IN THE SUPREME COURT OF FLORIDA

NO. 75149

CLARENCE EDWARD HILL,

Petitioner,

v.

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

Respondent.

PETITION FOR EXTRAORDINARY RELIEF, FOR A WRIT OF HABEAS CORPUS, REQUEST FOR STAY OF EXECUTION, AND, IF NECESSARY, APPLICATION FOR STAY OF EXECUTION PENDING THE FILING AND DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

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I. JURISDICTION TO ENTERTAIN PETITION, ENTER A STAY OF EXECUTION, AND GRANT HABEAS CORPUS RELIEF

A. 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, sec. 3(b)(9), Fla. Const. The petition presents constitutional issues which directly concern the judgment of this Court during the appellate process, and the legality of Mr. Hill's capital conviction and sentence of death. In May, 1983, Mr. Hill was sentenced to death. Direct appeal was taken to this Court. The trial court's judgment was affirmed but new sentencing was ordered. Hill v. State, 477 So. 2d 553 (Fla. 1985). A resentencing hearing was conducted in March, 1986 and death was reimposed in April, 1986. Mr. Hill appealed the death sentence and it was affirmed. Hill v. State, 515 So. 2d 176 (Fla. 1987). Jurisdiction in this action lies in this Court, **see**, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein involved the appellate review process. **See** Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985); Bassett v. Wainwrisht, 229 So. 2d 239, 243 (Fla. 1969); see also Johnson v. Wainwright, 498 So. 2d 938 (Fla. 1987); cf. Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Hill to raise the claims presented herein. **See**, e.g., Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Riley v. Wainwrisht, 517 So. 2d 656 (Fla. 1987); Wilson, supra.

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

errors which undermine confidence in the fairness and correctness of capital trial and sentencing proceedings. Wilson; Johnson; Downs; Riley. This petition presents substantial constitutional questions which go to the heart of the fundamental fairness and reliability of Mr. Hill's capital conviction and sentence of death, and of this Court's appellate review. Mr. Hill's claims are therefore of the type classically considered by this Court pursuant to its habeas corpus jurisdiction. This Court has the inherent power to do justice. As shown below, the ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. See, e.g., Riley; Downs; Wilson; Johnson, supra. The petition pleads claims involving fundamental constitutional error. See Dallas v. Wainwright, 175 So. 2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So. 2d 362 (Fla. 1984). The petition includes claims predicated on significant, fundamental, and retroactive changes in constitutional law. See, e.g., Jackson v. Dugger, supra; Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987); Tafero v. Wainwright, 459 So. 2d 1034, 1035 (Fla. 1984); Edwards v. State, 393 So. 2d 597, 600 n. 4 (Fla. 3d DCA), petition denied, 402 So. 2d 613 (Fla. 1981); cf. Witt v. State, 387 So. 2d 922 (Fla. 1980). The petition also involves claims of ineffective assistance of counsel on appeal. See Knight v. State, 394 So. 2d 997, 999 (Fla. 1981); Wilson v. Wainwright, supra; Johnson v. Wainwright, supra. These and other reasons demonstrate that the Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action. As the petition shows, habeas corpus relief would be more than proper on the basis of Mr. Hill's claims.

With regard to ineffective assistance, the challenged acts and omissions of Mr. Hill's appellate counsel occurred before this Court. This Court therefore has jurisdiction to entertain

Mr. Hill's claims, Knight v. State, 394 So. 2d at 999, and, as will be shown, to grant habeas corpus relief. Wilson, supra; Johnson, supra. This and other Florida courts have consistently recognized that the Writ must issue where the constitutional right of appeal is thwarted on crucial and dispositive points due to the omissions or ineffectiveness of appointed counsel. See, e.g., Wilson v. Wainwright, supra, 474 So. 2d 1163; McCrae v. Wainwright, 439 So. 2d 768 (Fla. 1983); State v. Wooden, 246 So. 2d 755, 756 (Fla. 1971); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); Ross v. State, 287 So. 2d 372, 374-75 (Fla. 2d DCA 1973); Davis v. State, 276 So. 2d 846, 849 (Fla. 2d DCA 1973), affirmed, 290 So. 2d 30 (Fla. 1974). The proper means of securing a hearing on such issues in this Court is a petition for writ of habeas corpus. Baggett, supra, 287 So. 2d at 374-75; Powell v. State, 216 So. 2d 446, 448 (Fla. 1968). With respect to the ineffective assistance claims, Mr. Hill will demonstrate that the inadequate performance of his appellate counsel was so significant, fundamental, and prejudicial as to require the issuance of the Writ.

Mr. Hill's claims are presented below. They demonstrate that habeas corpus relief is proper in this case.

B. REQUEST FOR STAY OF EXECUTION

Mr. Hill's petition includes a request that the Court stay his execution, presently scheduled for January 25, 1989. As will be shown, the issues presented are substantial and warrant a stay. This Court has not hesitated to stay executions when warranted to ensure judicious consideration of the issues presented by petitioners litigating during the pendency of a death warrant. See Spaziano v. Dugger (No. 74,675, Fla. Sept. 12, 1989); Tompkins v. Dusser (No. 74,098, Fla. June 2, 1989); Provenzano v. Dugger (No. 73,981, Fla. May 4, 1989); Jackson v. Dusser (73,982, Fla. May 4, 1989); Harich v. Dugger, (No. 73,931,

Fla. March 28, 1989); Lightbourne v. Dusser (No. 73,609, Fla. Jan. 31. 1989); Marek v. Dusser (No. 73,175, Fla. Nov. 8, 1988); Gore v. Dugger (No. 72,202, Fla. April 28, 1988); Riley v. Wainwright (No. 69,563, Fla., Nov. 3, 1986). See also Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Kennedy v. Wainwright, 483 So. 2d 426 (Fla. 1986); cf. State v. Sireci, 502 So. 2d 1221 (Fla. 1987); State v. Crews, 477 So. 2d 984 (Fla. 1985).

This is Mr. Hill's first and only petition for a writ of habeas corpus. The claims he presents are no less substantial than those involved in the cases cited above. He therefore respectfully urges that the Court enter an order staying his execution, and, thereafter, that the Court grant habeas corpus relief.

11. GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Petitioner asserts that his convictions and his sentence of death were obtained and then affirmed during the Court's appellate review process in violation of his rights as guaranteed by the fourth, fifth, sixth, eighth and fourteenth amendments to the United States Constitution, and the corresponding provisions of the Florida Constitution, for each of the reasons set forth herein. In Mr. Hill's case, substantial and fundamental errors occurred in both the guilt and penalty phases of trial. These errors were uncorrected by the appellate review process. As shown below, relief is appropriate.

CLAIM I

THE PROSECUTOR PEREMPTORILY EXCUSED BLACK PROSPECTIVE JURORS SOLELY BASED UPON THEIR RACE IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE, SECTION SIXTEEN OF THE FLORIDA CONSTITUTION. MOREOVER APPELLATE COUNSEL WAS INEFFECTIVE IN NOT ARGUING THIS ISSUE ON DIRECT APPEAL.

Clarence Hill was resentenced to death for the murder of a white police officer in a racially charged atmosphere. Racial animosity was apparent, vengeance ruled the community and a fair and impartial trial was impossible. From the outset, Clarence Hill, was deprived of an impartial jury by the underrepresentation of blacks on the Escambia County voter registration lists from which the venires in this case were drawn (T. 1484)(Motion to Dismiss Indictment based on Under-representation of Blacks and Other Minorities). The prosecutor ensured the State would reap the full benefit of this unconstitutional advantage by intentionally excluding those black potential jurors who were seated on the actual panel for no other reason than the color of their skin.

This issue was raised at trial but not on direct appeal. After the trial proceedings and before the judgment on direct appeal became final, the United States Supreme Court decided Batson v. Kentucky, **106 S.** Ct. **1712 (1986),** in which new rules and prohibitions against discriminatory exercise of peremptory challenges were announced. Batson is applicable to litigation pending on direct state or federal review not yet final when Batson was decided. Griffith v. Kentucky, **107 S.** Ct. **708 (1987).** Batson is applicable to collateral review of convictions that were not final when Batson was decided. Teague v. Lane, **109 S.** Ct. **1060, 1067 (1989).** The trial court did not apply Batson or the procedures established by the Florida Supreme Court pre-Batson in State v. Neil, **457** So. 2d **481 (1984),** to deny Mr.

Hill's objection to those unconstitutional tactics at trial. Under Batson, and Neil, relief is mandated here.

Mr. Hill's defense counsel noted the prosecutor's unconstitutional use of peremptory challenges against prospective black jurors and sought to invoke the inquiry mandated by this Court into the State's use of peremptory challenges as follows:

> MR. TERRELL [DEFENSE COUNSEL]: Your Honor, for the record, I need to voice a objection. The three black people on the panel who have been challenged, one was Mr. Belland, the other was Ms. Baker, who indicated she was slightly for the death penalty. Now we've got Ms. Lowe who has a back ground in criminal law enforcement, and feel that the circumstances, the State has started to selectively strike blacks from the panel.
>
> MR. ALLRED [ASSISTANT STATE ATTORNEY]: Your Honor, Ms. Lowe just gave some answer about whether or not if it was of any importance to her if it was a law enforcement officer when I asked her those questions. It was of no great concern to her, and of course, one of aggravating circumstances is that the law enforcement officer -- anyway, I was not satisfied with her answers to those questions in that regard. And I'm using a peremptory challenge. I'm not saying blatant enough to strike her for cause, the grounds for me, not regarding race. I've still got -- Mr. Green is still on there. I'm satisfied with him as a juror, you know, and he's a black. And that's not what I'm doing here.
>
> THE COURT: Motion denied.
>
> MR. ALLRED: In addition, [Assistant State Attorney] Schiller's notes say Ms. Lowe says she doesn't believe in the death penalty.
>
> THE COURT: Says she was neutral.
>
> MR. ALLRED: That's what his notes say. I thought she said she was neutral.
>
> THE COURT: I've got neutral.
>
> MR. TERRELL: Yes, sir. That's what my notes show.
>
> Bench conference concluded.)
>
> MR. ALLRED: We tender, Your Honor.
>
> (At the bench:
>
> MR. TERRELL: Your Honor, so that the

record may accurately show my objection on the issue we've just been discussing, technically I'm objecting and moving that the panel be struck and under the Neilson [sic] case, based on prosecution selective peremptory challenges of blacks.

THE COURT: Strike the panel? You've still got -- we've got blacks out there.

MR. TERRELL: Yes, sir. I think I have to make that objection under the Neilson case.

THE COURT: Now wait a minute, what's the Neilson case?

MR. ALLRED: He just needs to make the record. Technically he's got to move to strike.

THE COURT: McNeal, not Neilson.

MR. ALLRED: One of them. The first one that came out was Neal.

THE COURT: Neal, that's it.

(R. 165-67).

With respect to prospective juror Lowe, the prosecutor's entire inquiry with respect as to the importance of the victims' status as law enforcement officers is as follows:

MR. ALLRED: Greta Lowe.

THE COURT: There you go.

MR. ALLRED: Ms. Lowe, who is it that you are either close friends or related to in law enforcement?

PROSPECTIVE JUROR: I have two uncles, one in Detroit and one in New York City.

MR. ALLRED: And what do they do?

PROSPECTIVE JUROR: They're deputy sheriffs.

MR. ALLRED: All right. Are you close to those uncles?

PROSPECTIVE JUROR: They're not really -- one of them is married -- divorced from my aunt. And the other, he's my mother's brother-in-law. We're not close.

MR. ALLRED: Okay. Not closely related anymore because of divorces and that sort of thing?

PROSPECTIVE JUROR: Right.

MR. ALLRED: Did either of them have any influence upon your decision to go into criminal justice?

PROSPECTIVE JUROR: No.

MR. ALLRED: What was it exactly you were studying at West Florida?

PROSPECTIVE JUROR: Criminal justice.

MR. ALLRED: Do you feel that you may be influenced at all when you start beginning to consider in some detail evidence that the deceased in this case was a law enforcement officer on active duty in the performance of his duties, shot?

PROSPECTIVE JUROR: No.

MR. ALLRED: Okay. Does that have any impact upon you at all?

PROSPECTIVE JUROR: No. No. I'm sorry that he's dead, yes.

MR. ALLRED: Do you feel anything extra because he was a law enforcement officer?

PROSPECTIVE JUROR: No.

MR. ALLRED: Is it of interest or worthy of your consideration that this is a case involving a law enforcement officer as a deceased, as opposed to some other citizen?

PROSPECTIVE JUROR: You mean do I weigh it more?

MR. ALLRED: Yes.

PROSPECTIVE JUROR: No.

MR. ALLRED: That's all I have. Thank you.

(R. 164-65).

Significantly, not only did the prosecutor fail to advise prospective juror Lowe that the victims' status was relevant to determining aggravating factors, when she had previously stated she was able to follow the court's instructions (R. 18), but, she was the only prospective juror the prosecutor singled out for such voir dire questioning, notwithstanding the presence of other prospective jurors with relatives in law enforcement or who were former law enforcement officers themselves (R. 204)(prospective juror Davis' son law enforcement officer in Georgia); (R.

6)(prospective juror Colley former officer with Pensacola Police Department); (R. 89)(prospective juror Hicks former military police officer). Clearly the prosecutor's voir dire of prospective juror Lowe constituted a "singling [] out for special questioning designed to evoke a certain response," Reed v. Florida, 14 F.L.W. 298 (Fla. 1988), after the juror had already demonstrated her ability to follow the court's instructions. Furthermore, a relation to a law enforcement officer would be to the state's advantage, not detriment. Thus the prosecutor's first justification for exercising a peremptory challenge failed to demonstrate that the challenge was exercised solely because of the prospective juror's role. Furthermore, the prosecutor's second justification, that prospective juror Lowe did not believe in the death penalty was squarely rejected by the court which found her to be "neutral" on the question of capital punishment (R. 166).

While the prosecutor's explanation with respect to the preemptory strike against prospective juror Lowe was unbelievable, the prosecutor's explanation for the preemptory strike exercised against prospective juror Carter was nonexistent. Were the prosecutor conducted absolutely no individual voir dire. The only questions that were put to prospective juror Carter, were put by defense counsel regarding her exposure to pretrial publicity and her answers thereto consisted of a mere three lines of transcript:

> MR. TERRELL: Ms. Carter?
>
> PROSPECTIVE JUROR: Newspaper at the time of the incident, and this morning I saw the headlines. I didn't get a chance to read it.

(R. 69-70). Nothing else distinguished this black prospective juror from her white counterparts. The record reveals 35 out of the 44 prospective jurors had also been exposed to pretrial publicity in this case. As the Florida Supreme Court has made clear, it is not what appears in the record but rather, what

explanation the prosecutor offers upon which the exercise of a preemptory strike against a black juror must be evaluated. Kibler v. State, 14 F.L.W. 291, 293 (Fla. 1989). Here there was none. The defense having made a prima facie case of discrimination by the State in the exercise of preemptory challenges and the prosecutor having voluntarily assumed the burden, by going forward, it was incumbent upon the State to provide valid non-racial reasons for why jurors Lowe and Carter, both black prospective jurors, were struck. Reed v. State, 14 F.L.W. 298 (Fla. 1989). Even under the Neil threshold, the State failed to establish non-discriminatory exercise of its preemtory challenges and relief is therefore proper.

This Court has recognized that article I, section 16 of the Florida Constitution prohibits improper bias in the selection of juries. Neil, supra. This Court has consistently affirmed the enforcement of this important guarantee of an impartial justice system:

> We today reaffirm this State's continuing commitment to a vigorously impartial system of selecting jurors based on the Florida Constitutions explicit guarantee of an impartial trial. See Art. I, Sec. 16, Fla. Const.

