IN THE SUPREME COURT OF FLORIDA

NO. 74098

WAYNE TOMPKINS

Petitioner,

v.

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

Respondent.

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

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

A. JURISDICTION

This is an original action under Fla. R. App. P. 9.100(a). This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents constitutional issues which directly concern the judgment of this Court during the appellate process, and the legality of Mr. Tompkins' capital conviction and sentence of death. On September 19, 1985, Mr. Tompkins was sentenced to death. Direct appeal was taken to this Court. The trial court's judgment and sentence were affirmed. Tompkins v. State, 502 So. 2d 415 (Fla. 1986). Jurisdiction in this action lies in this Court, see, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein involved the appellate review process. See Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985); Baggett v. Wainwrisht, 229 So. 2d 239, 243 (Fla. 1969); see also Johnson v. Wainwrisht, 498 So. 2d 938 (Fla. 1987); cf. Brown v. Wainwrisht, 392 So. 2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Tompkins to raise the claims presented herein. See, e.g., Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Riley v. Wainwrisht, 517 So. 2d 656 (Fla. 1987); Wilson, supra.

This Court has consistently maintained an especially vigilant control over capital cases, exercising a special scope of review, see Elledse v. State, 346 So. 2d 998, 1002 (Fla. 1977); Wilson v. Wainwrisht, 474 So. 2d at 1165, and has not hesitated in exercising its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital trial and sentencing proceedings. Wilson; Johnson; Downs: Riley. This petition presents substantial constitutional questions which go to the heart of the fundamental fairness and

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

With regard to ineffective assistance, the challenged acts and omissions of Mr. Tompkins' appellate counsel occurred before this Court. This Court therefore has jurisdiction to entertain Mr. Tompkins' claims, Knight v. State, 394 So. 2d at 999, and, as will be shown, to grant habeas corpus relief. Wilson, supra; Johnson, supra. This and other Florida courts have consistently recognized that the Writ must issue where the constitutional right of appeal is thwarted on crucial and dispositive points due

to the omissions or ineffectiveness of appointed counsel. See, e.g., Wilson v. Wainwright, supra, 474 So. 2d 1163; McCrae v. Wainwrisht, 439 So. 2d 768 (Fla. 1983); State v. Wooden, 246 So. 2d 755, 756 (Fla. 1971); Baggett v. Wainwrisht, 229 So. 2d 239, 243 (Fla. 1969); Ross v. State, 287 So. 2d 372, 374-75 (Fla. 2d DCA 1973); Davis v. State, 276 So. 2d 846, 849 (Fla. 2d DCA 1973), affirmed, 290 So. 2d 30 (Fla. 1974). The proper means of securing a hearing on such issues in this Court is a petition for writ of habeas corpus. Bassett, supra, 287 So. 2d at 374-75; Powell v. State, 216 So. 2d 446, 448 (Fla. 1968). With respect to the ineffective assistance claims, Mr. Tompkins will demonstrate that the inadequate performance of his appellate counsel was so significant, fundamental, and prejudicial as to require the issuance of the Writ.

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

B. REQUEST FOR STAY OF EXECUTION

Mr. Tompkins' petition includes a request that the Court stay his execution, presently scheduled for June 6, 1989. As will be shown, the issues presented are substantial and warrant a stay. This Court has not hesitated to stay executions when warranted to ensure judicious consideration of the issues presented by petitioners litigating during the pendency of a death warrant. See Harich v. Dugger, (No. 73,931, Fla. March 28, 1989); Lishtbourne v. Dusser (No. 73,609, Fla. Jan. 31. 1989); Marek v. Dusser (No. 73,175, Fla. Nov. 8, 1988); Gore v. Dusser (No. 72,202, Fla. April 28, 1988); Riley v. Wainwrisht (No. 69,563, Fla., Nov. 3, 1986). See also, Downs v. Dusser, 514 So. 2d 1069 (Fla. 1987); Kennedy v. Wainwrisht, 483 So. 2d 426 (Fla. 1986); cf. State v. Sireci, 502 So. 2d 1221 (Fla. 1987); State v. Crews, 477 So. 2d 984 (Fla. 1985).

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

11. GROUNDS FOR HABEAS CORPUS RELIEF

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

CLAIM I

THE PENALTY PHASE JURY INSTRUCTIONS SHIFTING THE BURDEN TO MR. TOMPKINS TO PROVE THAT DEATH WAS INAPPROPRIATE VIOLATED THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS AND DENIED MR. TOMPKINS HIS RIGHTS TO AN INDIVIDUALIZED AND RELIABLE CAPITAL SENTENCING DETERMINATION, CONTRARY TO MULLANEY V. WILBUR, **421** U.S. **684 (1975),** MILLS V. MARYLAND, **108** S. CT. **1860 (1988),** AND ADAMSON V. RICKETTS, **865** F.2d 1011 (9TH CIR. **1988)**(EN BANC).

When Hitchcock v. Dugger, 107 S. Ct. **1821 (1987),** was pending certiorari review before the United States Supreme Court, this Honorable Court recognized that Hitchcock presented issues which would drastically alter the standard of review which the Court had been applying to claims of error in Florida capital sentencing proceedings. Accordingly, during the pendency of

Hitchcock, the court did not hesitate to stay the execution of petitioners presenting similar claims of relief. See Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987).[1]

On March 27, 1989, the United States Supreme Court granted certiorari review in Blystone v. Pennsylvania, 88-6222, in order to determine whether the eighth amendment was violated by a Pennsylvania capital sentencing proceeding in which the jurors were informed that death would be the appropriate penalty unless the petitioner was able to show that the mitigating circumstances proffered overcame the aggravating circumstances. The petitioner in Blystone asserted that the proceeding violated his rights (under Lockett v. Ohio and Hitchcock v. Dusser) to an individualized and reliable capital sentencing determination because the mandatory nature of the statute restricted the jury's "full" consideration of mitigating evidence.

Mr. Tompkins herein presents similar fifth, sixth, eighth, and fourteenth challenge to the proceedings actually conducted in his case. Blystone thus presents an issue which should affect the disposition of this petitioner's claim and which, like Hitchcock, may drastically alter this Court's previous analysis. As in Riley, a stay of execution is appropriate here.

Mr. Tompkins' sentencing jury was instructed at the outset of the sentencing process:

> The State and the defendant may now present evidence relative to the nature of the crime and the character of the defendant.

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[1] In Riley, a successive post-conviction action, the petitioner urged the court to stay his then-scheduled execution in order to afford him full and fair review of the same issue pending before the United States Supreme Court in Hitchcock v. Dusser. In his petition, Mr. Riley quoted from the certiorari petition in Hitchcock. The showing made by the petitioner in Riley was sufficient to demonstrate that Hitchcock would significantly affect his case, and the Florida Supreme Court therefore stayed the petitioner's execution. As discussed below, Mr. Tompkins herein shows that Blystone v. Pennsylvania, 88-6222 (March 27, 1989)(granting certiorari review), will significantly affect his case, and therefore that he is entitled to the same relief as Mr. Riley.

> You are instructed that this evidence, when considered with the evidence you've already heard, is presented in order that you might determine, first, whether sufficient aggravating circumstances exist that would justify the imposition of the death penalty and, second, whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any.
>
> At the conclusion of the taking of the evidence and after argument of counsel, you will be instructed on the factors in aggravation and mitigation that you may consider.

(R. 407-408).

Defense counsel argued that the jury's task was to look at Wayne Tompkins as an individual when determining the aggravating and mitigating factors (R. **449-452),** but the State had already made it clear that the legislature by establishing aggravating and mitigating circumstances intended the defendant to have the burden of proving that life was appropriate.

> Further, to assist you in your determination as to which punishment to recommend, the legislature of Florida has enacted certain guidelines in the form of aggravating and mitigating circumstances.
>
> Now, the State is bound by nine aggravating circumstances. As Judge Coe told you, we are limited at this time in arguing three of those nine to this jury as being applicable to this particular case.
>
> You will first determine if sufficient aggravating circumstances from those nine exist to warrant your recommendation for the death penalty.

(R. **448).** The State went an then to discuss the "weighing process" (R. **441-442).**

The court's instructions then solidified the burden-shifting notion:

> However, it is your duty to follow the law that will now be given to you by the Court and to render to me an advisory sentence 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.

(R. **452-453)** and to emphasize it again:

> Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.

(R. 453).

