AUGUSTUS HARPER
Attorney at Law
317 East Park Avenue
Tallahassee, Florida 32301
(904) 224-5900

LARRY HELM SPALDING
Capital Collateral Representative

MARK EVAN OLIVE
Chief Assistant CCR

OFFICE OF THE CAPITAL COLLATERAL REPRESENTATIVE
1533 South Monroe Street
Tallahassee, Florida 32301
(904) 487-4376

By: _____
Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to Carolyn M. Snurkowski, Assistant Attorney General, Department of Legal Affairs, Magnolia Park Courtyard, 111-29 North Magnolia Street, Tallahassee, Florida 32301, this 11th day of March, 1988.

Attorney

IN THE SUPREME COURT OF FLORIDA

NO. 72088

WILLIE JASPER DARDEN,

Petitioner,

v.

RICHARD L. DUGGER, Secretary,
Department of Corrections, State of Florida,

Respondent.

AMENDED PETITION FOR WRIT OF HABEAS CORPUS, MOTION FOR STAY OF EXECUTION, AND/OR FOR STAY OF EXECUTION PENDING FILING AND DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

ROBERT AUGUSTUS HARPER
Attorney at Law
317 East Park Avenue
Tallahassee, Florida 32301
(904) 224-5900

LARRY HELM SPALDING
Capital Collateral Representative

MARK EVAN OLIVE
Chief Assistant CCR

OFFICE OF THE CAPITAL COLLATERAL
REPRESENTATIVE
1533 South Monroe Street
Tallahassee, Florida 32301
(904) 487-4376

COUNSEL FOR PETITIONER

IN THE SUPREME COURT OF FLORIDA

NO. _____

WILLIE JASPER DARDEN,

Petitioner,

v.

RICHARD L. DUGGER, Secretary,
Department of Corrections, State of Florida,

Respondent.

AMENDED PETITION FOR WRIT OF HABEAS CORPUS, MOTION FOR STAY OF EXECUTION, AND/OR FOR STAY OF EXECUTION PENDING FILING AND DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

Petitioner, Willie J. Darden, an indigent proceeding 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. Petitioner avers 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 and in accordance with Fla.R.App.P. 9.100(e), Mr. Darden states:

I.

JURISDICTION

This is an original action under Fla.R.App.P. 9.100(a). On Friday, March 11, 1988, Mr. Darden filed a petition for writ of habeas corpus in this Court. As a result of the unprecedented short warrant period, by oversight two important claims were not

included in the Friday filing. However, counsel has been informed that this Court will not receive or examine the Friday pleading until Monday morning, and it is to be hoped that the additional issues presented here can be reviewed on Monday morning as well.

This Court has original jurisdiction pursuant to Fla.R.App.P. 9.030(a)(3), and Article V, Section 3(b)(9), Fla. Const. The petition presents issues which directly concern the judgment of this Court on appeal, and in post-conviction, and hence jurisdiction lies in this Court. See, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981). The first issue presented was expressly ruled upon by this Court on direct appeal, and the second issue was also ruled upon, at least sub silencio, on direct appeal. Petitioner requests that this Court revisit the claims in light of errors of constitutional magnitude in the prior treatment: "[I]n the case of error that prejudicially denies fundamental constitutional rights . . . this Court will revisit a matter previously settled . . . ." Kennedy v. Wainwright, No. 68,264 (Fla. February 12, 1986).

II.

FACTS IN SUPPORT OF CLAIMS

A. THE RACIST AND INFLAMMATORY ARGUMENTS AND COMMENTS BY THE PROSECUTOR CANNOT BE TOLERATED IN THIS STATE, AND THEY RENDERED AT LEAST THE SENTENCING PROCEEDING PATENTLY UNRELIABLE.

A divided Florida Supreme Court found the prosecutor's arguments in this case constitutional in 1976. Darden v. State, 329 So. 2d 287 (Fla. 1976). A divided Supreme Court did the same in 1986. Darden v. Wainwright, 106 S.Ct. 2464 (1986). However, this Court last month unanimously condemned the injection of race into capital sentencing proceedings, noting that "the risk of racial prejudice infecting a criminal trial takes on greater significance in the context of a capital sentencing proceeding."