State v. Slappy, 522 So. 2d 18, 21 (Fla. 1988) cert. denied, 108 S. Ct. 2873 (1988).

In a series of cases, this Court has evolved a set of standards for the enforcement of prohibition against the exclusion of jurors based upon race. In Neil, supra, the Court held that the defendant must make a prima facie showing that there is substantial likelihood that peremptory challenges have been exercised because of racial bias. Once this showing is made, the burden shifts to the State to establish an independent basis for excusing the juror.

However, where the defense makes an objection and the court proceeds to hear a proffer of justification for the challenge

from the State, the burden is in fact shifted:

> Reed argues that the procedure in this case unfairly did not allow the burden to shift from the defense. We disagree in that the prosecutor accepted the burden by going forward and, indeed, did everything he would have done had the judge found that the defense had made a prima facie case. More to the point is whether any jurors were struck for purely racial reasons.

Reed v. State, supra, 14 F.L.W. at 298. See also Kibler v. State, supra. This is particularly true where the defendant is of the same class as the jurors who are being struck. Kibler, supra.

Finally, the State is restricted to the reasons actually given by the State for striking a juror as opposed to other reasons which may appear in the record:

> In its brief, the state refers to other portions of the voir dire which reflect reasons unrelated to race that might have been a legitimate basis to excuse Mr. Williams and Mr. Jones. However, the Neil inquiry must necessarily focus on the reasons given by the prosecutor for making the challenge.

Kibler, supra, 14 F.L.W. at 293.

Even if a single juror is struck because of racial bias, it will constitute error:

> We know, for example, that number alone is not dispositive, nor even the fact that a member of the minority in question has been seated as a juror or alternative. United States v. Gordon, 817 F.2d 1538, 1541 (11th Cir. 1987); United States v. David, 803 F.2d 1567, 1571 (11th Cir. 1986); Fleming v. Kemp, 794 F.2d 1478 (11th Cir. 1986); Neil, Pearson; Floyd. Indeed, the issue is not whether several jurors have been excused because of their race, but whether any juror has been so excused, independent of any other. This is ***so*** because
>
> > the striking of a single black juror for a racial reason violates the Equal Protection Clause, even where other black jurors are seated, and even then there are valid reasons for the striking of some black jurors.
>
> Gordon, 817 F.2d at 1541. Accord David; Fleming; Pearson; Floyd. As the Eleventh Circuit has stated,
>
> > Batson restates the principle that "'[a] single invidiously discriminatory governmental act' is not 'immunized by

> the absence of such discrimination in the making of other comparable decisions." Batson, supra, 106 S.Ct. at 1722, quoting Arlington Heights v. Metropolitan Housing [Development] Corp., 429 U.S. 252, 266 N. 14, 97 S.Ct. 555, 564 N. 14, 50 L.Ed.2d 450 (1977). Fleming, 794 at 1483. Accord Pearson.

State v. Slappy, 522 So. 2d 18, 22 (Fla. 1988).

When these standards are applied to Mr. Hill's case, it is clear that the State assumed the burden of showing an independent basis and that the reasons given were not sufficient:

> At this juncture, Neil imposes upon the other party an obligation to rebut the inference created when the defense met its initial burden of persuasion. This rebuttal must consist of a "clear and reasonably specific" racially neutral explanation of "legitimate reasons" for the state's use of its peremptory challenges. Batson, 476 U.S. at 96-98 & n. 20, 106 S.Ct. at 1722-24 & n. 20.

Slappy, supra, 522 So. 2d at 22.

Under Batson, the threshold prime facie showing by required by the defense to establish discrimination in the exercise of preemptory challenges is even less stringent then the requirements of Neil.

Under Batson, a defendant need only show:

> 1. That they are members of a cognizable racial group.
>
> 2. That the prosecutor has exercised peremptory challenges to move from the venire members of the defendant's race.
>
> 3. That from these first two facts established by the defendant and other relevant facts, there is raised an inference that the prosecutor has used peremptory challenges to exclude his veniremen from the challenges to exclude his veniremen from the petit jury solely on account of their race.

Batson at 90 L.Ed.2d 87-88.

The standard set forth in Batson was further explained by this Court in Slappy, supra. This Court reasoned that the Constitution prohibits the exclusion of a juror based on race. The defense need not show a systematic exclusion of blacks. Slappy, 522 So. 2d at 21. The Court explained in Slappy that the

challenge to a juror is suspect if the State did not question the juror regarding the issue asserted as the reason for his exclusion. Id. At Mr. Hill's trial, the court employed the systematic exclusion standard set forth in Swain v. Alabama, 380 U.S. 202 (1965) and failed to correctly assess the prosecutor's use of peremptory challenges.

The State fails to meet their burden when the explanation for excluding a particular juror is based on a pretext not legitimately related to the issues at trial or a factor revealed by the answers to questions posed during voir dire. Justice Marshall explained that unconscious racism influences the explanation for a challenge when the State characterizes a juror based on instinct:

> Nor is outright prevarication ... the only danger here. "[I]t is even possible that an attorney may lie to himself in an effort to convince himself that his motives are legal." ... A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is "sullen," or "distant," a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported.... [P]rosecutors' peremptories are based on their "seat-of-the-pants instincts." ... Yet "seat-of-the-pants instincts" may often be just another term for racial prejudice. Even if all parties approach the Court's mandate with the best of conscious intentions, that mandate requires them to confront and overcome their own racism on all levels.

Batson v. Kentucky, 476 U.S. at 106, 106 S.Ct. at 1728 (Marshall, J., concurring)(citations omitted).

The reasons offered by the State for challenging the blacks excused were superficial and pretextual. Defense counsel and the trial court noted that the reasons for the exclusion were unsubstantiated.

This error undermined the reliability of the jury's sentencing determination and prevented the jury from assessing the full panoply of mitigation presented by Mr. Hill. For each

of the reasons discussed above the Court should vacate Mr. Hill's unconstitutional sentence of death.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Hill's death sentence. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings, **see** Wilson v. Wainwrisht, **474** So. 2d **1163** (Fla. **1985),** and it should now correct this error.

Moreover, the claim is now properly brought pursuant to the Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. This issue involved a classic violation of well settled principles of Florida law. Neil, supra, was decided over two years prior to the filing of appellant's brief on the direct appeal of the resentencing. Simularly, Batson, **supra,** was decided five months prior to appellant counsel's filing of the brief. It virtually "leaped out upon even a casual reading of transcript." Matire v. Wainwrisht, **811** F.2d **1430, 1438** (11th Cir. **1987).** This clear claim of per se error required no elaborate presentation -- counsel only had to direct this Court to the issue. The court would have done the rest, based on long-settled Florida and federal constitutional standards.

No tactical decision can be ascribed to counsel's failure to urge the claim. **No** procedural bar precluded review of this issue. **See** Johnson v. Wainwrisht, supra, **498** So. 2d **938.** However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Hill of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwrisht, supra, **474** So. 2d at **1164-65;** Matire, supra. Accordingly, habeas relief must be accorded now.

CLAIM II

THE TRIAL COURT ERRED WHEN IT RESPONDED TO QUESTIONS FROM THE JURY AND REFUSED TO DISCLOSE TO MR. HILL AND HIS COUNSEL THE QUESTIONS ASKED, IN VIOLATION OF MR. HILL'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

During Mr. Hill's resentencing proceedings, and before deliberations commenced, the trial court received two questions from the jury. The record reflects the following colloquy between the court, the jury and Mr. Hill's counsel:

> THE COURT: Good morning, everyone. All right, I have two questions, and I don't think I can tell you. Those questions where we couldn't comment on directly. They are within the confines of the evidence and you weigh the evidence as you see it and take it by what you believe has been presented. That's all I can tell you. We can't tell you yes, this has been done and no, this hasn't been done.
>
> MR. TERRELL: Your Honor, may I see the questions?
> THE COURT: No, because I'm not commenting on them. Call you next witness, Mr. Allred.

(R. 374). The questions were never disclosed to counsel and were not made part of the record.

Under Rule 3.410 Florida Rules of Criminal Procedure, once deliberations begin, any requests from the jury concerning instructions and evidence must be dealt with only after giving notice to the prosecuting attorney and to counsel for the defendant. This Court has held that:

> Any communication with the jury outside the presence of the prosecutor, the defendant, and defendant's counsel is so fraught with potential prejudice that it cannot be considered harmless.

Ivory V. State, 351 So. 2d 26 (Fla. 1977). This Court further explained that:

> it is prejudicial error for a trial judge to respond to a request from the jury without the prosecuting attorney, the defendant, and defendant's counsel being present and having the opportunity to participate in the discussion of the action to be taken on the jury's request. This right to participate

> includes the right to place objections on record as well as the right to make full argument as to the reasons the jury's request should or should not be honored.

Id.

Communications between the court and jury prior to deliberations are governed by Rule 3.180, Florida Criminal Procedural Rules. Rule 3.180a(5) ensures the defendant's presence "at all proceedings before the court when the jury is present." When the court has a discussion with the jury in violation of Rule 3.180 the courts have held that it is reversible error. See Adkins v. Smith, 197 So. 2d 865, 867 (Fla. 4th DCA 1967); Loudermilk v. State, 186 So. 2d 16, 817 (Fla. 4th DCA 1966), Deans v. State, 180 So. 2d 178, 180 (Fla. 2nd DCA 1965). As the court in Adkins explained:

> Although the better practice is to require counsel for the defendant and the state to be present while any conversation takes place between the jury and the court, a casual conversation or exchange of remarks is not reversible error unless it violates the provisions of F.S.A. section 914.01.

Adkins, 197 So. 2d supra at 867. Any communication other than casual conversation or exchange of remarks unrelated to the proceedings is reversible error.

In Mr. Hill's case the jury communicated privately with the court through written questions. Although the Court obtained the communication in the physical presence of Mr. Hill and his counsel, that communication remained private and was never disclosed to the defense despite their requests to be allowed to see the questions. The court however responded to the questions and instructed the jury that the matters were "within the confines of the evidence" and that they should "weigh the evidence as they see it." Despite the disclaimer, the court did comment on the questions.

Although Mr. Hill and counsel were physically present, without knowledge of what the questions were they could no more intelligently determine if Mr. Hill's rights were being protected

or not, than if they were actually absent. Mere presence alone is nothing without the defendant and counsel being given basic due process rights: notice of the subject matter and an opportunity to be heard on the matter. Mr. Hill's rights under Rule 3.180 were abrogated under these circumstances. Mr. Hill's counsel requested notice of what the questions were and that request was denied. The result being no better than if Mr. Hill and counsel were absent.

In the present case, the circumstances surrounding counsel's representation of Mr. Hill -- the court's refusal to disclose the questions asked by the jury -- "prevented [him] from assisting the accused during a critical stage of the proceedings." See, United States v. Cronic, 466 U.S.648, 659 (1984). The court's action deprived Mr. Hill of his right to the effective assistance of counsel, and under Cronic, prejudice must be presumed based upon counsel's inability to give advice. See, .cp3 Stano v. Dugger, No. 88-3375, slip op. at 12 (11th Cir. Nov. 17, 1989). Mr. Hill is entitled to habeas corpus relief.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Hill's death sentence. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings, see Wilson v. Wainwriaht, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error.

Moreover, the claim is now properly brought pursuant to the Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. This issue involved a classic violation of longstanding principles of Florida law. It virtually "leaped out upon even a casual reading of transcript." Matire V. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). This clear claim of per se error required no elaborate presentation -- counsel only had to direct

this Court to the issue. The court would have done the rest, based on long-settled Florida and federal constitutional standards.

No tactical decision can be ascribed to counsel's failure to urge the claim. No procedural bar precluded review of this issue. See Johnson v. Wainwright, susra, 498 So. 2d 938. However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Hill of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra. Accordingly, habeas relief must be accorded now.

CLAIM III

THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING CIRCUMSTANCE WAS APPLIED TO MR. HILL'S CASE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

On direct appeal in Mr. Hill's case, this Court invalidated the application of the "cold, calculated and premeditated" aggravating circumstance because "[t]he evidence does not rise to the level of heightened premeditation . . . which is necessary to support this aggravating circumstance." Hill v. State, 515 So. 2d 76, 79 (Fla. 1987). Thus, this aggravating circumstance was overbroadly applied by Mr. Hill's jury and judge. Under Maynard v. Cartwright, 108 S. Ct 1853 (1988), the overbroad application of aggravating circumstances violates the eighth amendment. As the record in its totality reflects, the sentencing jury never applied the "heightened premeditation" limiting construction of the cold, calculated aggravating circumstance, as required by Maynard v. Cartwrisht.

Aggravating circumstance (5)(i) of Section 921.141, Florida Statutes, is unconstitutionally vague, overbroad, arbitrary, and capricious on its face, and is in violation of the sixth, eighth, and fourteenth amendments to the United States Constitution and Article I, sections 2, 9 and 16 of the Florida Constitution.

This circumstance is to be applied when:

> The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

921.141(5)(i), Florida Statutes.

This aggravating circumstance was added to the statute subsequent to the United States Supreme Court's decision in Proffitt v. Florida, **428** U.S. 242 **(1976),** and thus its constitutionality has yet to be reviewed by the United States Supreme Court. The United States Supreme Court has set standards governing the function of aggravating circumstances:

> Statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition, they circumscribe the class of persons eligible for the death penalty.

Zant v. Stephens, 462 U.S. **862, 77 L.Ed** 2d **235, 103** S. Ct. **2733 (1983).** The Court went on to state that:

> An aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty.

Id. at **2742-2743.** Thus, it is evident that certain aggravating circumstances can be defined and imposed so broadly as to fail to satisfy eighth and fourteenth amendment requirements.

Concern over the severity and finality of the death penalty has mandated that any discretion in imposing the death penalty be narrowly limited. Gress v. Georgia, **428** U.S. **153, 188-89 (1976);** Furman v. Georsia, **408** U.S. **238 (1972).** The Court in Greuq interpreted the mandate of Furman as one requiring that severe limits be imposed due to the uniqueness of the death penalty:

> Because of the uniqueness of the death penalty, Furman held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner.

428 U.S. at **189.** Capital sentencing discretion must be strictly guided and narrowly limited.

It is well established that, although a state's death

penalty statute may pass constitutional muster, a particular aggravating circumstance may be so vague, arbitrary, or overbroad as to be unconstitutional. People v. Superior Court (Engert), 647 P.2d 76 (Cal. 1982); Arnold v. State, 224 S.E.2d 386 (Ga. 1976). In People v. Superior Court (Engert), supra, the California Supreme Court struck down an aggravating circumstance that a homicide was "especially heinous, atrocious, and cruel, manifesting exceptional depravity" as unconstitutionally vague and violative of due process, on its face, under the California and United States Constitutions. In Arnold, supra, the Georgia Supreme Court struck down as unconstitutionally vague, under the United States Constitution, an aggravating circumstance that applied when the homicide "was committed by a person who has a substantial history of serious assaultive criminal convictions." 224 S.E.2d at 391-92. The Court held this aggravating circumstance to be unconstitutional under traditional "void for vagueness" standards. 224 S.E.2d at 391. The Court went on to note the special scrutiny (for possible vagueness) required under a death penalty statute:

> This doctrine [vagueness] has particular application to death penalty statutes after Furman v. Georgia, supra, where, if anything is made clear, it is that a wide latitude of discretion in a jury as whether or not to impose the death penalty is unconstitutional.

224 S.E.2d at 391-92. Aggravating circumstances must be subjected to special scrutiny for unconstitutional vagueness.

Section 921.141(5)(i), on its face fails in a number of respects to "genuinely narrow the class of persons eligible for the death penalty." The circumstance has been applied by this Court to virtually every type of first degree murder. This aggravating circumstance has become a global or "catch-all" aggravating circumstance. Even where this Court has developed principles for applying the (5)(i) circumstance, those principles have not been applied with any consistency whatsoever.