Such instructions, which shift to the defendant the burden of proving that life is the appropriate sentence, violate the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), as the Court of Appeals for the Ninth Circuit recently held in Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(en banc). In Adamson, the Ninth Circuit held that because the Arizona death penalty statute "imposes a presumption of death on the defendant," the statute deprives a capital defendant of his eighth amendment rights to an individualized and reliable sentencing determination:

> We also hold A.R.S. sec. 13-703 unconstitutional on its face, to the extent that it imposes a presumption of death on the defendant. Under the statute, once any single statutory aggravating circumstance has been established, the defendant must not only establish the existence of a mitigating circumstance, but must also bear the risk of nonpersuasion that any mitigating circumstance will not outweigh the aggravating circumstance(s). **See** Gretzler 135 Ariz. at 54, 659 P.2d at 13 (A.R.S. sec. 13-703(E) requires that court find mitigating circumstances outweigh assravating circumstances in order to impose life sentence). The relevant clause in the **statute--"sufficiently** substantial to call for leniency"--thus imposes a presumption of death once the court has found the existence of any single statutory aggravating circumstance.

Recently, the Eleventh Circuit held in Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988), that a presumption of death violates the Eighth Amendment. The trial judge, applying Florida's death penalty statute, had instructed the jury to presume that death was to be recommended as the appropriate penalty if the mitigating circumstances did not outweigh the aggravating circumstances. Examining the jury instructions, the Eleventh Circuit held that a presumption that death is the appropriate sentence impermissibly "tilts the scales by which the [sentencer] is to balance aggravating and mitigating circumstances in favor of the state," Id. at 1474. The court further held that a

presumption of death "if employed at the level of the sentencer, vitiates the individualized sentencing determination required by the Eighth Amendment." Id. at 1473.

The Constitution "requires consideration of the character and record of the individual offender and the circumstances of the particular offense," Woodson, 428 U.S. at 304, because the punishment of death is "unique in its severity and irrevocability," Gresg, 428 U.S. at 187, and because there is "fundamental respect for humanity underlying the Eighth Amendment." Woodson, 428 U.S. at 304 (citation omitted). A defendant facing the possibility of death has the right to an assessment of the appropriateness of death as a penalty for the crime the person was convicted of. Thus, the Supreme Court has held that statutory schemes which lack an individualized evaluation, thereby functioning to impose a mandatory death penalty, are unconstitutional. See, e.g., Sumner v. Shuman, 107 S.Ct. 2716, 2723 (1987); Roberts, 428 U.S. at 332-33; see also Poulos, Mandatory Capital Punishment, 28 Ariz. L. Rev. at 232 ("In simple terms, the cruel and unusual punishments clause requires individualized sentencing for capital punishment, and mandatory death penalty statutes by definition reject that very idea.").

In addition to precluding individualized sentencing, a presumption of death conflicts with the requirement that a sentencer have discretion when faced with the ultimate determination of what constitutes the appropriate penalty. See Comment, Deadly Mistakes: Harmless Error in Capital Sentencing, 54 U. Chi. L. Rev. 740, 754 (1987)("The sentencer's authority to dispense mercy . . . ensures that the punishment fits the individual circumstances of the case and reflects society's interests.").

Arizona Revised Statute sec. 13-703(E) reads, in relevant part: "the court . . . shall impose a sentence of death if the court finds one or more of the aggravating circumstances . . . and that there are no mitigating circumstances sufficiently substantial to call for leniency." Thus, the Arizona statute presumes that death is the appropriate penalty unless the defendant can sufficiently overcome this presumption with mitigating evidence. In imposing this presumption, the statute precludes the individualized sentencing required by the Constitution. It also removes the sentencing judge's discretion by requiring the judge to sentence the defendant to death if the defendant fails to establish mitigating circumstances by the requisite evidentiary standard, which outweish the aggravating

circumstances. See Arizona v. Rumsey, 467 U.S. 203, 210 (1984)("death must be imposed if there is one aggravating circumstance and no mitigating circumstance sufficiently substantial to call for leniency"); State v. Jordan, 137 Ariz. 504, 508, 672 P.2d 169, 173 (1983)("Jordan III")(sec. 13-703 requires the death penalty if no mitigating circumstances exist).

The State relies on the holdings of its courts that the statute's assignment of the burden of proof does not violate the Constitution. The Arizona Supreme Court reasons that "[o]nce the defendant has been found guilty beyond a reasonable doubt, due process is not offended by requiring the defendant to establish mitigating circumstances." Richmond, 136 Ariz. at 316, 666 P.2d at 61. Yet this reasoning falls short of the real issue--that is, whether the presumption in favor of death that arises from requiring that the defendant prove that mitigating circumstances outweigh aggravating circumstances, offends federal due process by effectively mandating death.

In addition, while acknowledging that A.R.S. sec. 13-703 places the burden on the defendant to prove the existence of mitigating circumstances which would show that person's situation merits leniency, State v. Poland, 144 Ariz. 388, 406, 698 P.2d 183, 201 (1985) aff'd, 476 U.S. 147 (1986), the State suggests that its statute does not violate the Eighth Amendment because subsection (E) requires the court to balance the aggravating against the mitigating circumstances before it may conclude that death is the appropriate penalty. While the statute does require balancing, it nonetheless deprives the sentencer of the discretion mandated by the Constitution's individualized sentencing requirement. This is because in situations where the mitigating and aggravating circumstances are in balance, or, where the mitigating circumstances give the court reservation but still fall below the weight of the aggravating circumstances, the statute bars the court from imposing a sentence less than death and thus precludes the individualized sentencing required by the Constitution. Thus, the presumption can preclude individualized sentencing as it can operate to mandate a death sentence, and we note that "[p]resumptions in the context of criminal proceedings have traditionally been viewed as constitutionally suspect." Jackson, 837 F.2d at 1474 (citing Francis and Sandstrom).

Thus, we hold that the Arizona statute, which imposes a presumption of death, is unconstitutional as a matter of law.

Adamson, supra, 865 F.2d at 1041-44 (footnotes omitted)(emphasis in original).

What occurred in Adamson is precisely what occurred in Mr. Tompkins' case. The instructions, and the standard upon which the court based its own determination, violated the eighth and fourteenth amendments, Mullaney v. Wilbur, 421 U.S. 684 (1975), Lockett v. Ohio, 438 U.S. 586 (1978), and Mills v. Maryland, 108 S. Ct. 1860 (1988). The burden of proof was shifted to Mr. Tompkins on the central sentencing issue of whether he should live or die. This unconstitutional burden-shifting violated Mr. Tompkins' due process and eighth amendment rights. See Mullaney, supra. See also Sandstrom v. Montana, 442 U.S. 510 (1979); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988). Moreover, the application of that unconstitutional standard at the sentencing phase violated Mr. Tompkins' rights to a fundamentally fair and reliable capital sentencing determination, i.e., one which is not infected by arbitrary, misleading and/or capricious factors. See Adamson, supra; Jackson, supra. The instruction as given was fundamental error under the eighth amendment.

The focus of a jury instruction claim is "what a reasonable juror could have understood the charge as meaning." Francis v. Franklin, 471 U.S. 307 (1985); see also Sandstrom v. Montana, 442 U.S. 510 (1979). The gravamen of Mr. Tompkins' claim is that the jury was in essence told that death was presumed appropriate once aggravating circumstances were established, unless Mr. Tompkins proved that the mitigating circumstances outweighed the aggravating circumstances. A reasonable juror could have well understood that mitigating circumstances were factors calling for a life sentence, that aggravating and mitigating circumstances had differing burdens of proof, and that life was a possible penalty, while at the same time understanding, based on the instructions, that Mr. Tompkins had the ultimate burden to prove that life was appropriate.

The express application of a presumption death violated eighth amendment principles:

> Presumptions in the context of criminal proceedings have traditionally been viewed as constitutionally suspect. Sandstrom v. Montana, 442 U.S. 510 (1979); Francis v. Franklin, 471 U.S. 307 (1985). When such a presumption is employed in sentencing instructions given in a capital case, the risk of infecting the jury's determination is magnified. An instruction that death is presumed to be the appropriate sentence tilts the scales by which the jury is to balance aggravating and mitigating circumstances in favor of the state.
>
> It is now clear that the state cannot restrict the mitigating evidence to be considered by the sentencing authority. Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). . . . Rather than follow Florida's scheme of balancing aggravating and mitigating circumstances as described in Proffitt [v. Florida, 428 U.S. 242, 258 (1976)], the trial judge instructed the jury in such a manner as virtually to assure a sentence of death. A mandatory death penalty is constitutionally impermissible. Woodson v. North Carolina, 428 U.S. 280 (1976); see also State v. Watson, 423 So. 2d 1130 (La. 1982) (instructions which informed jury that they must return recommendation of death upon finding aggravating circumstances held unconstitutional). Similarly, the instruction given is so skewed in favor of death that it fails to channel the jury's sentencing discretion appropriately. Cf. Gregg v. Georgia, 428 U.S. 153, 189 (1976) (sentencing authority's discretion must "be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action").

Jackson v. Dusser, 837 F.2d 1469, 1474 (11th Cir. 1988), cert. denied, 108 S. Ct. 2005 (1988).

