IN THE SUPREME COURT OF FLORIDA

No. 71,678

EDWARD D. KENNEDY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

APPEAL FROM THE FOURTH JUDICIAL CIRCUIT COURT IN AND FOR DUVAL COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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Capital Collateral Representative

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SUMMARY OF ARGUMENT

I. Mr. Kennedy's Rule 3.850 Motion plead non-record facts in support of compelling constitutional claims regarding his conviction and sentence of death. His motion and supporting materials did not conclusively show that he was entitled to no relief, and the trial court's summary denial of his motion without an evidentiary hearing was therefore erroneous.

II. Mr. Kennedy was indicted by a Duval County Grand Jury presided over by a foreman selected via a system which chooses forepersons in a racially discriminatory manner. Mr. Kennedy's Rule 3.850 Motion and supporting materials demonstrated that the Duval County Grand Jury system historically operated in a fundamentally unfair and unreliable in violation of the fifth, sixth, eighth, and fourteenth amendments. He was and is entitled to an evidentiary hearing at which he would prove his entitlement to relief.

III. Mr. Kennedy was sentenced to death by a jury which was consistently and repeatedly misinformed and mislead regarding their true role in the sentencing process. Mr. Kennedy's sentencing jury has repeatedly informed through prosecutorial argument and judicial instruction that the judge bore the 'sole'

and 'final' responsibility for sentencing, and that the judge was in no way bound to follow their recommendation regarding punishment. Because such misleading information and instructions diminished the jury's sense of responsibility for the awesome task of determining whether Mr. Kennedy should live or die, his sentence of death violates the eighth amendment precepts of Caldwell v. Mississippi, 105 S.Ct. 2633 (1985).

IV. Pervasively improper prosecutorial argument at both the sentencing and guilt-innocence phases of Mr. Kennedy's capital trial rendered his conviction and sentence of death fundamentally unfair and unreliable. The prosecutor repeatedly commented on Mr. Kennedy's exercise of his right to remain silent, introduced irrelevant and improper considerations into the penalty phase, argued the "worth" of the victims and contrasted their "worth" with that of Mr. Kennedy interjected his personal opinions, and argued improper non-statutory aggravating circumstances. This persistent improper argument occurred during and infected both the guilt-innocence and penalty phases of the trial, and rendered Mr. Kennedy's conviction and sentence of death racially and sexually discriminatory manner, that it so operated in his case, and that his conviction therefore violated the fourteenth amendment.

V. Mr. Kennedy did not receive the effective assistance of counsel at either the guilt-innocence of the punishment phase of his capital trial. Mr. Kennedy's Rule 3.850 Motion pled extensive non-record facts with regard to trial counsel's unreasonable errors and omissions. Hsi well-supported allegations demonstrated that, had counsel acted reasonably, there is a reasonable probability that the result in this case would have been different. He was entitled to an evidentiary hearing at which he would prove his allegations, and the trial court's summary denial of his claim without such a hearing was erroneous. See e.g., O'Callaghan v. State, 461 So.2d 1354 (Fla. 1984); Squires v. State, 512 So.2d 138 (Fla. 1987).

VI. The State's sole reliance on voter registration lists in the selection of petit jurors deprived Mr. Kennedy of his sixth, eighth, and fourteenth amendment right to be tried by a ;jury selected from a representative cross-section of the community. The selection process also violated the fourteenth amendment because Mr. Kennedy (a black capital defendant) was tried by a state-court system which substantially excluded blacks from service on petit juries. This claim involves per se prejudicial sixth amendment, equal protection, and due process

error. The claim should be heard and an evidentiary hearing should be conducted.

VII. Mr. Kennedy was denied his sixth, eighth, and fourteenth amendment rights: his capital trial and sentencing proceedings were rendered fundamentally unreliable and unfair by the ubiquitous presence of uniformed troopers, press, television cameras, and other hostile entities whose presence served to overwhelm Mr. Kennedy's jurors and an evidentiary hearing is needed on this fundamental constitutional claim.

VIII. Florida law entitled Mr. Kennedy to a jury instruction on self-defense under the circumstances of his case. Not only did the court erroneously refuse to instruct the jury with regard to self defense, but the prosecutor argued to them that the judge would instruct them that they could not consider it. By refusing to instruct the jury with regard to Mr. Kennedy's only viable defense to the charges, the Court relieved the State of its burden of proof of all elements of the offense charged and effectively directed a verdict in favor of the State. Mr. Kennedy's conviction and sentence of death thus violate the sixth, eighth, and fourteenth amendments.

IX. Mr. Kennedy was denied his sixth, eighth, and fourteenth amendment rights because of trial counsel's prejudicially ineffective omission of failing to use a critical item of evidence which would have established his client's defense. Mr. Kennedy is entitled to an evidentiary hearing and, thereafter, post-conviction relief.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Mr. Kennedy was convicted for the murders of Floyd H. Cone, Jr., and Robert P. McDermon on December 4, 1981 (Tt. 1066). The penalty proceedings commenced early the following morning. Defense counsel presented two witnesses during the penalty phase, and Mr. Kennedy testified on his own behalf. The testimony of the two witnesses, including the State's cross examination, encompassed a total of ten pages (Tt. 1115-1125). Defense counsel's entire presentation in mitigation and in argument that his client's life should be spared consisted of but thirty-five pages of the more than twelve hundred pages of trial transcript. The trial judge sentenced Mr. Kennedy to death on January 12, 1982. This Court affirmed the conviction and sentence. Kennedy v. State, 455 So. 2d 351 (1984).

On January 16, 1986, then Governor of Florida Bob Graham denied Mr. Kennedy's request for Executive Clemency and signed a death warrant effective from noon on February 12, 1986, to noon on February 19, 1986. On February 3, 1986, Mr. Kennedy filed an Application for Extraordinary Relief and Petition for a Writ of Habeas Corpus in this Court. In that pleading, Mr. Kennedy requested that the Court reverse his judgment and conviction because his death qualified trial jury was not impartial and did

not represent a fair cross-section of the community. Mr. Kennedy asked the Court to grant him a new direct appeal because his appellate counsel was ineffective in her representation. This Court denied the requested relief on February 12, 1986. Mr. Kennedy filed an Application for Stay of Execution pending submission of a petition for a writ of certiorari in the United States Supreme Court. The United States Supreme Court granted a stay on February 14, 1986. Mr. Kennedy filed a petition for writ of certiorari in the United States Supreme Court on June 12, 1986. The petition was denied on October 14, 1986. Kennedy v. Wainwright, 107 S. Ct. 291 (1986).

On January 2, 1987, Appellant filed a Motion for Post Conviction Relief pursuant to Fla. R. Crim. P. 3.850 in the trial court. This and an amended motion were denied without an evidentiary hearing. The trial judge summarily dismissed all claims (Circuit Court Order Denying Motion for Post Conviction Relief, p. 9) (Tt. 1482). The trial court in denying Appellant relief improperly relied on the legal standard necessary for Mr. Kennedy to prevail on the merits of his claims after an evidentiary hearing, rather than on the legal standard necessary to obtain an evidentiary hearing.

B. SUBSTANTIVE FACTS

1. The Offense

Mr. Kennedy became involved in a struggle with a store manager during an attempted armed robbery in which the manager inadvertently grabbed the gun, fired the trigger, and shot himself. Mr. Kennedy and a co-defendant both plead guilty to first degree murder and were sentenced to life imprisonment without possibility of parole for 25 years. He was incarcerated at Union Correctional Institute, appropriately referred to as "The Rock," with its chambered stone walls, weeping with the humidity of the hot Florida summer days. Rape, robbery -- even murder -- were commonplace at the Rock. Everything could be had for a price, from homosexual favors to homicidal acts. The violence that surged within those walls enveloped all, inmates and guards alike.

It was from these Hadean depths that Mr. Kennedy escaped on April 11, 1981. Breathlessly running throughout the night, wading through muddied ditches, waist high in water, he thought of nothing other than his pursuers and their relentless hounds. Spurred on by the sound of the barking dogs heralding his capture, and with it, certain death, Mr. Kennedy alternately walked and ran over the sun-baked fields. With an energy driven by fear, he was able to put a distance of 35 miles between himself and The Rock (Tt. 38). He had gone 36 hours without

sleep, and it was almost that long since he had eaten his last meal (Tt. 37). Hungry and exhausted, he searched for a place to lay down to furtively take a few hours of restless sleep.

He sought refuge in a house trailer. Clad in prison clothing, and aware that a manhunt was underway, he knew that he was a walking target, and that it was open season for a black inmate:

> Now, you got to understand, North Florida, people that live in that area, whites in that area have ultraconservative racial views. I'm not going to say they're racists, but, I'm going to say their attitudes are ultraconservative.
>
> Now, when it comes to a convict -- which they have these two prisons up there and all they hear is bad things about the Institution and convicts, right? So, if you're black and you escape out of there, being realisitic in your mind, you know that it's open season on you because if they ever get a chance to gun you down, that's what they're going to do because that's how they feel about you.

(Tt. 1138).

After so many months of incarceration and brutalization within the Rock, Mr. Kennedy's instincts were honed for self-preservation. He looked for a quiet place to refresh himself with water and sleep, undisturbed by others. Hungry, tired, and defenseless, a black man in prison clothing running through the backwoods of northern Florida, he feared any type of encounter with another human being.

As he approached the trailer, Mr. Kennedy saw a large stack of bottles under a pecan tree, growing aside the trailer. He picked up a bottle, and threw it up on the porch, striking the side of the trailer (Tt. 833). Assured that the trailer was indeed abandoned, he made his way inside.

Once inside the trailer, he removed his prison clothing and put on a pair of blue jeans and a shirt (Tt. 835). The trousers were many sizes too large for him, and hung limply about his body (Tt. 500). He next thought to clean up; after traveling all night, he went into the bathroom to wash off the caked on mud and dirt, and to cool himself off [] (Tt. 836).

To Mr. Kennedy's surprise and horror, a Florida Highway patrol car drove up (Tt. 837), and Floyd Cone entered the trailer, while an officer remained outside. Mr. Kennedy repeatedly assured Mr. Cone that he did not want to hurt him (Tt. 838). Mr. Kennedy instructed Mr. Cone to tell the officer to come into the trailer (Tt. 838-839), and that they would not be harmed.

Patrolman McDermon came up on the porch and opened the door (Tt. 840). He stood at the doorway, hesitating (Tt. 840). Mr. Cone nodded to Mr. McDermon, alerting Mr. McDermon to Mr. Kennedy's presence in the kitchen (Tt. 840). McDermon immediately jumped back and fired a shot at Mr. Kennedy (Tt. 840). McDermon ran from the trailer and returned to the patrol

car (Tt. 840-841). Mr. Kennedy fled the trailer, and as he alighted onto the porch, McDermon again fired another shot at him (Tt. 841). Only after being twice fired upon did Mr. Kennedy return the gunfire (Tt. 841). McDermon crept under the patrol car, and continued to shoot at Mr. Kennedy (Tt. 844). They exchanged shots, and McDermon was fatally wounded (Tt. 844-845).

Mr. Kennedy ran back to the trailer (Tt. 845). As he started up the concrete steps leading to the porch, Cone dove out of the trailer door and lunged towards him (Tt. 845). As Cone charged out of the door, he reached forward and grabbed Kennedy's shirt (Tt. 846). They grappled with the gun, and Mr. Kennedy fired, killing Cone.

In pure terror, Mr. Kennedy ran towards the pecan trees behind the trailer (Tt. 849). He ran unsteadily, holding a shotgun in one hand, and holding his pants up with the other, a belt draped uselessly about his neck. (Tt. 499-500, 725). Suddenly, he began to hear the sound of bullets exploding (Tt. 849). He turned to look back, and saw several State Troopers chasing him with guns drawn, firing at him (Tt. 558, 754), trying to kill him (Tt. 604). A shout of "kill that black son-of-a-bitch," was heard (Tt. 109, 112, 602).

Lieutenant Z. V. Smallwood of the Florida Highway Patrol, fired the first shot (Tt. 558); he aimed his 357 Magnum service revolver and fired (Tt. 602). Mr. Kennedy momentarily staggered,

it appearing as if he had been hit, but continued to run away from the barrage of bullets (Tt. 502). The Lieutenant fired four more rounds (Tt. 502, 557).

Officer H. L. Fouraker, a Florida State Trooper with the Florida Highway Patrol, joined in the melee. He, too, shot off five rounds at Mr. Kennedy (Tt. 575). Another Florida Highway Patrol officer, Trooper Richard Earl Davis, Sr., tried to kill Kennedy (Tt. 728, 753), as he haplessly ran through the fields. Davis looked through his sight alignment, and carefully took aim, firing three shots (Tt. 727). Kennedy continued to breathe -- and to run. Undeterred, Davis fired five more rounds (Tt. 729). Davis vowed that he "would take care of theis 'son-of-a-bitch.'" (Tt. 82). He later admitted that while he was acting in the performance of his duties, that there was undeniably a part of him that simply wanted to kill Kennedy (Tt. 753). To that end, Davis fired a total of nine or ten rounds (Tt. 753).

Although he had every opportunity to shoot and was threatened with imminent death, Mr. Kennedy never fired back (Tt. 559). He was having troubles keeping his pants up, and the officers were closing in on him (Tt. 505). Trying desperately to escape with his life, he ran. There was a fence separating the pecan grove from the field. As he came to the fence, he turned. The guns and the bullets were getting ever closer. His pursuers were now within 150 feet of him and closing in (Tt. 505). Mr.

Kennedy lifted the shotgun as he hoisted himself over the fence. At that point, the sight of the shotgun was set directly at Smallwood (Tt. 505). It would have been a clear shot (Tt. 505). But Mr. Kennedy did not shoot (Tt. 507). Although Smallwood had just fired off five bullets from his 357 Magnum trying to kill Mr. Kennedy and now lay before Kennedy completely defenseless, Kennedy did not shoot. He did not wish to hurt Smallwood or anyone else, Mr. Kennedy just wanted to stay alive.

Mr. Kennedy saw another trailer nearby, and ran to it to escape his pursuers. He stayed inside with the owner of the trailer and her child, as a helicopter hovered noisely overhead (Tt. 524, 733). Numerous police officers -- prison guards, highway patrolmen, county sheriffs -- surrounded the trailer (Tt. 561, 754). Rifles, pistols, and shotguns were drawn, waiting impatiently to be fired (Tt. 561, 754). Mr. Kennedy knew that McDermon was dead, and believed that the police wanted nothing more than to kill him, too. Mr. Kennedy stood trapped and afraid.

Officer Davis attempted to coerce Mr. Kennedy into leaving the protection of the trailer. Immediately after assuring Mr. Kennedy that McDermon and Cone were fine (Tt. 736, 738, 755), Davis stated that, on his honor as an officer of the law, if Kennedy were to give himself up, no one would shoot him (Tt. 755). But Kennedy was painfully aware that the men were dead (Tt.

739), and he repeatedly echoed the remorseful refrain that he had been forced to kill the men in self defense (Tt. 809).

Kennedy knew that to leave the shelter of the trailer was to walk into a sure death trap. In responding to Davis' entreaties to leave the trailer and to walk into the open and loaded arms of the surrounding officers, Kennedy declined, stating, "No way, man, I done killed one of your own and I know what you Highway Patrolmen do. Ya'll will kill me." (Tt. 528).

Negotiations between Mr. Kennedy and the officers remained ongoing for a couple of hours. Initially, Davis inquired about the safety of Ms. Templin, the resident of the trailer (Tt. 739). She immediately responded that she and her son were both fine (Tt. 739). Kennedy reassured Davis that he did not want to hurt Ms. Templin or her son, but that he feared that he would be killed were he to leave the trailer and their company (Tt. 755).

After extracting a promise from Kennedy to place the gun down and place his hands on the window where they could be seen by the surrounding officers (Tt. 530, 740), Davis stripped off his weapons and stood in plain view of Mr. Kennedy (Tt. 530). Davis was clearly at the mercy of Kennedy, yet Kennedy never fired a shot (Tt. 756).

Davis discussed with Kennedy the terms of his surrender. Fearing certain death from the hundreds of prison guards, state troopers, and local law enforcement officers surrounding the

trailer, Mr. Kennedy offered to give himself up on the sole condition that the news media be present and film the surrender (Tt. 60, 529, 756). He felt that under the watchful gaze of the television cameras he could peaceably surrender, "for in his mind he did not trust that he would live if he walked out of the trailer without the t.v. cameras there[.]" (Tt. 563).

Hundreds of guns were poised, the officers' fingers gently touching the trigger; as Mr. Kennedy slowly stepped outside of the trailer. As he had promised, Mr. Kennedy held the barrel of the gun between the top action and the trigger housing, pointed towards the ground (Tt. 533, 742) and peacably surrendered. Unarmed, Davis approached Kennedy, who, without incident, let him take the shotgun from his grasp (Tt. 744).

2. Post-Conviction Proceedings

Mr. Kennedy's original 3.850 was filed with this Court on January 2, 1987, as was required by the time limitations in the amended Florida Rule of Criminal Procedure 3.850. At the time the Motion was filed, undersigned counsel (the Office of the Capital Collateral Representative [CCR]) was actively engaged in preparing similar motions for six inmates who, like Mr. Kennedy, also fell under the recently established time limitation provisions of the Rule. Until December, 1986, virtually all of CCR's resources and energies were directed toward the representation of individuals who, by virtue of the Governor's

issuance of death warrants, were facing imminent execution. As a result, Mr. Kennedy and those of CCR's clients in a similar posture were not provided with the level of professional and diligent representation which is contemplated by Rule 3.850 and by the statute creating CCR and mandating its post-conviction representation of all death row inmates in the state. (Fla. Stat. sec. 27.702).

On April 2, 1987, Mr. Kennedy filed an Amended Motion for Post-Conviction Relief pursuant to counsel's request for leave to amend within ninety days of the filing of the original motion. On April 17, 1987, Judge Charles O. Mitchell, of the Circuit Court of the Fourth Judicial Circuit, in and for Duval County, Florida, issued an Order to show cause why the relief requested by Mr. Kennedy should not be granted. A hearing was scheduled for May 20, 1987, pursuant to the trial court's Order. Two days before the hearing, counsel for the State responded to Mr. Kennedy's Rule 3.850 Motion and filed a Motion for Summary Dismissal and Memorandum of Law in Support Thereof. In accordance with the circuit court's April 17th Order, a hearing was held, in chambers, before Judge Mitchell. Assistant Attorneys General Gary Printy and George Z. Betah appeared before the judge on behalf of the State of Florida. CCR appeared on behalf of the Defendant. Mr. Kennedy was not present at the proceedings. At the conclusion of the hearing, counsel for Mr.

Kennedy requested, and the circuit court granted, permission for time in which to brief the issues raised in Mr. Kennedy's Post-Conviction Motion and Amended Post Conviction Motion, and discussed at the pre-hearing conference.

On June 12, 1987, Mr. Kennedy filed a Motion requesting that the in chambers hearing of May 20th be transcribed. Counsel averred that a transcript of the proceedings was essential to preparation of a Memorandum of Law in Support of an Evidentiary Hearing. Further, irrespective of the outcome of the post-conviction proceedings at the circuit court level, counsel recognized that an appeal would most certainly be taken by one of the parties and a transcript would facilitate and expedite the appellate proceedings. Nonetheless, the circuit court denied Mr. Kennedy's motion for preparation of transcript. Counsel for Mr. Kennedy filed a Post Hearing Memorandum of Law on August 20, 1987.

The circuit court granted the State's Motion for Summary Dismissal as to all claims and Mr. Kennedy's Motion for Post Conviction Relief and Amended Motion for Post Conviction Relief were summarily denied without an evidentiary hearing. The Order Denying Motion for Post Conviction Relief was entered on September 4, 1987. Mr. Kennedy filed a Motion for Rehearing on September 18, 1987, which was denied by the circuit court on

November 18, 1987. A Notice of Appeal was entered on December 15, 1987. This appeal followed.

The facts relevant to each of the claims are presente din the body of the arguments that follow. The arguments demonstrate that the circuit court's summary denial was error.

ARGUMENT

ARGUMENT I

THE TRIAL COURT ERRED IN SUMMARILY DENYING APPELLANT'S 3.850 MOTION WITHOUT AN EVIDENTIARY HEARING

Mr. Kennedy's verified Rule 3.850 Motion alleged facts in support of claims which have traditionally been raised by sworn allegations in post-conviction petitions, and tested through an evidentiary hearing. For example, he identified specific unreasonable omissions by trial counsel which caused prejudice, and showed that he was denied the fundamental constitutional protections afforded by the sixth, eighth, and fourteenth amendments to the United States Constitution. Regardless of whether Mr. Kennedy would ultimately <u>prove</u> and <u>win</u> his claims, he was entitled to an evidentiary hearing with respect to them, unless the files and records in the case <u>conclusively</u> showed that he would necessarily <u>lose</u> the claims. In that instance, the judge must attach "a copy of that portion of the files and records which conclusively shows that the prisoner is entitled to

no relief . . ." Fla. R. Crim. P. 3.850. Otherwise, an evidentiary hearing is proper.

In O'Callaghan v. State, 461 So. 2d 1354, 1355-56 (Fla. 1984), this Court recognized that a hearing was required because facts necessary to the disposition of an ineffective assistance claim were not "of record." See also Vaught v. State, 442 So. 2d 217, 219 (Fla. 1983). Indeed, this Court has stated that it:

> [E]ncourage[s] trial judges to conduct evidentiary hearings when faced with this type of proceeding in view of the relatively recent decision in the United States Supreme court in Sumner v. Mata, 449 U.S. 539 (1981). It is important for the trial courts of this state to recognize that, if they hold an evidentiary hearing on this type of issue, under the Sumner decision their finding of fact has a presumption of correctness in the United States district courts.
>
> . . .
>
> When a state court does not hold an evidentiary hearing, the United States district courts believe they are mandated to hold an evidentiary hearing because of the provisions of subparagraphs (2), (3), (6), (7), and (8) of section 2254 (d) unless they can find that the petition is totally frivolous. The practical effect of the state court's denial of an evidentiary hearing on an ineffective-assistance-of-counsel claim is to leave the factual finding of this issue to the federal courts. It is for this reason that we suggest, even when not legally required, that trial courts conduct, in most instances, evidentiary hearings on this type of issue.