Section 921.141(5)(i), is unconstitutionally vague, on its face. Even the words of the aggravating circumstance provide no true indication as to when it should be applied. This is precisely the flaw which led to the striking of aggravating circumstances in People v. Supreme Court (Engert), supra, and Arnold v. State, supra.

The terms **"cold"** and **"calculated"** suffer from the same deficiency as terms held vague in People v. Superior Court of Santa Clara County (Engert), supra. Thus, here also:

> The terms address the emotions and subjective, idiosyncratic values. While they stimulate feelings of repugnance, they have no direct content.

647 P.2d at 78. Here, as in Arnold v. State, supra, the terms are "highly **subjective."** 224 S.E.2d at 392. The finding of this aggravating circumstance depends on a finding that the homicide is **"cold,** calculated, and **premeditated."** The terms cold and calculated are unduly vague and subjective. This is especially true when considered in the context of the special need for reliability in capital sentencing.

This Court has discussed this aggravating factor. See Jent v. State, 408 So. 2d 1024, 1032 (Fla. 1982); McCray v. State, 416 So. 2d 804, 807 (Fla. 1982); Combs v. State, 403 So. 2d 418 (Fla. 1981). In Jent, supra, this Court stated:

> the level of premeditation needed to convict in the penalty phase of a first degree murder trial does not necessarily rise to the level of premeditation in subsection (5)(i). Thus, in the sentencing hearing the state will have to prove beyond a reasonable doubt the elements of the premeditation aggravating factor -- **"cold,** calculated...and without any pretense of moral or legal justification".

408 So. 2d at 1032. This Court in McCray stated:

> That aggravating circumstance [(5)(i)] ordinarily applies in those murders which are characterized as executions or contract murders, although that description is not intended to be all-inclusive.

416 So. 2d at 807. Although this Court has attempted to require more in this aggravating circumstance than simply premeditation,

the jury was not told that in Mr. Hill's case. In fact, the jury was told that the original jury at trial found Mr. Hill guilty of premeditated murder and that

> Consequently, you will not concern yourself with the question of guilt in this case.

(R. 262). Because of the lack of any limiting instruction and the instruction that "premeditated murder" was already found, Mr. Hill's jury was in effect instructed to find the "cold, calculated, and premeditated" aggravating factor.

In part because of the concerns discussed above, this Court has further defined "cold, calculated, and premeditated":

> We also find that the murder was not cold, calculated and premeditated, because the state has failed to prove beyond a reasonable doubt that Rogers' actions were accomplished in a **"calculated"** manner. In reaching this conclusion, we note that our obligation in interpreting statutory language such as that used in the capital sentencing statute, is to give ordinary words their plain and ordinary meaning. **See** Tatgel v. State, 356 So.2d 787, 789 (Fla.1978). Webster's Third International Dictionary at 315 (1981) defines the word **"calculate"** as "[t]o plan the nature of beforehand: think out ... to design, prepare or adapt by forethought or careful plan." There is an utter absence of any evidence that Rogers in this case had a careful plan or prearranged design to kill anyone during the robbery. While there is ample evidence to support simple premeditation, we must conclude that there is insufficient evidence to support the heightened premeditation described in the statute, which must bear the indicia of "calculation."

Rosers v. State, 511 So. 2d 526, 533 (Fla. 1987). This Court's subsequent decisions have plainly recognized that cold, calculated and premeditated requires proof beyond a reasonable doubt of a "careful plan or prearranged **design."** See Mitchell v. State, 527 So. 2d 179, 182 (Fla. 1988)("**the** cold, calculated and premeditated factor [] requir[es] a careful plan or prearranged design."); Jackson v. State, 530 So. 2d 269, 273 (Fla. 1988)(application of aggravating circumstance "error under the principles we recently enunciated in **Rogers**.").

Because neither Mr. Hill's jury nor trial judge had the benefit of the narrowing definition set forth in Rosers, his sentence violates the eighth and fourteenth amendments. Moreover, the decision in Rosers preceded the direct appeal in Mr. Hill's case by several months. Mr. Hill is entitled to the benefit of the Rosers rule. The judge did not require any **"heightened"** premeditation as required by McCray, supra, and certainly he did not properly instruct the jury on this limiting construction. Moreover, Mr. Hill's jury was instructed that Mr. Hill was guilty of "premeditated murder" and told not to concern itself with such questions. Based upon these instructions, the reasonable juror would automatically presume that the "cold, calculated and premeditated" aggravating factor was present in this case.

What occurred here is precisely what the eighth amendment was found to prohibit in Maynard v. Cartwrisht, **108** S. Ct. **1853 (1988).** In fact, these proceedings are even more egregious than those upon which relief was mandated in Cartwrisht. The result here should be the same as in Cartwrisht:

> Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman V. Georsia, **408** U.S. **238 (1972).**

108 S. Ct. at **1859** (emphasis added).

The Court there discussed its earlier decision in Godfrev v. Georgia, **446** U.S. **420 (1980):**

> Godfrev v. Georgia [] which is very relevant here, applied this central tenet of Eighth Amendment law. The aggravating circumstance at issue there permitted a person to be sentenced to death if the offense **"was** outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Id., at **422.** The jury had been instructed in the words of the

statute, but its verdict recited only that the murder was "outrageously or wantonly vile, horrible or inhuman." The Supreme Court of Georgia, in affirming the death sentence, held only that the language used by the jury was "not objectionable" and that the evidence supported the finding of the presence of the aggravating circumstance, thus failing to rule whether, on the facts, the offense involved torture or an aggravated battery to the victim. Id., at 426-427. Although the Georgia Supreme Court in other cases had spoken in terms of the presence or absence of these factors, it did not do so in the decision under review, and this Court held that such an application of the aggravating circumstance was unconstitutional, saying:

> "In the case before us, the Georgia Supreme Court has affirmed a sentence of death based upon no more than a finding that the offense was 'outrageously or wantonly vile, horrible and inhuman.' There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterized almost every murder as 'outrageously or wantonly vile, horrible and inhuman.' Such a view may, in fact, have been one to which the members of the jury in this case subscribed. If so, their preconceptions were not dispelled by the trial judge's sentencing instructions. These save the jury no guidance concernins the meaning of any of rthe assravatins circumstance's] terms. In fact, the jury's interpretation of [that circumstance] can only be the subject of sheer speculation." Id., at 428-429 (footnote omitted).

The affirmance of the death sentence by the Georgia Supreme Court was held to be insufficient to cure the jury's unchanneled discretion because that court failed to apply its previously recognized limiting construction of the aggravating circumstance. Id., at 429, 432. This Court concluded that, as a result of the vague construction applied, there was "no principled way to distinguish this case, in which the death penalty was imposed. from the many cases in which it was not." Id., at 433. Compare Proffit V. Florida, 428 U.S. 242, 254-256, 96 S.Ct. 2960, 2967-2968, 49 L.Ed.2d 913 (1976). It plainly rejected the submission that a particular set of facts surrounding a murder, however shocking they might be, were enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty.

Cartwrisht, supra, 108 s. Ct. at 1858-59 (emphasis added).

In Florida, a resentencing is required when aggravating circumstances are invalidated. See, e.g., Schafer v. State, 537 So. 2d 988 (Fla. 1989)(remanded for resentencing where three of five aggravating circumstances stricken and no mitigating circumstances identified); Nibert v. State, 508 So. 2d 1 (Fla. 1987)(remanded for resentencing where one of two aggravating circumstances stricken and no mitigating circumstances found); cf. Rembert v. State, 445 So. 2d 337 (Fla. 1984)(directing imposition of life sentence where one of two aggravating circumstances stricken and no mitigating circumstances found). The striking of this aggravating factor on direct appeal certainly requires resentencing under Florida law. Under eighth amendment law it is the sentencer who must make the "reasoned moral response." Penry v. Lynaugh, 109 S. Ct. 2934, (1989). The United States Supreme Court has granted certiorari in a case to determine whether an appellate court has the power to usurp the sentencer's discretion and declare improper consideration of an aggravating circumstance harmless. Clemons v. Mississippi, 109 S. Ct. 3184 (1989).

Under Florida law, aggravating circumstances "must be proven beyond a reasonable doubt." Hamilton v. State, 547 So. 2d 630, (Fla. 1989). In fact, Mr. Hill's jury was so instructed. Florida law also establishes that limiting constructions of the aggravating circumstances are "elements" of the particular aggravating circumstance. "[T]he State must prove [the] element[s] beyond a reasonable doubt." Banda v. State, 536 So. 2d 221, 224 (Fla. 1988). Unfortunately, Mr. Hill's jury received no instructions regarding the elements of the "cold, calculated and premeditated" aggravating circumstance submitted for the jury's consideration. Its discretion was not channeled and limited in conformity with Cartwrisht.

Florida law requires the jury to weigh the aggravating

circumstances against mitigating evidence. In fact, Mr. Hill's jury was so instructed. This Court has produced considerable case law regarding the import of instructional error to a jury regarding the mitigation it may consider and balance against the aggravating circumstances. In Mikenas v. Dusser, this Court ordered a new sentencing because the jury had not received an instruction explaining that mitigation was not limited to the statutory mitigating factors. The error was cognizable in post-conviction proceedings even though there had been no objection at trial, the issue had not been raised on direct appeal, and at a resentencing to the judge alone, the judge had known that mitigation was not limited to the statutory mitigating factors. It was cognizable because the Florida Supreme Court determined that Hitchcock required the sentencing jury in Florida to receive accurate information which channeled and limited its sentencing discretion, but allowed the jury to give full consideration to the defendant's character and background. Because of the weight attached to the jury's sentencing recommendation in Florida, instructional error is not harmless unless the reviewing court can "conclude beyond a reasonable doubt that an override would have been authorized." Mikenas, 519 So. 2d at 601. In other words, there was sufficient mitigation in the record for the jury to have a reasonable basis for recommending life and thus preclude a jury override.

Similar conclusions have been reached in other cases where the jury was erroneously instructed. Meeks v. Dugger, So. 2d ___, 14 F.L.W. 313, 314 (Fla. June 22, 1989)("Had the jury recommended a life sentence, the trial court may have been required to conform its sentencing decision to Tedder v. State, 322 So. 2d 908 (Fla. 1975), which requires that, if there is a reasonable basis for the recommendation, the trial court is bound by it."); Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1989)("It is of no significance that the trial judge stated that he would have

imposed the death penalty in any event. The proper standard is whether a jury recommending life imprisonment would have a reasonable basis for the recommendation."); Floyd v. State, 497 So. 2d 1211, 1216 (Fla. 1986)("In view of the inadequate and confusing jury instructions, we believe Floyd was denied his right to an advisory opinion. We cannot sanction a practice which gives no guidance to the jury for considering circumstances which might mitigate against death."). In Mr. Hill's case the jury received no guidance as to the "elements" of the aggravating circumstances against which the evidence in mitigation was balanced. In Florida, the jury's pivotal role in the capital process requires its sentencing discretion to be channeled and limited. The failure to provide Mr. Hill's sentencing jury the proper "channeling and limiting" instructions violated the eighth amendment principle discussed in Mavnard v. Cartwrisht.

In Maynard v. Cartwrisht, the Court held that "the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." 108 S. Ct. at 1858. There must be a "principled way to distinguish [the] case, in which the death penalty was imposed, from the many cases in which it was not." Id. at 1859, quoting, Godfrev v. Georgia, 446 U.S. 420, 433 (1980). In Mr. Hill's case, the jury was not instructed as to the limiting constructions placed upon of the "cold, calculated and premeditated" aggravating circumstance. The failure to instruct on the "elements" of this aggravating circumstance in this case in combination with the instruction that "premeditated murder" was previously established and not a concern of theirs, left the jury free to ignore those "elements," and left them with the reasonable belief that the cold, calculated and premeditated aggravating circumstance must be found. The jury was given no

limiting instruction which was found to be invalid in Furman v. Georgia, 408 U.S. 238 (1972), and Maynard v. Cartwrisht.

In Pinkney v. State, 538 So. 2d 329, 357 (Miss. 1988), it was recognized that "Maynard v. Cartwrisht dictates that our capital sentencing juries in this State be more specifically instructed on the meaning of 'especially, heinous, atrocious, or cruel.'" The court then ruled, "hereafter capital sentencing juries of this State should and must be specifically instructed about the elements which may satisfy the aggravating circumstance of 'especially heinous, atrocious or cruel.'" Id.

The Tennessee Supreme Court concluded that under Maynard v. Cartwrisht, juries must receive complete instructions regarding aggravating circumstances. State v. Hines, 758 S.W.2d 515 (Tenn. 1988). The court did not read Cartwrisht as applying only to the heinous, atrocious, and cruel aggravating circumstance. The court there also found that ambiguity in the instructions regarding any limiting constructions of an aggravating circumstance violated Mills v. Marvland, 108 S. Ct. 1860 (1988). The court ruled that error under Maynard v. Cartwrisht and Mills could not be found to be harmless beyond a reasonable doubt.

The court in Brogie v. State, 760 P.2d 1316 (Okla. Crim. 1988), also found error under Maynard v. Cartwrisht. The court found eighth amendment error where jury instructions failed to include any qualifying or limiting constructions placed upon an aggravating circumstance. Under this construction of Maynard v. Cartwrisht, Mr. Hill's jury received inadequate instructions and his sentence of death violates the eighth amendment.

This Court should now correct Mr. Hill's death sentence which violates the eighth amendment principle discussed in Maynard v. Cartwrisht, 108 S. Ct. 1853, 1858 (1988):

> Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically asserted that the challenged provision fails adequately to inform juries what they must

> find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman V. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L.Ed.2d (1972).

The striking of this aggravating factor requires resentencing. Schafer, supra. Id. The "harm" before the jury is plain -- a jury's capital sentencing decision, after all, is not a mechanical counting of aggravators and involves a great deal more than that. The error denied Mr. Hill an individualized and reliable capital sentencing determination. Knight v. Dusser, 863 F.2d 705, 710 (11th Cir. 1989).

Under Witt V. State, 387 So. 2d 922 (Fla.), cert. denied, 449 U.S. 1067 (1980), Cartwright represents a fundamental change in law, that in the interests of fairness requires the decision to be given retroactive application. The errors committed here cannot be found to be harmless beyond a reasonable doubt. There was mitigating evidence before the jury which could have caused a different balance to be struck had this aggravating circumstances not been found and weighed against the mitigation. Habeas corpus relief is warranted under Hitchcock, Cartwright and the eighth amendment. A new jury sentencing proceeding must be ordered. Recently, a petition for a writ of certiorari was granted in Clemons v. Mississippi, 109 S. Ct. 3189 (1989), to consider the very questions at issue here: whether the eighth amendment permits an appellate court to save a sentence of death by reweighing aggravating and mitigating factors where the authority for capital sentencing under state law rests exclusively with the trial court sentencer. Certainly, Mr. Hill's execution must be stayed pending resolution of that case. A stay of execution and habeas corpus relief are appropriate.

This error undermined the reliability of the jury's sentencing determination and prevented the jury from assessing the full panoply of mitigation presented by Mr. Hill. For each of the reasons discussed above the Court should vacate Mr. Hill's

unconstitutional sentence of death.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Hill's death sentence. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings, **see** Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error. Accordingly, habeas relief must be accorded now.

CLAIM IV

THIS COURT'S FAILURE TO REMAND FOR RESENTENCING AFTER STRIKING AN AGGRAVATING CIRCUMSTANCE ON DIRECT APPEAL DENIED MR. HILL THE PROTECTIONS AFFORDED UNDER FLORIDA'S CAPITAL SENTENCING STATUTE, IN VIOLATION OF DUE PROCESS, EQUAL PROTECTION, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

A capital sentencing scheme is constitutional only to the extent that it is applied consistently to all capital defendants and eliminates any risk that death will be imposed in an arbitrary, capricious, or unreliable manner. **See**, e.g., Proffitt v. Florida, 428 U.S. 242 (1976). Mr. Hill was not afforded those protections, and thus was denied his due process, equal protection, and eighth and fourteenth amendment rights.