Robinson v. State, 13 F.L.W. 63 (Fla. Feb. 5, 1988). As this Court found, "[d]ue to the nature of the individual judgment that the jury must make in a capital sentencing proceeding, there is a greater opportunity for latent racial bias to affect its judgment than when the jury is acting merely as factfinder." Id.

Because of the changes in death penalty jurisprudence, this Court may no longer tolerate for Florida what was tolerated on direct appeal in 1976. The prosecutor used race very effectively, in a context that reeked of racial animus. As the United States Magistrate recognized in 1981, the situation, as in Robinson, was fertile soil for the seeds of racial prejudice:

> 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. I am convinced that the jury deliberation was substantially influenced by the improper argument and that the jury was predjudiced against Darden by the argument.

See Magistrate Report and Recommendations, attached hereto as Attachment 1. The magistrate (and Justices England and Sundberg) would have vacated the conviction. Mr. Darden here asks that this Court apply today's law to yesterday's argument, and vacate the death sentence.

Black men were in chains for years in this country. Literally. They were on their knees, as white men did all they could to emasculate them. Black men were considered less than human, were caged, and were led about in shackles. They were not guilty of crime. They were simply property.

As Magistrate Game noted, this trial was ripe for racial animus. The prosecutor took great advantage of the fact that "discrimination on the basis of race persists," Robinson, supra, at 16. It takes absolutely no imagination to realize that a white man who argues to a white jury about a black man accused of

murder, and accused of "vile sexual advances on a white woman," Magistrate's Report, and who tells the jury that the black man should be at his knees at the end of a leash because he is an animal, it takes no imagination to figure that race is being used.

That is what the prosecutor requested -- hate, dehumanization, emasculation, and degradation for this black man. And this was before Mr. Darden was convicted. Certainly it affected sentencing, or there is that risk. Listen to the prosecutor:

> He shouldn't be out of his cell unless he has a leash on him and a prison guard at the other end of that leash.

(R. 750).

> [T]his animal was on the public for one reason.

(R. 749).

> I wish that I could see [Willie Darden] sitting here with no face, blown away by a shotgun . . . . But he is lucky, the public unlucky, people are unlucky, it didn't happen.

(R. 758-59).

These and other arguments made by this prosecutor have been condemned by every court that has examined them. This Court noted that "the prosecutor's remarks under ordinary circumstances would constitute a violation of the Code of Professional Responsibility . . ." Darden v. State, 329 F.2d at 290. The state has wisely yielded: "No one has ever really suggested that McDaniel's closing remarks were anything but improper. . ." Respondent's Supplemental Answer, p. 12, quoted in Magistrate's Report and Recommendation. The federal district court characterized the argument as a "tirade" containing "blatant expression of personal opinion" and "a series of utterly tasteless and repulsive remarks" 513 F.Supp. at 953, 955:

> "Anyone attempting a text book illustration of a violation of the Code of Professional Responsibility, Canon 7, EC 7-24 and DR 7-

> 106(c)(4) could not possibly improve upon [the prosecutor's] example."

513 F.Supp. at 955. The majority federal panel decision in 1983, which is the en banc court's opinion, similarly condemned the arguments "as tasteless and unprofessional," which "contained personal opinion," and "would have been reversible error on appeal from a federal criminal case." 699 F.2d 1031, 1035-36. Like the district court, however, the majority opinion concluded (without discussing the eighth amendment) that the arguments were harmless. The United States Supreme Court split 5-4 in 1986, regarding the error.

The issue now is whether the Florida Supreme Court will accept the risk that race is sending Mr. Darden to his death.