Jones v. State, 446 So. 2d 1056, 1062-63 (Fla. 1984).

Accordingly, this Court has not hesitated to remand Rule 3.850 cases for required evidentiary hearings. See, e.g., Lemon v. State, 498 So. 2d 423 (1986); Zeigler v. State, 452 So. 2d 537 (1984); Vaught, supra; Smith v. State, 461 So. 2d 1354 (Fla. 1985); Morgan v. State, 461 So. 2d 1534 (Fla. 1985); Meeks v. State, 382 So. 2d 673 (Fla. 1980); McCrae v. State, 437 So. 2d 1388 (Fla. 1983); LeDuc v. State, 415 So. 2d 721 (Fla. 1982); Demps v. State, 416 So. 2d 808 (Fla. 1982); Arango v. State, 437 So. 2d 1099 (Fla. 1983). These cases control, and an evidentiary hearing is necessary.

ARGUMENT II

PETITIONER'S CONVICTION VIOLATES THE FOURTEENTH AMENDMENT BECAUSE HE WAS INDICTED BY A GRAND JURY PRESIDED OVER BY A FOREMAN SELECTED VIA A SYSTEM WHICH HISTORICALLY, AND IN THIS CASE, CHOSE FOREPERSONS IN A RACIALLY DISCRIMINATORY MANNER

"Racial prejudice has no place in our system of justice and has long been condemned by this Court." Robinson v. State, 520 So. 2d 1 (Fla. 1988); see Cooper v. State, 186 So. 230 (1939); Huggins v. State, 176 So. 154 (1937). The courts must be forever vigilant that race not be a factor in our criminal justice system. See McCleskey v. Kemp, 107 S. Ct. 1756 (1987). Nonetheless, as the United States Supreme Court recognized in Rose v. Mitchell, 443 U.S. 545 (1979), it is undeniable that the

vestiges of racism and racial prejudice remain. While today racial discrimination is perhaps more subtle, it is nonetheless insidious. It must not be tolerated.

A. STATISTICS AND OTHER FACTS IN SUPPORT OF CLAIM

Mr. Kennedy was tried in a racially charged atmosphere which effected his trial in every conceivable manner -- from his indictment to his sentence of death. Due to the composition of the Duval County grand jury, which systematically excluded blacks and women from positions of leadership, Mr. Kennedy's conviction was impermissibly and unconstitutionally obtained.

Mr. Kennedy's grand jury, as well as those impaneled in Duval County during the years 1966 to 1982, was selected in a discriminatory manner as regards the sex and race of the foreperson. The foreman of the grand jury which indicted Mr. Kennedy, like 33 of his 35 predecessors, was a white male. During the 15 years extending from 1966 through 1982, only 2.8% of the 35 grand jury forepersons selected were female; 97.2% of the forepersons were male. This composition of grand jury forepersons becomes all the more opprobrious when one considers that during this same time period males comprised 46% of the registered voters in Duval County, and females represented the majority of registered voters at 54%. According to the 1980

census, in Duval County, 49% of the population aged 18 or older was male; 52% was female.

The racial imbalance reflected in the selection of grand jury forepersons is equally glaring: from 1966 through 1982, 34 grand jury forepersons, or 94.4%, were white, and 5.6% were black. This racial composition resulted in spite of the the fact that during this same period whites comprised 78% of the registered voters, and blacks comprised 22% of the registered voters. According to the 1980 census, of the entire population of Duval County aged 18 or older, 76% were white, and 24% were black.

A total of 825 persons were called to serve on the 36 grand juries which were impaneled during this sixteen year period. Over the years, 455 males and 370 females served as grand jurors; 55% of those serving on the grand jury were males, and 45% were females. Of the 825 persons serving on the grand jury during this time period, 635 or 77% were white, and 190 or 23% were black.

The procedure employed for selecting grand jury forepersons in Duval County during the time under consideration was extremely lacking in objective standards. The process was without specific criteria to ensure validity and reliability. Rather, circuit court judges, charged with the responsibility of impaneling grand juries and selecting forepersons, attempted to identify individuals possessing such qualities as leadership,

administrative ability, education, intelligence, and attentiveness (R. 1089, 1104, 1112, 1129, 1173, 1184); qualities which the judges were much more likely to attribute to other white males. Aside from "years of education," these character traits are, at best, difficult to quantify. The judges, in making their assessments, relied upon subjective measures like employment history, personal acquaintance, personal appearance, and administrative experience (R. 1088, 1089, 1097, 1011, 1012, 1129, 1184). Reliance on these criteria resulted in the exclusion of a disproportionate number of blacks and women from service as grand jury forepersons.

Discrimination in the standards employed in the selection of grand jury forepersons and in the application of such standards resulted in a gross discrepancy between the number of blacks in the population, on the voter rolls, and on the grand jury and their negligible representation as grand jury forepersons. The fact that the representation of women as grand jury forepersons is not in any way reflective of their proportion within the general population, the voter rolls, or the grand jury, shouts of discrimination.

The grand jury is one of our most important political and legal institutions serving to "protect[] the innocent from unwarranted public accusation." United States v. Meachanik, 106 S. Ct. 938, 943 (1986)(O'Connor, J.)(dissenting). Its

significance in death penalty cases in Florida is particularly compelling. Whereas the institution of criminal proceedings in all other offenses in this state may be prosecuted through an information, a capital offense must be prosecuted by grand jury indictment. Fla. R. Crim. P. 3.140(a)(1), Fla. R. Crim. P. 3.140(a)(2).

Discrimination in the selection of grand jurors distorts the deliberative process, and impugns the integrity of the entire judicial system:

> Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice. Selection of members of a grand jury because they are of one race and not another destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process. The exclusion from grand jury service of Negroes, or any group otherwise qualified to serve, impairs the confidence of the public in the administration of justice . . . . The harm is not only to the accused, indicted as he is by a jury from which a segment of the community has been excluded. It is to society as a whole.

Rose v. Mitchell, 443 U.S. 555, 556 (1979). A conviction resulting from an indictment in which blacks were barred from participation cannot stand. Cassell v. Texas, 339 U.S. 282, 290 (1950)(Frankfurter, J., concurring). See also Alexander v. Louisiana, 405 U.S. 625, 629 (1972). A "criminal defendant's right to equal protection of the laws has been denied when he is indicted by a grand jury from which members of a racial group

purposely have been excluded." Vasquez v. Hillery, 106 U.S. 617, 623 (1986)(quoting Rose at 556). The grand jury process is so integral to our basic system of justice, that should this fundamental right be abrogated, the conviction must be set aside, though there be no error at trial. Id. See also United States v. Sneed, 729 F.2d 1333 (11th Cir. 1984).

B. ANDREWS V. STATE ESTABLISHED THE CONSTITUTIONAL SIGNIFICANCE OF THE GRAND JURY FOREPERSON IN THE STATE OF FLORIDA

Discrimination against blacks and women in the selection of grand jury forepersons will not be tolerated under the fourteenth amendment to the United States Constitution. See Hobby v. United States, 104 S. Ct. 3093 (1984); Gibson v. Zant, 705 F.2d 1543 (11th Cir. 1983). Four justices of the Florida Supreme Court have recognized that discrimination in the selection of the grand jury foreperson constitutes constitutional error in Florida. See Andrews v. State, 443 So. 2d 78 (Fla. 1983). The Florida Supreme Court majority did not grant Mr. Andrews relief because under the facts presented, he failed to prove that the underrepresentation of blacks and women amongst Leon County's grand juries resulted from discriminatory practices. Nonetheless, the concurring opinion of Chief Justice Boyd emphatically condemned any form of discrimination in the judicial system, including in the selection of grand jury foreperson:

> I believe that the exclusion of black citizens from any position in our legal system or society in general, including grand jury foreman, is intolerable. We in the judiciary should continue our efforts to remedy any such exclusionary tendencies and to ensure that black citizens fully participate in all phases of the judicial process.

Id. at 86. Justices Shaw, Adkins, and Ehrlich dissented, concluding that the post of grand jury foreperson is a constitutionally significant position in the administration of justice in Florida, and that Andrews had demonstrated a prima facie showing of discrimination. Thus, a four-justice majority held that discrimination in the selection of the grand jury foreperson offends the Constitution.

Historically, the position of Florida grand jury foreperson has been recognized as one of grave import -- the Constitution of the State of Florida demands that an indictment be signed by the foreperson of the grand jury. The legislature, through the enactment of statutes, has emboldened the post of grand jury foreperson with great significance, entailing numerous responsibilities. Article 1, Sec. 15, Constitution of the State of Florida. See also Fla. R. Crim. P. 3.140(f). State statute requires that the foreperson appoint a clerk to keep the minutes of the grand jury proceedings. Fla. Stat. sec. 905.13. It is statutorily mandated that the foreperson keep a list of all witnesses appearing before the tribunal. Fla. Stat. sec. 905.195. The foreperson is also responsible for appointing

interpreters when necessary. Fla. Stat. sec. 905.15. The grand jury foreperson serves for a continuous period of six months; it is a long-term position. Most importantly, the foreperson, in conjunction with the State Attorney, directs the course of the grand jury investigation.

Mr. Kennedy's entitlement to relief is not disturbed by Hobby v. United States, 468 U.S. 339 (1984), in which a similar claim in the federal court context was denied. The defendant in Hobby, however, predicated his argument exclusively on the due process clause. In contrast, Mr. Kennedy relies upon both the due process and the equal protection clauses of the Constitution, a distinction which, as will be shown, makes a difference. Moreover, Mr. Kennedy, unlike the defendant in Hobby, is a black male, and as such is a member of one of the classes subject to discrimination.[1]

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[1]Mr. Kennedy also has standing to object to the systematic exclusion of women from the position of grand jury foreperson. Appellant need not be a member of the class subject to discriminatory treatment to have standing to raise a constitutional claim. Peters v. Kiff, 407 U.S. 493 (1972); United States v. Sneed, 729 F.2d 1333 (11th Cir. 1984); United States v. Holman, 680 F.2d 1340 (11th Cir. 1982). See also Taylor v. Louisiana, 419 U.S. 522 (1975)(A male has standing under sixth amendment analysis to challenge exclusion of females from petit jury); United States v. Perez-Hernandez, 672 F.2d 1380 (11th Cir. 1982)(Hispanic male has standing under equal protection analysis to challenge exclusion of blacks and females for the office of federal grand jury foreperson).

> [A]s [a] member[] of the class excluded from service as grand jury foremen, [appellant] ha[s] suffered the injuries of stigmatization and prejudice associated with racial discrimination. The Equal Protection Clause has long been held to provide a mechanism for the vindication of such claims in the context of challenges to grand and petit juries.

Hobby, 466 U.S. at 347. Furthermore, the Court in Hobby addressed only the very narrow issue of the appropriate remedy for discrimination in the selection of federal, not state, grand jury forepersons. The facts of this case are distinguishable from those presented in Hobby with regard to this critical issue -- the position of the Florida state grand jury foreperson is more than just an administrative position with merely ministerial tasks.

Finally, the Court's decision in Hobby was predicated on the assumption that if "the composition of the federal grand jury as a whole serves the representational due process values expressed in Peters [v. Kiff, 407 U.S. 493 (1972)], discrimination in the appointment of one member of the grand jury to serve as its foreman does not conflict with those interests." Hobby, 466 U.S. at 3097. (emphasis added). But in the case sub judice, the composition of the grand jury as a whole was not properly constituted. Not only were blacks disproportionately excluded from the position of foreperson, they were also underrepresented on the grand jury venire. Because the underlying composition of

the grand jury was not reflective of the community as a whole, the selection of the foreperson was similarly tainted.

C. THE PRIMA FACIE CASE OF DISCRIMINATION

At an evidentiary hearing, Mr. Kennedy would make a prima facie showing of unconstitutional discrimination in the selection of grand jury forepersons in Duval County from 1966 to 1981. The test which must be met to in establish the sufficiency of a prima case was enunciated in Castaneda v. Partida, 430 U.S. 482, 494 (1970):

> The first step is to establish that the group is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied. . . . Next, the degree of under-representation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as [foreperson], over a significant period of time. . . . This method of proof, sometimes called the rule of exclusion, has been held to be available as a method of proving discrimination against a delineated class. . . . Finally, . . . a selection procedure that is susceptible to abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing.

See Rose v. Mitchell, 443 U.S. 545, 566 (1979); United States v. Sneed, 729 F.2d 859, 861 (11th Cir. 1984); Gibson v. Zant, 705 F.2d 1543, 1546 (11th Cir. 1983); Bryant v. Wainwright, 686 F.2d 1373, 1375-76 (11th Cir. 1982), cert. denied, 461 U.S. 932 (1982); United States v. Perez-Hernandez, 672 F.2d 1380, 1386

(11th Cir. 1982); Guice v. Fortenberry, 661 F.2d 496, 499 (5th Cir. 1981).

1. Blacks And Women Constitute Distinct Classes Which Have Been, But Which Should Not Have Been, Singled Out For Different Treatment Under The Law

Blacks and women form discrete classes, for constitutional analysis purposes. United States v. Sneed, 729 F.2d 1333 (11th Cir. 1984); Gibson v. Zant, 705 F.2d 1543 (11th Cir. 1983); Bryant v. Wainwright, 686 F.2d 1373 (11th Cir. 1982), cert. denied., 461 U.S. 932 (1982); United States v. Perez-Hernandez, 672 F.2d 1380 (11th Cir. 1982). See Taylor v. Louisiana, 419 U.S. (1975); Rose v. Mitchell, 443 U.S. 545 (1979); Strauder v. West Virginia, 100 U.S. 303 (1879). Their underrepresentation on the grand jury is of heightened concern in the consideration of a capital indictment. As compared to other segments of the population, blacks and women have systematically demonstrated that they are more likely to find reasonable doubt and are less supportive of the death penalty, and therefore less like to return a true bill in a capital case. See Moran & Comfort, Neither 'Tentative nor Fragmentary': Verdict Preference of Impaneled Felony Jurors as a Function of Attitude Towards Capital Punishment, 71 J. of Applied Psych. (1986).

2. Blacks And Women Are Significantly Under-represented In The Position Of Grand Jury Foreperson

The United States Supreme Court has avoided adopting explicit mathematical parameters for proving systematic exclusion of discrete classes. See Alexander v. Louisiana, 405 U.S. 625 (1972); Bowen v. Kemp, 769 F.2d 627 (11th Cir. 1985); Gibson v. Zant, 705 F.2d 1543 (11th Cir. 1983); Bryant v. Wainwright, 686 F.2d 1373 (11th Cir. 1982), cert. denied. p. 461 U.S. 932 (1982). See also United States v. Sneed, 729 F.2d 1333 (11th Cir. 1984). The courts have consistently maintained that:

> There is not, however, a magic formula which can be applied to every factual situation in resolving the question of discrimination. Exact mathematical standards have never been developed, nor should they be. Such a mechanical approach would be too rigid for the wide variety of and unique factual patterns of discrimination cases arising under the Equal Protection Clause.

Bryant, 686 F.2d 1373 at 1376. See Alexander, 405 U.S. 625 at 630. Nonetheless, applying the absolute disparity test adopted by the Eleventh Circuit Court of Appeals in Bryant v. Wainwright, 686 F.2d 1373 (11th Cir. 1982), cert. denied, 461 U.S. 932 (1982), unconsititutional underrepresentation is evident. In Bryant, the Eleventh Circuit suggested a sample size of twenty-five to thirty foreperson appointments in order to meaningfully evaluate the systematic nature of the discriminatory composition of the office. The Bryant Court also set forth a minimum

percentage of an absolute disparity of 15% as generally sufficient to establish a prima facie case. The absolute disparity between the presence of blacks in Duval County and their presence as grand jury forepersons (16.4%) and the presence of women in Duval County and their presence as grand jury forepersons (51.2%) during the years of 1966 through 1982, exceeds this critical limit. The resulting absolute disparity is "sufficiently large [that] it is unlikely that [this disparity] is due solely to chance or accident, and, in the absence of evidence to the contrary, one must conclude that racial or other class-related factors entered into the selection process." Castaneda v. Partida, 430 U.S. 494, n.13 (1977); Rose v. Mitchell, 443 U.S. 545, 571 (1979); Bryant v. Wainwright, 686 F.2d 1373, 1376 (11th Cir. 1982), cert. denied., 461 U.S. 932 (1982).

3. The Selection Procedure Was Susceptible To Abuse And Was Not Race Or Gender Neutral

Grand jury forepersons were selected in open court by circuit court judges who were guided in their choices by such intangible qualities as leadership, attentiveness, and administrative experience. While perhaps grand jury forepersons should possess these traits, the unguided and standardless inquiry of the judges disproportionately excluded blacks and women from serving as grand jury forepersons. This Court should

find, as have other Courts, that the selection procedure used in choosing a foreperson was susceptible to abuse because the circuit judges actually saw the venire and had actual knowledge of the race and gender of each of the grand jurors. See United States v. Sneed, 729 F.2d 1333 (11th Cir. 1984); United States v. Perez-Hernandez, 672 F.2d 1380 (11th Cir. 1982) (per curiam). See also Gibson v. Zant, 705 F.2d 1543 (11th Cir. 1983).

D. APPELLANT IS ENTITLED TO AN EVIDENTIARY HEARING

This Court should grant Mr. Kennedy an evidentiary hearing on this claim. Relief is premised on three separate grounds. First, although the defendant in Andrews did not prevail on the merits, the case established a new principle of law which is applicable in post-conviction proceedings. See Witt v. State, 387 So. 2d 922 (1980). Witt emphasized that all major constitutional "changes of law" are cognizable in proceedings under Fla. R. Crim. P. 3.850. 387 So. 2d at 929. Andrews is such a change in the law, as it represents the first time that four Justices of this Court have applied the same analysis in determining the importance of the post of the grand jury foreperson.

There is another, more fundamental reason for applying Andrews in this case. As Chief Justice Boyd states in his concurring opinion in Andrews, "the exclusion of black citizens

from any position in our legal system . . . is intolerable." 443 So. 2d at 86. The rights at stake are not only Mr. Kennedy's, but also those of all citizens of Duval County and of the State of Florida. Discrimination on the basis of race in the composition of grand juries "strikes at the fundamental values of our judicial system and our society as a whole." Vasquez v. Hillery, 106 S. Ct. 617, 623 (1986)(quoting Rose v. Mitchell, 443 U.S. 545, 556 [1979]). Moreover, history has shown that alternative remedies for racial discrimination "are ineffectual." Id., n.5 at 623. Neither criminal prosecution nor civil litigation has effectively deterred discrimination in the criminal justice system.

There was no conceivable tactical reason for trial counsel's failure to challenge the indictment on this ground The only possible explanation is the novelty of Andrews. See Reed v. Ross, 468 U.S. 1, 104 S. Ct. 2901 (1984). Alternatively, Mr. Kennedy is entitled to relief because his counsel, through his failure to object, rendered substandard representation and was therefore ineffective. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). Further, failure to preserve the grand jury claim was prejudicial: had the original indictment been dismissed, there is a reasonable probability that a new grand jury would have weighed the evidence of premeditation

differently and returned an indictment for murder in the second degree.

Mr. Kennedy suffered prejudice, since a grand jury in which a black or a woman played a leadership role would have been more likely to have resisted the State's effort to procure an indictment on a capital charge. Moreover, "even if a grand jury's determination of probable cause is confirmed in hindsight by a conviction on the indicted offense, that confirmation in no way suggests that the discrimination did not impermissibly infect the framing of the indictment and, consequently, the nature or very existence of the proceedings to come. "Vasquez v. Hillery, 106 S. Ct. 617, 623 (1986). See also United States v. Meachanik, 106 S. Ct. 938, 949, n.2 (1986). "Respect for the rule of law demands that improperly procured indictments be quashed even after conviction, because 'only by upsetting convictions so obtained can the ardor of prosecuting officials be kept within legal bounds and justice be secured; for in modern times all prosecution is in the hands of officials.'" United States v. Meachanik, 106 S. Ct. 938, 949 (1986)(citations omitted)(Marshall, J. dissenting).

ARGUMENT III

THE TRIAL COURT AND PROSECUTOR MISLED THE JURY BY INSTRUCTING THAT THEIR SENTENCING VERDICT CARRIED NO INDEPENDENT WEIGHT, DIMINISHING THE JURY'S AWESOME SENSE OF RESPONSIBILITY FOR THE SENTENCE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

From the initial questioning during voir dire to the final instructions at sentencing, the trial court and the prosecutor repeatedly diminished the jury's sense of responsibility with respect to its role in the sentencing process. Mr. Kennedy's sentencing jury was incorrectly informed of its function, and its awesome responsibility in the capital sentencing proceedings was unconstitutionally denigrated.

A. CHANGE IN LAW

The United States Supreme Court in Caldwell v. Mississippi, 472 U.S. 320 (1985), 105 S.Ct. 2633 (1985), held that "it is constitutionally impermissible to rest a death sentence on a determination of a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 105 S.Ct. at 2639. The eighth amendment's protections directed to insuring reliability in sentencing, mandate that capital sentencers "view their task as a serious one of determining whether a specific human being should die at the hands of the State." Id. at 2640. When a jury

has been so relieved of "'the truly awesome responsibility of decreeing death for a fellow human,'" id., "there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences" id. See Adams v. Wainwright, 804 F.2d 1526, 1532 (11th Cir. 1986), modified, 816 F.2d 1493 (11th Cir. 1987), cert. granted, 56 U.S.L.W. 3608 (U.S. Mar. 7, 1988); Mann v. Dugger, No. 86-3182, slip op. at 17 (11th Cir. April 21, 1988) (per curiam). A death sentence so rendered must be vacated.