The trial court sentenced Mr. Hill to death on the basis of six aggravating circumstances (R. 835-42). The court's order imposing the death sentence concludes: "there has not been sufficient mitigating factors to outweigh aggravating circumstances" (R. 842). Clearly, the trial court believed that the six aggravating circumstances the court found were "sufficient" to justify a death sentence.

However, on direct appeal, this Court invalidated the cold, calculated and premeditated aggravating circumstance because the evidence does not demonstrate a "heightened degree of premeditation, calculation or planning." Hill v. State, 515 So.

2d 176, 179 (Fla. 1987). This Court approved the trial court's other findings of aggravation and affirmed the death sentence. Id.

This Court's failure to reverse and remand for resentencing is in direct conflict with the court's own well-established standards. In Elledse v. State, 346 So. 2d 998, 1003 (Fla. 1977), this Court held that if improper aggravating circumstances are found, "then regardless of the existence of other unauthorized aggravating factors we must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death." Accordingly, reversal is required when mitigation may be present and an aggravating factor is struck, Elledse, supra, or even when mitigation is not found and an aggravating factor is struck. Alvin v. State, 14 F.L.W. 457 (Fla. Sept. 14, 1989); Schafer v. State, 537 So. 2d 988 (Fla. 1989); Nibert v. State, 508 So. 2d 1 (Fla. 1987).

In Alvin, supra, the trial court found no mitigating circumstances and two aggravating circumstances. After invalidating one aggravating circumstance, this Court remanded for resentencing because "we are not convinced that the judge would have imposed the same sentence had he known of the invalidity of one of the two aggravating circumstances." 14 F.L.W. at 458.

The same is true in Mr. Hill's case, and the result should have been the same. In Mr. Hill's case, the trial court determined that five aggravating circumstances were "sufficient" to justify the sentence of death (R. 842). Further, the trial court imposed death only after "weighing" the aggravating and mitigating circumstances and determining that mitigation did not "outweigh" aggravation (Id.). The court's order thus indicated that the court relied upon the five aggravating circumstances, weighed those factors against the mitigating circumstances, and found that mitigation did not outweigh aggravation. As in Alvin,

supra, there is no way to know if the trial judge would have imposed death had he known of the invalidity of one of the five aggravating circumstances. As in Alvin, Schafer, Nibert, and Elledae, this Court should have remanded for resentencing so that the trial court could have reweighed aggravation and mitigation. This Court's failure to remand for resentencing deprived Mr. Hill of his rights to due process and equal protection by denying him the liberty interest created by Florida's capital sentencing statute. See Vitek v. Jones, 445 U.S. 480 (1980); Hicks v. Oklahoma, 447 U.S. 343 (1980).

This Court is not the sentencer under Florida law. Reweighing by the sentencer is what the law requires and what the court should have ordered. As the en banc Ninth Circuit has explained:

> Post hoc appellate rationalizations for death sentences cannot save improperly channeled determinations by a sentencing court. Not only are appellate courts institutionally ill-equipped to perform the sort of factual balancing called for at the aggravation-mitigation stage of the sentencing proceedings, but, more importantly, a reviewing court has no way to determine how a particular sentencing body would have exercised its discretion had it considered and applied appropriately limited statutory terms.

Adamson v. Ricketts, 865 F.2d 1011, 1036 (9th Cir. 1988)(en banc).[1]

In Florida, the trial court (jury and judge) is the only body authorized to weigh aggravating circumstances against mitigating circumstances. In Mr. Hill's case, this Court unconstitutionally took over that function, contrary to its own precedent, which

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[1]The United States Supreme Court has granted certiorari in Clemons v. Mississippi, 109 S. Ct. 3184 (1989), to consider the very questions at issue here: whether the eighth amendment permits an appellate court to save a sentence of death by reweighing aggravating and mitigating factors where the authority for capital sentencing under state law rests exclusively with the trial court sentencer.

requires a trial judge to engage in a meaningful weighing of aggravating and mitigating circumstances before imposing a death sentence. See, e.g., Nibert v. State, 508 So. 2d 1 (Fla. 1987); Muehleman v. State, 503 So. 2d 310 (Fla. 1987); Van Royal v. State, 497 So. 2d 625 (Fla. 1986). For example, this Court sets aside death sentences where findings of fact are issued long after the death sentence was imposed because in such circumstances, the Court cannot know that "the trial court's imposition of the death sentence was based on a 'reasoned judgment' after weighing the aggravating and mitigating circumstances." Van Royal, 497 So. 2d at 629-30 (Ehrlich, J., concurring). In Patterson v. State, 513 So. 2d 1257 (Fla. 1987), this Court observed that Nibert had held that the judge's failure to write his own findings did not constitute reversible error "so long as the record reflects that the trial judge made the requisite findings at the sentencing hearing." Patterson, 513 So. 2d at 1262, quoting Nibert, 508 So. 2d at 4. Recently, this Court again emphasized that sentencing responsibility rests at the trial court level and that "the sentencing order should reflect that the determination as to which aggravating and mitigating circumstances apply under the facts of a particular case is the result of 'a reasoned judgment' by the trial court." Rhodes v. State, 547 So. 2d 1201, ___ (Fla. 1989).

This Court's precedent thus clearly established that the trial court is the capital sentencer and that the trial court must reach a "reasoned judgment" based upon the trial court's weighing of aggravation and mitigation. In Mr. Hill's case, this Court undertook sentencing responsibility and thus denied Mr. Hill the protections afforded him under the Florida capital sentencing statute.

Moreover, this Court also usurped the jury's role in Florida capital sentencing. The nature of Florida's capital sentencing process ascribes a role to the sentencing jury that is central and "fundamental," Riley v. Wainwright, 517 So. 2d 656, 657-58 (Fla.

1988); Mann v. Duaaer, 844 F.2d 1446, 1452-54 (11th Cir. 1988)(in banc), representing the judgment of the community. Id. Thus, when error occurs before a Florida sentencing jury, resentencing before a new jury is required. Riley; Mann. Mr. Hill's jury was permitted to consider an aggravating circumstance which this Court later held was not properly considered. Thus, this Court should have remanded for resentencing before a new jury, rather than assuming (as it implicitly must have) that Mr. Hill's jury would still recommend death without the invalidated aggravating factors.

Under Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), a Florida capital jury is treated as a sentencer for eighth amendment purposes. Under Mavnard v. Cartwriaht, 108 S. Ct. 1853 (1988), a sentencing jury must be properly instructed regarding the aggravation it may consider. Hitchcock and Cartwriaht are new law establishing that this claim is properly presented in these proceedings and establishing that Mr. Hill is entitled to relief.

This Court's failure to follow its own case law and remand for resentencing deprived Mr. Hill of his rights to due process and equal protection and violated the eighth and fourteenth amendments. This error undermined the reliability of the jury's sentencing determination and prevented the jury from assessing the full panoply of mitigation presented by Mr. Hill. For each of the reasons discussed above the Court should vacate Mr. Hill's unconstitutional sentence of death. This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Hill's death sentence. Accordingly, habeas relief must be accorded now.

CLAIM VI

MR. HILL'S DEATH SENTENCE WAS IMPOSED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE HIS JURY WAS PREVENTED FROM GIVING APPROPRIATE CONSIDERATION TO, AND HIS TRIAL JUDGE REFUSED TO CONSIDER, ALL EVIDENCE PROFFERED IN MITIGATION OF PUNISHMENT CONTRARY TO EDDINGS V. OKLAHOMA, MILLS V. MARYLAND, AND HITCHCOCK V. FLORIDA.

At the time of Mr. Hill's trial it was axiomatic that the eighth amendment required that a capital sentencer, "not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Eddinas v. Oklahoma, **455** U.S. **104, 110 (1982)** quoting Lockett v. Ohio, **438** U.S. **586, 604 (1978).** No less clear was the fundamental tenant that "the sentencer may not refuse to consider or be precluded from considering any relevant mitigation." Eddings, supra at **114.** Recently in Mills v. Maryland, **108** S. Ct. **1860 (1988),** the United States Supreme Court in surveying the prime directive of Lockett and its progeny stressed the ability of the sentencer to consider all evidence of mitigation unimpeded.

> [I]t is not relevant whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by statute, Lockett v. Ohio, supra; Hitchcock v. Duaaer, ___ U.S. ___ **107** S. Ct. **1821, 95** L.Ed. **2d (1987);** by the sentencing court, Eddinas v. Oklahoma, supra; or by evidentiary ruling, Skipper v. South Carolina, [476 U.S. **1 (1986)] . . .** [w]hatever the cause, the conclusion would necessarily be the same: Because the [sentencer's] failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of Lockett, it is our duty to remand this case for resentencing."

Mills at **1866** quoting Eddinas v. Oklahoma, **455** U.S. at **117** (O'Connor, J., concurring).

In Mr. Hill's case, the judge refused to follow Eddinas, supra; Hitchcock, supra; Mills, supra; Penrv v. Lvnauah, **109** S. Ct. **2934 (1989),** and the jury was precluded from fully

considering substantial and unrebutted statutory and nonstatutory mitigation regarding Mr. Hill's drug intoxication, chronic drug abuse, below average intelligence, learning disabilities, substantial domination by his co-defendant, and his role as a good provider for his family.

Cliff Jackson, Mr. Hill's co-defendant, testified at the resentencing that the pair began to use drugs on the early morning of October **19, 1982** (R. **573).** That after the pair walked to Mobile, Jackson grew tired and decided to steal a car (R. **573).** Jackson further testified that the pair continued to use cocaine throughout the morning and were doing lines of cocaine in the stolen car en route to Pensacola (R. **573).** Upon arriving in Pensacola it was Jackson who decided they should rob a bank (R. **574).** Jackson then decided the pair needed a disguise and purchased sunglasses for both Hill and himself (R. **575).** Jackson testified that the pair entered Freedom Savings, where he approached a teller and asked about opening an account. Jackson testified he was directed to another teller where he continued the pretextual dialogue about opening an account and then signaled to Mr. Hill that the robbery should commence (R. **576).** At that point Jackson walked behind the barrier separating the tellers from the lobby and stood behind a teller using his finger to simulate the barrel of a gun (R. **576).** Jackson then instructed Mr. Hill to "get those two women" who Jackson believed were attempting to activate the silent alarm (R. **577, 578).** Mr. Hill complied with Jackson's instructions and placed the women behind the counter on the floor (R. **577, 591).** Jackson then asked the tellers the location of the vault and when there was no reply threatened all the employees by saying, **"If** don't nobody know where the safe is then this woman here, she goes." (R. **577).** When there was no immediate reply Jackson instructed Mr. Hill to grab a maintenance man who Jackson believed to be the bank manager. Again, Mr. Hill complied with Jackson's orders (R. **577).** When a teller told

Jackson she could open the vault, Mr. Hill accompanied her. A telephone rang during the course of the robbery and Jackson instructed the teller he was holding to "answer the phone and act normal" (R. 578). Jackson heard the caller state that the police were out front and told Mr. Hill to come out of the safe (R. 578). Jackson then grabbed a plastic trash bag and placed the money in it. Jackson and Mr. Hill then proceeded out the back door. When some of the money was dropped on the floor, Jackson stopped to pick it up. Mr. Hill, who did not see Jackson stop to retrieve the money, proceeded to exit through the back door (R. 579). Jackson, upon seeing a police car at the back door, decided to exit via the front door where he was apprehended by two officers (R. 579). Jackson was lying in a prone position when he heard someone yell "halt" followed by gunfire (R. 580). Jackson then got up and saw one of the officers approaching him with his gun drawn. There was a struggle for the weapon which Jackson ultimately gained control of. Taking aim at the officer, Jackson attempted to fire the weapon (R. 581). On cross-examination Jackson testified that he told Mr. Hill which car to steal in Mobile (R. 585-86) and that he was the leader of the robbery.

Clarence Hill testified at resentencing that since age 16, he had been employed and contributed to the financial support of his parents, siblings, and extended family members up to and including shortly before his arrest in the instant case (R. 604, 607). Mr. Hill also testified that he had been "snorting" cocaine throughout the day of October 18, 1982, into that night, and began using cocaine again on the morning of the 19th up until the time of the instant offense (R. 610). Mr. Hill testified the cocaine made him feel "like [he] could do just about anything" (R. 611).

Edna Hill, Mr. Hill's father, testified that his son contributed portions of his salary towards household expenses to help support the family (R. 559). Octavia Hill, Mr. Hill's

mother, testified on cross-examination that her son was incapable of making independent decisions and throughout his life, with one exception, had always sought to rely on the advise of others (R. 551-52). On direct examination Mrs. Hill testified that she was at a loss to explain her son's conduct but had heard in the neighborhood that he had been using "dope" (R. 551). Paul Wilson, a former classmate, and friend of Mr. Hill testified at trial that Mr. Hill used marijuana in his presence on prior occasions (R. 1367) and only a few days prior to the instant offense Mr. Wilson had seen both Mr. Hill and Jackson and that Mr. Hill "looked like he was . . . on something." (T. 1368).

The defense mental health expert, Dr. James Larson, testified that Mr. Hill's profile on the MMPI "found indications of [Mr. Hill] being the type of individual who would readily use drugs, as the sort of person who could be impulsive, this sort of person would enjoy the experience of being intoxicated or enjoy the experience of being high" (R. 512). Dr. Larson also testified that Mr. Hill had a verbal score on the WAIS-R intelligence test of 76 which places him in the "borderline range . . . borderline intelligence meaning one step above retarded" (R. 509). Dr. Larson also testified that a California test of mental maturity administered in school when Mr. Hill was twelve years old reflected a score of 67 "which falls in the retarded range" (R. 510). Dr. Larson opined that Mr. Hill's full range I.Q. score based on the WAIS-R was 84, placing Mr. Hill in the 16th percentile of the population (R. 508). Dr. Larson also testified that he found "no major mental illness or psychosis . . . that is he is without serious mental disorder" (R. 511). Based on Mr. Hill's full range I.Q. score, Dr. Larson determined that Mr. Hill was not retarded (R. 515).

On rebuttal, the State introduced the testimony of Officer Eddie Ragland who had arrested Mr. Hill in 1982. Officer Ragland testified that a search of the vehicle that Mr. Hill was driving

disclosed a bag of marijuana under the front seat (R. 656).