B. MR. DARDEN'S DEATH SENTENCE IS PREDICATED UPON AN AUTOMATIC AGGRAVATING CIRCUMSTANCE

In Florida, the "usual form" of indictment for first-degree murder under sec. 783.04, Fla. Stat. (1987), is to "charg[e] murder . . . committed with a premeditated design to effect the death of the victim." Barton v. State, 193 So.2d 618, 624 (Fla. 2d DCA 1968). The absence of felony murder language is of no moment: when a defendant is charged with a killing through premeditated design, he or she is also charged with felony-murder, and the jury is free to return a verdict of first-degree murder on either theory. Blake v. State, 156 So.2d 511 (Fla. 1963); Hill v. State, 133 So.2d 68 (Fla. 1961); Larry v. State, 104 So.2d 352 (Fla. 1958).

Petitioner was charged with first-degree murder in the "usual form": murder "from a premeditated design to effect the death of" the victim in violation of Florida Statute 782.04. An indictment such as this which "tracked the statute" charges felony murder: section 782.04 is the felony murder statute in Florida. Lightbourne v. State, 438 So.2d 380, 384 (Fla. 1983).

It is impossible to determine whether the guilty verdict in this case rests on premeditated or felony murder grounds. The jury received instructions on both theories, the prosecutor argued both, and a general verdict was returned. If one or the other basis for the conviction results in an unconstitutional sentence, then a new sentencing hearing is necessary. See Stromberg v. California, 283 U.S. 359 (1931).

III.

NATURE OF RELIEF REQUEST

Mr. Darden respectfully requests that this Court stay his execution, and reconsider the appropriateness of the sentence of death. He specifically requests that the death sentence be vacated, and that a new sentencing proceeding be conducted.

IV.

LEGAL BASIS FOR RELIEF

A. THE RISK THAT RACE ANIMUS AFFECTED THE SENTENCE REQUIRES RESENTENCING.

It is well known that the argument in this case was damnable. The question posed here is whether it created the risk that Mr. Darden was sent to the gallows because of the color of his skin. It would simply be sophistry to suggest that 1) urging jurors to consider Mr. Darden an animal who should be leashed, 2) who should be paraded around (while outside his cage) by a prison guard at the end of the leash, and 3) to wish for and picture, along with the prosecutor, Mr. Darden with no face, is not an argument dripping in requests for racial animus to control. It must not go uncorrected:

> The prosecutor's comments and questions about the race of the victims of prior crimes committed by appellant easily could have aroused bias and prejudice on the part of the jury. That such an appeal was improper cannot be questioned. The questioning and

resultant testimony had no bearing on any aggravating or mitigating factors.

Racial prejudice has no place in our system of justice and has long been condemned by this Court. E.g., Cooper v. State, 136 Fla. 23, 186 So. 230 (1939); Huggins v. State, 129 Fla. 329, 176 So. 154 (1937). Nonetheless, race discrimination is an undeniable fact of this nation's history. As the United States Supreme Court recently noted, the risk that the factor of race may enter the criminal justice process has required its unceasing attention. McCleskey v. Kemp, 107 S.Ct. 1756, 1775 (1987). We cannot, however, by rule of law so quickly eradicate attitudes long held and deeply entrenched. Thus, despite "unceasing" efforts, discrimination on the basis of race persists. As the United States Supreme Court acknowledged in Rose v. Mitchell, 443 U.S. 545, 558-59 (1979):

> [W]e . . . cannot deny that, 114 years after the close of the War Between the States . . . , racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole. Perhaps today that discrimination takes a form more subtle than before. But it is not less real or pernicious.