The rules derived from Lockett v. Ohio, 438 U.S. 586 (1978), "are now well established . . . ." Skipper v. South Carolina, 476 U.S. 1, 4 (1986). See also Hitchcock v. Dugger, 107 S. Ct 1821, (1987). These rules require that the sentencer:

a. "not be precluded from considering as a mitigating factor, and aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers

as a basis for sentence less than death," Lockett v. Ohio, 438 U.S. at 604 (emphasis in original);

b. not be permitted to "exclud[e] such evidence from [his or her] consideration," Eddinss v. Oklahoma, 455 U.S. 104, 115 (1982)(emphasis supplied); and

c. not be "prevented[ed] . . . from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation," Lockett v. Ohio, 438 U.S. at 605.

Proper analysis requires consideration of the United States Supreme Court's recent decision in Mills v. Maryland, 108 S. Ct. 1860 (1988). There, the Court focused on the special danger that an improper understanding of jury instructions in a capital sentencing proceeding could result in a failure to consider factors calling for a life sentence:

> Although jury discretion must be guided appropriately by objective standards, see Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (plurality opinion), it would certainly be the height of arbitrariness to allow or require the imposition of the death penalty [when the jury's weighing process is distorted by an improper instruction]. It is beyond dispute that in a capital case "'the sentencer [may] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" Eddinss v. Oklahoma, 455 U.S. 104, 110 (1982), quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion) (emphasis in original). See Skipper v. South Carolina, 476 U.S. 1, 4 (1986). The corollary that "the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence'" is equally "well established." Ibid. (emphasis added), quoting Eddinss, 455 U.S., at 114.

Mills, supra, 108 S. Ct. at 1865 (footnotes omitted). Cf. Hitchcock v. Dusser, 107 S. Ct. 1821 (1987).

In Mills, the court concluded that, in the capital sentencing context, the Constitution requires resentencing unless

a reviewing court can rule out the possibility that the jury's verdict rested on an improper ground:

> With respect to findings of guilt on criminal charges, the Court consistently has followed the rule that the jury's verdict must be set aside if it could be supported on one ground but not on another, and the reviewing court was uncertain which of the two grounds was relied upon by the jury in reaching the verdict. See, e.g., Yates v. United States, 354 U.S. 298, 312 (1957); Strombers v. California, 283 U.S. 359, 367-368 (1931). In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds. See, e.g., Lockett v. Ohio, 438 U.S., at 605 ("[T]he risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty . . . is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments"); Andres v. United States, 333 U.S. 740, 752 (1948) ("That reasonable men might derive a meaning from the instructions given other than the proper meaning of [section] 567 is probable. In death cases doubts such as those presented here should be resolved in favor of the accused"); accord, Zant v. Stephens, 462 U.S. 862, 884-885 (1983). Unless we can rule out the substantial possibility that the jury may have rested its verdict on the "improper" ground, we must remand for resentencing.

Mills, supra, 108 S. Ct. at 1866-67 (footnotes omitted). Thus under Mills the question must be: could reasonable jurors have read the instructions as calling for a presumption of death which shifted the burden to the defendant and deprived him of an individualized sentencing under Lockett, Eddings, Skipper, and Hitchcock, supra. The answer to that question in Mr. Tompkins' case must be yes.

The effects feared in Adamson and Mills are precisely the effects resulting from the burden-shifting instruction given in Mr. Tompkins' case. In being instructed that mitigating circumstances must outweigh aggravating circumstances before the jury could recommend life, the jury was effectively told that once aggravating circumstances were established, it need not consider mitigating circumstances unless those mitigating

circumstances outweighed the aggravating circumstances. Cf. Mills, supra; Hitchcock, supra.

The United States Supreme Court's recent grant of a writ of certiorari in Blystone v. Pennsylvania, 44 Cr. L. 4210 (March 27, 1989), will require that Court to resolve the issue presented here. The question presented in Blystone has obvious ramifications here. Under Pennsylvania law, the jury is instructed that where it finds an aggravating circumstance present and no mitigation is presented, it "must" impose death. However, if mitigation is found then the jury must decide whether the aggravating circumstances outweigh the mitigating. Specifically, in Blystone, the defendant decided no mitigation was to be presented. Thus, the jury after finding an aggravating circumstance returned a sentence of death.

Clearly, under Pennsylvania law, the legislature chose to place upon a capital defendant a burden of production as to evidence of mitigation and a burden of persuasion as to whether mitigation exists. However, once evidence of a mitigating circumstance is found then the State bears the burden of persuasion as to whether the aggravating circumstances outweigh the mitigating such that a death sentence should be returned.

Under Florida law and the instructions presented here, once one of the statutory aggravating circumstances is found by definition sufficient aggravation exists to impose death. The jury is then directed to consider whether mitigation has been presented which outweighs the aggravation. Thus under the instructions given here the finding of a statutorily-defined aggravating circumstance operated to impose upon the defendant, the burden of production and the burden of persuasion of the existence of mitigation, and the burden of persuasion as to whether the mitigation outweighs the aggravation. Certainly, the Florida law is more restrictive of the jury's ability to conduct an individualized sentencing than the Pennsylvania statute at

issue in Blvstone. The outcome in Blvstone will directly affect correct resolution of the issue presented and the viability of Mr. Tompkins' death sentence.

Moreover, the error raised here can not be written off as harmless. Any consideration of harmlessness must also consider that had the jury voted for life, that vote could not have been disturbed -- the evidence before the jury established much more than a "reasonable basis" for a jury's life recommendation. See Hall v. State, 14 F.L.W. 101 (Fla. 1989); Mann v. Dusser, 844 F.2d 1446, 1450-51 (11th Cir. 1988)(en banc); Wasko v. State, 505 So. 2d 1314 (Fla. 1987); Tedder v. State, 322 So. 2d 908 (Fla. 1975). In fact, the sentencing judge found that the defense had established one statutory mitigating circumstance. This circumstance would have constituted a reasonable basis for a life recommendation. Under Florida law, to be binding, a jury's decision to recommend life does not require that the jury reasonably concluded that the mitigating circumstances outweighed the aggravating. In fact, the Tedder standard for overriding a jury recommendation of life belies any contention of harmlessness made by the Respondent. Under Tedder and its progeny, a jury recommendation of life may not be overridden if there is a "reasonable basis" discernible from the record for that recommendation, regardless of the number of aggravating circumstances, and regardless of whether the mitigation "outweighs" the aggravation. See, e.g., Ferrv v. State, 507 So. 2d 1373 (Fla. 1987)(override reversed irrespective of presence of five aggravating circumstances); Hawkins v. State, 436 So. 2d 44 (Fla. 1983)(same). Thus the instruction not only violated Mullaney and Adamson, but it was not an accurate statement of Florida law. The error can not be found to be harmless beyond a reasonable doubt because if the jury here had been correctly told that it could recommend life so long as it had a reasonable basis for doing so and the jury had recommended life, a reasonable

basis for that recommendation existed in the record. Thus a life recommendation could not have been overridden.

This error undermined the reliability of the jury's sentencing determination and prevented the jury from assessing the full panoply of mitigation presented by Mr. Tompkins. The jury did not know that it could recommend life if it had a reasonable basis for doing so.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Tompkins' death sentence. The ends of justice also call on the court to entertain the merits of the claim, Moore v. Kemp, 824 F.2d 847 (11th Cirt. 1987); Potts v. Zant, 638 F.2d 727 (11th Cir. 1981), subsequent history, 734 F.2d 526 (11th Cir. 1984). The constitutional errors herein asserted "precluded the development of true facts, and "perverted the jury's deliberations concerning the ultimate question[s] whether in fact [Wayne Tompkins was guilty of first-degree murder and should have been sentenced to die.]" Smith v. Murray, 106 S. Ct. 2661, 2668 (1986)(emphasis in original). Under such circumstances, the ends of justice require that the claim now be heard. Moore, supra; Potts, supra. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings, see Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error.

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

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

No tactical decision can be ascribed to counsel's failure to urge the claim. However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Tompkins of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra.

For each of the reasons discussed above the Court should vacate Mr. Tompkins' unconstitutional sentence of death. At the very least this Court must stay Mr. Tompkins' execution pending Blystone.

CLAIM II

DURING THE COURSE OF MR. TOMPKINS' TRIAL, THE PROSECUTION AND THE COURT IMPROPERLY ASSERTED THAT SYMPATHY TOWARDS MR. TOMPKINS WAS AN IMPROPER CONSIDERATION IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS AND PARKS V. BROWN, 860 F.2D 1545 (10TH CIR. 1988) (EN BANC).