Without question evidence of intoxication at the time of the offense under Florida law is a relevant nonstatutory mitigating circumstance which must be considered by the sentencer. Hararave v. Dugger, 832 F.2d 1528, 1534 (11th Cir. 1987); Foster v. Dugger, 518 So. 2d 901, 902 n.2 (Fla. 1987); Waterhouse v. Duaser, 522 So. 2d 341, 344 (Fla. 1988). In Mr. Hill's case the proffered evidence of voluntary intoxication was ignored by the court based on the testimony of Mr. Leonard Reid. The court erroneously ruled that Mr. Reid Leonard was an expert in chemistry. This qualification was objected to by the defense and was clearly erroneous. This violated Eddinas, supra at 876. Here the refusal was not based on the court's restrictive interpretation of admissible nonstatutory mitigation present in Eddinas, but rather the Court's erroneous evidentiary ruling which allowed incompetent evidence to be received and thereby allowed the court to ignore Mr. Hill's intoxication as a statutory mitigating factor pursuant to Fla. Stat. 921.141(6)(f). As Mills instructs, the actual impediment to consideration is irrelevant if the net result is the preclusion from the sentencer's consideration of all mitigation. Unmistakably the court in Mr. Hill's case was so precluded as evidenced by its sentencing order:

> 1. The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. There was testimony of a psychologist who conducted psychological examinations on the Defendant. That he gave IQ tests as to the psychological age. He had furnished to him the school records of the Defendant from the 9th to 12th grade and had the benefit of the consulations with Defendant himself. That the verbal IQ test showed the Defendant at 76 which was borderline normal. His performance was 101, 52 being the average; and the Defendant was well within the range of average. He was at 84 in another catagory which was low average. He had no mental illness or disorder. He would not be appropriate for involuntary hospitalization under the Baker Act. On cross-examination, he tetsified that the mental age was consistant with the

> chronological age. Along with this, there was the benefit of the Defendant's testimony at trial and the Court's observation was that his testimony did not appear to be unusual, slow or dim-witted. He testified in a manner that indicated he understood the nature of the questions and responded appropriately. He did testify that he had been sniffing cocaine and presented the testimony of his accomplice who indicated that they had had some cocaine, but there was expert testimony by Dr. Reid Leonard that as a result of the blood samples of the Defendant furnished by examination by way of chemical analysis showing only a residue of aspirin. The Court had the benefit of the Defendant's testimony to weigh with this testimony. The Court is of the opinion based upon the evidence that the Defendant has not sustained this mitigating circumstance.

(R. 839-40).

By accepting the incompetent evidence regarding Mr. Hill's "blood test" the court effectively nullified all proffered evidence of Mr. Hill's intoxication at the time of the offense and simply failed to consider Mr. Hill's well documented history of chronic drug abuse. Thereby erroneously refusing to consider any such evidence not only as a statutory mitigating factor but, as nonstatutory mitigation as well.

That the court's refusal to consider evidence of Mr. Hill's intoxication at the time of the offense, and history of drug abuse, in conjunction with his below average intelligence pursuant to subsection (6)(b) was erroneous is made patent by the case law interpreting this mitigating factor. This Court in Perri v. State, 441 So. 2d 606 (Fla. 1983), noted the proper standard to be applied with respect to this statutory mitigating factor:

> The trial court denied defendant's request for a psychiatric evaluation prior to the sentence proceeding. The trial court found the defense of insanity had not been raised and there was no indication or evidence that the defendant was incompetent. The court also found that the prior psychiatric evaluation had determined that the defendant was competent.
>
> Section 921.141(6)(b), Florida Statutes (1981), states that a felony committed while defendant was under the influence of extreme

mental or emotional disturbance is a mitigating factor.

Section 921.141(6)(f) states that if the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired, a mitigating factor arises.

We explained these mitigating factors in State v. Dixon, 283 So.2d 1, 10 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974), as follows:

> Extreme mental or emotional disturbance is a second mitigating consideration, pursuant to Fla.Stat. Section 921.141(7)(b), F.S.A., which is easily interpreted as less than insanity but more than the emotions of an average man, however inflamed.
>
> * * *
>
> Mental disturbance which interferes with but does not obviate the defendant's knowledge of right and wrong may also be considered as a mitigating circumstance. Fla.Stat. Section 921.141(7)(f), F.S.A. Like subsection (b), this circumstance is provided to protect that person who, while legally answerable for his actions, may be deserving of some mitigation of sentence because of his mental state.
>
> * * *
>
> Perri did not testify during the guilt proceeding and did not testify during the sentence proceeding. His only testimony was given to the judge for the purpose of stating that he had been in mental institutions. This should be enough to trigger an investigation as to whether the mental condition of the defendant was less than insanity but more than the emotions of an average man, whether he suffered from a mental disturbance which interfered with, but did not obviate, his knowledge of right and wrong. A defendant may be legally answerable for his actions and legally sane, and even though he may be capable of assisting his counsel at trial, he may still deserve some mitigation of sentence because of his mental state.

Id. at 608-9. See also Amazon v. State, 487 So. 2d 8, 13 (Fla. 1986)(inconclusive evidence that defendant had taken drugs the night of the offense and stronger evidence that the defendant had a history of drug abuse constitutes sufficient evidence that

defendant could have acted under extreme mental or emotional distress).

Clearly, as reflected in the sentencing order, the trial court's erroneous evidentiary ruling led to the court's refusal to consider the proffered evidence in mitigation. Eddings, makes plain that the trial court may not "refuse to consider as a matter of law, any relevant mitigating evidence. Id. at 877. By making the erroneous evidentiary ruling with respect to the State's **"expert"** chemist the trial court effectively precluded its consideration of this evidence by depriving Mr. Hill of the individualized sentencing to which he is entitled. In doing so, the court committed fundamental eighth amendment error and resentencing relief is now warranted.

The trial court not only refused to consider statutory and nonstatutory mitigation of Mr. Hill's intoxication but in addition refused to consider Jackson's substantial domination of the dim-witted, and intellectually impaired, Clarence Hill, as the following makes plain:

> MR. TERRELL: For the record, I'm requesting the one about domination of another.
>
> THE COURT: No, I'm not giving that. He wasn't dominated by anyone. In fact, if you take the evidence from the side of the State, they completely refuted he was leading.
>
> MR. AllRED: I don't care if you give anything he asks, just to avoid the question.
>
> THE COURT: I'm not going to give it, because he wasn't dominated.
>
> MR. ALLRED: He's saying that he was and would suggest that, you see it's an alternative in that instruction. It says either under the domination of another or under extreme duress. This duress idea may flow from the cocaine thing, if we fail to give the instruction.
>
> THE COURT: That's why you give them the other one.
>
> MR. ALLRED: Under the doubling up thing, I guess.

> THE COURT: Yeah, I'm giving that one because he said it. Whether they believe it or not, that's another matter, but he said, "I was high on coke. I didn't know what I was doing." So -- all right, you can give it, that's all. Let's see, we came up with No. 4, wasn't it?
>
> MR. TERRELL: Yes, sir. For the record, I note my objection regarding No. 5.

(R. 662-3).

This ruling by the court is at once both confused and confusing. Ultimately this ruling demonstrates in the plainest terms possible the court's refusal to consider the proffered evidence in mitigation of Jackson's substantial domination, and Mr. Hill's dependance on the decision making of others. Rather then accepting the fact that Mr. Hill had a right to the mitigating instruction once "any evidence" has been introduced to support this mitigating factor, **see**, e.g., ~~Garner v. State~~, 480 So. 2d 91, 92, 93 (Fla. 1985), the trial court apparently assumed that once the state introduces evidence in rebuttal as to the existence of this mitigating factor the court may **sua** ~~sponte~~ issue a quasi directed verdict on that statutory mitigator. This stands in sharp contrast to the eighth amendment teachings of ~~Lockett~~, supra; Eddings; supra; Mills, supra; ~~Hitchcock~~, ~~supra~~. Mr. Hill's domination by his co-defendant Jackson was unmistakeably a proper statutory mitigating factor established by the legislature and improperly ignored by the trial court. As Eddings makes plain, "[while] a sentencer . . . may determine the weight to be given relevant mitigating evidence . . . [] they may not give it no weight by excluding such evidence from [its] consideration." Id. at 114-5. The court's flat refusal to consider the substantial proffered evidence regarding domination, let alone to instruct Mr. Hill's jury pursuant to subsection (6)(l), stands in sharp contrast to this basic eighth amendment requirement. If one juror cannot "blackball" from consideration a mitigating factor, Mills, supra, it becomes difficult, if not impossible, to determine how a trial court may constitutionally preclude such

consideration. The mere fact that trial counsel was able to argue the existence of substantial domination by Jackson cannot suffice to replace the sentencer's individualized consideration of this factor. Mere presentation alone is not sufficient. ~~Downs v.~~ Dugger, 514 So. 2d 1069 (Fla. 1987). Nor can the general ~~Lockett~~ catchall instruction suffice. Unlike the other six statutory mitigating factors which pertain exclusively to the defendant's conduct, history, and mental state, subsection (6)(e) like subsection (6)(c), pertains to the conduct of others, and is completely external to the capital defendant. Thus a rational juror could reasonably believe that an instruction which allowed for consideration of any other aspect regarding the defendant's character or record, and any other circumstance of the offense -- read in conjunction with the statutory mitigating factors pertaining exclusively to the defendant, actually precluded from their consideration the character or actions of a codefendant. Cf. Mills v. Maryland, 108 S. Ct. 1860, 1866 (1988). In this fashion, as in Penry, the trial court's failure to instruct on the statutory mitigating factor of substantial domination may well have deprived Clarence Hill's jury with a vehicle to give mitigating effect to Jackson's domination. Penry at 2449.

Similarly the court also failed to instruct Mr. Hill's jury that they could consider as a statutory mitigating factor that:

> The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

In Perri, supra. The Florida Supreme Court noted the proper standard to be applied with respect to this statutory mitigating factor:

> We explained [this] mitigating factors in State v. Dixon, 283 So.2d 1, 10 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974), as follows:
>
> > Extreme mental or emotional disturbance is a second mitigating consideration, pursuant to Fla.State. Section 921.141(7) (b), F.S.A., which is easily

> interpreted as less than insanity but more than the emotions of an average man, however inflamed.

Perri at 608. See also Amazon V. State, 487 So. 2d 8, 13 (Fla. 1986)(inconclusive evidence that defendant had taken drugs the night of the offense and stronger evidence that the defendant had a history of abuse constituted sufficient evidence that the defendant could have acted under extreme mental or emotional distress). Here as in Amazon, substantial testimony was introduced demonstrating not only intoxication on the day of the offense but also Clarence Hill's longstanding chronic drug abuse. In addition, evidence was also presented that Mr. Hill suffered from profound learning disabilities and intellectual impairments. The proffered evidence here rose to a level far above that in Amazon, yet the trial court once again refused to consider or instruct Mr. Hill's jury with respect to this statutory mitigating factor.

Once again the sentencer was precluded from considering, and the Court refused to consider, all statutory mitigation proffered by the defense. The trial court's refusal to instruct the jury on the statutory mitigating circumstance of extreme mental or emotional disturbance was prejudicial and reversible error since it may have affected the jury's penalty recommendation. Toole V. State, 479 So. 2d 731, 734 (Fla. 1985). As Mills makes plain, the sentencer's ability to consider all evidence of mitigation must be unimpeded; the actual barrier to the consideration of the mitigating evidence is of no moment. Here, the trial judge boldly refused to consider, Eddings, supra, and Mr. Hill's jury was precluded from considering, Lockett, supra; Hitchcock, supra, this statutory mitigating factor. As a result, Mr. Hill's sentence of death is unreliable and relief is appropriate. The unreliability of Mr. Hill's death sentence is beyond question. Not only was Mr. Hill's jury precluded from considering two statutory mitigating factors but in addition, weighed what little non-precluded

mitigation remained against two invalid aggravating factors. See Claim II supra; see also Hill v. State, 515 So. 2d 176 (Fla. 1987).

The Court also failed to consider the nonstatutory mitigating factor that the defendant was a good provider notwithstanding uncontroverted evidence from Octavia Hill, Edna Hill, and Clarance Hill's own testimony that he consistently contributed portions of his salary towards the economic support of his family and extended family. Despite the presence of this mitigating circumstance the Court found no nonstatutory mitigation. In its sentencing order the Court stated:

> Any other aspect of the Defendant's character or record and any other circumstances of the offense - several witnesses, James Wilson knew the Defendant for 19 years and was a school mate; Lucille Tilley knew the Defendant and his family for 19 years; Mrs. Petway knew the Defendant and his family for a number of years in Mobile since 1968; Grace Singleton, 79 years old, knew the Defendant when he was a little boy; Patsy McCaskill, his sister-in-law, knew him about six years; and the father and mother of the Defendant testified as to particulars of his character when he was a boy for honesty and peacefulness. On cross-examination, Tilley didn't know the Defendant had been arrested for robbery in Mobile as did Petway; Singleton was not aware of the robbery; McCaskill did know about the robbery. The Court is of the opinion that this evidence is insufficient to support this mitigating circumstance.

(R. 841-2).

The eighth and fourteenth amendments require that a state's capital sentencing scheme establish appropriate standards to channel the sentencing authority's discretion, thereby "eliminating total arbitrariness and capriciousness" in the imposition of the death penalty. Proffitt v. Florida, 428 U.S. 242 (1976). A reviewing court should determine whether there is support for the original sentencing court's finding that certain mitigating circumstances are not present. Magwood v. Smith, 792 F.2d 1438, 1449 (11th Cir. 1986). If that finding is clearly erroneous the defendant "is entitled to resentencing." Id. at

1450. This Court has recognized that a capital defendant's contributions to family ,community or society reflects on character and provides evidence of positive character traits to be weighed in mitigation. Rosers v. State, 511 So. 2d 526, 535 (Fla. 1987) citing Lockett v. Ohio, 438 U.S. 536, 604-5 (1978). Here, as in Rogers, Mr. Hill established consistent economic support to his family, evidence that went completed uncontroverted by the State.

In Lamb v. State, 532 So. 2d 1051 (Fla. 1988), this Court remanded the case for resentencing where it was not clear that the trial court had considered the evidence presented in mitigation. In addition to information about a drug problem:

> Lamb also introduced nonstatutory mitigating evidence that he would adjust well to prison life; that his family and friends feel he is a good prospect for rehabilitation; that before the offense he was friendly, helpful, and good with children and animals;

Lamb, supra, at 1054. This Court quoted from its opinion in Roaers v. State, 511 So. 2d 526, 534 (Fla. 1987), saying:

> The trial court's first task in reaching its conclusions is to consider whether the facts alleged in mitigation are supported by the evidence. After the factual finding has been made, the court then must determine whether the established facts are of a kind capable of mitigating the defendant's punishment, i.e., factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed. If such factors exist in the record at the time of sentencing, the sentencer must determine whether they are of sufficient weight to counterbalance the aggravating factors.

Lamb, supra, at 1054.

Since the court was "not certain whether the trial court properly considered all mitigating evidence," id. at 1054, the case was remanded for a new sentencing.

Here, the judge refused to recognize mitigating circumstances that were present. Under Penry v. Lynaugh's

requirement that a capital sentencer fully consider and give effect to the mitigation, 109 S. Ct. 2934 91989), as well as under Eddings, supra; Magwood, supra: and Lamb, supra, the sentencing court's refusal to consider this non-statutory mitigating circumstance which was established was error.

Mr. Hill's jury was also precluded from considering the mitigating evidence of his intellectual deficits and learning disabilities present since birth. Dr. Larson found that Mr. Hill suffered from a severe learning disability, and that he was of subnormal intelligence which affected him both mentally and emotionally.

Notwithstanding this evidence, a reasonable juror could have found that Mr. Hill's disabilities did not establish the only statutory mitigating circumstance instructed. Mr. Hill's jury was instructed, that mental or emotional disabilities could be considered as mitigating circumstances if the evidence demonstrated that:

> The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(R. *706).*

Although Dr. Larson did not believe that Mr. Hill's disorders **"substantially** impaired" his capacity for controlling his behavior or appreciating its wrongfulness at the time of the offense, a reasonable juror could have found the disorders were not so severe that they met the statutory criteria. Indeed Dr. Larson testified that Mr. Hill suffered from no major mental illness or psychosis. Nevertheless, a reasonable juror could still have found on the basis of the evidence that Mr. Hill did suffer from a learning disability and below average intelligence, that he suffered from this disorder much of his life, and that in conjunction with his cocaine intoxication, it plainly contributed to his thinking and behavior at the time of the crime. As previously noted the Florida law recognizes that a history of

drug and alcohol addiction can be considered as a nonstatutory mitigating factor. Hararave v. Duaaer, 832 F.2d 1528, 1534 (11th Cir. 1987); Foster v. Dugger, 518 So. 2d 901, 902 n.2 (Fla. 1987); Waterhouse v. Duaaer, 522 So. 2d 341, 344 (Fla. 1988).