The application of Caldwell to Florida capital proceedings was first addressed by the Eleventh Circuit Court of Appeals in Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), modified 816 F.2d 1493 (11th Cir. 1987), cert. granted, 56 U.S.L.W. 3608 (U.S. Mar. 7, 1988), and the analysis enunciated in Adams has reaffirmed and explicated recently in Mann v. Dugger, No. 86-3182, slip op. at 17 (11th Cir. April, 21, 1988) (en banc). What is most important is that "Caldwell represents a significant change in law [which] . . . was not reasonably available to Adams until the Caldwell decision." 804 F.2d at 1530. On rehearing, the newness of Caldwell was underlined by the Adams Court wrote:

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

> such as those made by the trial judge in this case implicated the Eighth Amendment.

Id. at 1495.

As Adams and Mann make clear, the ruling in Caldwell constitutes new law, law which was not available to Mr. Kennedy at the time of his trial or during his direct appeal. The importance of Caldwell being a fundamental change in the law is that its law can now be raised on collateral attack:

> [T]he state of the case law prior to Caldwell, gave no indication that such statements might violate the eighth amendment . . . Caldwell was the first Supreme Court case to hold that prosecutorial statements regarding appellate review might violate the eighth amendment . . . . We conclude that Caldwell represented new law; thus a Caldwell violation, if proven, would present new grounds for relief.

McCorquodale v. Kemp, 829 F.2d 1035, 1036-37 (11th Cir. 1987); Accord Adams 816 F.2d at 1495. But see Combs v. State, 13 F.L.W. 142 (Feb. 18, 1988). New law is cognizable in post-conviction proceedings. Witt v. State, 38 So. 2d 922, 931 (Fla. 1980).

B. CALDWELL APPLIES IN FLORIDA

The judge and the jury, acting in concert, are responsible for capital sentencing in Florida. A review of Florida case law inevitably leads to the conclusion that "the Florida jury plays an important role in the Florida capital sentencing scheme." Mann v. Dugger, No. 86-3182, slip op. at 14 (11th Cir. Apr. 21,

1988) (per curiam). The extreme importance of the role of the jury at sentencing is well established by statute and has been repeatedly countenanced by this Court. The legislative intent that can be gleaned from Section 921.141 Fla. Stat. indicates that the legislature sought to devise a scheme of checks and balances in which the input of the jury serves as an integral part." Messer v. State, 330 So. 2d 137, 142 (Fla. 1976). See also Lamadline v. State, 303 So. 2d 17, 20 (Fla. 1974)(the right to a sentencing jury is "an essential right of the defendant under our death penalty legislation"). "Under Florida's capital sentencing statute, it is the jury's function, in the first instance, to determine the validity and weight of the evidence presented in aggravation and mitigation." Holsworth v. State, 13 F.L.W. 138, 141(19__). See also Valle v. State, 502 So. 2d 1225 (Fla. 1987); Floyd v. State, 497 So. 2d 1211 (Fla. 1986); Copeland v. Wainwright, 505 So. 2d 425 (Fla.), vacated, 108 S. Ct. 55 (1987). Ignoring a jury's recommendation is only warranted when there are no "valid mitigating factors discernable from the record upon which the jury could have based its recommendation." Ferry v. State 507 So. 2d 1373, 1376 (Fla. 1987). See, e.g., Lusk v. State, 446 So. 2d 1038 (Fla.), cert. denied, 469 U.S. 873 (1984). The trial judge's authority to override a jury recommendation of life is significantly curtailed by this Court's exacting appellate review.[2] See Mello and

Robson, Judge Over Jury: Florida's Practice of Imposing Death Over Life in Capital Cases, 13 Fla. St. U. L. Rev. 31, 53-54 (1985)(three quarters of all jury overrides are reversed on appeal).[3] Thus the jury's advisory opinion, as a reflection of the conscience of the community, e.g., McCampbell v. State, 421 So. 2d 1072 (Fla. 1982), is an integral and important part of the capital sentencing process that it is entitled to great weight, e.g., Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); Lamadline v. State, 303 So. 2d 17 (Fla. 1974), and it cannot be overruled unless "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975).

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[2]See, e.g., Wasko v. State, 505 So. 2d 1314 (Fla. 1987); Brookings v. State, 495 So. 2d 135 (Fla. 1986); McCampbell v. State, 421 So. 2d 1072 (Fla. 1982); Goodwin v. State, 405 So. 2d 170 (Fla. 1981); Odom v. State, 403 So. 2d 936 (Fla. 1981), cert. denied, 456 U.S. 925, 102 S.Ct. 1970 (1982); Neary v. State, 384 So. 2d 881 (Fla. 1980); Malloy v. State, 382 So. 2d 1190 (Fla. 1979); Shue v. State, 366 So. 2d 387 (Fla. 1978); McCaskill v. State, 344 So. 2d 1276 (Fla. 1977); Thompson v. State, 328 So. 2d 1 (Fla. 1976).

[3]During 1986 and 1987, this Court affirmed trial judge overrides in only two of eleven cases, less than twenty percent of the time. See Grossman v. State, 13 Fla. L. Weekly, 127, 135 (Feb. 18, 1988)(Shaw, J., specially concurring).

Holsworth v. State, 13 F.L.W. 138, 141 (Feb 18, 1988); Burch v. State, slip op. No. 68,881, p. 5 (Feb. 18, 1988); DuBoise v. State, 520 So.2d 260, 266 (Fla. 1988); Hansbrough v. State, 509 So.2d 1081, 1086 (Fla. 1987); Ferry v. State, 507 So.2d 1373, 1376 (Fla. 1987); Wasko v. State, 505 So. 2d 1314, 1318 (Fla. 1987); Irizarry v. State, 496 So.2d 822, 825 (Fla. 1986); Brookings v. State, 495 So.2d 135, 142 (Fla. 1986). The stringent Tedder standard is viewed by the United States Supreme Court as integral to the constitutionality of the statute in that Tedder provides procedural protection "afford[ing] significant[]

282, 295-296 (1977).

In Mann, the Eleventh Circuit examined Caldwell in the context of a sentencing procedure that gives great weight to the jury recommendation. Mann v. Dugger, No. 86-3182 slip op. (11th Cir. Apr. 21, 1988) (en banc). The Mann Court adopted a two pronged analysis of Caldwell claims:

> First, we must determine whether the prosecutor's comments to the jury were such that they would 'minimize the jury's sense of responsibility for determining the appropriateness of death.' Caldwell, 472 U.S. at 341, 105 S.Ct. at 2646. Second, if the comments would have such effect, we must determine 'whether the trial judge in this case sufficiently corrected the impression left by the prosecutor.' McCorquodale v. Kemp, 829 F.2d 1035, 1037 (11th Cir. 1987)

Id. at 21.

The prosecutor's statements in Mann imparted the message to the jury that its role in imposing the death penalty was a mere predicate to the court's automatic imposition of the death sentence. The court's failure to correct the prosecutor's misleading comments was, a tacit endorsement:

> When a trial court does not correct misleading comments as to the jury's sentencing role, the state has violated the defendant's eighth amendment rights because the court has given the state's imprimatur to those comments; the effect is the same as if the trial court had actually instructed the jury that the prosecutor's comments represented a correct statement of the law. 1988) (citations omitted).

Id. at 21,22 (citations omitted).

Reasonable jurors could well have concluded that the ultimate sentencing responsibility rested not with them, but with the court.[4] It is doubtful that even "extraordinarily attentive

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[4]See Sandstrom v. Montana, 442 U.S. 510, 514 (1979) ("whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable jury could have interpreted the instructions"); accord Cronin v. State, 470 So. 2d 802, 804 (Fla. 4th DCA 1985)(standard of review is "whether there was a reasonable possibility that the jury could have been misled"). See also Godfrey v. Georgia, 446 U.S. 420, 428-29 (1980)(reviewing how a "person of ordinary sensibility could" interpret an instruction and finding that "the jury's interpretation . . . can only be the subject of sheer speculation"; Andres v. United States, 333 U.S. 740, 752 (1948) (noting "[t]hat [since] reasonable men might derive a meaning from the instructions given other than the proper meaning" relief was required, because "[i]n death cases doubts such as those presented here should be resolved in favor of the accused" (emphasis added)).

juror[s] might rationally have drawn [from these instructions] an inference," Washington v. Watkins, 655 F.2d 1346, 1370 (5th Cir. 1981) or "appreciat[ed] . . . the gravity of their choice and . . . the moral responsibility reposed in them as sentencers." California v. Ramos, 463 U.S. 992, 1011 (1983). The inquiry for this Court to resolve is whether the trial court's corrective instructions "would, in the mind of a reasonable juror who had been exposed to the misleading comments, correct the misapprehension that the [prosecutor's] comments would induce." Mann at 22.

C. CALDWELL WAS VIOLATED: COMMENTS

Caldwell was violated in several ways.

1. Reducing Responsibility: Judge is Sentencer

In Mr. Kennedy's case, the court and the prosecutor repeatedly told the jurors that their function at capital sentencing was de minimis. During voir dire, the trial judge stated:

> [T]he State and the Defense will present arguments for or against the sentence of death. Then, the jury will render an advisory sentence to the Court as to whether the defendant should be sentenced to life imprisonment or to death. This advisory sentence may be by a majority vote of the Jury and the judge then sentences the defendant to life imprisonment or death.

> The judge is not required to follow the advice of the jury. Thus, the Jury does not impose punishment if such a verdict is rendered. The imposition of punishment is the function of the Judge of this court and not the function of the Jury.

(Tt. 121). This is an inaccurate statement of the law; under Tedder, the trial judge is required to follow the jury's recommendation "unless virtually no reasonable person could differ." 322 So. 2d 908, 910 (Fla. 1975)

The prosecutor reinforced the trial court's infirm instruction, dismissing the jury's vital role in the sentencing process "creat[ing] a danger of bias in favor of the death penalty," Adams v. Wainwright,804 F.2d 1526, 1531, n.7 (11th Cir. 1986):

> Now, in the second phase you make a recommendation--the Jury would make a recommendation to Judge Mitchell as to whether the penalty should be life imprisonment, and, that's important that you understand at this time that that's not binding on Judge Mitchell; that Judge Mitchell can follow your recommendations or disregard your recommendations under Florida law.

(Tt. 168). This is precisely the language which Mann denounced. The legislature's use of the term "advisory" in describing the jury's role in the sentencing process was not intended to be ascribed its common parlance meaning of "nonbinding" or "something that a decisionmaker may follow or reject as he or she sees fit." Mann v. Dugger, supra, slip op at 6. The jurors were directly misinformed of the importance to be accorded their

judgment. The State's specific remarks that the jury's sentencing determination was not binding on the court incurred the danger warned of in Mann. The proseuctor's statements misrepresented the nature of the jury's vital role within the Florida capital sentencing scheme.

The grossly inaccurate information imparted to the jury by the prosecutor and echoed by the judge misled the jurors into believing that their role was a ministerial one.

2. Reducing Responsibility: The "Law" Required Death

The prosecutor advised the jury that:

> The Judge is going to tell you when you come back in--if there is a second phase, the Judge is going to tell you that you still have a duty to obey the law in the second phase and follow the law, listen to certain aggravating and mitigating circumstances and make a recommendation. And, the Judge is going to tell you that your oath continues and you have a duty to follow the law.

(Tt. 17). The prosecutor continued to admonish the jury that it was not they who were responsible for meting out the death sentence, but it was "the law," and that the jury was but a mere instrument in the imposition of the pre-ordained sentence:

> If it goes to the second phase if the Defendant is found guilty, then, the Judge is going to give you instructions on what the law is as to whether you should recommend death or life.
>
> The Judge will tell you there are certain aggravating factors you should consider and

> certain mitigating factors you should consider, and, based on the law, you should return the appropriate verdict.
>
> Would you be able to vote for death in the second phase if the aggravating circumstances outweighed the mitigation? Would you be able to follow the law at that point and vote for a recommendation of death?

(Tt. 325).

The prosecution repeatedly shifted the responsibility for sentencing from the jury to the judge, the legislature, and "the law." The jurors were confused and misled throughout the entire proceedings, and failed to appreciate the independence and significance of their role at sentencing.

During voir dire, the prosecutor, in questioning prospective juror Hurwitz, misrepresented the significant role of the jury in sentencing: "At this point, the Jury makes a recommendation to the Judge; the Judge does the sentencing." (Tt. 359). The jurors were confused and misled with regard to their role throughout voir dire. Juror Hurwitz explained, "I mean, I feel I have to support the law, and, I'm very confused about that. And, if the law gives Judge Mitchell the option, I don't know that I could avoid supporting the law." (Tt. 361). Ms. Hurwitz served on Mr. Kennedy's jury. The fatally flawed instructions by the prosecutor led Ms. Hurwitz and others on the jury to believe that their decision at sentencing had little or no effect on the actual sentence rendered.

During his summation to the jury at the penalty phase, the prosecutor again stressed that it was not the jury's duty to make an independent judgment regarding the appropriateness of imposing the death sentence, but that "the law" would dictate the proper outcome in each case:

> Now, I asked you--and, I repeat--if you would follow the law at this phase. Judge Mitchell is going to tell you that you still have a duty to follow the law. Mr. Treece will tell you that you can pardon the Defendant, you can ignore the law. We wouldn't be here if you had to return one verdict or the other, but, you have a duty to follow the law and Judge Mitchell is going to tell you you have to do that duty.
>
> . . .
>
> Now, what standards do you apply? The legislature and the courts have come up with standards for the jury, to guide the jury, to assist the jury, and they are called aggravating factors and mitigating factors.
>
> And, the law is that--and the judge will tell you what aggravating factors you can consider to aggravate for the death penalty and what mitigating factors, if they are supported by the evidence. . . .
>
> . . .
>
> Now, let me briefly run down the five--there are five aggravating factors that you, as a matter of law, have a duty to consider whether they're supported by the evidence or not. The judge will tell you five aggravating factors that the Florida Legislature has approved by the courts that you should consider in making your recommendation.
>
> And, he will read you three mitigating factors. . . .

(Tt. 1166-68).

The prosecutor continued in this vein:

> [I]f you listen to Judge Mitchell, you're not going to have any choice in this case but to come back with a recommendation of death.

(Tt. 1194).

The prosecutor's carefully structured argument improperly precluded the jury's consideration of, for example, non-statutory mitigating circumstances, and created a statutory mandate for death:

> [After listing the aggravating circumstances applicable to the case] It sounds like the representatives are repeating themselves.
>
> All of the ones you can consider--there are eight in the statute books and five of them apply in this case.
>
> And, do you see how the Legislature intended for you to consider those that relate to people escaping from incarceration and hurting other people or killing other people--killing other people rather? There is no question of the escape.

(Tt. 1173). The United States Court of Appeals for the Eleventh Circuit has repeatedly struck down death sentences tainted by a prosecutor's improper and misleading invocation of state authority. Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985)(en banc), 106 S. Ct. 404 (1986) reh'g den'd (Prosecutor's argument that the Justices of the Supreme Court of Georgia decry consideration of mercy and "have no sympathy with that sickly

sentimentality" in death penalty cases was "extremely improper."); Wilson v. Kemp, 777 F.2d 621 (11th Cir. 1985), cert. denied, 106 S. Ct. 2258 (1968)(Prosecutor's argument instructing jurors that capital punishment is "essential to an ordered society" and denigrating mercy as a valid sentencing consideration is "fundamentally opposed to current death penalty jurisprudence" and strikes at "the core of the jury's role in capital sentencing.") "Arguments delivered while wrapped in the cloak of state authority have a heightened impact on the jury," Drake at 1459, and there is thus a need for greater scrutiny when examining the misconduct of a prosecutor invoking legislative sanction for the automatic imposition of the death penalty in a specific case or set of circumstances. Just as "[t]elling the jurors that the sentiment [against mercy] was that of the highest court of the state created a severe danger that they would defer to such an expert legal judgment in their choice of penalty," id., the prosecutor's argument in Mr. Kennedy's case, which invoked the authority of both the legislature and the trial judge, created an intolerable risk that the jurors would believe that they had -- as the prosecutor said -- "no choice" but to recommend death if they remained true to their oaths.

The prosecutor's statements in this case, like those in Caldwell, minimized the role of the jury in the sentencing process and violated the eighth amendment's "need for reliability

in the determination that death is the appropriate punishment in a specific case."

D. CALDWELL WAS VIOLATED: NO CORRECTIVE INSTRUCTIONS

The trial judge failed to correct the prosecutor's misstatements of law, and perpetuated and exacerbated the state's erroneous instructions that the sentencing decision was not the province of the jury, but lay solely within the court's discretion:

> JUDGE MITCHELL: It is the Judge's job to determine what a proper sentence would be if the Defendant is guilty . . . . The penalty is for the Court to decide. You are not responsible for the penalty in any way because of your verdict.

(Tt. 1057). This is not the law. The court's instruction cuts at the very heart of Tedder and Caldwell. The court did more than simply fail to instruct the jurors that he was indeed bound by their sentencing determination unless "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ," Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). The trial judge's improper remarks completely negated the "awesome responsibility" which must fall upon a jury deciding whether death is the appropriate punishment. Caldwell, 105 S.Ct. at 2640.

The court's jury instructions during the penalty phase of the trial are equally condemnable:

> JUDGE MITCHELL: The final decision as to each count as to what punishment shall be imposed rests solely with the Judge of this court; however, the law requires that you, the Jury, render to the Court an advisory sentence as to each count as to what punishment should be imposed upon the Defendant.

(Tt. 1075).

> The final decision as to each count as to what punishment shall be imposed rests solely with the Judge of this court, however, the law requires that you, the Jury, render to the Court an advisory sentence.

(Tt. 1076). The penalty phase instructions reaffirmed both themes struck in the prosecutor's voir dire and closing argument: that the jury's recommendation received minimal weight in the judge's sentencing decision, and that the jury's function was simply the ministerial one of totalling up aggravating and mitigating circumstances without making any independent determination that death was the appropriate sentence:

> JUDGE MITCHELL: As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge; however, it is your duty to follow the law that will now be given to you by the Court and render to the Court an advisory sentence as to each count based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty, and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

(Tt. 1211). At no point did the Court inform the jury that its decision would be given "great weight," or that a recommendation of life imprisonment could be overridden only if "virtually no reasonable person could differ." A reasonable juror, having been exposed to the diatribe by the prosecutor and without the benefit of a corrective instruction by the trial court, would incorrectly have concluded that his or her responsibility in imposing the sentence was minimal. Resentencing is required.

ARGUMENT IV

THE PROSECUTOR'S CLOSING ARGUMENT IN THE GUILT/INNOCENCE AND PENALTY PHASES RENDERED THE VERDICT AND SENTENCING UNFAIR AND UNRELIABLE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS, AND COUNSEL'S FAILURE TO OBJECT WAS UNREASONABLE

The eighth amendment imposes a fundamental prerequisite to the validity of any death sentence: the reliability of such a sentence cannot be open to question. A capital sentence "does not meet the standard of reliability that the Eighth Amendment requires" when "the State [seeks] to minimize the jury's sense of responsibility for determining the appropriateness of death." Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633, 2646 (1985). Similarly, a death sentence cannot stand when the proceedings "create the risk" that the sentencer's verdict may be based on considerations or information which are "irrelevant to a capital sentencing decision." Booth v. Maryland, 107 S. Ct.

2529, 2535 (1986). Guilt/innocence proceedings that risk a conviction of first-degree murder when a lesser degree was possible also violate eighth and fourteenth amendment principles. Beck v. Alabama. 447 U.S. 625 (1980).

Defense counsel was forced to object no less than five times to the prosecutor's penalty phase argument. The trial judge overruled the objections and denied counsel's motion for a mistrial on each occasion. The jury did not receive any curative instructions. Compare Donnelly v. DeChristoforo, 416 U.S. 637 (1974)(judge gave curative instruction following single improper remark). The impropriety of the prosecutor's closing argument was raised on direct appeal. Here, the State's outrageous comments clearly rendered the jury's sentencing decision suspect, devoid of the assurances of reliability demanded by the eighth amendment. Mr. Kennedy here presents new law, see Booth, Caldwell, supra that condemns the procedures which led to his conviction and sentence, and which require reversal.

A. IMPROPER PROSECUTORIAL REMARKS ON MR. KENNEDY'S INVOCATION OF HIS FIFTH AMENDMENT RIGHT TO SILENCE

Mr. Kennedy specifically invoked his constitutional right to remain silent and chose to testify on his own behalf only during the penalty phase of the proceedings. Nonetheless, his rights were flagrantly violated when the prosecutor, during both the

guilt/innocence and penalty phases, improperly commented on Mr. Kennedy's fifth and fourteenth amendment privilege against self incrimination. In what can only be seen as a deliberate attempt to draw the jury's attention to appellant's failure to confess and rto testify, the prosecution prodded the jury:

> What independent proof do we have of the burglary without - - again, <u>without any statement from the Defendant</u>?

(Tt. 997)(emphasis added). During the sentencing phase, the prosecutor again impermissibly commented upon Mr. Kennedy's constitutional right against self-incrimination and admonished the jurors that Mr. Kennedy's failure to testify "conclusively" demonstrated the absence of a factor in mitigation:

> "The best evidence that you have as to what that man's state of mind is or was - - because <u>he didn't tell you when he took the stand</u>. He didn't say one word about that trailer--."

(Tt. 1180)(emphasis added). Defense counsel immediately objected to the State's offensive comment and moved for a mistrial. The judge overruled the objection and denied the motion (Tt. 1181). The trial court failed to take any corrective action; the jury was not immediately informed of Mr. Kennedy's constitutional right to remain silent, nor was the jury instructed to disregard the prosecution's prejudicial remarks.