When Hitchcock V. Dugger, 107 S. Ct. 1821 (1987), was pending certiorari review before the United States Supreme Court, this Honorable Court recognized that Hitchcock presented issues which would drastically alter the standard of review which the Court had been applying to claims of error in Florida capital sentencing proceedings. Accordingly, during the pendency of Hitchcock, the court did not hesitate to stay the execution of petitioners presenting similar claims of relief. See Riley v. Wainwrisht, 517 So. 2d 656 (Fla. 1987).[2]

[2]In Riley, a successive post-conviction action, the petitioner urged the court to stay his then-scheduled execution in order to afford him full and fair review of the same issue pending before the United States Supreme Court in Hitchcock v. Dugger. In his petition, Mr. Riley quoted from the certiorari

(footnote continued on following page)

On April 24, 1989, the United States Supreme Court granted certiorari review in Saffle v. Parks, in order to determine whether the eighth amendment was violated by an instruction which could have led the jurors to believe sympathy and mercy for the defendant were not to be considered in weighing the mitigation present in a capital penalty phase proceeding. The respondent in Parks had successfully asserted in the Tenth Circuit Court of Appeals that the proceeding violated his rights (under ~~Lockett v. Ohio~~ and Hitchcock v. Dugger) to an individualized and reliable capital sentencing determination because the instruction restricted the jury's **"full"** consideration of mitigating evidence. The same error occurred in Mr. Tompkins' case.

During the course of Mr. Tompkins's trial, the State and the court informed the jurors chosen to sit that sympathy was an improper factor for their consideration. During voir dire, Mr. Benito instructed the jury panel including every prospective juror as to the things they should **not** consider:

> Q. Does anybody have any problem with that particular role, following the instructions handed down by Judge Coe?
>
> I anticipate that there are two areas regarding your deliberations that Judge Coe will touch on his instructions. I anticipate that he will advise you that in reaching your verdict in this particular case, you are not to allow feelings of sympathy to play any role in your deliberations.
>
> I know **it's** very difficult to be totally objective, but that's what you are required to try and do. No feelings of sympathy should enter into your deliberations.

(footnote continued from previous page)

petition in Hitchcock. The showing made by the petitioner in Riley was sufficient to demonstrate that Hitchcock would significantly affect his case, and the Florida Supreme Court therefore stayed the petitioner's execution. As discussed below, Mr. Tompkins herein shows that Saffle v. Parks, ___ Cr. L. ___ (April 24, 1989)(granting certiorari review of Parks v. Brown)(March 27, 1989)(granting certiorari review), will significantly affect his case, and therefore that he is entitled to the same relief as Mr. Riley.

(R. 45-46).

This admonition to ignore sympathy was reinforced throughout the voir dire:

> Mr. Brown, did you understand your role as factfinder if you are picked as a juror in this particular case?
>
> A. Yes.
>
> Q. And that you are not to let sympathy -- not to let sympathy enter into your deliberations if possible?

(R. 71).

The court then instructed the jury:

> This case must not be decided for or against anyone because you feel sorry for anyone or are angry at anyone.

(R. 395). The court hammered home the notion that the jury was not free to show mercy by its later instructions:

> Feeling of prejudice, bias or sympathy are not legally reasonable doubt and they should not be discussed by any of you in any way.

(R. 396)(emphasis added). This instruction was given in the guilt phase, but no instruction was given in the penalty phase indicating that sympathy towards Mr. Tompkins could then be considered.

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

> The clear impact of the [prosecutor's statement's] is that a sense of mercy should not dissuade one from punishing criminals to the maximum extent possible. This position on mercy is diametrically opposed to the Georgia death penalty statute, which directs that "the jury shall retire to determine whether any mitigating or aggravating circumstances . . . exist and whether to recommend mercy for the defendant." O.C.G.A. Section 17-10-2(c)(Michie 1982). Thus, as we held in Drake, the content of the [prosecutor's closing] is "fundamentally opposed to current death penalty jurisprudence." 762 F.2d at 1460. Indeed, the validity of mercy as a sentencing consideration is an implicit underpinning of many United States Supreme Court decisions in

> capital cases. See, e.g., Woodson v. North Carolina, 428 U.S. 280, 303, 96 S.Ct. 2978, 2990, 49 L.Ed.2d 944 (1976)(striking down North Carolina's mandatory death penalty statute for the reason, inter alia, that it failed "to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death"); Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978)(striking down Ohio's death penalty statute, which allowed consideration only of certain mitigating circumstances, on the grounds that the sentencer may not "be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death") (emphasis in original). The Supreme Court, in requiring individual consideration by capital juries and in requiring full play for mitigating circumstances, has demonstrated that mercy has its proper place in capital sentencing. The [prosecutor's closing] in strongly suggesting otherwise, misrepresents this important legal principle.

Wilson v. Kemp, 777 F.2d 621, 624 (11th Cir. 1985).

Requesting the jury to dispel any sympathy they may have towards the defendant undermined the jury's ability to reliably weigh and evaluate mitigating evidence. Parks v. Brown, 860 F.2d 1545 (10th Cir. 1988)(en banc), cert. granted sub nom. Saffle v. Parks, Cr. L. (April 24, 1989). See Coleman v. Saffle, F.2d ___, No. 87-2011 (10th Cir., March 6, 1989); Davis v. Maynard, ___ F.2d ___, No. 87-1157 (10th Cir., March 14, 1989). The jury's role in the penalty phase is to evaluate the circumstances of the crime and the character of the offender before deciding whether death is an appropriate punishment. Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). An admonition to disregard the consideration of sympathy improperly suggests to "the jury that it must ignore the mitigating evidence about the [petitioner's] background and character." California v. Brown, 479 U.S. 538, 107 S. Ct. 837, 842 (1987)(O'Connor, J., concurring).

Sympathy is an aspect of the defendant's character that must be considered by the jury during penalty deliberations:

The capital defendant's constitutional right to present and have the jury consider mitigating evidence during the capital phase of the trial is very broad. The Supreme Court has held that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978) (emphasis in original). See also Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

The sentencer must give "individualized" consideration to the mitigating circumstances surrounding the defendant and the crime, Brown, 479 U.S. at 541; Zant v. Stephens, 462 U.S. 862, 879 (1983); Eddings v. Oklahoma, 455 U.S. 104, 111-12 (1982); Lockett, 438 U.S. at 605, and may not be precluded from considering "any relevant mitigating evidence." Eddinss, 455 U.S. at 114. See also Andrews v. Shulsen, 802 F.2d 1256, 1261 (10th Cir. 1986), cert. denied, ___ U.S. 107 S. Ct. 1964, 95 L. Ed. 2d 536 (1987).

Mitigating evidence about a defendant's background or character is not limited to evidence of guilt or innocence, nor does it necessarily go to the circumstances of the offense. Rather, it can include an individualized appeal for compassion, understanding, and mercy as the personality of the defendant is fleshed out and the jury is given an opportunity to understand, and to relate to, the defendant in normal human terms. A long line of Supreme court cases shows that a capital defendant has a constitutional right to make, and have the jury consider, just such an appeal.

In Gress v. Georsia, 428 U.S. 153 (1976), the Court upheld the Georgia sentencing scheme which allowed jurors to consider mercy in deciding whether to impose the penalty of death. Id. at 203. The Court stated that "[n]othing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution." Id. at 199.

In Woodson v. North Carolina, 428 U.S. 280, 304 (1976), the Court struck down mandatory death sentences as incompatible with the required individualized treatment of defendants. A plurality of the Court stated that mandatory death penalties treated defendants "not as uniquely individual human beings but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the death penalty." Id. at 304. The Court held that "the fundamental

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

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

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

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

"Mercy," "humane" treatment, "compassion," and consideration of the unique "humanity" of the defendant, which have all be affirmed as relevant considerations in the penalty phase of a capital case, all

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

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

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

Petitioner's counsel, in his closing argument, then relied on this testimony to argue that petitioner's youth, race, school experiences, and broken home were mitigating factors that the jury should consider in making its sentencing decision. In so doing, defense counsel appealed directly to the

> jury's sense of compassion, understanding, and sympathy, and asked the jury to show **"kindness"** to his client as a result of his background. Record, vol. V, at 708-723.
> . . . [There is] an impermissible risk that the jury did not fully consider these mitigating factors in making its sentencing decision.
>
> . . .
>
> As we discussed above, sympathy may be an important ingredient in understanding and appreciating mitigating evidence of a defendant's background and character.

Parks v. Brown, 860 F.2d at **1554-57**. On April **24**, 1989, the United States Supreme Court granted a writ of certiorari in order to review the decision in ~~Parks~~. See ~~Saffle v. Parks~~, Cr.L. (cert. granted April **25**, 1988).

The remarks by the prosecutor during voir dire coupled with the court's instruction may have served to constrain the jury in their evaluation of mitigating factors. Under Mills v. Maryland, 108 S. Ct. 1860 (1978), if reasonable jurors may have understood what they were told as precluding consideration of mercy or sympathy towards Mr. Tompkins, then a new sentencing proceeding must be ordered. Certainly, here reasonable jurors could have understood the instructions as precluding them from allowing the natural tendencies of human sympathy from entering into their determination of whether any aspect of Mr. Tompkins' character required the imposition of a sentence other than death.