In this overall context, a reasonable juror plainly could have believed that all of the evidence bearing upon Mr. Hill's mental and emotional condition of the time of the crime was to be considered only in relation to the one statutory mitigating circumstance which addressed this concern. Hararave v. Duaaer, 832 F.2d 1528, 1534 (11th Cir. 1987); Messer v. Florida, 834 F.2d 890, 894-5 (11th Cir. 1987); Cf. Mills v. Maryland, 108 S. Ct. 1860, 1866 (1988).

The reasonableness of this interpretation of the instructions is supported by the trial court's findings in support of Mr. Hill's sentence of death. As demonstrated by his findings, the trial judge considered the evidence of Mr. Hill's mental and emotional disabilities only in relation to the one statutory mitigating circumstance which addressed this subject. Certainly a reasonable juror could likewise assume that consideration of Mr. Hill's mental and emotional state were exclusively limited to this enumerated statutory mental mitigating factor and nowhere else. In this respect, the preclusive instruction in Hill's case which reasonable jurors could have interpreted in an "all or nothing" fashion thereby foreclosing further consideration of the effects of Mr. Hill's learning disability and below average intelligence as nonstatutory mitigation, operated in much the same fashion as the special circumstances in Penrv v. Lynaugh, 109 S. Ct. 2934 (1989). In Penrv the Court found that the use of the qualifier **"deliberately"** in Texas' functional equivalent of a mitigating factor, without further definition, was insufficient to allow the jury to give effect to Johnny Penry's mitigating evidence of mental retardation. The issues involved in several cases currently pending before the United States Supreme Court will have

import for the issue presented here. See Blystone v. Pennsylvania, 109 S. Ct. 1567 (1989); Boyle v. California, 109 S. Ct. 2447 (1989); Saffle v. Parks, 109 S. Ct. 1930 (1989).

In Penry the Court found that a rational juror could have concluded that Penry's mental retardation did not preclude him from acting deliberately, yet also conclude that Penry's mental retardation made him less culpable than a normal adult. In striking the sentence of death the Court noted:

> In this case, in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty, we conclude that the jury was not provided with a vehicle for expressing its "reasoned moral response" to that evidence in rendering its sentencing decision. Our reasoning in Lockett and Eddings thus compels a remand for resentencing so that we do not "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Lockett, 438 U.S., at 605, 93 S.Ct., at 879 (concurring opinion). "When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." Lockett, 438 U.S., at 605, 98 S.Ct., at 2965.

Here, reasonable jurors at Mr. Hill's trial, having found that his learning disability and below average intelligence was not **"substantial"** may still well have concluded that Mr. Hill's intellectual impairments reduced his moral culpability, but were left with no vehicle with which to give effect to that conclusion.

The trial court's findings thus establish not only that he failed to comply with Lockett, in his own sentencing deliberations by refusing to consider Mr. Hill's intoxication, intellectual impairments, domination by his co-defendant and status as a good provider, but also that a reasonable juror, despite knowing that she might consider nonstatutory mitigating circumstances could believe that the evidence of mental health and emotional disability was properly considered only in relation

to the statutory mitigating circumstance. Ultimately the Court's refusal to consider and the jury's reasonable mistake in failing to consider meant that neither fully considered the only evidence in Mr. Hill favor in deciding whether he should live or die.

In Penry, the Supreme Court held:

> [5,6] Underlying Lockett and Eddings is the principle that punishment should be directly related to the personal culpability of the criminal defendant. If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendnts who have no such excuse." California v. Brow, 479 U.S. 538, 545, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987)(concurring opinion). Moreover, Eddings makes clear that it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence. Hitchcock V. Dusser, 481 U.S. 393, 107 S. Ct. 1821, 95 L.Ed.2d 347 (1987). Only then can we be sure that the sentencer has treated the defendant as a "uniquely individual human **bein[g]**" and has made a reliable determination that death is the appropriate sentence. Woodson, 428 U.S., at 304, 305.

109 S. Ct. at 2947.

The jury was not allowed and the judge refused to comply with the dictates of Penry. These fundamental violations of eighth amendment jurisprudence demonstrate that relief is now appropriate.

This error undermined the reliability of the jury's sentencing determination and prevented the jury from assessing the full panoply of mitigation presented by Mr. Hill. For each of the reasons discussed above this Court should vacate Mr. Hill's unconstitutional sentence of death.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Hill's death sentence. This Court has not hesitated in the past to exercise

its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings, **see** Wilson v. Wainwrisht, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error.

Moreover, the claim is now properly brought pursuant to the Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. This issue involved a classic violation of longstanding principles of Florida law. **See** Lockett, Eddings, supra. It virtually "leaped out upon even a casual reading of transcript." Matire v. Wainwrisht, 811 F.2d 1430, 1438 (11th Cir. 1987). This clear claim of per se error required no elaborate presentation -- counsel only had to direct this Court to the issue. The court would have done the rest, based on long-settled Florida and federal constitutional standards.

No tactical decision can be ascribed to counsel's failure to urge the claim. **No** procedural bar precluded review of this issue. **See** Johnson v. Wainwright, supra, 498 So. 2d 938. However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Hill of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwrisht, supra, 474 So. 2d at 1164-65; Matire, supra. Accordingly, habeas relief must be accorded now.

CLAIM VI

DURING THE COURSE OF MR. HILL'S TRIAL THE COURT IMPROPERLY ASSERTED THAT SYMPATHY AND MERCY TOWARDS MR. HILL WAS AN IMPROPER CONSIDERATION, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The jury in Mr. Hill's trial was repeatedly admonished by the State Attorney, and instructed by the trial court, that feelings of mercy or sympathy could play no part in their deliberations as to Mr. Hill's ultimate fate. During the penalty phase closing argument, the prosecutor made it plain that

considerations of mercy and sympathy were to have no part in the proceedings:

> we spend so much time doing in voir dire in selecting you, was for . . . us to pick 12 of you from among the community who would best be able to impartially and objectively consider the facts and circumstances of this case, impartially and objectively without undue emphasize toward the emotional aspects that arise on both sides of the case; people that will make a decision not based upon feeling sorry for Steve Taylor and his family and will not make a decision based upon feeling sorry for the defendant or his family. But rather people that can coolly, coldly, and calculatedly, and objectively reach a decision in this case based upon the facts that have been proffered to you beyond a reasonable doubt,

(R. 664). The prosecutor went further:

> Now, I mentioned my oath, and I've mentioned the oaths of all the other people involved and yours as well. Now, in executing that oath, in living up to the requirements of that oath, <u>what I want you to do is keep in mind the perspective involved so far as your individual feelings about mercy</u>. No one likes the idea of taking another person's life, no one. And, therefore, when a person's life is at stake, you should not look at it as an individual responsibility that you hold. In taking an oath, contrary to it being a personal responsibility, you have simply sworn to consider all the circumstances and apply the law. It's a one-plus-one-step process. You don't have to personally involve yourself in that. All you have to do is be reasonable about the facts and circumstances that have been shown and then pursuant to your oath you are required to apply those to the law, and it's the law. We're a nation of laws, not men. that's why it's not your decision. It's the law's decision as to what happens and what should happen to Clarence Hill.
>
> Mr. Terrell mentioned something to you in opening statement about being true to yourselves. You have not taken an oath to be true to yourselves. It's assumed you'll be true to yourselves. But being true to yourself is not involved in the process of determining what the law says should happen to Clarence Hill. You should be true to your oath, and your oath is to follow the law. So in being true to yourselves, be true to your oath, be true and be sure than when you're making your individual vote in there, that you are following the law, being true to the law. Because it's the law that says what aggravating circumstances are and what mitigating circumstances are. And then

> whether one outweighs the other is your decision under the law, not outside the law. Not mercy for mercy's sake. Because that would go outside the scope of the law and exceed your oath.

(R. 668)(emphasis added).

Trial counsel objected to that argument and the Court sustained the objection but gave no cautionary instruction to correct the misstatement of the prosecutor. In fact, the Court later placed its imprimatur on the State Attorney's no mercy or sympathy admonishment to the jury by expressly instructing them prior to their deliberations that such considerations were precluded by law and would result in a miscarriage of justice. Significantly, the following instruction was the only one provided by the Court with respect to the role that mercy or sympathy could play in deliberations:

> This advisory recommendation must be decided only upon the evidence you have heard and the answers of the witnesses that are in the form of exhibits and evidence and these instructions. This recommendation must not be decided for or against anyone because you feel sorry for anyone or you're angry at anyone. Remember, the lawyers are not on trial. Your feelings about them should not influence your decision in this case. Feelings of prejudice, bias or sympathy are not legally reasonable doubts, and they should not be discussed by any of You in any way. Your recommendation must be based on your views of the evidence and on the law contained in these instructions.

(R. 710)(emphasis added). The jury was never informed that a different standard, one allowing for consideration of mercy or sympathy, was applicable at the penalty phase.

In Wilson v. Kemp, 777 F.2d 621, 624 (11th Cir. 1985), the court found that statements of prosecutors, which may mislead the jury into believing personal feelings of mercy must be cast aside, violate the federal constitution:

> The clear impact of the [prosecutor's statements] is that a sense of mercy should not dissuade one from punishing criminals to the maximum extent possible. This position on mercy is diametrically opposed to the Georgia death penalty statute, which directs that "the jury shall retire to determine

> whether any mitigating or aggravating circumstances . . . exist and whether to recommend mercy for the defendant." O.C.G.A. Section 17-10-2(c)(Michie 1982). Thus, as we held in Drake, the content of the [prosecutor's closing] is "fundamentally opposed to current death penalty jurisprudence." 762 F.2d at 1460. Indeed, the validity of mercy as a sentencing consideration is an implicit underpinning of many United States Supreme Court decisions in capital cases. See, e.g., Woodson v. North Carolina, 428 U.S. 280, 303, 96 S.Ct. 2978, 2990, 49 L.Ed.2d 944 (1976)(striking down North Carolina's mandatory death penalty statute for the reason, inter alia, that it failed "to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death"); Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978)(striking down Ohio's death penalty statute, which allowed consideration only of certain mitigating circumstances, on the grounds that the sentencer may not "be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death") (emphasis in original). The Supreme Court, in requiring individual consideration by capital juries and in requiring full play for mitigating circumstances, has demonstrated that mercy has its proper place in capital sentencing. The [prosecutor's closing] in strongly suggesting otherwise, misrepresents this important legal principle.

Wilson v. Kemp, 777 F.2d at 624. Requesting the sentencers to dispel any sympathy they may have had towards the defendant undermined the sentencers' ability to reliably weigh and evaluate mitigating evidence. The sentencers' role in the penalty phase is to evaluate the circumstances of the crime and the character of the offender before deciding whether death is an appropriate punishment. Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). An admonition to disregard the consideration of sympathy improperly suggests to the sentencer "that it must ignore the mitigating evidence about the [petitioner's] background and character." California v. Brown, 479 U.S. 538, 107 S. Ct. 837, 842 (1987)(O'Connor, J., concurring). The sympathy arising from the mitigation, after

all, is an aspect of the defendant's character that must be considered:

> The capital defendant's constitutional right to present and have the jury consider mitigating evidence during the capital phase of the trial is very broad. The Supreme Court has held that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978) (emphasis in original). See also Woodson v. North Carolina, 428 U.S. 280, 304 (1976).
>
> The sentencer must give "individualized" consideration to the mitigating circumstances surrounding the defendant and the crime, Brown, 479 U.S. at 541; Zant v. Stephens, 462 U.S. 862, 879 (1983); Eddings v. Oklahoma, 455 U.S. 104, 111-12 (1982); Lockett, 438 U.S. at 605, and may not be precluded from considering "any relevant mitigating evidence." Eddings, 455 U.S. at 114. See also Andrews v. Shulsen, 802 F.2d 1256, 1261 (10th Cir. 1986), cert. denied, ___ U.S. ___, 107 S. Ct. 1964, 95 L. Ed. 2d 536 (1987).
>
> Mitigating evidence about a defendant's background or character is not limited to evidence of guilt or innocence, nor does it necessarily go to the circumstances of the offense. Rather, it can include an individualized appeal for compassion, understanding, and mercy as the personality of the defendant is fleshed out and the jury is given an opportunity to understand, and to relate to, the defendant in normal human terms. A long line of Supreme court cases shows that a capital defendant has a constitutional right to make, and have the jury consider, just such an appeal.
>
> In Gress v. Georgia, 428 U.S. 153 (1976), the Court upheld the Georgia sentencing scheme which allowed jurors to consider mercy in deciding whether to impose the penalty of death. Id. at 203. The Court stated that "[n]othing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution." Id. at 199.
>
> In Woodson v. North Carolina, 428 U.S. 280, 304 (1976), the Court struck down mandatory death sentences as incompatible with the required individualized treatment of defendants. A plurality of the Court stated that mandatory death penalties treated defendants "not as uniquely individual human beings but as members of a faceless,

undifferentiated mass to be subjected to the blind infliction of the death penalty." Id. at 304. The Court held that "the fundamental respect for humanity underlying the Eight Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." Id. The Court explained that mitigating evidence is allowed during the sentencing phase of capital trial in order to provide for the consideration of "compassionate or mitigating factors stemming from the diverse frailties of humankind." Id.

In Eddings v. Oklahoma, 455 U.S. 104 (1982), the Court reviewed a sentencing judge's refusal to consider evidence of a defendant's troubled family background and emotional problems. In reversing the imposition of the death penalty, the Court held that "[j]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence." Id. at 113-14 (emphasis in original). The Court stated that although the system of capital punishment should be "consistent and principled," it must also be "humane and sensible to the uniqueness of the individual." Id. at 110.

In Caldwell v. Mississippi, 472 U.S. 320 (1985), the Court held that an attempt to shift sentencing responsibility from the jury to an appellate court was unconstitutional, in part, because the appellate court is ill equipped to consider "the mercy plea [which] is made directly to the jury." Id. at 330-31. The Court explained that appellate courts are unable to "confront and examine the individuality of the defendant" because "[w]hatever intangibles a jury might consider in its sentencing determination, few can be gleaned from an appellate record." Id.

In Skipper v. South Carolina, 476 U.S. 1 (1986), the trial court had precluded the defendant from introducing evidence of his good behavior while in prison awaiting trial. The Court held that the petitioner had a constitutional right to introduce the evidence, even though the evidence did not relate to his culpability for the crime. Id. at 4-5. The Court found that excluding the evidence "impeded the sentencing jury's ability to carry out its task of considering all relevant facets of the character and record of the individual offender." Id. at 8.

"Mercy," "humane" treatment, "compassion," and consideration of the unique "humanity" of the defendant, which have all be affirmed as relevant considerations in the penalty phase of a capital case, all inevitably involve sympathy or are sufficiently intertwined with sympathy that they cannot be parsed without significant risk of confusion in the mind of a reasonable juror. Webster's Third International Dictionary (Unabridged ed. 1966) describes "mercy" as "a compassion or forbearance shown to an offender," and "a kindly refraining from inflicting punishment or pain, often a refraining brought about by a genuinely felt compassion and sympathy." Id. at 1413 (emphasis added). The word "humane" similarly is defined as "marked by compassion, sympathy, or consideration for other human beings." Id. at 1100 (emphasis added). Webster's definition of "compassion" is a "deep feeling for and understanding of misery or suffering," and it specifically states that "sympathy" is a synonym of compassion. Id. at 462. Furthermore, it defines "compassionate" as "marked by . . . a ready inclination to pity, sympathy, or tenderness." Id (emphasis added).

Without placing an undue technical emphasis on definitions, it seems to us that sympathy is likely to be perceived by a reasonable juror as an essential or important ingredient of, if not a synonym for, "mercy," "humane" treatment, "compassion," and a full "individualized" consideration of the "humanity" of the defendant and his "character." . . . [I]f a juror is precluded from responding with sympathy to the defendant's mitigating evidence of his own unique humanness, then there is an unconstitutional danger that his counsel's plea for mercy and compassion will fall on deaf ears.