The State's specific reference to an accused's decision not to take the stand or not to provide inculpatory statements is a

serious violation of the defendant's constitutional right against self-incrimination. Griffin v. California, 380 U.S. 609 (1965); David v. State, 369 So. 2d 943 (1979). The State of Florida has jealously protected an accused's Fifth Amendment right from the overzealous ardour of the prosecuting attorney and from other equally contemptable infringements. The Florida Rules of Criminal Procedure Rule 3.250, provides in part:

> [n]o accused person shall be compelled to give testimony against himself, nor shall any prosecuting attorney be permitted before the jury or court to comment on the failure of the accused to testify in his own behalf.

This Court has warned state attorneys of the constitutional impropriety of prosecutorial comments on the defendant's decision not to testify in his/her own behalf: "As early as Jackson v. State, 45 Fla. 38, 34 So. 243 (1903), this Court recognized that the prosecuting officer would not be permitted comment on the failure of an accused to take the witness stand even though he does so by innuendo under the guise of disclaiming any intention of doing so." Gordon v. State, 104 So. 2d 524, 540 (Fla. 1958). The prohibition against commenting on the defendant's privilege against self-incrimination is absolute and may not be breached either directly or through veiled remarks:

> In summary, our law prohibits <u>any</u> comment to be made, <u>directly or indirectly</u>, upon the failure of the defendant to testify. <u>This is true without regard to the character of the comment, or the motive or intent with which it is made</u>, if such comment is subject to an

> interpretation which would bring it within the statutory prohibition and regardless of its susceptibility to a different construction.

Trafficante v. State, 92 So. 2d 811, 814 (Fla. 1957)(emphasis added). See also Wilson v. State, 371 So. 2d 126, 127 (1978).

Whether a remark is an indirect and impermissible comment is predicated on the determination that the comment is "manifestly intended" by the State or "would naturally and necessarily" be understood by the jury as relating to the defendant's fifth amendment privilege. United States v. Vera, 701 F.2d 1349, 1362 (11th Cir. 1983). See also Matire v. Wainwright, 811 F.2d 1430, 1435 (11th Cir. 1987); United States v. Jones, 648 F.2d 215, 218 (5th Cir. 1981); United States v. Palacios, 612 F.2d 972, 973 (5th Cir. 1980); United States v. Diecidue, 603 F.2d 535, 552 (5th Cir. 1979), cert. denied, sub. nom. United States v. Miller, 446 U.S. 912 (1980). If the State's remarks are:

> fairly susceptible of being interpreted by the jury as a statement to the effect that 'an innocent man would attempt to explain the circumstances but the defendant offered no such explanation. . . then the comment thus interpreted or construed violated the prohibition of the rule.

David v. State, 369 So. 2d 943, 944 (Fla. 1979)(quoting David v. State, 348 So. 2d 420, 421 (Fla. 4th DCA 1977). The State's comment on Mr. Kennedy's failure to take the stand was clear:

> [T]here is no need to resort to possible interpretations or constructions of the prosecutorial comment when there is such a direct reference to the defendant's silence.

Id. The jury must have understood the State's remarks as casting aspersions upon Mr. Kennedy's exercise of rights. When viewed in the context of the overall proceedings, the prosecutor's remarks demonstrate the intent to underscore the appellant's decision not to confess, and to effectively preclude the jury's finding of a factor in mitigation. The prosecution's remark infected the trial with error, arousing, as it did, an awareness in the minds of the jurors that Mr. Kennedy exercise his rights. The comments made by the prosecution in Mr. Kennedy's case constituted error. The jury cannot be requested to impose death based upon unconstitutional and irrelevant consideration, see section B, infra, and Booth, Caldwell, supra, and the conviction and sentence must be set aside.

B. PROSECUTORIAL COMMENTS CONCERNING "VICTIM IMPACT" RESULTED IN THE JURY'S UNBRIDLED CONSIDERATION OF FACTS NOT IN EVIDENCE, IRRELEVANT AND INFLAMMATORY FACTORS IN VIOLATION OF THE EIGHTH AMENDMENT

The presentation of evidence or argument concerning "the personal characteristics of the victim" to a capital sentencing jury violates the eighth amendment because such factors "create[] a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." Booth v. Maryland, 107 S. Ct. 2529, 2533 (1987). It is constitutionally impermissible to rest a sentence of death on evidence or argument

the purpose of which is to compare the "worth" of the defendant to that of the victim. Cf. Booth, supra; Vela v. Estelle, 708 F.2d 954 (5th Cir. 1983); see also Moore v. Kemp, 809 F.2d 702, 747-50 (11th Cir. 1987)(en banc) (Johnson, J., concurring in party and dissenting in part). Evidence and arguments relating to the "worth of victim" or "comparable worth" are irrelevant and unrelated to the character of the offender, and/or the circumstances of the offense. See Zant v. Stephens, 462 U.S. 862, 879 (1983). The victim's rights or personal characteristics may not enter into sentencer's deliberations, whether via argument or evidence.

The United States Supreme Court in Booth expressed the importance of restricting the jury's consideration to those factors which are strictly related to the defendant:

> Nor is there any justification for permitting such a decision to turn on the perception that the victim was a sterling member of the community rather than someone of questionable character. This type of information does not provide a 'principled way to distinguish [cases] in which the death penalty was imposed, from the many cases in which it was not.'

Id. at 2534 (footnote omitted)(citations omitted). The Booth Court recognized that defendants whose victims were "assets" to their community are not, therefore, more deserving of punishment. Id. at 2534 n.8. The attributes of the victim are irrelevant to the sentencing determination: "We thus reject the contention

that the presence or absence of emotional distress of the victim's family, or the victim's personal characteristics, are proper sentencing considerations in a capital case." Id. at 2535 (footnote omitted).

In his closing argument to the jury during the penalty phase, the prosecutor interjected prejudicial and inflammatory comments regarding the "worth" of the victims, denying Mr. Kennedy an individualized sentencing determination and rendering his sentence of death arbitrary, capricious and unreliable. See generally, Booth, supra, 107 S. Ct. at 2532-35. The state attorney argued that the sentence of death was warranted because one of the victims was a law enforcement officer: "[Bob McDermon] had a job to protect you out there." (Tt. 1175)(emphasis added). After defense counsel objected and interrupted this improper line of argument, the State Attorney promised "I'm not going to say it anymore." (Tt. 1176). Yet only a few minutes later, the prosecutor returned to this point and embellished it:

> This case cries out for the death penalty. There is no other penalty that will take care of a person like Kennedy. He has forefeited the right to be on the face of the earth.
>
> He killed Bob McDermon, one of the fine--he did more than kill Bob McDermon. He killed a man in a police uniform. He killed your symbol, society's symbol for order, for decency, a man who was out there trying to protect people.

> I'm not taking anything away from Mr. Cone. He had a right to live, but when you kill a man in a police uniform that is society's symbol for order, for safety, for protection in your home, for protection on the street, for protection in your businesses, and you just--cold blooded murder a policeman, you've done--you've wiped out a little bit of the heart of society itself."

(Tr. 1195).

The prosecutor also stressed "victim's rights":

> But, you know, there are other rights involved; the right of Floyd Cone. Floyd Cone had the right to life, liberty, and the pursuit of happiness also under the laws of the State of Florida. He had a right to enjoy those hound dogs with his brother and hunt and whatever else he may have enjoyed. But, don't ever lose the fact that this man, Edward Kennedy, and no one else extinguished those rights. Officer McDermon, he had his rights. He had his rights to life, liberty, and the pursuit of happiness, to enjoy his Trooper friends and whatever friends and family he may have had; to have lived and died of natural causes.

(Tt. 1010-1011). The prosecutor thereupon concluded his argument with a final plea for a unanimous verdict of death. Again, defense counsel sought a mistrial; again the trial court denied the motion and took no step to cure the error. (Tr. 1195-96).

Florida's capital punishment statute, section 921.141, has been painstakingly constructed to avoid imposition of the death penalty on the basis of emotionalism and caprice. See Bush v. State, 461 So. 2d 936 (Fla. 1985)(Ehrlich, J., specially concurring). The statute narrowly restricts the aggravating

circumstances which the sentencing body may consider to those specifically enumerated within the statute. Section 921.141(5). This Court has "previously held that '[t]he aggravating circumstances specified in the statute are exclusive, and no others may be used for that purpose." Grossman v. State, 13 Fla. L. Weekly, 127, 131 (Feb. 18, 1988)(citing Miller v. State, 373 So. 2d 882, 885 (Fla. 1979).

The "worth" of the deceased is not a factor to be considered in aggravation, nor are the repercussions of the victim's death upon family and friends a circumstance to be weighed in aggravation. See Bush v. State, 461 So. 2d 936 (Fla. 1985) (Ehrlich, J., specially concurring)("The suffering of the survivors is not relevant to any of the factors" enumerated in Section 921.141, Florida Statutes, which may be presented to a jury in support of the death penalty.) "[V]ictim impact is a non-statutory aggravating circumstance which would not be an appropriate circumstance on which to base a death sentence." Grossman v. State, 13 Fla. L. Weekly, 127, 131 (Feb. 18, 1988). The worth of the victim or the impact of the victim's death upon other persons are irrelevant factors and should not be considered by the jury in determining the severity of the defendant's sentence.

This Court has recognized this new law. Permitting "this type of evidence in aggravation appears to be reversible error in

view of the United States Supreme Court decision in Booth v. Maryland." Patterson v. State, 513 So. 2d 1257, 1263 (Fla. 1987)(citations omitted). The Patterson Court "caution[ed] . . . judge[s] not to utilize . . . the emotional distress of the victim's family in the weighing process."

Here, the state argued that Mr. McDermon and Mr. Cone had rights, as did their families. Perhaps the most blatant unlawful comments made by the State were those regarding the "victims." The prosecutor, in an attempt to evoke sympathy for the deceased and to demand vengeance on their behalf argued:

> "But, you know, there are other rights involved; the right of Floyd Cone. Floyd Cone had the right to life, liberty, and the pursuit of happiness also under the laws of the State of Florida. He had a right to enjoy those hound dogs with his brother and hunt and whatever else he may have enjoyed. But, don't ever lose the fact that this man, Edward Kennedy, and no one else extinguished those rights. Officer McDermon, he had his rights. He had his rights to life, liberty, and the pursuit of happiness, to enjoy his Trooper friends and whatever friends and family he may have had; to have lived and died of natural causes"

(Tt. 1010-1011).

Defense counsel pointed out that this line of argument was not relevant to any statutory aggravating or mitigating circumstance. The trial court again denied a motion for mistrial, encouraging the prosecutor to mine this vein even more deeply.

> MR. AUSTIN: Ladies and Gentlemen, I'm almost through, and, I'm going to sit down in just a minute. But, I mean what I just said. Bob McDermon had a right; Mr. King said it, he had a right. He was in his 30's -- early 30's.
>
> He had a right to live, to work, to visit with his friends, to visit with Trooper Davis, his best friend, to enjoy Mr. Davis' children and to raise a family of his own.
>
> He had a right to grow old, to do the things that he wants to do, to have a career in his department.
>
> Mr. Cone lived modestly in an old house-trailer. He lived in a rural area. He obviously liked his guns, dogs, and going with his brother shooting.
>
> He lived modestly, but that was his castle. And, again, for 800 years in our system of justice, a man's home is his castle.
>
> This murderer went in it and violated the sanctity of that home, violated Mr. Cone's castle, and killed him in the threshold of his own castle, of his own home.
>
> And Mr. Cone had a right to enjoy his family and his brother, to go hunting and live out here on his land and to earn his livelihood. He had all these rights.

(Tr. 1189-90). As in Booth, counsel for Mr. Kennedy immediately objected to the injection of these considerations. But see Grossman v. State, 13 Fla. L. Weekly, 27 (Feb. 18, 1988).

Recently this Court adopted the harmless error analysis enunciated in Chapman v. California, 386 U.S. 18 (1967), for determining whether a violation under Booth mandates reversal of

a sentence. Id[1]. In deciding whether Booth errors are so fundamental and pervasive as to never constitute harmless error, this Court relied upon the following United States Supreme Court language:

> The VIS [Victim Impact Statement] in this case provided the jury with two types of information. First, it described the personal characteristics of the victims and the emotional impact of the crimes on the family. Second, it set forth the family members' opinions and characterizations of the crimes and the defendant. For the reasons stated below, we find that this information is irrelevant to a capital sentencing decision, and that its admission creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner.'

Id. at 19. (citing Booth v. Maryland, 107 S. Ct 2529, 2533 (1987)). The Grossman Court held that "[i]f the reviewing court can say beyond a reasonable doubt that the death sentence would have been imposed had the irrelevant evidence not been introduced, the error is harmless; if the court cannot say this

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[1]Justice Ehrlich, specially concurring in Bush v. State, 461 So. 2d 936, 942 (Fla. 1985)(emphasis added) determined that prosecutorial arguments regarding victim impact are rarely a proper topic for comment:

> I can think of few arguments which are more calculated to arouse an intense emotional response in a jury than the graphic portrayal of the survivors' bereavement.

beyond a reasonable doubt, the error is harmful." id. at 132. Moreover, Grossman placed great emphasis on interpretation of the Booth Court's use of the word "may", finding that "[t]he use of the word 'may' and the internal analysis of the Booth court show that some victim impact statements will differ in impact from others." id.

This interpretation shortchanges the import of the passage from Booth. It is the very fact that some victim impact statements will differ in impact from others that violates the constitutional dictates of the eighth amendment. The error in permitting the use of comments relating to the worth of the victim is that such statements are not subject to distillation into a uniform aggravating factor. Remarks about the victim are completely at odds with "[t]he whole thrust of American jurisprudence in the capital punishment area [which] has . . . attempt[ed] to excise from the sentencing process any traces of bias or caprice by channeling and cabining discretion." Moore v. Kemp, 809 F.2d 702, 747 (11th Cir. 1987)(Johnson, J., concurring in part and dissenting in part)(citing Furman v. Georgia, 408 U.S. 238, 242 (1972)(Douglas, J., concurring).

The prosecutor inflamed the prejudices and emotions of Mr. Kennedy's jury with impassioned entreaties to invoke the ultimate penalty for the death of "a man in a police uniform. . . . [a] symbol, society's symbol for order, for decency, a man who was

out there trying to protect people." (Tt. 1195) The State did not "'merely let the jury know who the victim was, but rather . . . urge[d] the jury to return a sentence of death because of who the victim was.'" Moore v. Kemp, 809 F.2d 702, 747 (11th Cir. 1987)(Johnson, J., concurring in part and dissenting in part)(citing Moore v. Zant, 722 F.2d 640, 651 (11th Cir. 1983)) (emphasis in original). The State impermissibly "encouraged the jury to set punishment based on the goodness of the murder victim[s]." Vela v. Estelle, 708 F.2d 954, 965 (5th Cir. 1983). The jury's decision in recommending the death penalty was not based upon reason, but on the prejudicial effect of the prosecution's arguments.

Even under the harmless error analysis adopted in Grossman v. State, 13 Fla. L. Weekly 27 (Feb. 18, 1988), the record in this case amply demonstrates that the prosecutor injected irrelevant and immaterial evidence and argument of victim impact calculated solely to prejudice the jury, and that Mr. Kennedy's sentence of death was based on these unconstitutional considerations.

C. PROSCRIBED GOLDEN RULE ARGUMENTS INVITED THE JURY TO IMAGINE THE VICTIM'S UNEXPECTED DEATH IN HIS OWN HOME

As if it was not enough to evoke sympathy for the victims and demand vengeance on their behalf, the prosecutor drove the point, quite literally, closer to home:

> Can you imagine, in your own living room not bothering a soul on a Saturday afternoon. He stopped at his relative's house and had a beer and walked back to your own house, and a total stranger, because you got in his way, destroys you?

(Tt. 1190)(emphasis added). Defense counsel objected to the State's patently unlawful argument, but the trial court overruled the objection.

This was not the first time the prosecutor had resorted to such unseemly tactics. In closing, the State urged the jury to return a verdict of "guilty", underscoring the observation that:

> I suppose there are many joggers running around the streets, must be somebody from Deland jogging in here in this jury panel, but, all the testimony was is that - -

(Tt. 986). Defense counsel correctly noted that this comment by the State tended to place the jury in the place of one of the witnesses or participants of the crime (Tt. 986). Counsel moved for a mistrial (Tt. 986). The court denied the motion and failed to caution the State or to give a curative instruction to the jury (Tt. 986).

The prosecutor's comments ran far astray of the considerations properly before the jury, and the state's remarks "violate[d] the prosecutor's duty to seek justice, not merely 'win' a death recommendation." Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985). Such prosecutorial overreaching cannot be condoned: "It ill becomes those who represent the state in the application of its lawful penalties to themselves ignore the precepts of their profession and their office." Id. (emphasis in original) The State's prejudicial and irrelevant arguments defiled the jury trial and sentencing deliberations, in violation of the fifth, sixth, eighth and fourteenth amendments. Moreover, the flouting of ethical limititations of prosecutioral conduct violated the duty of the state attorney to seek justice, not merely a conviction. Bush v. State, 461 So. 2d 936, 942 (Fla. 1985)(Ehrlich, J., specially concurring). These improper considerations "may" have effected the outcome, Booth, supra, and reversal is necessary.

D. MISLEADING PROSECUTORIAL ARGUMENTS INVENTED A FALSE LEGISLATIVE MANDATE FOR THE DEATH PENALTY IN ANY CASE INVOLVING MURDER BY AN ESCAPED INMATE, RESULTED IN A CAPITAL SENTENCE BASED UPON FACTORS NOT PROPERLY WITHIN THE JURY'S CONSIDERATION, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS

During the penalty phase, the prosecutor vehemently argued that it was the legislature's intent to impose a mandatory sentence of death for a killing which occurred in the course of a

prison escape. The State repeatedly misinformed the jury that it had "no choice" but to recommend death if it followed the trial court's instructions.

New law condemns such argument. In Sumner v. Shuman, 107 S. Ct. 2716 (1987), the United States Supreme Court held that a death sentence, imposed pursuant to a mandatory capital sentencing procedure involving any prisoner serving a life sentence who commits murder, failed to comport with the dictates of the eighth and fourteenth amendments. The Court premised its decision on the constitutionally mandated individualized capital-sentencing doctrine. Id. at 2721. Justice Blackmun, in delivering the opinion of the Court, rendered an exhaustive history of the development of this doctrine. He noted that the landmark decisions of Gregg v. Georgia, 428 U.S. 153 (1976), Proffitt v. Florida, 428 U.S. 242 (1976), and Jurek v. Texas, 428 U.S. 262 (1976), "emphasized the fact that those capital schemes permitted the sentencing authority to consider relevant mitigating circumstances pertaining to the offense and a range of factors about the defendant as an individual." Sumner v. Shuman, 107 S. Ct. 2721 (1987). By contrast, those death penalty statutes discussed in Woodson v. North Carolina, 428 U. S. 280 (1979), and Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976), were found to be fatally flawed, as they precluded the sentencing authority from considering factors in mitigation. The

Sumner Court explained that mandatory death penalty statutes, by failing to replace arbitrary and capricious jury discretion with objective standards, did not comply with the criterion set forth in Furman v. Georgia, 408 U.S. 238 (1972). A sentence of death imposed pursuant to a mandatory death penalty statute was disproportionate and fundamentally unfair:

> A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.

Sumner, 107 S. Ct. at 2722 (citing Woodson v. North Carolina, 428 U.S. 280, 304 (1979).

The Sumner Court continued to trace the history of individualized determinations in capital-sentencing proceedings through the decades to its must recent and unanimous reaffirmation in Hitchcock v. Dugger, 107 S. Ct. 1821 (1987). Hitchcock unequivocally held that in capital cases, "the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence.'" Id. at p. 1822 (citations ommitted). Sumner concluded that, "[h]aving reached

unanimity on the constitutional significance of individualized sentencing in capital cases," 107 S. Ct. 2716, 2727 (1987), a mandatory death penalty procedure was constitutionally infirm. Thus, a mandatory sentence of death, such as was urged by the prosecutor in Mr. Kennedy's case, constituted a "departure from the individualized capital sentencing doctrine [and] is not justified and cannot be reconciled with the demands of the Eighth and Fourteenth Amendments." Sumner at p. 2723. As a result, Mr. Kennedy's conviction and sentence of death were rendered fundamentaly unfair and the outcome of this proceeding untrustworthy. A new sentencing hearing is dictated.

E. IMPROPER AND IRRELEVANT PROSECUTORIAL REMARKS REGARDING NON-STATUTORY AGGRAVATING FACTOR OF LACK OF REMORSE RENDERED SENTENCING CONSTITUTIONAL INFIRM

The State Attorney inflamed the jurors' passions by summoning them to consider the non-statutory aggravating circumstance of lack of remorse:

> Did he ever ask you to forgive him; say he was sorry that he's destroyed Bob McDermon's life, that he's destroyed Floyd Cone's life? Not a word. I think that goes to his character. I think that goes to a diabolical state of mind.

(Tt. 1186-87). The prosecutor intentionally mistated the evidence. In fact, Mr. Kennedy had repeatedly expressed his sorrow over the deaths of Mr. McDermon and Mr. Cone:

> I know they died at my hands, you know, and I'm sorry for it.
>
> I apologized to the Troopers out there in Templin's trailer; I said, I said, "I'm sorry," and they know I said that. I said "I'm sorry."

(Tt. 1146).

Aggravating factors are limited to those provided for by statute. McCampbell v. State, 421 So. 2d 1072 (Fla. 1982). Lack of remorse is not a valid statutory aggravating factor, and may not be relied upon in the sentencing deliberations nor in the imposition of the death penalty. Id. See Trawick v. State, 473 So. 2d 1235 (Fla. 1985); Pope v. State, 441 So. 2d 1073 (Fla. 1984).