This error undermined the reliability of the jury's sentencing determination and prevented the jury from assessing the full panoply of mitigation presented by Mr. Tompkins. This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Tompkins' death sentence. Certainly, California v. Brown, Mills, and Parks v. Brown are new cases that expound upon the old principles of Lockett and Eddings, just as Hitchcock expounded upon Lockett. Thus, these cases are unquestionably retroactive as the Tenth Circuit Court of Appeals has noted the State of Oklahoma

conceded. Coleman v. Saffle, supra, slip op. at 30. Soon the United States Supreme Court will address this very issue in its review of Parks. Certainly Mr. Tompkins execution must be stayed pending the decision in Parks.

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

Mr. Tompkins was deprived of the opportunity to have the jury informed that mercy and sympathy were a basis for returning a life recommendation. Accordingly, Mr. Tompkins' death warrant must be stayed pending the United States Supreme Court decision in Parks, and thereafter habeas relief granted.

CLAIM III

MR. TOMPKINS' SENTENCE OF DEATH, RESTING ON THE "HEINOUS, ATROCIOUS, AND CRUEL" AGGRAVATING FACTOR, IS IN DIRECT AND IRRECONCILABLE CONFLICT WITH AND CONTRARY TO MAYNARD V. CARTWRIGHT, 108 S. CT. 1853 (1988), IS IN CONFLICT WITH THE NINTH CIRCUIT COURT OF APPEALS DECISION IN ADAMSON V. RICKETTS, ___ F.2D ___, NO. 84-2069 (9TH CIR. DEC. 22, 1988) (EN BANC), AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

The issue raised by Mr. Tompkins' claim is identical to that raised in Maynard v. Cartwrisht, 108 S. Ct. 1853 (1988).[3] Under the Cartwrisht decision, Mr. Tompkins is entitled to relief. However, this Court on direct appeal applied an improper standard of review for determining the applicability of the heinous,

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[3]Oklahoma's "heinous, atrocious, or cruel" aggravating circumstance was founded on Florida's counterpart, see Cartwrisht v. Maynard, 802 F.2d 1203, 1219, and the Florida Supreme Court's construction of that circumstance in State v. Dixon, 283 So. 2d 1 (Fla. 1973) was the construction adopted by the Oklahoma courts.

atrocious and cruel aggravating circumstance. This determination must be re-evaluated in light of the standard set forth by the United States Supreme Court in Cartwrisht. The issue is also identical to that raised in Adamson v. Ricketts, 865 F.2d 1011, (9th Cir. 1988)(en banc); Davis v. Mavnard, F.2d ___, No. 87-1657 (10th Cir., March 14, 1989); and Coleman v. Saffle, F.2d ___, No. 87-2011 (10th Cir., March 6, 1989), and is in conflict with those decisions.

In the present case, as in Cartwrisht, the jury instructions provided no guidance and no definition whatsoever regarding the "heinous, atrocious or cruel" aggravating circumstance. The jury was simply told: "3. The capital felony was especially wicked, evil, atrocious or cruel" (R. 453).

The Tenth Circuit's en banc opinion (unanimously overturning the death sentence) explained that the jury in Cartwrisht received the following instruction:

> the term "heinous" means extremely wicked or shockingly evil; **"atrocious"** means outrageously wicked and vile; **"cruel"** means pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the sufferings of others.

Cartwright v. Mavnard, 822 F.2d 1477, 1488 (10th Cir. 1987)(en banc), affirmed 108 S. Ct. 1853 (1988). Thus, Mr. Tompkins' jury received and the trial judge applied even less of a limiting construction of this aggravating circumstance than what was contained in the instruction found wanting in Cartwrisht. In Cartwrisht, the United States Supreme Court unanimously held that such an instruction did not @@adequatelyinform juries what they must find to impose the death **penalty."** 108 S. Ct. at 1858.

When this claim was presented to this Court in Mr. Tompkins' direct appeal, again as in Cartwrisht, this Court rejected the claim, merely finding the aggravating circumstance was supported by "sufficient evidence.@@ Tompkins v. State, 502 So. 2d 415, 421 (Fla. 1986). This, too, was similar to what the appellate court found in Cartwrisht. There, the state appellate court recited

facts which in its opinion supported the application of the circumstance. Cartwrisht v. Maynard, 822 F.2d at 1488-89. On direct appeal, this Court recited evidence which would have permitted an inference that the murder was heinous, atrocious, or cruel. In essence the Court merely conducted a sufficiency of the evidence inquiry. See Tompkins, 502 So. 2d at 421. Such an analysis is not sufficient under Cartwrisht to channel the sentencer's discretion in applying this aggravating circumstance.

The United States Supreme Court affirmed the Tenth Circuit's grant of relief in Cartwrisht, explaining that the death sentence did not comply with the fundamental eighth amendment principle requiring the limitation of capital sentencers' discretion. The failure to adequately instruct on the aggravating circumstance rendered the circumstance unconstitutionally vague in the particular case at issue. The Court's eighth amendment analysis fully applies to Mr. Tompkins' case: here the trial court announced no limitation on the meaning or applicability of this aggravating factor: these proceedings are even more egregious than those upon which relief was mandated in Cartwrisht. As noted previously the jury in Cartwrisht received more guidance than Mr. Tompkins' jury. The result here should be the same as in Cartwrisht:

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

108 s. Ct. at 1859.

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

> Godfrev v. Georgia [] which is very relevant here, applied this central tenet of Eighth Amendment law. The aggravating circumstance at issue there permitted a

person to be sentenced to death if the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Id., at 422. The jury had been instructed in the words of the statute, but its verdict recited only that the murder was "outrageously or wantonly vile, horrible or inhuman." The Supreme Court of Georgia, in affirming the death sentence, held only that the language used by the jury was "not objectionable" and that the evidence supported the finding of the presence of the aggravating circumstance, thus failing to rule whether, on the facts, the offense involved torture or an aggravated battery to the victim. Id., at 426-427. Although the Georgia Supreme Court in other cases had spoken in terms of the presence or absence of these factors, it did not do so in the decision under review, and this Court held that such an application of the aggravating circumstance was unconstitutional, saying:

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

The affirmance of the death sentence by the Georgia Supreme Court was held to be insufficient to cure the jury's unchanneled discretion because that court failed to apply its previously recognized limiting construction of the aggravating circumstance. Id., at 429, 432. This Court concluded that, as a result of the vague construction applied, there was "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." Id., at 433. Compare Proffitt v. Florida, 428 U.S. 242, 254-256 (1976). It plainly rejected the submission that a particular set of facts surrounding a

> murder, however, shocking they might be, were enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty.

Cartwrisht, susra, 108 S. Ct. at 1858-59.

Accordingly, the Court concluded that words given to the jury in the instructions regarding heinous, atrocious or cruel were inadequate: "To say that something is 'especially heinous' merely suggests that the individual jurors should determine that the murder is more than just 'heinous,' whatever that means, and an ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous.'" 108 S. Ct. at 1859.

In Mr. Tompkins' case, as in Cartwrisht, what was relied upon by the jury, trial court, and Florida Supreme Court did not guide or channel sentencing discretion. Likewise, here, no "limiting construction" was ever applied to the "heinous, atrocious or cruel" aggravating circumstance. This Court on direct appeal did not cure the unlimited discretion exercised by the jury and trial court by recitation of facts to support this factor. The Court simply reviewed the evidence and found that the jury may have inferred the presence of the aggravating circumstance.

The manner in which the jury and judge were allowed to consider "heinous, atrocious or cruel" provided for no genuine narrowing of the class of people eligible for the death penalty, because the terms were not defined in any fashion, and a reasonable juror could believe *any* murder to be heinous, atrocious or cruel under the instructions. Mills v. Maryland, 108 S. Ct. 1860 (1988). These terms require definition in order for the statutory aggravating factor genuinely to narrow, and its undefined application here violated the eighth and fourteenth amendments. Godfrev v. Georgia, 446 U.S. 420 (1980). Jurors must be given adequate guidance as to what constitutes

"especially heinous, atrocious, or cruel." Maynard v. Cartwright, 108 U.S. 1853 (1988). In essence the jury must be told of the elements constituting this circumstance.

In Mr. Tompkins' case, the Court offered no explanation or definition of "heinous, atrocious, or cruel" but simply instructed the jury that the third aggravating circumstance the jury could consider was whether the crime "was especially wicked, evil, atrocious or cruel." (R. 453). The judge's oral instructions may have been interpreted by the jury as telling them that in fact the murder was wicked, evil, atrocious or cruel. This alone violated Mills v. Maryland, 108 S. Ct. 1860 (1988).