The situation presented here, involving a black man who is charged with kidnapping, raping, and murdering a white woman, is fertile soil for the seeds of racial prejudice. We find the risk that racial prejudice may have influenced the sentencing decision unacceptable in light of the trial court's failure to give a cautionary instruction. Our courts consistently have held that the trial judge should not only sustain an objection to such improper conduct but also should reprimand the offending prosecuting officer in order to impress upon the jury the gross impropriety of being influenced by improper argument or testimony. Gluck v. State, 62 So.2d 71, 73 (Fla. 1952); Deas v. State, 119 Fla. 839, 845, 161 So. 729, 731 (1935); Edwards v. State, 428 So.2d 357, 359 (Fla. 3d DCA 1983). Our cases also have long recognized that improper remarks to the jury may in some instances be so prejudicial that neither rebuke nor retraction will destroy their influence, and a new trial should be granted despite the absence of an objection below or even in the presence of a rebuke by the trial judge. Pait v. State, 112 So.2d 380, 385 (Fla. 1959); Ryan v. State, 457 So.2d 1084, 1091 (Fla. 4th DCA 1984); Peterson v. State, 376 So.2d 1230, 1234 (Fla. 4th DCA 1979), cert. denied, 386 So.2d 642 (1980); Ailer v. State, 114 So.2d 348, 351 (Fla. 2d DCA 1959).

We emphasize that the risk of racial prejudice infecting a criminal trial takes on greater significance in the context of a capital sentencing proceeding. In Turner v. Murray, 106 S.Ct. 1683, 1688 (1986), in which the United States Supreme Court held that capital defendants accused of interracial crimes have a constitutional right to question prospective jurors on the issue of racial bias, the Court based its decision on two factors unique to the capital sentencing proceeding. First, in a capital sentencing proceeding before a jury, the jury is called upon to make a "highly subjective, 'unique, individualized judgment regarding the punishment that a particular person deserves.'" Id. at 1687 (citations omitted). Due to the nature of the individualized judgment that the jury must make in a capital sentencing proceeding, there is a greater opportunity for latent racial bias to affect its judgment than when the jury is acting merely as factfinder. Id. at 1688 n.8. As the Court further explained:

> Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejuudice 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. Such a juror might also be less favorably inclined toward petitioner's evidence of mental disturbance as a mitigating circumstance. 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.

Id. at 1687 (footnote omitted).

Second, the Turner Court pointed out that although there is some risk of racial prejudice whenever there is a crime involving interracial violence, the risk of improper sentencing in a capital case is "especially serious" due to the complete finality of the death sentence. Id. at 1688.

Accordingly, under the circumstances of this case, particularly in the absence of a cautionary instruction, we cannot presume that the prejudicial testimony did not remain imbedded in the minds of the jurors and influence their recommendation. Because we cannot say beyond a reasonable doubt that the

> jury's recommendation was not motivated in part by racial considerations, we cannot deem the error harmless. See Chapman v. State, 386 U.S. 18, 24 (1967); State v. DiGuilio, 491 So.2d 1129, 1139 (Fla. 1986). We thus reverse the death sentence and remand to the trial court to hold a new sentencing proceeding before a jury.

Robinson v. State, 13 F.L.W. 63 (Fla. Feb. 5, 1988). This Court should not turn its head from what happened to Mr. Darden. Robinson is the law, and it should apply to Mr. Darden.

B. MR. DARDEN'S DEATH SENTENCE IS PREDICATED UPON AN AUTOMATIC AGGRAVATING CIRCUMSTANCE.

If felony murder was the basis of Mr. Darden's conviction, then the subsequent death sentence is skewed. Cf. Stromberg v. California, 283 U.S. 359 (1931). This is because the death penalty in this case was predicated upon an unreliable automatic finding of a statutory aggravating circumstance -- the very felony murder finding that formed the basis for conviction. Automatic death penalties upon conviction of first degree murder violate the eighth and fourteenth amendments, as was recently stated by the United States Supreme Court in Sumner v. Shuman, 107 S. Ct. 2716 (1987), new law which makes this issue a proper one to now raise and which provides "cause" for any purported procedural default. In this case, felony murder was found as a statutory aggravating circumstance. The sentencer was entitled automatically to return a death sentence upon a finding of guilt of first degree (felony) murder. Every felony-murder would involve, by necessity, the finding of a statutory aggravating circumstance, a fact which, under the particulars of Florida's statute, violates the eighth amendment: an automatic aggravating circumstance is created which does not narrow ("[A]n aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty . . . ." Zant v. Stephens, 462 U.S. 862, 876 (1983)). In short, Mr. Darden was convicted for felony murder, and he then faced statutory aggravation for felony

murder. This is too circular a system meaningfully to differentiate between who should live and who should die, and it violates the eighth and fourteenth amendments.