Quantifying lack of remorse is beset with those complications inherent in proving a negative. This Court, in Pope v. State, 441 So. 2d 1073, 1078 (Fla. 1984), explicated those difficulties and their corrolary constitutional infirmities:

> [R]emorse is an active emotion and its absence, therefore, can be measured or inferred only from negative evidence. This invites the sort of mistkae which occured inthe case now before us - - inferring lack of remorse from the exercise of constitutional righrts. This sort of mistake may, in an extreme case, rasie a question as to whether the defendant has been denied some measure of due process, thus mandating a remand for reconsideration of the sentence.

Considering lack of remorse for any purpose - either as an aggravating factor or in enhancement of a proper statutory aggravating factor - poisons the jury recommendation and constitutes error of such magnitude as to mandate a new sentencing trial. Id. at 1240 - 1241. See Agan v. State, 445 So. 2d 326, 328 (Fla. 1984); Pope v. State, 441 So. 2d 1073, 1078 (Fla. 1984). It cannot be denied that these improper concerns "may" have affected the sentence, and reversal is necessary.

F. IMPROPER PERSON OPINION, AND COMMENT ON WHAT IS AGGRAVATING

The prosecutor repeatedly injected his personal opinion on the evidence into his arguments. He improperly vouched for the credibility of the State's witnesses. Commenting on the veracity of of Officer Moneyhun, the prosecutor exclaimed,

> But, I'll say this to you in all sincerity: If you believe that Officer Moneyhun walked in this courtroom, got up there on that stand and took an oath before you and made a solemn pact with god to tell the truth, if you believe he did that, and came in here and lied against that Defendant and made up all that statement that he recited to you, then, I say you should acquit him if that's what you believe because we've got the worst, most corrupt law enforcement agencies in this State if that happened, and, I don't believe it

(Tt. 999)(emphasis added).

> I believe [Francis Templin] said she was sick to her stomach and couldn't talk, as well she should have been

(Tt. 999). The prosecutor was similarly not without his opinion on the evidence regarding the commission of a burglary:

> Now, that's about as much force and taking of a man's property as you can conceivably have. So, I think under the evidence of this case, it's hard to say that there was anything other than a robbery in addition to the burglary.

(Tt. 1001).

The jury was also misled by the State's running commentary on the evidence regarding the merits of the defendant's case:

> As I say, there's no question clearly that Mr. Cone and Mr. McDermon were killed during the course of a burglary and during the course of a robbery. It might at least be arguable that Mr. Kennedy had no premeditated intent to kill Mr. Cone because it was so quick, according to the statement that he tells Officer Moneyhun, if you believe that. Because he was certainly robbing him in his own house and burglarizing his house when he killed him. It was during the course of that burglary and robbery, so, there's no question there

(Tt. 1002).

> There's no question when he went at him with that rifle he had a premeditated intent to kill

(Tt. 1003). But there was a very real question concerning Mr. Kennedy's intent to kill: The prosecutor impermissibly directed the jurors not to consider that issue.

The prosecutor then stepped completely beyond the record, to express his personal belief that Mr. Kennedy would have killed others:

> Let me tell you something, folks, if he could have gotten out of there by killing those officers, if he could have killed Mrs. Templin, if he could have killed Shawn, that baby, if it would have gotten him out of there he would have killed every one of them. He would have killed every one of them if it had gotten him free.

(Tr. 1184). This "testimony" by the prosecutor had no evidentiary foundation, bore no relevance to any of the statutory aggravating circumstances on which the prosecutor purported to rely, and inflamed the jury with images of child murder.

The prosecutor argued that Mr. Kennedy's character was an aggravating factor.

> [I]t's an aggravating factor, his character. We can't do it that way, because the Legislature put it this way, but we have disproved the presence of a good character beyond and to the exclusion of every reasonable doubt. . . .

(Tr. 1185-86). The State, in its argument to the jury, impermissibly made gratutious derogatory comments regarding Mr. Kennedy's character. The prosecutor's gross misconduct was apparent from the outset:

> He [Mr. Kennedy] tied him up and stuck a handball in his mouth where he could have strangled. That certainly doesn't seem like the conduct of a peaceful, law abiding citizen as Mr. Treece seems to depict his client as being.

(Tt. 982). The State continued this diatribe:

> He makes much to-do -- you know, Mr. Treece talks and says, 'Well, he could have killed Officer Davis, he could have killed Officer Smallwood, he could have killed Frances Templin if he had really wanted to, if he was really a mad, vicious killer.' He makes him should like some candidate for the Nobel Prize or a good samaritan.

(Tt. 983)

> He wasn't sparing Mrs, Templin's life or Lieutenant Smallwood's or Mr. Davis' life out of the kindness of his heart....He wasn't being a good Samaritan....he wasn't doing this out of any kindness or act of mercy by sparing the life of Mrs. Templin or those officers because he'd have bushwacked them and shot them down just like he did Mr. Cone and just like he did Mr. McDermon if he had had the opportunity because we know what sort of person he is.

(Tt. 984). Such statements of opinion by the prosecutor, unsupported by record evidence, clearly violated the Code of Professional Responsibility, Canon 7, EC7-24, and DR 7-106(c)(4).

"It is improper in the prosecution of persons charged with a crime for the representative of the state to apply offensive epithets to defendants or their witnesses, and to engage in vituperative characterizations of them." Green v. State, 427 So. 2d 1036, 1038 (Fla. 3d DCA 1983). See Dugue v. State, 498 So. 2d 1334, 1337 (Fla. 2d DCA 1986). See also Dukes v. State, 356 So. 2d 873 (Fla. 4th DCA 1978). The Florida Bar Code of Professional Responsibility mirrors the standards set by the American Bar

Association. The Florida code is not merely precatory, rather, it is a codification of those standards to which an attorney's conduct must conform. Rule 4-3.4(e) of the Rules Regulating the Florida Bar specifically prohibits counsel from expressing his/her personal opinion "as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant or as to the guilt or innocence of the accused." On numerous occasions, the Florida courts have stated that they will not condone arguments in derogation of this disciplinary rule and associated ethical cannon. S. H. Investment and Development Corp., HIC v. Kincaid, 495 So. 2d 768 (Fla. 5th DCA 1986); Borden, Inc. v. Young, 479 So. 2d 850 (Fla. 3d DCA 1985), review den'd, 488 So. 2d 832 (Fla. 1986); Schrier v. Parker, 415 So. 2d 794 (Fla. 3d DCA 1982). See also Dukes v. State, 356 So. 2d 873 (Fla. 4th DCA 1978); Sequin v. Hauser Motor Company, 350 So. 2d 1089 (Fla. App. 4 Dist. 1977).

Defense counsel lodged five objections with the Court to the prosecutor's flagrantly impermissible penalty phase argument. The trial judge overruled the objection and denied defense counsel's motion for a mistrial on each occasion. Florida law has repeatedly held that such improper remarks have been found to be so egregious as to constitute fundamental error, vitiating the need for contemporaneous objection. Duque v. State, 498 So. 2d 1334 (Fla. 2d DCA 1986); S. H. Investment and Development Corp.,

HIC v. Kincaid, 495 So. 2d 768 (Fla. 5th DCA 1986); Block v. Addis, 493 So. 2d 539 (Fla. 3d DCA 1986); Borden, Inc. v. Young, 479 So. 2d 850 (Fla. 3d DCA 1985), review den'd, 488 So. 2d 832 (Fla. 1986); Shreier v. Parker, 415 So. 2d 794 (Fla. 3d DCA 1982). See also Hillson v. Deeson, 383 So. 2d 732 (Fla. 3d DCA 1980). Now, new law, see Booth, supra, reveals that the eighth amendment is violated by the injection of irrelevant and inflammatory matters at sentencing.

G. THE COURT MUST DETERMINE MR. KENNEDY'S CLAIMS ON THE MERITS

Neither Caldwell nor Booth had been decided at the time of Mr. Kennedy's trial, sentencing, and direct appeal. These precedent-setting decisions require that Mr. Kennedy's claim be determined on the merits pursuant to Rule 3.850. See generally, Witt v. State, 387 So. 2d 922 (Fla. 1980); cf. Morgan v. State, 12 Fla. L. Weekly 433 (Fla. 1987).

Mr. Kennedy's eighth amendment challenges are properly before the Court. Witt v. State; see also, Tafero v. State, 459 So. 2d 1034, 1035 (Fla. 1984)(finding Enmund v. Florida, 458 U.S. 782 [1982], a change in law cognizable in post-conviction proceedings); Edwards v. State, 393 So. 2d 597, 600 n.4 (Fla. App.), petition denied, 402 So. 2d 613 (Fla. 1981)(finding Cuyler v. Sullivan, 446 U.S. 335 [1980], a change in law cognizable in post-conviction proceedings). The holdings of Booth and Caldwell

decided questions of fundamental constitutional error -- proceedings which violate these precedents render any ensuing sentence arbitrary, capricious, and unreliable. Mr. Kennedy's eighth amendment claim is properly before this Court as it presents errors of fundamental magnitude such as those found cognizable in post-conviction proceedings in Reynolds v. State, 429 So. 2d 1331, 1333 (Fla. App. 1983)(sentencing error); Palmes v. Wainwright, 460 So. 2d 362, 265 (Fla. 1984)(suppression of evidence); Nova v. State, 439 So. 2d 255, 261 (Fla. App. 1983)(right to jury trial); O'Neal v. State, 308 So. 2d 569, 570 (Fla. 2d DCA 1975)(right to notice); French v. State, 161 So. 2d 879, 881 (Fla. 1st DCA 1964) (denial of continuance); Flowers v. State, 351 So. 2d 3878, 390 (Fla. 1st DCA 1977)(sentencing error); Cole v. State, 181 So. 2d 698 (3d DCA 1966)(right to presence of defendant at taking of testimony). Moreover, because human life is at stake, fundamental error is more closely considered. See, e.g., Wells v. State, 98 So. 2d 795, 801 (Fla. 1957)(overlook technical niceties where death penalty imposed); Burnette v. State, 157 So. 2d 65, 67 (Fla. 1963)(error found fundamental "in view of the imposition of the supreme penalty").

H. THE UNRELIABILITY OF THE DEATH SENTENCE

The prosecutor's closing arguments at the trial and penalty phases stand in blatant violation of the mandates of Caldwell,

Booth, and the eighth amendment. The egregious misconduct discussed above did not consist of isolated comments to the contrary, the misconduct pervaded the State's entire argument. Consequently, Mr. Kennedy was sentenced to death by a jury whose sense of responsibility for the awesome task of deciding whether a man should live or die was completely undermined. The jury's verdict and sentence of death was not the product of an individualized determination based on reliable sentencing considerations. Under Caldwell and Booth, the eighth amendment places on the State the burden of establishing that the improper argument had no effect on the jury's verdict of death. In this case, that burden cannot be met, for under no construction can these arguments be said to have had no effect upon nor affected the jury.

ARGUMENT V

AN EVIDENTIARY HEARING IS REQUIRED ON MR. KENNEDY'S ALLEGATIONS THAT SENTENCING COUNSEL PROVIDED INEFFECTIVE ASSISTANCE

"An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." Strickland v. Washington, 104 S. Ct. 2052, 2063 (1984). A defendant is entitled, not merely to nominal representation, but to the diligent efforts of a zealous advocate. In Strickland, the Supreme Court expressly recognized

that the sentencing phase of a capital trial "is sufficiently like a trial in its adversarial format and in the standards for decision that counsel's role in the proceeding is comparable to counsel's role at trial -- to ensure that the adversarial process works to produce a just result under the standards governing decision." Id. at 2064.

In this case, trial counsel unreasonably and prejudicially failed to conduct any investigation into Mr. Kennedy's life history and was thus woefully unprepared to present evidence of mitigating factors to the judge and the jury. As was alleged in the Rule 3.850 motion, had counsel acted reasonably, there is a reasonable probability that the result in this case would have been different. The allegations warranted an evidentiary hearing. See Wilson v. Butler, 813 F.2d 664 (1987)(Defendant alleged sufficient showing of prejudice to warrant an evidentiary hearing on counsel's ineffectiveness for failing to adequately investigate and present detailed facts about client's poverty-stricken childhood and deficient mental capacity.); Porter v. Wainwright, 805 F.2d 930 (11th Cir. 1986)(Case remanded for an evidentiary hearing on the issue of whether defendant's attorneys were unconstitutionally ineffective for failing to investigate and present mitigating character evidence.); Thomas v. Kemp, 796 F.2d 1322 (11th Cir. 1986)(Court affirmed district court's ruling that counsel's failure to investigate, obtain, and present

mitigating evidence from mother, family members, and individuals acquainted with the defendant from school, work, or the neighborhood fell below objective standard of reasonableness under prevailing professional norms.); Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984)(Counsel found ineffective for failing to examine records of client's prior hospitalization though counsel was unaware of client's previous institutionalization.); Jones v. Thigpen, 788 F.2d 1101 (5th Cir. 1986), cert. denied, 107 S. Ct. 1292 (1987)(Counsel found ineffective for failing to present evidence of client's mental retardation and emotional disturbance, as failure was professionally unreasonable and prejudicial.); Beavers v. Balkcom, 636 F.2d 114 (5th Cir. 1981)(Counsel found ineffective for failing to examine records of client's prior commitment to mental hospital.)

Two types of "individualized sentencing" background information should have been investigated and presented. First, Mr. Kennedy's compelling mitigating upbringing would have made a difference. Second, the effect of the prison on Mr. Kennedy, and the way in which prison conditions contributed to this offense, would have been persuasive in the life/death balance. Counsel acted unreasonably by not knowing and by not presenting this evidence.

A. MR. KENNEDY'S MITIGATING FAMILY BACKGROUND

If provided an evidentiary hearing, Mr. Kennedy would show:

a. Edward Deanalvin Kennedy, Jr. was born in Boston City Hospital on May 25, 1945. He grew up in Wrentham, Massachusetts, as the only child in the only black family in this small, rural, white community. Mr. Kennedy's parents, now deceased, were elderly when he was born and passively reacted to and generally tolerated the pervasive racial discrimination that existed in Wrentham during the 1950's and 1960's.

b. Mr. Kennedy's father, Edward Kennedy, Sr., was born in Rome, Georgia, in 1895 and raised in Bainbridge, Georgia. He left Bainbridge at the age of 14 after witnessing the lynching of a black man who was left hanging in a tree for three days "to teach the niggers a lesson." As his son, Edward, Jr., grew up, the elder Mr. Kennedy told him this story often, as an example of how deep rooted and ugly racism in the South had been.

c. Because of their race, the Kennedys were isolated from the other families in Wrentham. Edward, Jr., never had an opportunity to play or interact with other children until he was school aged. At first the other children were intrigued by his skin color -- they would rub his skin to see if the black would come off and ask him if he was made of chocolate. By the third grade, however, Edward, Jr. was made so acutely aware of his racial "inferiority" that he developed a severe stutter. The

speech defect increased his self-consciousness, which only added to his lower self-esteem and self-perception that he was different. To this day, Mr. Kennedy cannot coherently say the words, "Wrentham, Massachusetts."

d. Because Mr. Kennedy's parents did not have to face the same constant taunting and rejection from peers as did Edward, Jr., in school every day, they could never understand what it was like to live among an exclusively white population Edward, Jr. felt increasingly isolated as he had no peer support, and little family support. When Edward, Jr. did seek comfort from his parents, he was told over and over again the horrifying details of the Bainbridge, Georgia, lynching and to be thankful for having escaped the South.

e. The inability of Mr. Kennedy's parents to understand the constant psychological torture he suffered at school drove a wedge between Edward, Jr., and his parents. Contributing to this problem was the damaging rejection of him by his mother, who had to raise Edward, Jr., knowing that he was really the son of her husband's mistress.

f. Mr. Kennedy's certificate of birth indicates that his father was Edward D. Kennedy and that his biological mother was a "Ms. Grant" who was 28 years old at the time of his birth and that she was born in New York, New York. The woman who was forced to raise Edward Kennedy as if he were her own child was

Daisy L. Norwood, born in Rome, Georgia, on June 29, 1891. Ms. Norwood was married to Edward D. Kennedy, Sr., on June 12, 1932, in Malden, Massachusetts. This explains much about the rejection and alienation Mr. Kennedy experienced from his mother and father as he grew up. His mother could not accept him knowing he was not her child, and could not offer him a mother's love. Mr. Kennedy's father consistently contributed to young Edward's already plummeting self-esteem and person demoralization by taunting him with predictions that he would "turn out bad."

g. Edward Kennedy's school records show how deeply he was affected by the alienation from his peers and rejection from his parents. Testing developed by The Psychological Corporation in New York, New York, and administered to Mr. Kennedy at the age of 13 show him to have fallen far below the norm of his fellow students. For instance, Mr. Kennedy was rated in the third percentile in the category of "sentences" and the fifteenth percentile in the "numerical" section of the examination. Overall, this testing placed Mr. Kennedy in the eighth percentile (meaning that 92% of Mr. Kennedy's peers tested higher than he did) with a grade equivalent of 3.5 even though he was in the eighth grade at that time. Achievement tests taken in the sixth and seventh grades show Mr. Kennedy to have scored an equivalent grade placement of 5.1 and 5.9, respectively. Thus, Mr. Kennedy's ability to perform academically decreased as the racial

taunts and physical abuse from his peers increased. By the time Mr. Kennedy graduated high school, his class standing sunk to 125 out of 126 students.

h. In his teens, Mr. Kennedy was beaten mercilessly and frequently be the young white men in his school. In 1960, at the age of fifteen, he was kicked in the eye and left with a serious visual defect. Mr. Kennedy's parents were so embarassed by their son's victimization and so unwilling to give him support that they did not take him to a physician until five days after this incident. When they did, they told the doctor that Edward, Jr., had struck his eye on the corner of a kitchen cabinet. The resulting loss of vision in Mr. Kennedy's left eye was so great that he recieved a "4-F" classification from the military, and only a cornea transplant can help to correct his seriously defective eyesight. In addition to the numerous blows to the skull administered by his schoolmates, Mr. Kennedy suffered a severe head injury at the age of six when he mysteriously "fell" out of his parents moving car.

i. Mr. Kennedy was first incarcerated only three months after his graduation from high school. He was sentenced to two months in the Norfolk, Massachusetts House of Corrections for larceny in September of 1963 and was in and out of prison for various property crimes for the next fifteen years. Caught in a self-destructive downward spiral, Mr. Kennedy could not escape

the snowballing effect of consistent institutionalization.

j. Thus, rejected by his biological mother, unsupported and shunned by his parents, alienated and ridiculed by his peers, ignored by his teachers and scorned by a society that would not look past the color of his skin, Mr. Kennedy grew up in an atmosphere of fear, hatred and loneliness governed by race.

k. Mr. Kennedy had, and continues to have, a speech disorder, which is often indicative of psychological disorders. Moreover, the etiology of such impairment substantiates Mr. Kennedy's testimony at sentencing, and the evidence proffered above, concerning a childhood damaged by discrimination and abuse:

> Mr. Edward Kennedy was seen on March 26, 1987 at the Florida State Prison for a speech-language and audiological evaluation. He was very cooperative throughout the evaluation even though some of the question she was asked were designed to elicit stress.
>
> Mr. Kennedy was reported to have a speech disorder usually referred to as stuttering. He stated that this problem with his speech began during elementary school (approximately fourth grade) when he began experiencing "racial problems." These problems, according to both Mr. Kennedy and history information, were due to him being the only Negro student in an all white school in the Boston area. Mr. Kennedy stated that during these episodes with his classmates he would "freeze up inside and couldn't talk." When asked regarding whether he asked for parental help in dealing with these situations, Mr. Kennedy responded: "They didn't want to talk about it." He stated

> that eventually the situations went from verbal attacks by white students to physical attacks. During one of these attacks when he was fifteen, Mr. Kennedy received a severe injury to one eye with resulting loss of vision. Mr. Kennedy commented that he lost motivation at school and his grades which had been mainly "B's and A's dropped to C's". School records confirm this drop in scholastic standing as Mr. Kennedy was rated on school records as being above average in reading in third grade with a standard achievement test given on May 11, 1954 showing functioning at the fourth grade fourth month level. In comparison in the fourth grade, Mr. Kennedy received a standard achievement score of fourth grade ninth month when tested May 18, 1955. By seventh grade his grades were predominately D's and C's. He graduated with a standing of 125 out of 126 in his class despite his I.Q. of 101.

(R. 1386).

1. Diagnostic testing has demonstrated that Mr. Kennedy's speech disorder is a product of stress, anxiety and fear arising out of the strong but ambivalent desire to express his emotions and fear of reprisal:

> This type of stress, anxiety and fear resulted in both the desire to say what is being felt and fear of the end result if it is said. As stated by Van Riper in <u>THE NATURE OF STUTTERING</u>.
>
> "Strong emotions such as those accompaning the expectation of imminent unpleasantness, punishment, or frustration are disintegative, and they produce breakdown not only in the formulation of messages but also in their motoric expression. For example, if one is consumed with fear or anxiety, it is difficult to organize the flow of thought sufficiently to produce fluent speech. Also, if the fear is great enough, it tends to

> disrupt the intricate coordination patterns required for fluency so that broken speech results. In the stutterer any stimulus previously associated with the emotions that originally produced such breakdown would tend to create fear and also to disrupt speech."