In declining to find a violation of Cartwrisht, the court on direct appeal applied the very analysis which Cartwright condemned. The court concluded that "death under these circumstances is heinous, atrocious and cruel," Tompkins v. State, 502 So. 2d at 421. In so concluding, the court failed to consider that the instruction at issue here did not "adequately inform [the jurors] what they must find to impose the death penalty." 108 S. Ct. at 1858. The analysis on direct appeal contravenes the United States Supreme Court's holding in Cartwrisht.

Even though this Court had consistently held that in order to show "heinous, atrocious, and cruel" something more than the norm must be shown, **see** Cooper v. State, 336 So. 2d 1133 (Fla. 1976); Odom v. State, 403 So. 2d 936 (Fla. 1981); Parker v. State, 458 So. 2d 750 (Fla. 1984), the Court found that "heinous, atrocious and cruel" applied to Mr. Tompkins' case (R. 680). In fact, in Proffitt v. Florida, 428 U.S. 242 (1976), the circumstance was found to have sufficient guidance because this Court had construed it as containing the requirement that the crime was "conscienceless or pitiless" because it was "unnecessarily torturous to the victim." 428 U.S. at 255-56.

When Mr. Tompkins challenged this aggravating circumstance on direct appeal, the court did not have the benefit of Maynard v. Cartwriaht, decided by the United States Supreme Court in June, 1988. However, Cartwright is merely an extension of Godfrev which did exist at the time of Mr. Tompkins' trial, sentencing and direct appeal. Just as Hitchcock v. Dusser, 107 S. Ct. 1821 (1987), had applied retroactively to Lockett v. Ohio, Cartwright also applied retroactively to Godfrev. The Tenth Circuit Court of Appeals has recognized that Cartwriaht is retroactive. Davis v. Maynard, F.2d , No. 87-1657 (10th Cir., March 14, 1989); Coleman v. Saffle, F.2d , No. 87-2011 (10th Cir., March 6, 1989).

Maynard v. Cartwrisht, supra, like Hitchcock v. Dusser, supra, constitutes a development of fundamental significance by concluding that state courts, such as the Florida Supreme Court, were misconstruing Godfrev v. Georgia, 446 U.S. 420 (1980). State courts had interpreted Godfrev as not requiring a sentencer to be instructed on or to apply limiting principles which were to guide and channel the sentencer's construction of the "heinous, atrocious or cruel" aggravating circumstance. Thus, the decision in Maynard v. Cartwriaht is very much akin to the decision in Hitchcock v. Duaaer, which held that the Florida Supreme Court and the Eleventh Circuit Court of Appeals had failed to properly construe Lockett v. Ohio, 438 U.S. 586 (1978). Cartwrisht, like Hitchcock, changed the standard of review previously applied. See Thompson v. Duaaer, 515 So. 2d 173 (Fla. 1987); Downs v. Dusaer, 514 So. 2d 1069 (Fla. 1987).

Indeed, this Court had previously passed off Godfrev as only effecting its own appellate review of death sentences. Brown v. Wainwright, 392 So. 2d 1327, 1332 (Fla. 1981) ("Illustrative of the Court's exercise of the review function is Godfrev v. Georgia"). Thus it is clear that this Court has refused to honor Godfrev and declined to address the impact of Godfrev upon the

adequacy of jury instructions regarding this aggravating circumstance.[4]

In its decision in Maynard v. Cartwright, the United States Supreme Court held that state courts had failed to comply with Godfrev when they did not require adequate jury instructions which guided and channelled the jury's sentencing discretion. More is required than simply asking the jury if the homicide was "wicked, evil, atrocious or cruel." Maynard v. Cartwright also applies to the judge's sentencing where there has been a failure to apply the controlling limiting construction of "heinous, atrocious, or cruel." Adamson V. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(en banc). This Court's limited reading of Godfrev (as only effecting appellate review of a death sentence) was in error. That error has been recognized and spelled out in Maynard v. Cartwright. The jury must be instructed on the elements of the aggravating circumstances. Since the jury was not so instructed here, the heinous, atrocious, or cruel aggravating circumstance was improperly found.

The error here cannot be considered harmless beyond a reasonable doubt. Here without the aggravating circumstance at issue here, there remains only two aggravating circumstances to be weighed against one statutory mitigating circumstance. In Cartwright, state law at the time of Mr. Cartwright's direct appeal required that a death sentence be set aside when one of several aggravating circumstances was found invalid on appeal. Id. Similarly, in Florida, this Court remands for resentencing when aggravating circumstances are invalidated on direct appeal. See, e.g., Schaefer v. State, ___ So. 2d , No. 70,834 (Fla. Jan. 19, 1989)(remanded for resentencing where three of five

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[4] In fact, through 1988, Shepards' United States Citations shows that this Court cited Godfrev three times, once in Brown, once in Witt v. State, 387 So. 2d 922 (Fla. 1980), and once in the dissent in Hitchcock v. State, 413 So. 2d 741, 748 (Fla. 1982).

aggravating circumstances stricken and no mitigating circumstances identified); Nibert v. State, 508 So. 2d 1 (Fla. 1987)(remanded for resentencing where one of two aggravating circumstances stricken and no mitigating circumstances found); cf. Rembert v. State, 445 So. 2d 337 (Fla. 1984)(directing imposition of life sentence where one of two aggravating circumstances stricken and no mitigating circumstances found). Furthermore, in this case, the trial court did determine that mitigating factors were present (R. 680). Certainly a resentencing before a new jury is required where an aggravating circumstance is stricken and a statutory mitigating circumstance has been found to exist. Thus, the striking of this aggravating factor would certainly have required resentencing under Florida law. See Elledse v. State, 346 So. 2d 998 (Fla. 1977) (resentencing required where mitigation present and aggravating factor struck): cf. Mann v. State, 420 So. 2d 578 (Fla. 1982).

The application of the heinous, atrocious and cruel aggravating factor must be vacated in light of Cartwright's clear holding. The application of this factor was error where the jury was not instructed on the elements of the aggravating circumstance.

Just as this claim is identical to that found meritorious in Cartwrisht, so is it identical to the claim upon which the Ninth Circuit Court of Appeals granted relief in Adamson v. Ricketts, 865 F.2d 1011, (9th Cir. 1988)(en banc). There, the sentencing judge's verdict stated, "the aggravating circumstance[] . . . exists [since Adamson] committed the offense in an especially cruel, heinous and depraved manner," and described the murder. Adamson, supra, 865 F.2d at 1036. In Mr. Tompkins' case, the jury was instructed with and the trial judge applied the identical erroneous standard. The en banc Ninth Circuit found that the standard at issue lacked "any discussion or application of the 'actual suffering' cruelty standard" enunciated by the

Arizona Supreme Court as a limiting construction of the circumstance, and that thus the circumstance did not provide for the "suitably directed discretion" of the sentencer required by Mavnard v. Cartwright, 108 S. Ct. 1853 (1988) and Godfrev v. Georgia, 446 U.S. 420 (1980). Adamson, supra, 865 F.2d at 1036.

Adamson further found that appellate review of the propriety of the heinous, atrocious, or cruel aggravating circumstance did not cure the trial judge's overbroad application of the circumstance:

> That the Arizona Supreme Court affirmed Adamson's death sentence based on cruelty grounds in no way cures the sentencing judge's failure to apply this allegedly constitutional cruelty construction in Adamson's sentencing proceeding. . . . [A]s the Supreme Court has repeatedly emphasized, it is the suitably directed discretion of the sentencing bodv which protects against arbitrary and capricious capital sentencing. Maynard, 108 S. Ct. at 1858; Godfrev, 446 U.S. at 428-29; Gresg, 428 U.S. at 189; Furman, 408 U.S. at 313 (White, J., concurring). Post hoc appellate rationalizations for death sentences cannot save improperly channeled determinations by a sentencing court. Not only are appellate courts institutionally ill-equipped to perform the sort of factual balancing called for at the aggravation-mitigation stage of the sentencing proceedings, but more importantly, a reviewing court has no way to determine how a particular sentencing body would have exercised its discretion had it considered and applied appropriately limited statutory terms.

Adamson, supra, 865 F.2d at 1036 (emphasis in original)(footnote omitted).

As in Adamson, the discretion of the sentencing jury and judge in Mr. Tompkins' case was not properly channeled or guided, and the state high court's affirmance of the application of the heinous, atrocious, or cruel aggravating circumstance did not cure the sentencers' unbridled application of the factor. The direct appeal disposition of Mr. Tompkins' claim is in direct conflict with the Ninth Circuit's decision in Adamson.

The "heinous, atrocious, or cruel" aggravating factor, as applied in this case, violated the eighth and fourteenth

amendments. Indeed, there is no principled distinction between Mr. Tompkins' case and Maynard v. Cartwright. Habeas relief is proper.

CLAIM IV

MR. TOMPKINS CAPITAL CONVICTION AND SENTENCE ARE FUNDAMENTALLY UNFAIR IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE OF THE PROSECUTOR'S IMPROPER GOLDEN RULE ARGUMENT TO THE PENALTY JURY.