Here, the petitioner did offer mitigating evidence about his background and character. Petitioner's father testified that petitioner was a "happy-go-lucky guy" who was "friendly with everybody." The father also testified that, unlike other people in the neighborhood, petitioner avoided violence and fighting; that he (the father) was in the penitentiary during the petitioner's early childhood; that petitioner was the product of a broken home; and that petitioner only lived with him from about age 14 to 19. Although the father admitted that petitioner once was involved in an altercation at school, he suggested that it was a result of the difficulties of attending a school with forced bussing. Record, vol. V, at 667-82.

> Petitioner's counsel, in his closing argument, then relied on this testimony to argue that petitioner's youth, race, school experiences, and broken home were mitigating factors that the jury should consider in making its sentencing decision. In so doing, defense counsel appealed directly to the jury's sense of compassion, understanding, and sympathy, and asked the jury to show "kindness" to his client as a result of his background. Record, vol. V, at 708-723.
> . . . [There is] an impermissible risk that the jury did not fully consider these mitigating factors in making its sentencing decision.
>
> . . .
>
> As we discussed above, sympathy may be an important ingredient in understanding and appreciating mitigating evidence of a defendant's background and character.

Parks v. Brown, 860 F.2d at 1554-57. On April 25, 1989, the United States Supreme Court granted a writ of certiorari in order to review the decision in Parks. See Saffle v. Parks, Cr.L. (cert. granted April 25, 1988). A stay of execution in Mr. Hill's case would be more than appropriate pending the United States Supreme Court's establishing of standards for a determination of this claim.

The United States Supreme Court recently held in a case declared to be retroactive on its face that a capital sentencer jury must make a "reasoned moral response to the defendant's background, character, and crime." Penry v. Lynaugh, 109 S. Ct. 2934, 2947 (1989). It is improper to create "the risk of an unguided emotional response." 109 S. Ct. at 2951. A capital defendant should not be executed where the process runs the "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Penry, 109 S. Ct. at 2952. There can be no question that Penry must be applied retroactively. The Court there concluded that, Jurek v. Texas, 428 U.S. 262 (1976), notwithstanding, the Texas death penalty scheme previously found constitutional created the "risk that the death [would] be imposed in spite of factors which [] call[ed] for a less severe penalty." 109 S. Ct. at 2952. Thus Mr.

Penry's claim was cognizable in post-conviction proceedings. John Penry sought, and was granted relief, in part on the identical claim now pressed by Mr. Hill. Penry alleged that under Texas' functional equivalent of aggravating factors his jury was precluded from considering a discretionary grant of mercy based on the existence of mitigating factors. Id., 109 S. Ct. at 2942. The Court found that, as applied to Penry, the failure to so instruct was not a legitimate attempt by Texas to avoid unbridled discretion, 109 S. Ct. at 2951, but rather, an impermissible attempt to restrain the sentencer's discretion to decline to impose a death sentence. 109 S. Ct. at 2951. In Mr. Hill's case, the sentencer was expressly told that Florida law precluded considerations of sympathy and mercy. The net result is the same: the unacceptable risk that the jury's recommendation of death was the product of an unguided emotional response and therefore unreliable and inappropriate in Mr. Hill's case. This error undermined the reliability of the jury's sentencing verdict.

Given the State Attorney's admonition that Florida law precluded mercy and sympathy as mitigating factors upon which a sentence of less than death could be returned, reasonable jurors could have believed that to be true, given the court's subsequent instructions prior to penalty phase deliberations (R. 710), cf. Booth v. Maryland, 107 S. Ct. 2529 (1987); Penry v. Lynaugh, 109 S. Ct. 2934 (1989), similarly removing the sentencing recommendation from the realm of a reasoned and moral response. Counsel was prejudicially deficient in not objecting to the Court's inappropriate and unconstitutional instruction.

In light of the prosecutor's argument and the Court's subsequent instructions, Mr. Hill's jurors could well have reasonably believed that there was no vehicle for expressing the view that [Mr. Hill] did not deserve to be sentenced to death based upon mercy or sympathy. Id., 109 S. Ct. at 2950.

The error here undermined the reliability of the sentencing determination and prevented the jury from assessing mitigation. The prosecutor's argument and the Court's instruction impeded a "reasoned moral response" which by definition includes sympathy. Penry v. Lynaugh, 109 S. Ct. 2934, 2949 (1989). This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Hill's death sentence.

The retroactive opinion in Penry requires that this issue to be addressed and fully assessed at this juncture. The eighth amendment cannot tolerate the imposition of a sentence of death where there exists a "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Penry, 109 S. Ct. at 2952. Accordingly, relief should be accorded.

This error undermined the reliability of the jury's sentencing determination and prevented the jury from assessing the full panoply of mitigation presented by Mr. Hill. For each of the reasons discussed above the Court should vacate Mr. Hill's unconstitutional sentence of death.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Hill's death sentence. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings, **see** Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error.

Moreover, the claim is now properly brought pursuant to the Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. This issue involved a classic violation of longstanding principles of Florida law. **See** Lockett, Eddings, supra. It virtually "leaped out upon even a casual reading of transcript." Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). This

clear claim of per se error required no elaborate presentation -- counsel only had to direct this Court to the issue. The court would have done the rest, based on long-settled Florida and federal constitutional standards.

No tactical decision can be ascribed to counsel's failure to urge the claim. No procedural bar precluded review of this issue. See Johnson v. Wainwright, supra, 498 So. 2d 938. However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Hill of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwrisht, supra, 474 So. 2d at 1164-65; Matire, supra. Accordingly, habeas relief must be accorded now.

CLAIM VII

MR. HILL'S JURY RECEIVED IMPROPER INSTRUCTIONS RESULTING IN FUNDAMENTALLY UNFAIR CONVICTIONS AND SENTENCES IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS

Notwithstanding the fact that only one individual was killed, Mr. Hill's jury was instructed and returned verdicts of guilt on two counts of murder (R. 1267). The jury found Mr. Hill guilty of premeditated murder and felony murder robbery.

Under Florida law, Mr. Hill could only be convicted and sentenced to one count of murder. Muszynski v. State, 392 So. 2d 63, 64 (Fla. 5th D.C.A. 1981).

AS it is now impossible to determine which count of murder the jury actually convicted Mr. Hill on, all these murder convictions and their respective sentences must now be vacated and the case remanded for a new trial with a properly instructed jury. It is impossible to determine how the jury understood these instructions; the jury might have believed that the elements of one charge could satisfy the elements of a different charge. Strombers v. California, 283 U.S. 359 (1931). Muszynski, supra, holds that this error is fundamental.

The ambiguity in the double convictions of murder when there was only one victim became a central issue in the resentencing hearing. The resentencing proceeding was held on March 24-27, 1986, before Circuit Judge William S. Rowley and a jury. Prior to the penalty trial, defense counsel filed a motion in limine seeking to prevent the newly impaneled jury from being informed of the original jury's finding of premeditation (R. 820). The motion was renewed immediately after the jury was selected and just before they were sworn (R. 259-61). The trial court ruled, over defense objection, that the prior jury's finding of premeditation would be disclosed to the new penalty jury (R. 260-261). Accordingly, the trial court began his preliminary instructions to the jury by stating that appellant "has been found guilty of first degree premeditated murder and felony murder" (R. 262). The State's first witness, William Spence, a deputy clerk of the circuit court, referring to the verdict form from the original trial, testified over objection that the jury found appellant "[g]uilty of both first degree premeditated murder and a felony murder" (R. 289). After presentation of the evidence, closing arguments, and jury instructions, the jury returned a recommendation that appellant be sentenced to death (R. 714, 834).

The sentencing hearing was held on April 2, 1986. Prior to the imposition of sentence, defense counsel once again argued, as grounds why sentence should not be imposed, that the jury should not have been informed of the prior jury's finding of premeditation (R. 844-47). The trial court again overruled the objection (R. 845-47). The Court then, following the jury's recommendation, re-imposed the death penalty to make the resulting death sentence a denial of due process. See Darden v. Wainwright, supra, 91 L.Ed.2d at 157. Appellant's death sentence, imposed after such a proceeding, cannot

constitutionally be carried out. See also Caldwell v. Mississippi, supra; Wilson v. Kemp, supra; Drake v. Kemp, supra.

By disclosing to the newly impaneled penalty jury the original jury's finding that the homicide was premeditated, the trial court in effect instructed the jury to disregard appellant's testimony (**see** R. 614-17) that he did **not** intend to kill Officer Taylor or anyone else -- that he intended only to disarm the officers and free Cliff Jackson -- and that he began firing when Officer Bailly wheeled around and fired at him. The original jury evidently did not believe appellant's testimony, and found the homicide to have been premeditated. But the original jury was so tainted by prejudicial pre-trial publicity and prosecutorial misconduct as to deprive appellant of his constitutional right to a fair and impartial jury in the proceeding in which that finding of premeditation was made. Consequently, the instruction to the new jury that appellant had already been found guilty of premeditated murder as well as felony murder, and that the [new] jury was not to concern itself with the question of guilt (R. 262), was tantamount to a tranfusion of prejudice from the tainted original jury. The new jury should have been permitted to determine the question of premeditation, and to assess appellant's credibility, independently. The trial court's preliminary instruction to the jury, coupled with the testimony of court clerk William Spence which followed immediately thereafter (R. 289), deprived appellant of his constitutional right to have these critical issues of fact resolved by an impartial jury.

The guilt phase in this case clearly involved a substantial factual dispute as to whether or not the killing was premeditated. This, in turn, is a critically relevant issue with regard to penalty. If the penalty jury had believed appellant's testimony that he never intended to kill anyone, it would not have been required to recommend life, but it certainly would have

been more favorably disposed toward a life recommendation for an unintentional killing than for an intentional one. By informing the jury, through an instruction and through testimony, that the finding of premeditation had already been made, and by further instructing them that they were not to concern themselves with that question, the trial court prevented this critical issue of fact and credibility from being resolved by an impartial and fairly selected jury, and resurrected the harmful effect of the prejudicial publicity and prosecutorial misconduct which destroyed the impartiality of the original jury.

Such fundamentally unfair proceedings contravene the most basic principles of double jeopardy and habeas corpus relief is now proper; a new trial must be ordered.

This error undermined the reliability of the jury's sentencing determination and prevented the jury from assessing the full panoply of mitigation presented by Mr. Hill. For each of the reasons discussed above the Court should vacate Mr. Hill's unconstitutional sentence of death.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Hill's death sentence. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings, **see** Wilson V. Wainwright, **474** So. 2d **1163** (Fla. **1985),** and it should now correct this error.

Moreover, the claim is now properly brought pursuant to the Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. This issue involved a classic violation of longstanding principles of Florida law. It virtually "leaped out upon even a casual reading of transcript." Matire v. Wainwrisht, 811 F.2d **1430, 1438** (11th Cir. **1987).** This clear claim of per se error required no elaborate presentation -- counsel **only** had to direct

this Court to the issue. The court would have done the rest, based on long-settled Florida and federal constitutional standards.

No tactical decision can be ascribed to counsel's failure to urge the claim. No procedural bar precluded review of this issue. See Johnson v. Wainwright, supra, 498 So. 2d 938. However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Hill of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra. Accordingly, habeas relief must be accorded now.

CLAIM VIII

MR. HILL'S SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS SHIFTED THE BURDEN TO MR. HILL TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE SENTENCING JUDGE HIMSELF EMPLOYED THIS IMPROPER STANDARD IN SENTENCING MR. HILL TO DEATH.

A capital sentencing jury must be:

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

State v. Dixon, 283 So. 2d 1 (Fla. 1973)(emphasis added). This straightforward standard was never applied at the penalty phase of Mr. Hill's capital proceedings. To the contrary, the burden was shifted to Mr. Hill on the question of whether he should live or die. In Hamblen v. Dusser, 546 So. 2d 1039 (Fla. 1989), a capital post-conviction action, this Court addressed the question of whether the standard employed shifted to the defendant the burden on the question of whether he should live or die. The Hamblen opinion reflects that claims such as the instant should be addressed on a case-by-case basis in capital post-conviction

actions. Mr. Hill herein urges that the Court assess this significant issue in his case and, for the reasons set forth below, that the Court grant him the relief to which he can show his entitlement.

Shifting the burden to the defendant to establish that mitigating circumstances outweigh aggravating circumstances conflicts with the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), and Dixon, for such instructions unconstitutionally shift to the defendant the burden with regard to the ultimate question of whether he should live or die. In so instructing a capital sentencing jury, a court injects misleading and irrelevant factors into the sentencing determination, thus violating Caldwell v. Mississippi, 472 U.S. 320 (1985), Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), and Maynard v. Cartwrisht, 108 S. Ct. 1853 (1988). Mr. Hill's jury was unconstitutionally instructed, as the record makes abundantly clear (R. 706). The court then employed this unconstitutional standard in imposing death (R. 842). This claim is now properly before this Court, and relief is proper.

At the penalty phase of trial, judicial instructions informed Mr. Hill's jury that death was the appropriate sentence unless "mitigating circumstances exist that outweigh the aggravating circumstances" (R. 706). The trial judge then imposed death because "there has not been established sufficient mitigating factors to outweigh the aggravating factors" (R. 842). Such a standard, which shifts to the defendant the burden of proving that life is the appropriate sentence, violates the eighth and fourteenth amendments, as the Court of Appeals for the Ninth Circuit recently held in Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(in banc). This claim involves a "perversion" of the jury's deliberations concerning the ultimate question of whether Mr. Hill should live or die. See Hill v. Murray, 106 S. Ct. 2661, 2668 (1986). No bars apply under such circumstances.

Id. A writ of certiorari has been granted to resolve the split of authority between Adamson and the Arizona Supreme Court. Walton v. Arizona, 46 Cr. L. 3014 (October 2, 1989).

The jury instructions and the standard relied upon by the judge here employed a presumption of death which shifted to Mr. Hill the burden of proving that life was the appropriate sentence. As a result, Mr. Hill's capital sentencing proceeding was rendered fundamentally unfair and unreliable.

In Adamson, 865 F.2d at 1041-44, the Ninth Circuit held that because the Arizona death penalty statute "imposes a presumption of death on the defendant," the statute deprives a capital defendant of his eighth amendment rights to an individualized and reliable sentencing determination. What occurred in Adamson is precisely what occurred in Mr. Hill's case. See also Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988). The instructions, and the standard upon which the sentencing court based its own determination, violated the eighth and fourteenth amendments. The burden of proof was shifted to Mr. Hill on the central sentencing issue of whether he should live or die. Moreover, the application of this unconstitutional standard at the sentencing phase violated Mr. Hill's rights to a fundamentally fair and reliable capital sentencing determination, i.e., one which is not infected by arbitrary, misleading and/or capricious factors. See Adamson, supra; Jackson, supra. The unconstitutional presumption inhibited the jury's ability to "fully" assess mitigation, in violation of Penry v. Lynaugh, 109 S. Ct. 2935 (1989), a decision which was declared, on its face, to apply retroactively to cases on collateral review.

The focus of a jury instruction claim is "what a reasonable juror could have understood the charge as meaning." Francis v. Franklin, 471 U.S. 307 (1985); see also Sandstrom v. Montana, 442 U.S. 510 (1979). Here, the jury was in essence told that death was presumed appropriate once aggravating circumstances were

established, unless Mr. Hill proved that mitigating circumstances existed which outweighed the aggravating circumstances. A reasonable juror could have well understood that mitigating circumstances were factors calling for a life sentence, that aggravating and mitigating circumstances had differing burdens of proof, and that life was a possible penalty, while at the same time understanding, based on the instructions, that Mr. Hill had the ultimate burden to prove that life was appropriate. This violates the eighth amendment.