(R. 1388).

m. Mr. Kennedy's speech disorder arises out of the stressful environment in which he was raised as a child; the antagonistic, exclusively white neighborhood in which Mr. Kennedy lived as a child; and situations which he experienced in the fourth grade, contributing to his impairment:

> The effects of strong anxiety feelings upon the human organism are well known. Anxiety often interferes with physiological functions and shows itself in psychosomatic disorders. Anxiety reactions are diverse, but the most common features (which the average person experiences to varying degrees) are palpitation, vasomotor flushing, and respiratory distress. It is one of the most disturbing of mental states and often arises from interpersonal experiences, feeling of insecurity, and frustrations. When a child's adjustment is such that he frequently experiences anxiety reactions in situations where the average child is not threatened, he has difficulty in functioning: a disorganization of speech pattern may be a result of this confusion.

(R. 1388).

n. During his youth, situations not threatening to the average child were psychologically and physically threatening to Mr. Kennedy. They induced such anxiety and fear as to produce the resulting speech pathology:

In HANDBOOK ON STUTTERING. Bloodstein quotes Sheehan as follows:

"Sheehan postulated five distinct "levels" on which speech avoidance drives might operate. He states that these drives might emanate from 1) reactions to specific words, resulting principally from past conditioning to phonetic factors, 2) reactions to threatening speech situations, 3) guilt and anxiety concerning the emotional content of speech, 4) feelings of anxiety in the stutterer's relationships with listeners, especially when these are seen as authority figures, and 5) the ego-defensive need to avoid competitive endeavors posing "threat of failure or threat of success.""

All five of the postulates appear to be present in Mr. Kennedy's case. The repetition of initial sounds results from the type of reaction to specific words, resulting principally from past conditioning. The more severe blocks would be due to reactions to threatening speech situations as well as the guilt and anxiety concerning the emotional content of speech. Feelings of anxiety were evoked both in Mr. Kennedy's relationships with classmates during school and in his relationships with adults due to their lack of support of him. The ego-defensive need to avoid competitive endeavors posing "threat of failure or threat of success" is the end result of his failure in successfully dealing with the adverse situations as shown in his "loss of motivation: which he reported. This would also result in a hypersensitivity to situations which might be ego threatening or anxiety/fear provoking. Had Mr. Kennedy received adequate early intervention both with respect to the speech disorder and the psychological component, he had the intellectual capacity to have normal speech, and to succeed in school with resulting opportunities for gainful employment.

(R. 1389).

o. Had defense counsel adequately investigated Mr. Kennedy's, background, he would have contacted persons who intimately knew his client and who were willing and able to relate their experiences with Mr. Kennedy to the judge and jury. However, trial counsel failed to contact these individuals. One such individual was Mr. Kennedy's former girlfriend, Miss Lee Ruth Armstrong:

> I, LEE RUTH ARMSTRONG, hereby depose and say:
>
> 1. I met Ed Kennedy in 1978. We met at a restaurant and became friendly. We started seeing each other on a regular basis. I liked Sonny. Sonny was astute and very bright. He was a soft spoken man. He was good company, and just a nice guy. Sonny was also a perfect gentleman. He never tried to push himself on me.
>
> 2. I felt at ease with Sonny. We talked about a variety of different subjects. On occasion, we discussed Sonny's troubled childhood. We discussed his experience of growing up as a black child in an almost exclusively white neighborhood. Sonny grew up in Massachusetts, as did I. Although I am white, I still saw the effects of racial injustice and we discussed the atrocity of the subliminal racism in the North. It was much more pervasive than the open intolerance found in the South. It is a much more insidious type of racism as it is cloaked in tolerance and liberalism. Sonny and I discussed the arms length attitude with which he was treated by his peers, stemming from this unrealistic and unfounded fear of blacks. In the North, whites perceive blacks to be some type of alien race, hence the resulting abject fear -- a fear arising from prejudice and ignorance.

3. Sonny had a good friend, Oliver Cochran. I did not know Oliver that well, only that he and Sonny were buddies.

4. I used to work at a bar. I had to close up most nights. Sonny would meet me at closing and help me close up. He would help me balance the cash registrar, count the money, and make the deposit in a small safe on the premises. Generally receipts totalled between two and three thousand dollars.

5. In 1978, I received a call from the Miami Police about the Howard Johnson's incident. When I found out that Sonny was in trouble, I was floored and totally shocked. I just couldn't believe it. I visited Sonny several times before his trial. He said that he never wanted to kill anyone. I believe him. He said that he would never again carry a weapon. Ed was extremely upset; he was so filled with remorse because of the taking of a human life. There was just a feeling about him of complete and utter surrender, he was so sorry and so upset.

6. I continued to stay in touch with Sonny even after he went to UCI. I probably got to know more about him through those letters than I did going out with him. He really opened up. Sonny would write quite often. He'd write 15 and 20 page letters. Most of the time he would write about his feelings for me; that he was in love with me. After awhile, I didn't think that I could maintain the intensity of the relationship. I began to feel burdened by the emotional situation, so I stopped writing. After a time, I guess he got the message, because he stopped writing, too. I have not heard from him for quite some time. I do still care about him. Sonny was a good man; he was kind and gentle.

7. I do not know the details of what happened in 1981. But I do know that Sonny must have really been scared and felt that he

> was going to die. Otherwise, he would never have picked up a gun.
>
> No one has ever talked to me about Sonny. Even in 1978, the only person I ever heard from besides Sonny, were the police. I didn't even know of the incident in 1981. But, if anyone had ever asked me, I would have told them what I think; that Sonny is a kind and gentle man.

(R. 1392-1394).

Trial counsel failed adequately to investigate and prepare Mr. Kennedy's case. Had counsel not been so utterly derelict in his responsibilities, he would have been able to offer compelling, substantial mitigating evidence for the consideration of the jury and the court. Counsel's unreasonable and prejudicial conduct denied Mr. Kennedy of his right to a fair and individualized sentencing determination. Mr. Kennedy is entitled to relief.

B. MITIGATING PRISON DURESS

In this case, Mr. Kennedy's counsel also failed to investigate the very evidence which would have confronted the State's case for a death sentence head on: proof that the conditions at U.C.I. were so brutal and demoralizing that Mr. Kennedy reasonably believed that his safety, his sanity, his very life, depended upon making his escape. Mr. Kennedy found himself in an atmosphere of fear, violence, and hatred. He resisted becoming a part of the savage underworld which ruled The Rock,

but his experiences there were not without an effect. At U.C.I., Mr. Kennedy witnessed acts of violence by inmates against other inmates, by guards against inmates, and by inmates against guards. He knew the danger that awaited him if he returned to U.C.I.

U.C.I. taught Mr. Kennedy another lesson as well: the lesson that a black man had a great deal more to fear from whitie officers than a white man. The racial slurs Mr. Kennedy heard at U.C.I., and the scenes of violence he witnessed, could have not been lost on him when Floyd Cone and Robert McDermon arrived at Mr. Cone's trailer. After his days at U.C.I., Mr. Kennedy's fear was not the ordinary fear of a criminal of detection and apprehension, but the blind panic of a man suddenly confronted with an image of terror.

Defense counsel recognized that it was vital to portray Mr. Kennedy's fear and panic to the jury and to combat the image in the prosecutor's closing argument of a man wedded to violence, who escaped and killed, and who could therefore never be safely entrusted to a prison again. The defense presented three witnesses: two fellow inmates and the defendant. The jury heard that Mr. Kennedy was not violent in prison, but they had no reason to expect that he, or anyone else, would be. There was nothing remarkable in Mr. Kennedy's role as a pacifist and mediator at U.C.I., <u>unless</u> the jury also knew of the brutality

and violence which were pandemic in the institution. The jury heard that Mr. Kennedy was sorry about what had happened to Cone and McDermon and heard about Mr. Kennedy's fears, but the jury did not hear much at all about what Mr. Kennedy had to be afraid of. He was a "big strong boy," in the words of the prosecutor. (Tt. 1006). The jury did not, and could not be expected to, know that U.C.I. had overcome many big strong men before Mr. Kennedy. This anemic version of the facts surrounding Mr. Kennedy's escape -- an escape born of desperation and fear -- was not the whole story. Had defense counsel investigated the readily available sources of information about U.C.I., he would have discovered unimpeachable evidence that U.C.I. was not merely a prison, it was a netherworld of violence and terror. Only the true, graphic story of the horror from which Mr. Kennedy had escaped could have counteracted the prosecutor's powerful, emotional image of a man who escaped and killed without rhyme or reason. The "adversarial testing process" failed to produce a just result in Mr. Kennedy's case, because the defense counsel did nothing to substantiate his theory of mitigation, leaving Mr. Kennedy exposed to sentencing on the basis of the prosecutor's emotional sentencing appeal. The following materials could have been uncovered and presented before the sentencer with a minimum of effort and would have been so presented by reasonably diligent counsel:

a. Conditions at Union Correctional Institution (U.C.I.) before and during the period of Mr. Kennedy's incarceration were textbook illustrations of the depths of degradation to which a prison system can sink. The largest institution in the Florida system, and one of Florida's two maximum security facilities, U.C.I.'s continuing problems with overcrowding, inadequate and deteriorating physical facilities, and inadequate staffing (see Deposition of Superintendent Raymond Massey, App. N), have given it a well-earned reputation as a degrading and violent hell-hole. The Union Correctional Institution facility was designed to accommodate 1688 inmates, with an absolute maximum capacity of 2380; it usually houses more than 2500. During a period between September and November of 1983, the total population varied from 2,448 to 2,575. (See Interim Medical Survey Team Report - Costello v. Wainwright, R. 840-850; Deposition of Superintendent Raymond Massey, R. 865-923). Brutality and neglect have given rise to a surfeit of litigation over prison conditions in recent years (see, e.g. Affidavits in Kish v. Graham, R. 572-629; Interim Medical Survey Team Report - Costello v. Wainwright, R. 840-850); but little improvement has yet been realized.

b. "The Rock," formerly the main population facility at Union Correctional Institution, stands as a memorial to a brutally medieval corrections system and to the inmates who have lost their humanity, their sanity, and their lives there. A 1986

St. Petersburg Times editorial (December 19, 1986), R. 1323, declares, "The Rock is a blemish on Florida's prison record, and the cellblock's thick concrete walls should be knocked to the ground." Built in 1913, the Rock from the outside resembles a seventeenth century Bastille, and its interior facilities and amenities echo this theme. Reinforced with railroad steel, its eighteen inch-thick walls conceal a labyrinth of poorly-lit passageways connecting the most rudimentary of individual and group cells. The thickness of the walls causes them to sweat profusely in the humid Florida summers, resulting in a constantly damp, dank, and musty atmosphere reminiscent of a medieval dungeon. Because the building is unheated, in the winter its walls are covered with ice. (See affidavit of Steve Pillow, R. 558-561).

c. The food preparation and provision facilities at the Rock are an appropriate example of the woeful inadequacy of even the most basic of necessary services at U.C.I. The kitchen and communal mess facilities are notoriously unhygienic, a problem compounded by inadequate sanitary facilities and an unchecked and unrelenting plague of flies. (See Assessment of Health Program, R. 813-839; Interim Medical Survey Team Report, R. 840-850). Facilities in the mess hall are woefully inadequate to support the inflated inmate population, forcing many inmates to eat while standing or squatting on the floor. (See id.). Trays and utensils, if

available at all, are unwashed between uses. (See Assessment of Health Program, R. 813-839). The floor of the dining area is often slippery with filth and rotted food: thirsty inmates had to get down on hands and knees to get water from an open pipe below the floor. (See Interim Medical Survey Team Report, R. 840-850). The general lack of normal hygienic and sanitary precautions in the food preparation area at one point in 1983 resulted in fifty cases of gastroenteritis in a ten day period. (See id.).

d. The problems at U.C.I., and at the Rock in particular, were compounded by an inadequate correctional staff. Colonel Donald Jackson, Chief Correctional Officer, stated that he needed 150-200 people on each shift to do an adequate job of maintaining order at the prison; in 1982, he had, on the average, 90 officers on each shift. (See Deposition of Col. Donald Jackson, R. 924-982). Superintendent Raymond Massey was concerned with the prison's continued inability to maintain the staff at a stable and sufficient level. (See Deposition of Superintendent Raymond Massey, App. N). In the fiscal year of 1981, Massey reported, 150 new officers were hired, while 150 left. (See id.). Massey attributes this phenomenal turnover rate to the inadequate pay provided by the corrections system as a whole and the poor working conditions at Union Correctional Institution, (see id.), and his beliefs are supported by statements of present and former corrections officers. (Final Report of the Ad Hoc Subcommittee

on Management Oversight, "Correctional Officer Grievances," App. B).

e. The medical care facilities at the Rock are and have for some time been notorious for their unconscionable inadequacy. The deplorable state of health care in the Florida system, particularly at Union Correctional Institution, has been the subject of prolonged litigation and has led to the formation of numerous special commissions to study the problem. Reports of the commissions empanelled by the Federal District Court as a result of Costello v. Wainwright indicate little improvement in the situation from 1972, when Costello was initially instituted, up to 1984. (See Interim Medical Survey Team Report, R. 840-850; Assessment of Health Program, R. 813-839).

f. The most recent report of the state of health care at Union Correctional Institution indicates that the administration of the medical program is a hopeless morass of decentralized and independently acting bureaucracies. (Id., p. 826). The "sick call" screening process is largely managed by under- and untrained Medical Technician's Assistants with no formal instruction regarding patient assessment, management and diagnosis, and whose work is unsupervised and unreviewed by anyone but their immediate registered nurse supervisors. (Id., p. 826). The problems engendered by the lack of qualified health care personnel are compounded by the general shortage of correctional

personnel: inmates who are ill are often unable to avail themselves of the few services which are provided because of the general lack of available officers to escort them to the medical area. (Interim Medical Survey Team Report, p. 845, App. L). Some inmates are refused entrance to the clinic by the guards on duty there -- non-medical personnel -- out of sheer personal enmity and spite. (Final Report of the Ad Hoc Subcommittee on Management Oversight, "Excerpts form Correctional Officer Testimony," R. 168-328).

g. Those inmates who are fortunate enough to be taken to the medical area and screened are often not examined, and the notes of the Medical Technician Assistants who conduct the intake process are seldom reviewed by staff physicians. (Id., p. 847). Those with chronic illnesses are seldom given the appropriate examinations and follow-ups, but rather are usually prescribed a regimen of drugs, often contraindicated, and refused a second visit with a physician until the initially prescribed treatment regimen, whether appropriate or not, is completed. (Id.; Assessment of Health Program, p. 826).

h. Inmate deaths as a result of gross medical neglect are not uncommon: several deaths are well documented (Final Report of the Ad Hoc Subcommittee on Management Oversight, pp. 225-235), while numerous others are only indicated. (Id., "Excerpts from Correctional Officer Testimony"; "Crippled Criminals," Florida

Alligator, Sunday Magazine Supplement, 1980, R. 640-644). Those inmates with permanent physical disabilities inevitably languish and deteriorate in U.C.I.'s woefully inadequate and understaffed infirmary inpatient facility. (Assessment of Health Program, p. 826, App. K). One paraplegic inmate/patient at the Rock had to have both of his gangrenous legs amputated after a prison doctor mistakenly informed him to wear leg braces 24 hours a day. (See "Crippled Prisoners," R. 642).

i. Those who do seek treatment, and are not refused by the guards, are often surreptitiously punished by corrections officers and medical personnel. Several former corrections officers at U.C.I. report seeing on numerous occasions obviously sick and/or sedated inmates receive severe beatings at the hands of guards: one officer witnessed the spectacle of an ill inmate with only one leg being beaten by guards for requesting medical attention. Another former officer reported seeing a Mr. Decker, who was then in charge of the clinic, participating in the communal beating of inmate patients on several occasions. (See id.)

j. The problems engendered by the deteriorating and inadequate physical facilities and the lack of adequate support services, substantial as they are, pale in comparison to the pervasive atmosphere of violence and brutality that exists behind the walls of Union Correctional Institution. Stabbings,

robberies, assaults, and rape are daily occurrences, and few are strong enough to escape becoming a victim or a victimizer. The law of the jungle prevails at U.C.I., and those who do not develop the survival instincts of jungle animals do not survive there. (See affidavit of James Bonaventura, R. 566-570;; affidavit of Steve Pillow, R. 557-561; affidavit of John Middleton, R. 562-565; Final Report of the Ad Hoc Subcommittee on Management Oversight, R. 168-328). Inmates and guards alike live in constant fear of injury or death. Weapons were readily available at U.C.I. in the form of debris from the furniture factory, weight-lifting equipment, and pipes (see affidavit of John Middleton, R. 562-565), as well as those ready-made weapons which were frequently thrown over the wall or smuggled into the prison. (See Deposition of Superintendent Raymond Massey, R. 865-923). The inmate who wished to survive intact in general population had to obtain one of those weapons himself or learn to defend himself with his bare hands.

k. Incidents of inmate violence had already reached epidemic proportions by the time Ed Kennedy arrived at U.C.I. From January 1, to December 31, 1982, over 90 separate incidents were reported. (See Incident Reports, R. 660-776). Those statistics, however, are but the tip of the iceberg: a majority of the incidents go unreported by the victims, who fear retaliation and further abuse if they do report the assault. (See affidavit of

John Middleton, R. 562-565). Inmates who seek protection from the continuing violence risk becoming labelled "snitches" and suffering the consequences. (See id.). In many instances where inmates do report an assault, the prison inspectors conclude that there is no support for the inmates' complaints, and consequently no report is filed. (See Final Report of the Ad Hoc Subcommittee on Management Oversight, R. 168-328). To survive in this atmosphere, an inmate must be prepared to meet violence with violence, and become brutalized and dehumanized in the process. The only legal alternative to life in this jungle is protective custody, where the inmate is kept constantly locked in an individual cell and is deprived of those few privileges available to the general population. (See Affidavit of James Bonaventura, R. 566-570). Even so, there is a backlog of requests for protective custody (Interim Medical Survey Team Report, p. 161, R. 840-850), and many of those who do request it are encouraged by correction officers to stand up for themselves and are discouraged from seeking protective custody. Unfortunately, those who follow this advice often find themselves quickly overpowered and brutalized or facing assault or possession of weapon charges. (See Final Report of the Ad Hoc Subcommittee on Management Oversight, R. 168-328). A former corrections officer has concluded that if he were faced with the prospect of facing life as a prisoner at U.C.I., he would immediately attempt an

escape. (Affidavit of Stephen Pillow, R. 557-561). Many inmates, physically and/or mentally incapable of existing in this brutal environment, see escape as the only acceptable alternative, and some of them die in the attempt. (See "$500,000 suit filed in killing of prisoner trying to escape," Orlando Sentinel Star, Nov. 28, 1981, Newsclippings, R. 640-644).

l. The Rock was legendary as the most dangerous and violent prison facility in a system notorious for its violence and brutality. Its unlit twists and turns, blind corners and passages, and open-barred communal cells made it virtually unsupervisable (see Assessment of the Health Care Program, R. 813-839), even if the prison administration had had sufficient numbers of officers to properly supervise such a facility. As it was then, the staff was so inadequate that on the night shift, one guard was responsible for overseeing an entire wing. (See Final Report of the Ad Hoc Subcommittee on Management Oversight, R. 168-328). During mealtimes, the entire security staff was moved to the dining area, leaving those inmates who were not eating unsupervised and unprotected, and open to the ever-present danger of violent assault.

m. The Rock was virtually ruled by inmate gangs organized along racial lines, and individual survival often depended on membership in one of the gangs. (See affidavit of Stephen Pillow, R. 558-561; affidavit of John Middleton, R. 562-565;

affidavit of James Bonaventura, R. 566-570; Final Report of the Ad Hoc Subcommittee on Management Oversight, R. 168-328). The underlying racial hatred that fueled the constant gang warfare was supported and perpetuated by some corrections officers, who instigated and encouraged the conflicts between the groups for their own sadistic pleasure. (See Affidavit of James Bonaventura, R. 566-570; Affidavit of Stephen Pillow, R. 558-561; Final Report of the Ad Hoc Subcommittee on Management Oversight, R. 168-328). One former U.C.I. correctional officer remembers that his fellow employees constantly directed racial invectives at the black inmates, and singled them out as a group for exploitation and abuse. (See Affidavit of Stephen Pillow, R. 558-561). Inmate charges of blatant racial discrimination are too common and frequent to be enumerated. (See Final Report of the Ad Hoc Subcommittee on Management Oversight, R. 168-328).

n. This pervasive atmosphere of racism was inevitable, given the racial composition and dynamics of the prison population. Although half the inmate population is black, 82% of the correctional staff is white. Most of the officers are from the surrounding area, and are heavily influenced by the negative racial attitudes endemic to the rural South. By contrast, most of the black inmates suffered lifetimes of economic and social deprivation which they attribute to the white majority. Combining these white officers and black inmates in such an

oppressive environment exacerbates and enhances the underlying racial tensions already present. Because the white officers exercise such complete power and control over the lives of the inmates, black inmates, unable to strike back against the officers or the system itself, often internalize their hostility against these white officers. This internalized anger is then expressed in the form of violence against individual white inmates, or white inmates in general, and the repressed racism of the white population is expressed in what they percieve as retaliation against the black population. (See Final Report of the Ad Hoc Subcommittee on Management Oversight, R. 168-328).