The prosecutor during the penalty phase argument of Mr. Tompkins trial made inflammatory and prejudicial remarks to the jury injecting totally irrelevant factors for them to consider during their deliberations.

During the penalty phase the prosecutor told the jury:

> If Lisa DeCarr had had a choice of going to jail for life rather than die, what choice would she have made? People want to live. Lisa DeCarr did not have that choice, and you know why? You know why she didn't have that choice? Because this man decided for himself that Lisa DeCarr should die; and for making that decision, he, too, deserves to die.

(R. **447**).

A similar inflammatory remark was recently condemned by the this Court in Garron v. State, **528** So. 2d **353, 359** (Fla. **1988**). In Garron, the improper remark was similar to the one made by the prosecutor in Mr. Tompkins trial:

> If Le Thi were here, she would probably argue the defendant should be punished for what he did.

Garron, **528** So. 2d at **359** (footnote omitted).

The Garron Court explained the seriousness of improper prosecutorial argument during a capital trial:

> This is certainly not the first time prosecutorial misconduct has been brought to our attention. In State v. Murry, **443** So.2d **955** (Fla. **1984**), and again in Bertolotti v. State, **476** So.2d **130** (Fla. **1985**), this Court expressed its displeasure with similar instances of prosecutorial misconduct. Such violations of the prosecutor's duty to seek justice and not merely "win" a death recommendation cannot be condoned by this

Court. ABA Standards for Criminal Justice 3-5.8 (1980); 476 So.2d at 133. In Bertolotti we stated our concern:

> Nonetheless, we are deeply disturbed as a Court by the continuing violations of prosecutorial duty, propriety, and restraint. We have recently addressed incidents of prosecutorial misconduct in several death penalty cases.... As a Court, we are constitutionally charged not only with appellate review but also "to regulate... the discipline of persons admitted" to the practice of law. Art. V, Section 15, Fla. Const. This Court considers this sort of prosecutorial misconduct, in the face of repeated admonitions against such overreaching, to be grounds for appropriate disciplinary proceedings. It ill becomes those who represent the state in the application of its lawful penalties to themselves ignore the precepts of their profession and their office.

476 So.2d at 133 (emphasis added and in original)(citations omitted).

> The Court in Bertolotti noted that under those circumstances, disciplinary proceedings, not mistrial, was the proper sanction for the prosecutorial misconduct. Nevertheless, it appears that the admonitions in Bertolotti went unheeded and that the misconduct in this case outdistances the misconduct in Bertolotti, Thus, we believe a mistrial is the appropriate remedy here in addition to the possible penalties that disciplinary proceedings could impose upon the prosecutor.

Garron, 528 So. 2d at 359-360.

This type of improper argument is especially dangerous in a capital case, because the impassioned plea to the jury infects their deliberations and creates a great likelihood that their sentencing decision is tainted by caprice. Justice Ehrlich eloquently explained the impropriety of this type of comment:

> It is equally clear that the argument was irrelevant and improper.
>
> Section 921.141, Florida Statutes, sets forth those factors which may be presented to a jury in support of the prosecution's request for a recommendation of death. The suffering of the survivors is not relevant to any of the factors listed. The purpose of the death penalty statute as now drafted is to insulate its application from emotionalism

> and caprice. This Court has long condemned prosecutorial arguments which appeal to emotion rather than to reason. See, e.g., Tefeteller v. State, 439 So.2d 840 (1983), Singer v. State, 109 So.2d 7 (Fla. 1959); Clinton v. State, 53 Fla. 98, 43 So. 312 (1907). 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. I can imagine no set of facts on which this would be proper argument.
>
> Unfortunately, is spite of the clear teaching of this and other courts that such argument is improper, prosecutors continue to indulge in it. This is contrary to the ethics of the profession generally and in violation of the duty, as state attorneys, to seek justice, not merely convictions. Zealous representation of society's interest does not require society's advocate to overstep the bounds of professional restraint. Our holding that, in this case, the improper argument does not require a new sentencing trial must not be seen as our condoning such impropriety. Continued floating of ethical limitations of prosecutorial conduct can be corrected through professional discipline without burdening society at large or the criminal justice system with the cost of retrying the case.

Bush v. State, 461 So.2d 936, 942 (Ehrlich, J., concurring).

The remarks made by the prosecutor were clearly improper. The remarks went beyond those found in Bush and Bertolotti, and were at least as grievous as those found in Garron. This Court has stated that this type of argument injects improper considerations for the jury during deliberations:

> Later, the prosecutor made an argument which is a variation on the proscribed Golden Rule argument, inviting the jury to imagine the victim's final pain, terror and defenselessness. This violation has been addressed recently in Jennings v. State, 453 So.2d 1109 (Fla. 1984), vacated on other grounds, ___U.S.____, 105 S.Ct. 1351, 84 L.Ed.2d 374 (1985), but the prohibition of such remarks has long been the law of Florida. Barnes v. State, 58 So.2d 157 (Fla. 1951). Finally, the prosecutor urged the jury to consider the message its verdict would sent to the community at large, an obvious appeal to the emotions and fears of the jurors. These considerations are outside the scope of the jury's deliberation and their injection violates the prosecutor's duty to seek justice, not merely "win" a death

> recommendation. ABA Standards for Criminal Justice 3-5.8 (1980).

Bertolotti v. State, 476 So.2d 130, 133 (Fla. 1985)(footnote omitted).

The prosecutor's improper comments introduced a wholly irrelevant factor into the proceedings. Permitting this error to go uncured deprived Mr. Tompkins of a reliable sentencing determination. See Beck v. Alabama, 447 U.S. 685 (1980). This Court has long condemned the type of argument made here saying it undermines the reliability of the capital decision-making by injecting arbitrary and improper factors into the process. Mr. Tompkins was denied his fifth, sixth, eighth and fourteenth amendment rights. This constitutional infirmity in Mr. Tompkins death sentence must be remedied.

This error undermined the reliability of the jury's sentencing determination and caused the jury to consider improper factors during sentencing. For each of the reasons discussed above the Court should vacate Mr. Tompkins' unconstitutional sentence of death.

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

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

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

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

CLAIM V

MR. TOMPKINS WAS DENIED HIS SIXTH AMENDMENT RIGHT TO PRESENT A DEFENSE WHEN HIS JURY DID NOT HEAR EXCULPATORY EVIDENCE THAT THERE WERE OTHER SUSPECTS FOR THE CRIME AND OTHER WITNESSES WHO HAD SEEN THE VICTIM ALIVE AFTER THE TIME SHE WAS ALLEGEDLY KILLED BY MR. TOMPKINS, AND THAT THESE OTHER WITNESSES VERIFIED MR. TOMPKINS' VERSION OF WHAT OCCURRED.

During the cross-examination of Barbara DeCarr, one of the crucial State's witness against Mr. Tompkins, the following occurred:

> Q. Shortly after the day of March 23, 1984, did you speak to Kathy Stevens?
>
> A. No, sir.
>
> Q. Does the name Kathy Sample ring a bell?
>
> A. Yes, sir.
>
> Q. Who is Kathy Sample?
>
> A. Lisa's girlfriend.
>
> Q. You never heard her referred to as Kathy Stevens?
>
> A. No, sir.
>
> Q. What conversation did you have with Kathy Sample?
>
> MR. BENITO: I apologize, Mr. Hernandez. I object, Judge, as to hearsay.

THE COURT: Approach the bench.

[There was a discussion at bar as follows]:

THE COURT: What is she going to say?

MR. HERNANDEZ: Judge, she is going to say, and there will be other people that have told Barbara DeCarr that they saw Lisa after the 23rd of March, 1984.

MR. BENITO: She is going to testify, Judge, to that. She will be here to testify that she did tell Mrs. DeCarr that Lisa called her from New York and that she was all right, but she also testified that that was a lie.

Anything coming from this witness as to what Kathy said is strictly hearsay.

MR. HERNANDEZ: I have a question now if we are talking about the same person, Kathy Sample and Kathy Stevens.

MR. BENITO: I believe we are. Either way, Kathy Stevens was the one that talked about New York and the phone call. I think she is confused.

THE COURT: Why is this not hearsay?

MR. HERNANDEZ: Your Honor, I can rephrase the question.

THE COURT: Okay.

[Proceedings in open court follow]:

BY MR. HERNANDEZ:

Q. Mrs. DeCarr, isn't if a fact that after the day Lisa disappeared that you were informed by several people that Lisa DeCarr, your daughter, had been seen elsewhere around the community?

A. Yes, yes, sir.

BY MR. HERNANDEZ:

Q. Is it correct that you were informed, you investigation and neighborhood survey, or whatever that --

MR. BENITO: Excuse me, Mr. Hernandez. Judge, I believe the question is predicated upon hearsay.

THE COURT: I will have to hear the question.