The United States Supreme Court recently addressed a similar challenge in Lowenfield v. Phelps, 56 U.S.L.W. 4071 (January 13, 1988), and the discussion in Lowenfield illustrates the constitutional shortcoming in Mr. Darden's capital sentencing proceeding. In Lowenfield, petitioner was convicted of first degree murder under Louisiana law which required a finding that he had "a specific intent to kill to inflict great bodily harm upon more than one person," which was the exact aggravating circumstance used to sentence him to death. The United States Supreme Court found that the definition of first degree murder under Louisiana law that was found in Lowenfield provided the narrowing necessary for eighth amendment reliability:

> To pass constitutional muster, a capital-sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1983); cf. Gregg v. Georgia, 428 U.S. 153 (1976). Under the capital sentencing laws of most States, the jury is required during the sentencing phase to find at least one aggravating circumstance before it may impose death. Id., at 162-164 (reviewing Georgia sentencing scheme); Proffitt v. Florida, 428 U.S. 242, 247-250 (1976) (reviewing Florida sentencing scheme). By doing so, the jury narrows the class of persons eligible for the death penalty according to an objective legislative definition. Zant, supra, at 878 ("[S]tatutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty").
>
> In Zant v. Stephens, supra, we upheld a sentence of death imposed pursuant to the Georgia capital sentencing statute, under which "the finding of an aggravating circumstance does not play any role in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty." 462 U.S., at 874. We found no constitutional deficiency in that scheme

because the aggravating circumstances did all that the Constitution requires.

The use of "aggravating circumstances," is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion. We see no reason why this narrowing function may not be performed by jury findings at either the sentencing phase of the trial or the guilt phase. Our opinion in Jurek v. Texas, 428 U.S. 262 (1976), establishes this point. The Jurek Court upheld the Texas death penalty statute, which, like the Louisiana statute, narrowly defined the categories of murders for which a death sentence could be imposed. If the jury found the defendant guilty of such a murder, it was required to impose death so long as it found beyond a reasonable doubt that the defendant's acts were deliberate, the defendant would probably constitute a continuing threat to society, and, if raised by the evidence, the defendant's acts were an unreasonable response to the victim's provocation. Id., at 269. We concluded that the latter three elements allowed the jury to consider the mitigating aspects of the crime and the unique characteristics of the perpetrator, and therefore sufficiently provided for jury discretion. Id., at 271-274. But the Court noted the difference between the Texas scheme, on the one hand, and the Georgia and Florida schemes discussed in the cases of Gregg, supra, and Proffitt, supra:

> "While Texas has not adopted a list of statutory aggravating circumstances the existence of which can justify the imposition of the death penalty as have Georgia and Florida, its action in narrowing the categories of murders for which a death sentence may ever be imposed serves much the same purpose . . . . In fact, each of the five classes of murders made capital by the Texas statute is encompassed in Georgia and Florida by one or more of their statutory aggravating circumstances . . . . Thus, in essence, the Texas statute requires that the jury find the existence of a statutory aggravating circumstance before the death penalty may be imposed. So far as consideration of aggravating circumstances is concerned, therefore, the principal difference between Texas and the other two States is that the death penalty is an available sentencing option--even potentially--for a smaller class of murders in Texas." 428 U.S., at 270-271 (citations omitted).

It seems clear to us from this discussion that the narrowing function required for a

> regime of capital punishment may be provided in either of these two ways: The legislature may itself narrow the definition of capital offenses, as Texas and Louisiana have done, so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase. See also Zant, supra, at 876, n. 13, discussing Jurek and concluding, "in Texas, aggravating and mitigating circumstances were not considered at the same stage of the criminal prosecution."

Id. at 4075 (emphasis added).