o. The most appalling aspect of the daily violence and brutality of life in the Rock is the ever present spectre of violent sexual abuse. Forced rape is a daily, almost hourly, occurrence there, and is largely tolerated or overlooked, in some cases even encouraged, by the guards. (See id., R. 168-328 and R. 572-629; affidavit of Stephen Pillow, R. 558-561; affidavit of James Bonaventura, R. 562-565). According to one former correctional officer at U.C.I., "there ain't a time of day or night in there that they don't get had." (Final Report of the Ad Hoc Subcommittee on Management Oversight, p. 21, R. 168-328). Another former officer informed a House Committee investigating U.C.I. that "a young, slim, slender kid, probably his first time in an institution . . . after he's been there two or three days,

he's bound to get raped . . . they do everything possible to get an inmate in a position where he will be raped." (Id., p. 19). One officer estimated that 50 inmates a day are forcibly raped at U.C.I. (Id.). The same officer estimates a young inmate's chances of avoiding rape at U.C.I. as "almost zero, unless he's willing to stick somebody with a knife and fortunate enough to have one." (Id., p. 20). Those who are unable to physically resist sexual assault are soon enslaved, literally becoming the property of the rapist, to be passed along among other inmates at the whim and to the profit of the possessor. One common way, often the only way, for a young inmate who is unable or unwilling to get into the protective custody facility or to otherwise protect himself against violent physical assault to avoid becoming so possessed is to seek out a protector, a "sugar daddy," who will exchange his protection from other inmates for sexual favors. Rape is so current and all pervasive at the Rock that it is virtually impossible to avoid involvement: as one current inmate of Florida State Prison, who was also Ed Kennedy's partner in escape, put it, "you can choose to rape or to be raped, but only a few people can do neither." (See Affidavit of James Bonaventura, R. 566-570). Ed Kennedy's escape was his attempt to do neither one.

p. Perhaps the most disturbing element of the ongoing atmosphere of violence and brutality at U.C.I. and at the Rock

was the intimate involvement of members of the correctional staff. Numerous incidents of gratuitous violence and brutality reaching to the point of torture towards inmates by guards have been documented. (See, e.g., Affidavits in Kish v. Graham, R. 572-629; Final Report of the Ad Hoc Subcommittee, R. 168-328; Assessment of the Health Care Program, R. 813-839; affidavit of Stephen Pillow, R. 558-561; affidavit of James Bonaventura, R. 566-570). Some of this violence is perhaps understandable in the light of the general atmosphere of fear and anarchy inside the Rock: greatly outnumbered guards often resort to violence as a means of establishing what they feel is some semblance of control over the inmate population. As one former correctional officer testified before the House Committee on Corrections, Probation, and Parole, "the only real control that an officer has on an inmate there is the threat of a physical attack. It has to be known that it can't be tolerated because officers are outnumbered so severely that at any time the inmates want to, they can kill any officer in there or injure him permanently." (Final Report of the Ad Hoc Subcommittee, p. 13, R. 168-328).

q. Such methods of prison control became accepted procedure at U.C.I., and were participated in by virtually all correctional personnel. Among the guards there, a former officer explained, there is an unwritten code, "that if you were present when a beating occurred, you were just as guilty as any other

officer that is there. So if an officer hits an inmate and you are there, then you must also hit him so that you can not come forward and say anything." (Id., p. 14). This same officer explained how such behavior is covered up by both participating guards and non-participating investigative personnel, relating how the official Use of Force and Incident Reports that are written by the officers are slanted so that it appears that there was justification for the use of force. (Id.; see also affidavit of Stephen Pillow, R. 557-561). He also stated that the reporting officers were often assisted by prison inspectors who would "in fact help you make up your statement in order to protect yourself." (Final Report of the Ad Hoc Subcommittee, p. 15, R. 168-328). At times, the offending guards do not even bother with Use of Force reports: obvious injuries inflicted on inmates by guards are sometimes attributed to unexplained falls. (Id., p. 19) When inmates do attempt to report an assault by an officer, the prison inspectors routinely reject the complaint for lack of evidence, refusing to allow the inmate to take a polygraph to substantiate his complaint, although the prison officials are generally eager to allow polygraph tests for inmates willing to state the "official" version of any incident of alleged officer brutality. (Id., p. 7). In fact, the prison administration administers polygraphs to inmates testifying in support of the statements of prison employees and against fellow

inmates so regularly that certain employees are trained as polygraph technicians. (Id.)

r. The violence employed by guards against inmates is not confined to attempts to maintain control over an ever growing population by an ever dwindling number of trained prison officials: purely gratuitous acts of sadistic brutality against inmates have been documented. (See, e.g., "UCI employees go on trial today on sex charges," Jacksonville Times Union, Oct.14, 1980, Newsclippings, R. 632; "Goon Squad" transcript, R. 158-167; Final Report of the Ad Hoc Subcommittee, pp. 8-11, R. 179-182; affidavits in Kish v. Graham, R. 1204-1239). Special squads of guards, sometimes referred to as "Goon Squads," were formed to administer random torture to inmates, sometimes on the orders of prison officials but as often as not at their own whim. (See "Goon Squad" transcript, R. 158-167; affidavit of Stephen Pillow, R. 557-561; Final Report of the Ad Hoc Subcommittee, R. 168-328). The members of these squads would routinely single out individual inmates designated as troublemakers and take them into a small cell called the "cage" where they were mercilessly beaten by the entire squad. (Id., p. 19). A former member of one of these squads remembers that his fellow officers on the squad were "so deranged and perverted" that he "feared any encounter with them." (Affidavit of Stephen Pillow, R. 557-561). In method and make-up, these "special" squads resembled nothing as much as the

inmate gangs that roved unchecked in the Rock and rivaled the latter in their random infliction of brutality and terror.

s. Sadistic correction officers at Union Correctional Institution frequently employed and involved the inmates in their endeavors (see id.; affidavit of James Bonaventura, R. 566-570; "Goon Squad" transcript, R. 158-167), rewarding the favored prisoners who participated in their terrorism with money, drugs, or pre-arranged homosexual encounters. In one much publicized and well documented episode, an inmate was employed by the "Goon Squad" to administer punishment to selected inmates; in exchange for his help, he was allowed to choose the "boys" of his choice, whether or not those "boys" were willing. (Id.). This favored inmate publicly asserts that he once killed an inmate at the direction of a guard: The guard allegedly involved in this incident understandably denies the allegations -- State Senator Dr. Arnett Girardeau is convinced, based on his own investigation and the results of polygraphs administered to the inmate, that the allegations are true. (Id.)

t. The materials here presented are but the surface of the horror that was life in the Union Correctional Institution, and particularly the Rock, during the period of Edward Kennedy's incarceration there. It is almost inconcievable that anyone could survive a stay of any length there and emerge with their psyche and soul intact. Edward Kennedy lived in this environment

longer than most human beings could without sinking to the level of brutality necessary to survive there. Mr. Kennedy managed to survive for three years at U.C.I. and the Rock without becoming a victim or a victimizer: his record there reveals that he was never a serious management problem and was never a participant in violent behavior.

In sum, had defense counsel investigated readily available sources concerning the conditions at U.C.I. that precipitated Mr. Kennedy's escape, he would have emerged as a deeply flawed, but ultimately human individual for whom compassion and mercy were possible, rather than a monster bent on destruction, for whom only death was permissible.

ARGUMENT VI

MR. KENNEDY'S CONVICTION VIOLATES THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE HE WAS TRIED BY A PETIT JURY WHICH WAS NOT SELECTED FROM A FAIR CROSS-SECTION OF THE COMMUNITY

Mr. Kennedy fully incorporates the discussion presented in Argument II, supra, and further avers that he was entitled to an evidentiary hering upon his claim that the State's system of relying solely on voter registration lists in the selection of prospective jurors resulted in the underrepresentation of black individuals.

The State's sole reliance on voter registration lists in the selection of petit jurors deprived Mr. Kennedy of his sixth and fourteenth amendment right to be tried by a jury selected from a representative cross-section of the community. Moreover, the selection process violated the fourteenth amendment because Mr. Kennedy (a black capital defendant) was tried by a state-court system which substantially excluded blacks from service on petit juries.

The use of voter registration lists as the singular source for prospective jurors results in the systematic exclusion and significant underrepresentation of black individuals. The decreased proportion of those eligible to register in conjunction with the proportionally lower registration rate of minorities results in the virtual exclusion of black individuals from the pool of prospective jurors. "[I]f the use of voter registration lists as the origin for jury venires were to result in a sizeable underrepresentation of a particular class or group on the jury venires, then this could constitute a violation of a defendant's 'fair cross section' rights under the sixth amendment. Bryant v. Wainwright, 686 F.2d 1373, 1378 fn. 4 (11th Cir. 1982), cert. den., 461 U.S. 932. See Taylor v. Louisiana, 419 U.S. 522 (1975); Duren v. Missouri, 439 U.S. 357 (1979). Accordingly, the sixth and fourteenth amendments mandate that Mr. Kennedy be granted relief.

Counsel for Mr. Kennedy made timely objection to the venire, basing his objection on the total absence of any black individuals on the venire (R. 93). In 1981, the estimated census figures for Volusia County, Florida,revealed a total population of 268,200. In 1980, the census figures reflected that of the total population in Volusia County, 28,883 or 10.77% were black persons. In that same year, there was a total of 131,290 registered voters within Volusia County. Registered black voters numbered 9,483, or comprised 7.78% of the total voting population. The list of registered voters from which prospective jurors wasselected to serve at Mr. Kennedy's trial reveals the startling fact that of the 100 persons subpoenaed to appear for jury duty, none, or 0%, were black persons. The entire venire of 100 individuals consisted of exclusively white registered voters. See Argument II, supra. The United States Supreme Court has avoided specific mathematical parameters for proving systematic exclusion of discrete classes. Id. Nonetheless, statistical evidence demonstrates a severely disparate impact.

The absolute disparity can be derived by ascertaining the proportion in the group under examination as compared to the proportion in the basis of comparison. The difference between the proportion of black persons registered to vote in Volusia County (7.85%) and the proportion of black persons in Volusia County (10.76%) is minus 2.91%.

The comparative disparity can be obtained by ascertaining the proportion of the absolute disparity in comparison to the proportion in the basis of comparison. The proportion of the absolute disparity (-2.91%) in relation to the proportion of black persons in Volusia County (10.76%) is -27.04%.

The sixth amendment prohibits discrimination, whether intentional or not, in the overall jury selection process. The Constitution insures every criminal defendant "the right to ... an impartial jury." Decisions by the Supreme Court of the United States and the United States Courts of Appealshave repeatedly held that a defendant may challenge the discriminatory selection of jurors pursuant to the protections of the sixth amendment. See Duren v. Missouri, 439 U.S. 357 (1979); Taylor v. Louisiana, 419 U.S. 522 (1975); Bowen v. Kemp, 769 F. 2d 672 (11th Cir. 1985); Gibson v. Zant, 705 F. 2d 1543, 1547 (11th Cir. 1983).

> [T]he defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Once a prima facie case is set forth, the burden shifts to the State to disprove the defendant's claim. Discriminatory intent is irrelevant to a sixth amendment challenge. Id. at 368, n.26. See also Bowen v. Kemp, 769 F. 2d 672, 684 n.7 (11th Cir. 1985).

If the jury selection system resulted in a representative cross-section of the community, it would be anticipated that the composition of any one jury pool would be reflective of the constitution of the eligible community. In assessing whether a jury selection system accomplishes the constitutional mandate of obtaining a representative sample of the community, courts focus on a cognizable group within the community, and compare the percentage of those groups appearing in the jury pool to the percentage of the group in the general population. The goal of a representative jury may be compromised at various stages of the selection process. Specifically, if the list from which prospective jurors are selected does not represent a fair cross-section of the community, then the jury selection process is constitutionally defective ab initio.

The representation of black persons on the venire from which the jury was chosen is not fair and reasonable in relation to the number of black persons within the community.

In 1972, the number of persons in Florida registered to vote was 3,487,000 or 68.3% of the voting-age population. In 1976, the number of persons in Florida registered to vote was 4,094,000 or 66.9% of the voting-age population. In 1980, the number of persons in Florida registered to vote was 4,810,000 or 64.9% of the voting age population.

The percentage of eligible blacks registering to vote is appreciably below that of the general population. Nationwide, in 1972, 34.5% of the black population was not registered to vote. This figure rose to 41.5% in 1976. In 1978, the number of blacks not registered to vote increased to 42.9%. People v. Harris, 679 P.2d 433, 441 (Cal. 1984), cert. den., 105 S. Ct. 365 (1984). Because so few blacks are registered to vote as compared to those who are eligible to register, sole reliance on voter registration lists as the exclusive source for selection of prospective jurors results in the underrepresentation of black individuals on jury venires. Voter registration lists do not reflect a fair cross-section of the community as many voting age blacks simply do not register.

The procedures used to obtain the jury panel in Mr. Kennedy's case were those regularly practiced in Volusia County. The cause of the underrepresentation was systematic and was inherent in the jury selection system involved. This process, marked by its complete reliance on voter registration lists, and its inherent and non-random exclusion of black individuals, results in the underrepresentation of black jurors.

Mr. Kennedy has demonstrated that the underrepresentation of black individuals on the venire is a direct result of the random selection of persons from voter registration lists. His conviction was obtained in violation of the due process and the

equal protection clauses of the fourteenth amendment and the fair cross-section requirement of the sixth amendment. Such error is one of fundamental dimension, cognizable in post-conviction proceedings, and per se prejudicial. Mr. Kennedy's conviction must be reversed. Under no construction can a conviction and sentence of death resulting from the derogation of sixth and fourteenth amendment rights presented herein be allowed to stand. See, Gardner v. Florida, 430 U.S. 360 (1977).

ARGUMENT VII

MR. KENNEDY WAS DEPRIVED OF A FAIR TRIAL, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS, BECAUSE OF THE MASSIVE, PERVASIVE AND PREJUDICIAL PUBLICITY AND TRIAL ATMOSPHERE

This claim presents record and non-record facts. An evidentiary hearing is proper regarding the non-record facts. This claim presents fundamental error of constitutional dimension.

Mr. Kennedy was charged with the murder of a Florida State trooper and a civilian called to render assistance to the officer. These allegations, combined with the presence at trial of uniformed officers, the press and the television media created an atmosphere so inherently prejudicial as to render a fair trial an impossibility. The hostile attitude of the law enforcement officers towards Mr. Kenendy pervaded the courtroom. The press,

eager for a story, jammed into the tiny court, anxiously awaiting their next headline. Television cameras illuminated the proceedings, highlighting the widespread publicity already received by the case.

Mr. Treece, counsel for Mr. Kennedy, requested a change of venue, due to widespread pretrial publicity (Tt. 18). Mr. Treece stated that it was his understanding that the State would not object to a change of venue (Tt. 18). Furthermore, it was Mr. Treece's belief that the trial would be moved from Duval County to Volusia County (Tt. 18). State Attorney King consented to the change of venue, recognizing that statements made by the defendant were widely publicized in the Florida Times-Union (Tt. 19).

Mr. Treece argued that Duval County had also been poisoned by pretrial publicity and requested that the trial be moved to Hillsborough County (Tt. 19). Counsel for Mr. Kennedy reasoned that the circulation of the Times-Union and the Journal are significantly less in Hillsborough County than in Volusia County.

In support of the Motion for Change of Venue to Hillsborough County, Mr. Treece presented testimony by Terry Ruchala, a private investigator (Tt. 19-20). Terry Ruchala testified that "On a daily average basis, Volusia County, the Times is the Sunday paper, averaging 500 a day. That's just an average. The daily is 517 and on the Journal it is about one or two a day.

. . . Hillsborough on Sunday is 26; daily, 29; the Journal is 7." Terry Ruchala stated that these figures represent newspaper sales from newstands, vendors and subscriptions (Tt. 21).

The court ordered the trial moved to Volusia County, despite the persuasive evidence presented regarding pretrial publicity. (Tt. 21). On the first day of the trial, two television cameras were stationed in the courtroom (Tt. 431). Counsel for Mr. Kennedy immediately objected to the presence of the media, arguing that such publicity would deny Mr. Kennedy a fair trial (Tt. 431). Mr. Treece also objected to the presence of the two television cameras on the ground that they would prejudice the jury (Tt. 431). Mr. Treece stated that the media highlighted the publicity surrounding the case (Tt. 431).

The court, in denying Mr. Treece's objection, reasoned that the presence of cameras within the courtroom was a matter within the court's discretion (Tt. 432). After perceiving yet a third camera in the court, Mr. Treece renewed his objection (Tt. 432). The Court, without directly responding to Mr. Treece's second objection, nonetheless permitted the cameras to remain in the courtroom (Tt. 433).

The presence of the press was pervasive. The media was in full force outside of the courtroom, as well as within. Acknowledging the presence of numerous members of the press, Mr. Treece objected to the court's order permitting the jurors to

disperse during the lunch recess (Tt. 544). State Attorney King expressed concern that witnesses were present in the courtroom halls, discussing the case (Tt. 544).

The Court's overriding concern was of the cost incurred in keeping the jurors together (Tt. 544). To do so would necessitate paying the costs of the jurors' meals (Tt. 544). As a compromise offer, counsel for Mr. Kennedy suggested: "At the minimum I would ask that the Bailiff escort all the Jurors out of the courthouse and meet them at a point in time outside the courthouse and bring them back in, because there is so many people in the hallway that -- there's a lot of State Troopers out there" (Tt. 545).

State Attorney Austin agreed:

> It's awful close quarters; it really is. I don't know what to do about it, but, the trouble is, we could have already -- we could have had them ordered or something.
>
> We'll be forever getting them -- I wonder if you couldn't take them all one place.

(Tt. 545-546).

The court again rejected proposals by the State and the Defense to keep the jury together (Tt. 546). The entire trial was marred by a prejudicial atmosphere of uniformed officers and news media. Mr. Charles E. Meacham, an investigator appointed to assist Mr. Treece in Mr. Kennedy's representation, described the emotionally charged trial:

In addition to researching various elements of Mr. Kennedy's case, I also assisted Mr. Treece during the trial and was present in the courtroom everyday except for the early morning session of December 4, 1981. Because of the inflammatory publicity associated with Mr. Kennedy's case, a motion for a change of venue was granted and the trial was held in Deland, Florida, in Volusia County. The first day of the trial, police cars were lining the street outside the courthouse annex where the trial was held. Throughout the trial uniformed and armed officers were everywhere. In the courtroom and halls, uniformed troopers, sheriff's officers and other law enforcement officials were present everyday of the proceedings.

News people were in the courtroom every day. At least two or three rows of the spectator seats on the left of the courtroom as you look from the back of the room toward the judge were filled with press. The jury box was on the same side of the courtroom as where the press sat. One or two television cameras were present in the courtroom throughout the trial. The last day of the trial, four or five spectator rows were filled with press, and the balance were filled with highway patrolmen, at least 17 of them.

I believe that because the courtroom and the town of Deland were so small, the overdone security, intense news coverage and constant presence of armed and uniformed officers in the courtroom must have had a dramatic impact on all the participants of the trial. In fact, I was convinced by the first day of trial that one juror had already made up her mind about the case. This juror was so obviously distracted that the entire process seemed like a farce. Toward the last day, at least one other juror that I noticed had the same attitude.

Each time Mr. Kennedy was brought into the courtroom he was handcuffed and flanked by two uniformed and armed sheriff's officers, one of whom always sat right behind Mr. Kennedy within an arm's reach of him, in front of the bar. There were always at least four or five state uniformed troopers observing the proceedings, and law enforcement officials guarding every door or sitting in the audience. By the last day of Mr. Kennedy's trial there were seventeen uniformed Highway Patrolmen and several other uniformed officers present in the tiny courtroom.

One of the most offensive displays I have ever witnessed in my twenty years of courtroom experience occurred during Mr. Kennedy's trial. It happened when State Trooper Lieutenant Vince Smallwood was asked by State Attorney Ed Austin to identify Mr. Kennedy. Lieutenant Smallwood, who was in uniform, stepped right down and struck his finger right in Mr. Kennedy's face and said, "this man right here." His tone of voice was threatening and filled with hateful disgust. It was a clearly orchestrated move for the benefit of the jury and the television cameras. I was never so shocked as when Mr. Treece failed to object to this incident. Lieutenant Smallwood's behavior so typified the prevailing atmosphere during this trial that any observer would naturally conclude that Mr. Kennedy was, at least in <u>this</u> courtroom, assumed guilty until proven innocent.

. . .

In all my years of criminal trial work I have never seen a more inflammatory courtroom atmosphere than at Edward Kennedy's trial. With all of the uniforms, press coverage, and racism present in that courtroom, the jury had no choice but to return a guilty verdict and a unanimous recommendation of death.

A. MR. KENNEDY WAS DEPRIVED OF A FAIR TRIAL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS, BECAUSE OF THE PREJUDICIAL PRESENCE OF UNIFORMED OFFICERS WITHIN THE COURTROOM

Due to the presence of numerous uniformed law enforcement officers within and surrounding the courtroom, the likelihood of prejudice or intimidation was overwhelming. The court's failure to take the necessary measure to exclude the uniformed spectators denied Mr. Kennedy his right to a fair trial.

Courts are imbued with the inherent power to preserve order in the courtroom. The objective of this judicial right is to protect the rights of the accused and to further the interests of justice. Miami Herald Publishing Co. v. Lewis, 426 So. 2d 1 (Fla. 1982). Excluding spectators, remains within the court's discretion, see Bundy v. State, 455 So. 2d 330 (Fla. 1984); however, the primary aim of excluding spectators is the preservation of the rights of the defendant. Woods v. State, 490 So. 2d 24 (Fla. 1986); Bundy; Green v. State, 184 So. 504 (1938).

Daland is a small town, unaccustomed to the presence of uniformed correctional officers and state troopers. Police cars lined the street outside of the courthouse where the trial was held. Uniformed troopers, sheriff's officers and other police officers daily lined the courtroom and the halls. Law enforcement officers were ever present throughout the proceedings. On the final day of the trial, no less than 17

uniformed officers crowded into the tiny courtroom, exaggerating their already overwhelming presence. The mere presence of this display of the State's kinship and sympathy with the victims was prejudicial and intimidating. See Woods v. State, 490 So.2d 24 (Fla. 1986). Under the unique circumstances of this case, the presence of such a large number of uniformed officers at the most emotionally charged stage of the trial amounted to at a minimum, a clear abuse of judicial discretion. Id. (Shaw dissent). The trial court's failure to exclude the complainant or spectators constituted reversible error.