This error cannot be deemed harmless. In Mills v. Maryland, 108 S. Ct. 1860 (1988), the court concluded that, in the capital sentencing context, the Constitution requires resentencing unless a reviewing court can rule out the possibility that the jury's verdict rested on an improper ground. Id. 108 S. Ct. at 1866-67. Under Hitchcock, Florida juries must be instructed in accord with the eighth amendment principles. Hitchcock constituted a change in law in this regard. The constitutionally mandated standard demonstrates that relief is warranted in Mr. Hill's case.

The United States Supreme Court recently granted a writ of certiorari in Blystone V. Pennsylvania, 109 S. Ct. 1567 (1989), to review a very similar claim. The question presented in Blystone has obvious ramifications here. Under Pennsylvania law, the jury is instructed that where it finds an aggravating circumstance present and no mitigation is presented, it "must" impose death. However, if mitigation is found then the jury must decide whether the aggravating circumstances outweigh the mitigating. In Pennsylvania, the legislature chose to place upon a capital defendant a burden of production as to evidence of mitigation and a burden of persuasion as to whether mitigation exists. However, once evidence of a mitigating circumstance is found, then the State bears the burden of persuasion as to whether the aggravating circumstances outweigh the mitigating such that a death sentence should be returned.

Under the instructions and standard employed in Mr. Hill's case, once one of the statutory aggravating circumstances was found, by definition sufficient aggravation existed to impose death. The jury was then directed to consider whether mitigation had been presented which outweished the aggravation. Thus, under the standard employed in Mr. Hill's case, the finding of an aggravating circumstance operated to impose upon the defendant the burden of production and the burden of persuasion of the existence of mitigation, **and** the burden of persuasion as to whether the mitigation outweighs the aggravation. Where as here, the prosecution contends that the jury finding of guilt establishes the **"in** the course of a felony" aggravating circumstance, a presumption of death automatically arises. Certainly, the standard employed here was more restrictive of the jury's ability to conduct an individualized sentencing than the Pennsylvania statute at issue in Blvstone. See also Bovde v. California, **109** S. Ct. **2447** (Cert. sranted June 5, **1989).**

The effects feared in Adamson and Mills are precisely the effects resulting from the burden-shifting instruction given in Mr. Hill's case. In being instructed that mitigating circumstances must outweigh aggravating circumstances before it could recommend life, the jury was effectively told that once aggravating circumstances were established, it need not consider mitigating circumstances unless those mitigating circumstances outweighed the aggravating circumstances. This jury was thus constrained in its consideration of mitigating evidence, Hitchcock, **107** S. Ct. **1821 (1987),** and from evaluating the "totality of the circumstances," Dixon v. State, **283** So. 2d **1,** 10 (Fla. 1973), in determining the appropriate penalty. The jury was not allowed to make a "reasoned moral response" to the issues at Mr. Hill's sentencing or to **"fully"** consider mitigation, Penrv **v.** Lynaugh, **109** S. Ct. **2934, 2951 (1989).** There is a "substantial possibility" that this understanding of the jury

instructions resulted in a death recommendation despite factors calling for life. Mills, supra. The death sentence in this case is in direct conflict with Adamson, Mills, and Penry, supra. This error "perverted" the jury's deliberations concerning the ultimate question of whether Mr. Hill should live or die. Hill v. Murray, 106 S. Ct. at 2668.

Under Hitchcock and its progeny, no bars apply, because Hitchcock, decided after Mr. Hill's trial, worked a change in law. Relief is thereby appropriate, and Mr. Hill's sentence of death must be vacated.

This error undermined the reliability of the jury's sentencing determination and prevented the jury from assessing the full panoply of mitigation presented by Mr. Hill. For each of the reasons discussed above the Court should vacate Mr. Hill's unconstitutional sentence of death.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Hill's death sentence. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings, see Wilson V. Wainwrisht, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error.

Moreover, the claim is now properly brought pursuant to the Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. This issue involved a classic violation of longstanding principles of Florida law. See Lockett, Eddings, supra. It virtually "leaped out upon even a casual reading of transcript." Matire V. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). This clear claim of per se error required no elaborate presentation -- counsel only had to direct this Court to the issue. The court would have done the rest, based on long-settled Florida and federal constitutional standards.

No tactical decision can be ascribed to counsel's failure to urge the claim. No procedural bar precluded review of this issue. See Johnson v. Wainwriaht, supra, 498 So. 2d 938. However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Hill of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra. Accordingly, habeas relief must be accorded now.

CLAIM IX

MR. HILL WAS DENIED HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS BECAUSE THE JURY WAS NOT PROPERLY INSTRUCTED CONCERNING THE IMPROPER DOUBLING OF AGGRAVATING FACTORS.

This case involved unconstitutional doubling of aggravating circumstances (effecting an escape/hindering law enforcement). This issue involved per se reversible error, as the Florida Supreme Court's precedents make irrefutably clear. See Provence v. State, 337 So. 2d 783, 786 (Fla. 1976); Clark v. State, 379 So. 2d 97, 104 (Fla. 1980); Welty v. State, 402 So. 2d 1139 (Fla. 1981). Since mitigation was before the sentencing court, this error would have mandated reversal, see Elledge v. State, 346 So. 2d 998 (Fla. 1977), particularly because this Court already struck another aggravating circumstance (cold, calculated, and premeditated). See, Claims III and IV.

The United States Supreme Court recently held in a case declared to be retroactive on its face that a capital sentencer must make a "reasoned moral response to the defendant's background, character, and crime.@@ Penrv v. Lynaugh, 109 S. Ct. 2934 (1989). It is improper to create "the risk of an unguided emotional response." Id. A capital defendant should not be executed where the process runs the "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.'@ Id. There can be no question that Penrv must be

applied retroactively. The Court there concluded that, Jurek v. Texas, 428 U.S. 262 (1976), notwithstanding, the Texas death penalty scheme previously found constitutional created the "risk that the death [would] be imposed in spite of factors which [] call[ed] for a less severe penalty." Penry, 109 S. Ct. 2934. Thus Mr. Penry's claim was cognizable in post-conviction proceedings. Similarly here the decision in Penry requires the examination of the procedure in Mr. Hill's case where excess and inappropriate aggravating circumstances invoked "an unguided emotional response."

This Court has consistently reversed the defendant's sentence of death in cases in which aggravating circumstances were **"doubled".** In Mr. Hill's case the jury was improperly instructed that they could consider the two aggravating circumstances of "effecting escape" and "hindering law enforcement." Mr. Hill's counsel objected to the court instructing the jury on these two aggravating factors because they involved unconstitutional doubling (R. 659). The court overruled the objection stating that they both would apply in this case (R. 659). Thus, the jury was instructed that they could consider both of these aggravating circumstances in determining the appropriate sentence (R. 705).

The jury was allowed to consider two aggravating circumstances which were supported by "the same essential features" of Mr. Hill's crimes and which had been held to amount to improper doubling in a similar situation. Kennedy v. State, 455 So. 2d 351, 354 (Fla. 1984). In fact, the trial court later acknowledged its error and found that:

> The Court is of the opinion that this circumstance (hindering law enforcement) should not be applied as an aggravating circumstance because it in many respects is a duplication of circumstance #4 (effecting escape).

(R. 838).

The trial court's analysis of these two aggravating factors within the context of the facts of Mr. Hill's case (R. 837-38),

establish that "they should be treated as a single aggravating circumstance." Kennedy v. State, 455 So. 2d 351, 354 (Fla. 1984). The trial court erred in instructing the jury that they could consider the aggravating circumstances of **"effecting escape"** and "hindering law enforcement" as two separate aggravating circumstances.

This case, however, involved and involves the unconstitutionally classic types of doubling of aggravating circumstances. It involves fundamental error, and this Court should now correct the clear errors that were not corrected on direct appeal. Moreover, under Penry the presentation of these extra aggravating circumstances guaranteed an "unguided emotional response" by the sentencing judge who also did not consider nonstatutory mitigation, and thus violated the eighth amendment. There is in fact a likelihood in this case that the death sentence was **"imposed** in spite of factors which [] call[ed] for a less severe **penalty."** Penry, 109 S. Ct. 2934. Relief is now proper.

In Florida, a resentencing is required when aggravating circumstances are invalidated. **See**, e.g., Schafer v. State, 537 So. 2d 988 (Fla. 1989)(remanded for resentencing where three of five aggravating circumstances stricken and no mitigating circumstances identified); Nibert v. State, 508 So. 2d 1 (Fla. 1987)(remanded for resentencing where one of two aggravating circumstances stricken and no mitigating circumstances found); cf. Rembert v. State, 445 So. 2d 337 (Fla. 1984)(directing imposition of life sentence where one of two aggravating circumstances stricken and no mitigating circumstances found). The striking of this aggravating factor on direct appeal certainly requires resentencing under Florida law. Under eighth amendment law it is the sentencer who must make the "reasoned moral response." Penry v. Lynaugh, 109 S. Ct. 2934 (1989). The United States Supreme Court has granted certiorari in a case to determine whether an appellate court has the power to usurp the

sentencer's discretion and declare improper consideration of an aggravating circumstance harmless. Clemons v. Mississippi, 45 Cr. L. 4082.

Under Florida law, aggravating circumstances "must be proven beyond a reasonable doubt." Hamilton v. State, 547 So. 2d 630, (Fla. 1989). In fact, Mr. Hill's jury was so instructed. Florida law also establishes that limiting constructions of the aggravating circumstances are "elements" of the particular aggravating circumstance. "[T]he State must prove [the] element[s] beyond a reasonable doubt." Banda v. State, 536 So. 2d 221, 224 (Fla. 1988). Unfortunately, Mr. Hill's jury received no instructions indicating that they could not use the same essential facts to support two aggravating circumstances. See Kennedy v. State, 455 So. 2d 351, 354 (Fla. 1984). Its discretion was not channeled and limited in conformity with Cartwright.

Florida law requires the jury to weigh the aggravating circumstances against mitigating evidence. In fact, Mr. Hill's jury was so instructed. This Court has produced considerable case law regarding the import of instructional error to a jury regarding the mitigation it may consider and balance against the aggravating circumstances. In Mikenas v. Duaaer, 519 So. 2d 601 (Fla. 1988), the court ordered a new sentencing because the jury had not received an instruction explaining that mitigation was not limited to the statutory mitigating factors. The error was cognizable in post-conviction proceedings even though there had been no objection at trial, the issue had not been raised on direct appeal, and at a resentencing to the judge alone, the judge had known that mitigation was not limited to the statutory mitigating factors. It was cognizable because this Court determined that Hitchcock required the sentencing jury in Florida to receive accurate information which channeled and limited its sentencing discretion, but allowed the jury to give full

consideration to the defendant's character and background. Because of the weight attached to the jury's sentencing recommendation in Florida, instructional error is not harmless unless the reviewing court can "conclude beyond a reasonable doubt that an override would have been authorized." Mikenas, 519 So. 2d 601. In other words, there was sufficient mitigation in the record for the jury to have a reasonable basis for recommending life and thus preclude a jury override.

Similar conclusions have been reached in other cases where the jury was erroneously instructed. Meeks v. Dugger, ___ So. 2d 14 F.L.W. 313, 314 (Fla. June 22, 1989)("Had the jury recommended a life sentence, the trial court may have been required to conform its sentencing decision to Tedder v. State, 322 So. 2d 908 (Fla. 1975), which requires that, if there is a reasonable basis for the recommendation, the trial court is bound by it."); Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1989)("It is of no significance that the trial judge stated that he would have imposed the death penalty in any event. The proper standard is whether a jury recommending life imprisonment would have a reasonable basis for the recommendation."); Floyd v. State, 497 So. 2d 1211, 1216 (Fla. 1986)("In view of the inadequate and confusing jury instructions, we believe Floyd was denied his right to an advisory opinion. We cannot sanction a practice which gives no guidance to the jury for considering circumstances which might mitigate against death."). In Mr. Hill's case the jury was improperly instructed that it could consider the aggravating circumstances of "effecting escape" and "hindering law enforcement" as two separate aggravating circumstances against which the evidence in mitigation was balanced. In Florida, the jury's pivotal role in the capital process requires its sentencing discretion to be channeled and limited. The failure to provide Mr. Hill's sentencing jury the proper

"channeling and limiting" instructions violated the eighth amendment principle discussed in ~~Mavnard v. Cartwriaht~~.

In Mr. Hill's case, this Court also struck the aggravating circumstance of "cold, calculated and premeditated." In light of this, the error cannot be characterized as harmless. See ~~Elledge~~ v. State, 346 So. 2d 998 (Fla. 1977). The trial court found that these two aggravating factors are merged, and thus that the jury had been improperly instructed. Such an error requires resentencing. The **"harm"** before the jury is plain -- a jury's capital sentencing decision, after all, is not a mechanical counting of aggravators and involves a great deal more than that. The error denied Mr. Hill an individualized and reliable capital sentencing determination. Knight v. Dugger, 863 F.2d 705, 710 (11th Cir. 1989). The United States Supreme Court has granted certiorari in a case to determine whether an appellate court has the power to usurp the sentencer's discretion and declare improper consideration of an aggravating circumstance harmless. Clemons v. Mississippi, 109 S. Ct. 3184 (1989). In this case, the jury was instructed that it could consider two aggravating factors which were later declared improper.

It is, after all, "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty," Lockett v. Ohio, 438 U.S. 586, 605 (1978), that **"require[s]** us to remove any legitimate basis for finding ambiguity concerning the factors actually **considered."** Eddings v. Oklahoma, 455 U.S. 104, 119 (1982) (O'Connor, J., concurring). ~~See also~~ Godfrey v. Georgia, 446 U.S. 420 (1980).

It is axiomatic that a death sentence, to be valid, must be soundly based on correct and applicable law. This surely cannot occur when the sentencing jury can inflate the number of aggravating circumstances and produce **"an** unguided emotional response." Penry, 45 Cr. L. at 3195. The result here is unreliable. The jury's decision was skewed by instructions on

duplicitous aggravating factors and another wholly inappropriate aggravating factor. Had the jury been properly instructed, the result here could well have been different -- there was mitigation in this case. See Hall v. State, 541 So. 2d 1125 (Fla. 1989).

What occurred was fundamental error. The fundamental unfairness in this instance rendered Mr. Hill's capital sentencing proceeding unreliable. Rather than channelling sentencing discretion to avoid arbitrary and capricious results, and narrowing the class of persons eligible for death, Zant v. Stephens, 462 U.S. at 877, the duplication or **"doubling"** worked just the opposite result. Mr. Hill's sentence of death violates Penry and the eighth amendment. Mr. Hill is entitled to habeas corpus relief under the eighth and fourteenth amendments.

This error undermined the reliability of the jury's sentencing determination and prevented the jury from assessing the full panoply of mitigation presented by Mr. Hill. For each of the reasons discussed above habeas corpus relief is appropriate.

Moreover, the claim is now properly brought pursuant to the Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. This issue involved a classic violation of longstanding principles of Florida law. **See** Lockett, Eddings, supra. It virtually "leaped out upon even a casual reading of transcript." Matire V. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). This clear claim of per se error required no elaborate presentation -- counsel only had to direct this Court to the issue. The court would have done the rest, based on long-settled Florida and federal constitutional standards.

No tactical decision can be ascribed to counsel's failure to urge the claim. **No** procedural bar precluded review of this issue. **See** Johnson V. Wainwright, supra, 498 So. 2d 938. However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Hill of the

appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra. Accordingly, habeas relief must be accorded now.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing has been furnished by U.S. MAIL to The Honorable Robert A. Butterworth, Attorney General, The Capital, Tallahassee, FL 32399, this 11TH day of December, 1989.

_____
Attorney