Thus, if narrowing occurs either in the conviction stage (as in Louisiana and Texas) or at the sentencing phase (as in Florida and Georgia), then the statute may satisfy the eighth amendment as written. However, as applied, the operation of Florida law in this case did not provide constitutionally adequate narrowing at either phase, because conviction and aggravation were predicated upon a non-legitimate narrower -- felony-murder.

The conviction-narrower state schemes require something more than felony-murder at guilt/innocence. Louisiana requires intent to kill. Texas requires intentional and knowing murders. This narrows. Here, however, Florida allows a first-degree murder conviction based upon a finding that does not legitimately narrow -- felony murder. Mr. Darden's conviction and sentence required only a finding that he committed a felony during which a killing occurred, and no finding of intent was necessary.

Clearly, "the possibility of bloodshed is inherent in the commission of any violent felony, and . . . is foreseen," Tison v. Arizona, 107 S. Ct. 1676, 1684 (1987), but armed robbery, for example, is nevertheless an offense "for which the death penalty is plainly excessive." Id. at 1683. The same is true of burglary, as Proffitt (burglary felony murder insufficient for death penalty), supra, and other Florida cases have made clear. With felony-murder as the narrower in this case, neither the conviction nor the statutory aggravating circumstance meet constitutional requirements. There is no constitutionally valid

criteria for distinguishing Mr. Darden's sentence from those who have committed felony (or, more importantly, premeditated) murder and not received death.

This analysis cannot be sidestepped by any appellate finding of premeditation: first, it cannot be said that the jury found premeditation; second, neither the Florida Supreme Court, nor any other Court, can affirm a premeditation finding, since one does not exist. Consequently, if a felony-murder conviction in this case has collateral constitutional consequences (i.e. automatic aggravating circumstance, failure to narrow), a Florida Supreme Court, or any other court's, finding of premeditation does not cure those collateral reversible consequences.

The jury did not find premeditation. "To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined by the trial court." Cole v. Arkansas, 333 U.S. 196, 202 (1948). The principle that an appellate court cannot utilize a basis for review of a conviction different from that which was litigated and determined by the trial court applies with equal force to the penalty phase of a capital proceeding. In Presnell v. Georgia, 439 U.S. 14 (1978), the United States Supreme Court reversed a death sentence where there had been no jury finding of an aggravating circumstance, but the Georgia Supreme Court held on appeal there was sufficient evidence to support a separate aggravating circumstance on the record before it. Citing the above quote from Cole v. Arkansas, the United States Supreme Court reversed, holding:

> These fundamental principles of fairness apply with no less force at the penalty phase of a trial in a capital case than they do in the guilty/determining phase of a criminal trial.

Presnell, 439 U.S. at 18. Neither the Florida Supreme Court, nor any other court, can "affirm" based on premeditation when it

cannot be said that the conviction was obtained based on premeditation. If felony-murder could have been the basis, the appellate court is stuck with it, and Mr. Darden is entitled to relief.

CONCLUSION

WHEREFORE, petitioner respectfully requests that this Court grant a stay of execution, and that, upon judicious consideration of the matters contained herein, that the Court order resentencing. If relief is denied, petitioner respectfully requests that this Court enter a stay pending the filing and disposition of a petition for writ of certiorari in the United States Supreme Court.

Respectfully submitted,

ROBERT AUGUSTUS HARPER
Attorney at Law
317 East Park Avenue
Tallahassee, Florida 32301
(904) 224-5900

LARRY HELM SPALDING
Capital Collateral Representative

MARK EVAN OLIVE
Chief Assistant CCR

OFFICE OF THE CAPITAL COLLATERAL
REPRESENTATIVE
1533 South Monroe Street
Tallahassee, Florida 32301
(904) 487-4376

By: _____
Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to Carolyn M. Snurkowski, Assistant Attorney General, Department of Legal Affairs, Magnolia Park Courtyard, 111-29 North Magnolia Street, Tallahassee, Florida 32301, this 22 day of March, 1988.

Attorney

Amended Petition