An accused is entitled to a trial before an impartial jury unaffected by outside forces and influences. Id. (Shaw dissent). The presence of 17 uniformed officers who were, it can be assumed, also friends of the murder victim, appearing en masse at the trial of the accused assailant bearing signs expressing their concern regarding the outcome of the trial was unduly prejudicial. Id. (Shaw dissent). "Exhibitions of this nature have no place in a court of law because of the great possibility of jury intimidation or coercion." Id. at 28. (Shaw dissent).

The court could have implemented other means to extinguish the flames of prejudice inherent in the courtroom presence of the law enforcement officers. At the very least, the court could have required that those officers wishing to view the trial be required to wear civilian clothing.

Because the court failed to exercise its discretion in an effort to dispel the coercive nature of the presence of the law enforcement officers, Mr. Kennedy should be granted a new trial to correct the denial of his right to a fair trial under the sixth, eighth, and fourteenth amendment.

B. MR. KENNEDY WAS DEPRIVED OF A FAIR TRIAL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, BECAUSE OF THE PERVASIVE AND PREJUDICIAL PUBLICITY THAT ATTENDED THE TRIAL

"With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion." Irvin v. Dowd, 366 U.S. 717, 728, 81 S. Ct. 1639, 1645 (1961). Mr. Kennedy deserves no less. The inflammatory pre-trial publicity associated with Mr. Kennedy's case brought him to seek a change of venue. However, Volusia County failed to offer a forum conducive to quiet deliberations.

The presence of the press was pervasive. Each day, two to three rows of spectator seats were taken by the press, anxiously awaiting their next byline. The press coverage of the trial culminated on the last day of the trial. Four or five spectator rows were crammed with press, the balance of the courtroom being filled with highway patrolmen. Sitting so close to the press, the jurors had to be distracted by the constant chatter of the reporters and their continuous movement in the court, in their efforts to break the story.

Although the press is given wide latitude to report on trials, such efforts must not be allowed to divert the trial from its mandate "to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom according to legal procedures." Cox v. State of Louisiana, 379 U.S. 559, 583, 85 S. Ct. 466, 471 (1965)(Black, J., dissenting).

> The carnival atmosphere at trial could easily have been avoided since the courtroom and courthouse premises are subject to the control of the court. As we stressed in Estes, the presence of the press at judicial proceedings must be limited when it is apparent that the accused might otherwise be prejudiced or disadvantaged. Bearing in mind the massive pretrial publicity, the judge should have adopted stricter rules governing the use of the courtroom by newsmen, as Sheppard's counsel requested.

Sheppard v. Maxwell, 86 S. Ct. 1507, 1520 (1966).

The prejudicial atmosphere which forced the trial to be moved to Deland continued with a heightened fervor in this small town. The jury was repeatedly exposed to the cries and presence of the press; rendering a verdict not tainted by publicity was a virtual impossibility. Vasquez v. Hillery has reiterated that the denial of an impartial jury goes to the very heart of the sixth amendment right to a fair trial and is reversible error:

> When constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm....Similarly, when a petit jury has been selected upon improper criteria or has been

> exposed to prejudicial publicity, we have required reversal of the conviction because the effect of the violation cannot be ascertained.

106 U.S. 617, 623-24 (1986). See Sheppard v. Maxwell, 384 U.S. 333, 351-52, 86 S. Ct. 1507, 1516 (1966). Because of the prejudicial publicity to which the jury was continuously exposed, Mr. Kennedy's conviction must be reversed.

C. MR. KENNEDY WAS DEPRIVED OF A FAIR TRIAL IN VIOLATION OF THE SIXTH, EIGHTH,AND FOURTEENTH AMENDMENTS BECAUSE OF THE PREJUDICIAL PRESENCE OF CAMERAS WITHIN THE COURTROOM

Mr. Kennedy was convicted without due process of law. His trial failed to comport with the fourteenth amendment in that massive publicity prejudiced the jury and distracted them from their solemn duty. On the first day of the trial, three television camera persons were in the courtroom taking pictures. The presence of the media in an already small and crowded courtroom further disturbed the judical serenity and calm to which Mr. Kennedy was entitled, as his life hung in the balance. Estes v. State of Texas, 381 U.S. 536 (1965).

The trial was highly publicized, having already been transferred from Duval to Volusia County due to prejudicial pretrial publicity in the previous forum. Both the court and the state attorney made reference to the fact that the case had been transferred from Jacksonville (Tt. 86, 135). These statements,

particularly those made by the court, could only have impressed the jurors and the community with the notorious character of the defendant and of the case. Estes. The witnesses and the jury were undoubtedly made aware of the peculiar public importance of the case by the press and television coverage being provided. Id.

Mr. Kennedy is entitled to an evidentiary hearing on the fundamental constitutional claim, and thereafter, Rule 3.850 relief.

ARGUMENT VIII

THE JURY WAS INCORRECTLY INSTRUCTED THAT MR. KENNEDY HAD NO RIGHT TO DEFEND HIMSELF FROM AN UNLAWFUL ATTACK FROM LAW ENFORCEMENT OFFICERS, A VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

The only evidence regarding how the homicides occurred came from a purported confession from Mr. Kennedy. According to that statement, introduced by the State in their case-in-chief, Mr. Kennedy was in Mr. Cone's residence when Mr. Cone walked in. Mr. Kennedy told Mr. Cone he did not want to hurt him, (R. 838), and instructed Mr. Cone to tell the officer who was outside the trailer to come inside the trailer (R. 839-840). When the trooper looked into the trailer, he started shooting at Mr. Kennedy. Mr. Kennedy said he was frightened, and that he only shot because the officer and Mr. Cone were trying to kill him.

The officer was killed as he and Mr. Kennedy shot at each other outside of the trailer. Mr. Kennedy started back into the trailer, Mr. Cone dove at him, and Mr. Kennedy shot him (R. 845-846).

The law of the State of Florida, now and at the time of trial, allows a person to defend himself or herself from the unjustified deadly force by another, even if that "other" is a law enforcement official. Mr. Kennedy was entitled under the Eighth and Fourteenth Amendment to have the jury correctly instructed on all elements of the crime that the state must prove beyond a reasonable doubt. He was also entitled to jury instructions which did not relieve the state of its burden of proof on all elements of the offense. The state must prove, among other things, the absence of justifiable use of force and the absence of self-defense. The jury instructions in this case were unconstitutionally burden-relieving, and incorrectly stated the applicable law.

At the time of trial, the law in Florida regarding violence between a law enforcement officer and a civilian was a mixture of common and statutory law. Florida statutes provided:

> **776.051 Use of force in resisting or making an arrest; prohibition.--**
> (1) A person is not justified in the use of force to resist an arrest by a law enforcement officer who is known, or reasonably appears, to be a law enforcement officer.

(2) A law enforcement officer, or any person whom he has summoned or directed to assist him, is not justified in the use of force if the arrest is unlawful and known by him to be unlawful.

776.012 Use of force in defense of person.-- A person is justified in the use of force, except deadly force, against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force. However, he is justified in the use of deadly force only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another or to prevent the imminent commission of a forcible felony.

776.031 Use of force in defense of others.-- A person is justified in the use of force, except deadly force, against another when and to the extent that he reasonably believes that such conduct is necessary to prevent or terminate such other's trespass on, or other tortious or criminal interference with, either real property other than a dwelling or personal property, lawfully in his possession or in the possession of another who is a member of his immediate family or household or of a person whose property he has a legal duty to protect. However, he is justified in the use of deadly force only if he reasonably believes that such force is necessary to prevent the imminent commission of a forcible entry.

776.041 Use of force by aggressor.-- The justification described in the preceding sections of this chapter is not available to a person who:

(1) Is attempting to commit, committing, or escaping after the commission of, a forcible felony; or

(2) Initially provokes the use of force against himself, unless:

> (a) Such force is so great that he reasonably believes that he is in imminent danger of death or great bodily harm and that he has exhausted every reasonable means to escape such danger other than the use of force which is likely to cause death or great bodily harm to the assailant; or
>
> (b) In good faith, he withdraws from physical contact with the assailant and indicates clearly to the assailant that he desires to withdraw and terminate the use of force, but the assailant continues or resumes the use of force.

Thus, while one may not generally resist an arrest if it is known that the person making the arrest is a law enforcement officer, one may resist in self-defense if the arrestor or law enforcement officer is trying to kill. This was made clear in Ivester v. State, 398 So. 2d 926, 929 (Fla. 1st D.C.A. 1981):

> In defending against the charges of resisting arrest with violence, Ivester attempted to prepare a defense based on self-defense ... The motion to compel discovery was denied on the ground that a self-defense argument was "irrelevant and immaterial," because Section 776.051(i), Florida Statutes (1974) does not permit to use of force in resisting arrest.
>
> The issue of defending against a charge of resisting arrest with violence in self-defense has never been addressed with any finality in Florida. The appellant cites Burgess v. State, 313 So. 2d 479, 483 n.4 (Fla. 2d D.C.A. 1975) certified question dismissed 326 So. 2d 441 (Fla. 1976) reh. denied. Burgess stands for the proposition that no individual has the right to use force in resisting arrest, unless he apprehends bodily harm. While we agreed that this rule of law is correct, Section 776.051(1), Florida Statutes, states that "(1) A person is not justified in the use of force to resist an arrest by a law enforcement officer

who is known, or reasonably appears, to be a law enforcement officer." In Lowery v. State, 356 So. 2d 1325, 1326 (Fla. 4th D.C.A. 1978), the court read Section 843.01, Florida Statutes, in pari materia with Section 776.051(1), Florida Statutes (1974). It was concluded that one may not resist arrest with violence, even if the arrest is technically illegal. Lowery, supra, at 1326; see also Meeks v. State, 369 So. 2d 109 (Fla. 1st D.C.A. 1979); Morley v. State, 362 So. 2d 1013 (Fla. 1st D.C.A. 1978).

The Lowery court specifically left open the question of a defendant's right to use force in self-defense pursuant to Section 776.012, Florida Statutes (1979), which states in part that: "A person is justified in the use of force, except deadly force, against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself ... against such other's imminent use of unlawful force...." See also Pani v. State, 361 So. 2d 170 (Fla. 3rd D.C.A. 1978) reh. denied.

Sections 776.012 and 776.051, Florida Statutes (1974), were both enacted as a part of the same act. See Laws of Florida, Chapter 74-383. Statutes that are a part of a single act must be read in pari materia. Major v. State, 180 So. 2d 335, 337 n.1 (Fla. 1965). The effect of reading these statutes in pari materia is to permit an individual to defend himself against unlawful or excessive force, even when being arrested. This view is consistent with the position taken by other jurisdictions that have been confronted with questions relating to statutes similar to Sections 776.012, 776.051 and 843.01, Florida Statutes. See e.g., People v. Stevenson, 31 N.Y. 2d 108, 335 N.Y.S. 2d 52, 286 N.E. 2d 445 (1972); People v. Curtis, 70 Cal. 2d 347, 74 Cal. Rptr. 713, 450 P.2d 33 (1969); Annot. 77 A.L.R. 3d 281.

Chapter 776, Florida Statutes, recognizes principles set forth in the case law of other

> jurisdictions in that the right of self-defense against the use of excessive force by a police officer is a concept entirely different from resistance to an arrest, lawful or unlawful, by methods of self-help. People v. Curtis, supra, at 74 Cal. Rptr. 713, 714, 450 P.2d 38-39; see also State v. Nunes, 546 S.W. 2d 759, 762 (Mo. App. 1977). The former concept is grounded on the view that a citizen should be able to exercise reasonable resistance to protect life and limb; which cannot be repaired in the court-room. The latter view is based on the principle that a self-help form of resistance promotes intolerable disorder. Any damage done by an improper arrest can be repaired through the legal processes. Id.
>
> Therefore, self-defense is not "irrelevant" to a prosecution for resisting arrest with violence.

Ivester was decided before the trial in this case. In 1985, the Florida Supreme Court recognized that Ivester was the correct law, and that the standard jury instructions in existence and used at Mr. Kennedy's trial were incorrect:

> This is a petition to review Holley v. State, 464 So. 2d 578 (Fla. 1st D.C.A. 1984), in which the district court held that the trial judge erred in instructing the jury on self-defense because he failed to instruct that a person may defend himself against the use of unlawful or excessive force even when being arrested. After so holding, the district court certified the following question as one of great public importance:
>
> > Is Florida Standard Jury Instruction (Criminal) 3.04(d) a correct statement of the law in light of Ivester v. State, 398 So. 2d 926 (Fla. 1st D.C.A. 1981), review denied, 412 So. 2d 470 (Fla. 1982), and Allen v. State, 424 So. 2d 101 (Fla. 1st

D.C.A. 1982); review denied, 436 So. 2d 97 (Fla. 1983)?

Id. at 579. We have jurisdiction. Art. V, sec. 3(b)(4), Fla. Const. We find, as the state concedes, that standard jury instruction 3.04(d), as it existed at the time of this trial, did not properly state the law when self-defense is asserted as an affirmative defense to the charge of resisting arrest with violence. We approve the decision of the district court and note that this Court has subsequently modified Florida Standard Jury Instruction 3.04(d) to state the law correctly.

Holley was charged with and convicted of two counts of aggravated assault with a firearm, resisting arrest with violence, and two counts of armed robbery. All charges arose from Holley's arrest at an agricultural inspection station for carrying cannabis and his subsequent escape. At trial, Holley contended that the agricultural inspector threatened him with a knife in the course of his arrest. During the instruction conference, Holley's trial counsel requested a jury instruction based on the First District Court's decision in Ivester, advising the jury that an arrestee may defend himself against the unlawful or excessive force used by a law enforcement officer. Denying the request, the trial judge instructed the jury generally as to self-defense and concluded with that portion of Florida Standard Jury Instruction 3.04(d), which, as it existed at the time of trial, stated: "A person is never justified in the use of any force to resist an arrest."

In Ivester, the district court construed section 776.051(1), Florida Statutes (Supp. 1974), which provides that a person is not justified in the use of force to resist a known law enforcement officer, in pari materia with section 776.012, Florida Statutes (Supp. 1974), which provides in part: "A person in justified in the use of

force ... against another when ... he reasonably believes that such conduct is necessary to defend himself ... against such other's imminent use of unlawful force." The district court concluded:

> The effect of reading these statutes in pari materia is to permit an individual to defend himself against unlawful or excessive force, even when being arrested. This view is consistent with the position taken by other jurisdictions that have been confronted with questions relating to statutes similar to section 776.012, 776.051 and 848.01, Florida Statutes.

398 So. 2d at 930 (citations omitted).

We agree with the decision of the First District Court of Appeals in Ivester, Allen, and the instant case. As the state concedes, while a defendant cannot use force to resist an arrest, he may resist the use of excessive force in making the arrest. Our holding is consistent with our recently modified standard jury instruction set forth in Florida Bar re: Standard Jury Instructions (Criminal Cases), 477 So. 2d 985 (Fla. 1985).

We also agree with the district court that the error of the jury instruction was not harmless. Unlike Allen, this record contains conflicting evidence relating to alleged threats with a knife by a law enforcement agent. We reject as without merit Holley's claim that this Court should also reverse his conviction for aggravated assault, concluding the erroneous instruction applies only to the resisting arrest charge.

State v. Holley, 480 So. 2d 94, 95-96 (Fla. 1985). Two justices dissented on the affirmance of the aggravated assault conviction:

> The error in instructing the jury renders all of the verdicts unreliable and so all of the convictions should be reversed. The charges for aggravated assault were based on the very

> same conduct that forms the basis for the charge of resisting arrest. If the instruction on self-defense was error in that it did not fully apprise the jury of the right to defend oneself against excessive force, and if the evidence was susceptible of an interpretation by the jury leading to the conclusion that respondent's conduct was justified because of the use or threat of excessive force by the officer, then such a view by the jury would constitute a defense on the aggravated assault charges as well as the resisting arrest charge.

480 So.2d at 96 (Boyd, C. J., concurs in part and dissents in part with an opinion, in which Shaw, J., concurs).

Due process and equal protection concerns require that Mr. Kennedy's jury should have been instructed according to the applicable Florida law. However, the jury was instructed as follows:

> A person is only justified in using force likely to cause death or great bodily harm if he reasonably believes that such force is necessary to prevent the imminent death or great bodily harm to himself or another, or, the imminent commission of robbery and/or burglary against himself or another, or, the imminent commission of robbery and/or burglary against the other person.
>
> However, the use of force likely to cause death or great bodily harm is not justifiable if you find: One, that Edward Kennedy was attempting to commit or committing or escaping after the commission of a robbery and/or burglary; or, two, Edward Kennedy initially provoked the use of force against him.
>
> A law enforcement officer or any person he has summoned or directed to assist him need

> not retreat from nor stop efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. The officer is justified in the use of any force that he reasonably believes necessary to defend himself or another from bodily harm while making the arrest.
>
> That force is also justified when necessarily used in retaking a person who has been convicted of a felony and who has escaped and in arresting a person who has been convicted of a felony and who is fleeing from justice.
>
> The Court instructs you that Edward Kennedy could not have been legally confined to Union Correctional Institute unless he had been convicted of a felony.
>
> Edward Kennedy would not be justified in using force to resist an arrest by another who is known or reasonably appears to be a law enforcement officer.

(Tt. 1048-49)(Emphasis added). This is not the law. Mr. Kennedy was entitled under Florida law to defend himself from a violent arrest. Counsel requested such an instruction, the State argued against it, and the judge refused it (R. 931, 932).

> MR. KING [prosecutor]: He's contending that the officer assaulted him.
>
> Well, he's really not entitled to it under the law because of seven seventy six oh four one oh five and oh five one, if you see what I mean.

(Tt. 926).

Then the State incorrectly argued as follows:

> The judge will likewise instruct you that Edward Kennedy would not be justified in using any force to resist an arrest by

> another is known or reasonably appears to be a law enforcement officer.
>
> And, Lord knows, he reasonably appeared to be a law enforcement officer. He was out there, Kennedy saw him through the window, saw his patrol car. We know he was in uniform, and, Kennedy had a duty to stop at that time and he had no right to use any force for resisting arrest at that point in time, and, that's the law.
>
> So, we what we have in essence is that Officer McDermon is authorized under the law to shoot to kill under the circumstances of this case, and, under no circumstances in this case is Mr. Kennedy justified in using any armed force.
>
> * * * *
>
> And, bearing in mind -- even taking the Defendant's version at this time that the officer fired at him first, bear in mind the law of the State of Florida is McDermon has a perfect right to shoot and Edward Kennedy under the law of the State of Florida had absolutely no right to shoot under the circumstances of this case.

(Tt. 995, 1008).

The only possible defense was that Mr. Kennedy was shooting in self-defense, after he was attacked. The state introduced this very evidence in their case-in-chief. It was up to the state to prove all of the following: that Mr. Kennedy was an escapee; that he was engaged in either robbery or burglary, or escape after robbery or burglary, that an arrest of Mr. Kennedy would be lawful, that Mr. Kennedy provoked the use of force against him, and that Mr. Kennedy was not justified in responding

the way he did to shots fired at him. The jury was told that "under no circumstance" would Mr. Kennedy be justified in using any armed force. This was not the law, and the instruction violated the eight and fourteenth amendments. In addition, trial counsel unreasonably failed to know the law, to Mr. Kennedy's prejudice.

The state was unconstitutionally relieved of proving that Mr. Kennedy was lawfully in prison, a necessary predicate to "escape" and the lawfulness of any "recapture." The jury was instructed that "Edward Kennedy could not have been legally confined to Union Correctional Institute unless he had been convicted of a felony" (Tt. 1049). This violates the sixth, eighth, and fourteenth amendments.

ARGUMENT IX

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PLAY FOR THE JURY AND COURT THE VIDEOTAPE OF HIS SURRENDER AND ARREST, WHICH REVEALED HIS TRUE CONTEMPORANEOUS REMORSE FOR WHAT HAD OCCURRED, HIS LACK OF INTENT OR DESIRE TO KILL, AND THE STRENGTH OF HIS SELF-DEFENSE CLAIM

Mr. Kennedy's surrender was videotaped by the news media. A copy of that videotape is submitted herewith. The videotape was available to reasonable competent counsel at the time of trial.

The videotape reveals that Mr. Kennedy requested news media to be present at his surrender because he was afraid he would be

killed. After the media arrived, law enforcement officials promised Mr. Kennedy there would be no violence, and he promised them that he would not hurt the woman and child with him, or anyone else.

Mr. Kennedy is pictured surrendering, without hurting anyone at the "hostage" scene and without ever firing a shot. He tells the observers that he is sorry for what happened. The hostage victim is pictured as unharmed, talkative and relaxed, and her young child is obviously uninjured.

Mr. Kennedy is asked why he killed the victims. As he sits in the patrol car, he explains, emotionally and convincingly, that he did not want to kill the, that they started firing at him. This poignant and revealing film clip offers great support for the defense case actually argued, but was not presented to the jury or judge. This was an unreasonable omission, and there is reasonable likelihood that the result would have been different, but for the omission. Mr. Kennedy was denied his sixth, eighth, and fourteenth amendment rights. Mr. Kennedy is entitled to an evidentiary hearing on this claim. See O'Callaghan, supra. See also Squires v. State, 512 So.2d 138 (Fla. 1987).

CONCLUSION

Mr. Kennedy respectfully requests that this Court remand his case for an evidentiary hearing, and that the motion to vacate judgment and sentence be granted.

RESPECTFULLY SUBMITTED,

LARRY HELM SPALDING
Capital Collateral Representative

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By: _____
Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a true and correct copy of the foregoing Initial Brief of Appellant has been served on George Batch, Assistant State Attorney, Duval County Courthouse, 330 East Bay Street, Jacksonville, Florida 32201, and on Gary Printy, Assistant Attorney General, Department of Legal Affairs, 111-29 North Magnolia Drive, Tallahassee, Florida 32301, by U.S. Mail this 28 day of April, 1988.

_____
Attorney