BY MR. HERNANDEZ:

Q. You were informed that Lisa had run away?

THE COURT: Excuse me. I will sustain it.

BY MR. HERNANDEZ:

Q. Isn't it a fact that Lisa had been suspended from school or, at least, to a point where she had to go back with you --

A. Yes.

Q. -- before she could go back to school?

A. Yes, sir.

Q. It's your testimony that Lisa had never run away?

A. Yes, sir.

Q. Had she ever talked about running away?

A. No, sir.

Q. How many people told you that they had seen Wendy, that they had seen Lisa after the day she disappeared?

MR. BENITO: Judge, same objection. That question is predicated upon hearsay.

THE COURT: I will sustain the objection.

MR. BENITO: Can we approach the bench?

THE COURT: I will sustain the objection.

MR. BENITO: I need to approach the bench on another matter.

THE COURT: Approach the bench.

[There was a discussion at bar as follows]:

MR. BENITO: I would ask the Court to advise Mr. Hernandez that all these questions he is asking, he is getting his point across without having the answers come from the witness. They are all hearsay.

THE COURT: Are you congratulating him on his tactics?

MR. BENITO: I object to the form of the question which is predicated on hearsay.

THE COURT: I will deny your standing objection. If you have an objection, make it.

MR. BENITO: The questions and statement is already out. He can't predicate his questions on hearsay.

THE COURT: I don't presume to question his ways.

MR. BENITO: When I hear him say informed or advised, I will stand up at this time; and if you say you have to hear the questions, that will make it null and void anyway.

[Proceedings in open court follow]:

BY MR. HERNANDEZ:

Q. Isn't it a fact, Mrs. DeCarr, that in your subsequent check, looking for Lisa, that you determined that there was someone else that had seen Lisa in jeans and a maroon top?

MR. BENITO: Objection, Judge.

THE COURT: I will sustain the objection.

(R. **217-221).**

During the cross-examination of the State's lead detective who investigated Lisa DeCarr's disappearance the defense was again limited from eliciting exculpatory evidence:

CROSS EXAMINATION

BY MR. HERNANDEZ:

Q. Detective Burke, is it correct that you were the lead detective in this case in this investigation?

A. Yes, sir.

Q. And your interview with Mr. Tompkins was only a small portion of your involvement in this case; is that correct?

A. Yes, sir.

Q. You also stated that you interviewed Barbara DeCarr?

A. Yes, sir.

Q. Is it also correct that you also interviewed many other witnesses?

A. Yes, sir, many other people..

Q. Other people that you listed in your police report?

A. Yes, sir.

Q. In the course of your investigation and interviewing other people and doing whatever else you needed to do in following up that, did you become aware of other witnesses or people that said they had seen Lisa subsequent to March **24, 1983?**

MR. BENITO: Judge, I object. The question is predicated upon hearsay.

THE COURT: I am sorry. I missed the question.

[The requested text was read.]

THE COURT: I will sustain the objection.

MR. HERNANDEZ: Your Honor, may I be heard on that?

THE COURT: [Nods his head.]

[There was a discussion at bar as follows]:

MR. HERNANDEZ: Your Honor, Detective Burke's investigation consists more than just interviewing the witnesses, collecting evidence. In the course of that investigation if he collects information, evidence, or whatever, that Lisa DeCarr was seen subsequent to the day of the alleged disappearance and murder, it would not necessarily be hearsay because he collected it from other manners other than simply hearsay information.

THE COURT: I will sustain the objection.

[Proceedings in open court follow]:

BY MR. HERNANDEZ:

Q. In the course of your investigation, Detective, did you become familiar with the name of Wendy Chancey? I may be saying that last name wrong, Chancey or Chaney, Wendy.

A. I'm not sure.

Q. Did you investigate further to find out if any witnesses had, other than Mr. Tompkins, seen Lisa wearing blue jeans and a maroon top?

MR. BENITO: Judge, I object. That question is being predicated upon hearsay.

THE COURT: Sustain the objection.

(R. 285-287).

Defense counsel during cross-examination attempted to elicit additional exculpatory information:

BY MR. HERNANDEZ:

Q. During the course of your investigation did you ever hear anything about a neighbor seeing Lisa getting into a car on March 24, 1984?

MR. BENITO: Judge, again, that's hearsay.

THE COURT: Sustain the objection.

(R. ____).

A police report authored by Detective Gullo dated September 2, 1983 stated that Lisa had been sighted six months after her alleged disappearance:

> I received a phone call from Mrs. DeCarr who stated that she was told by friends of Lisa that they had seen Lisa on East 7th Avenue at about 46th Street. Lisa was standing in the Jewel "T" parking lot speaking with two or three other W/F's. The informants told Mrs. DeCarr that Lisa might be living in a trailer park which is across the street. Mrs. DeCarr told the informants that they should call the police the next time they see her. Mrs. DeCarr was advised that they didn't want to get involved with the police. I advised Mrs. DeCarr that I would take a photo of Lisa to the trailer park and attempt to find out if anyone had any information.

(R. 553).

Another police report dated April 26, 1983 stated that Lisa DeCarr had runaway to New York because she was pregnant:

> Received a telephone call from Mrs. DeCarr who advised that her son told her that Kathy Sample told him that Lisa called her. Mrs. DeCarr then contacted Kathy who told Mrs. DeCarr that Lisa called her yesterday (2:58 P.M.) from New York and told her she was o.k. and that she was pregnant. Kathy could not supply any other information.

(R. 551).

The theory that Lisa DeCarr had runaway was further supported by a police report by Detective K. E. Burke dated June

22, 1983 that stated:

> [Mrs. DeCarr] stated that they continue to search for LISA the next couple of days and that the only information that they had was a neighbor said that they had seen LISA getting into a green car, somewhere in the area of 15th and Osbourne.

(R. 517).

The contention by the defense that Lisa DeCarr was last seen wearing a maroon blouse and jeans is also borne out by information contained in police reports. A report dated July 9, 1984 authored by Detective Gullo states:

> 1430 hours, 9 July 1984, interviewed GLADYS STALEY, who is the mother of the suspect in this offense, WAYNE TOMPKINS. Her address is 14108 Tyco Drive, Brooksville, Florida. She stated that she had gone to Pasco County Jail where she had visited WAYNE on Sunday before 9 July 1984, and that at that time, WAYNE had been crying and telling her that he did not kill LISA. She stated she is not certain that it was the day LISA disappeared but she thinks it was the day, that she saw LISA at approx. 1430 hours, wearing a red shirt and blue-jeans. She further states that she thought that this day was the same day that BARBARA had taken JAMIE to the clinic. She stated after visiting her son that her son could furnish no additional information and kept telling her that he did not kill LISA.

(R. 511-12).

The police also contacted Lisa's school and learned that the school had some records regarding her disappearance:

> 1245 hours, 9 July 1984, the u/signed was re-contacted by Ms. SCHMIDT, of Middleton Junior High School, stating that she had now found LISA DeCARR's records and according to all of her recrods, LISA was, in fact, in school on March 23, 1983. She stated, as a matter of fact, LISA had been caught off of the school grounds smoking and was told on that date to have her mother bring her back to school on the 24th, so she could be re-admitted to school. She stated according to their records, on the 24th of March 1983, that BARBARA DeCARR had called. The time she called was unrecorded. And stated at the time she called that LISA had left. She stated there was no indication as to a runaway or what. That the noted only mentioned that she had left. She stated further that Ms. DeCARR had asked for KATHERINE MAMORE, who lives at 7401 Orleans address so she could go look for LISA.

(R. 511).

At a deposition of Barbara DeCarr on March 5, 1985, she confirmed the theory that Lisa had runaway:

> A. Kathy [Stevens a/k/a Sample a/k/a Mamorel said that Lisa was thinking of leaving and she wanted to know the address of the Beach house.
>
> Q. Place?
>
> A. Place.
>
> Q. So, Kathy had had some conversations with Lisa before, about Lisa running away?
>
> A. Apparently.
>
> Q. Did you call the Beach Place?
>
> A. I went over to Beach Place.
>
> Q. Okay. Lisa wasn't there?
>
> A. Of course not.
>
> Q. Did you have information at that point in time from Kathy Sample that Lisa might be pregnant?
>
> A. Yes.
>
> Q. Do you know if she was?
>
> A. No, sir. I don't.
>
> Q. If she was you didn't know it.
>
> A. That's right.
>
> Q. And did you leave a picture at Beach Place of Lisa?
>
> A. They took a copy of it.

(Deposition of Barbara DeCarr, p. 31)(emphasis added).

Mrs. DeCarr reported that Lisa's friends had seen her dressed in a maroon top and jeans:

> A. Okay. Wendy.
>
> Q. Were you there when Wendy was giving the statement?
>
> A. Yes.
>
> Q. Do you remember what Wendy said?
>
> A. She said she go into a brown Pinto --

Q. And do you --

A. -- with colored windows.

Q. And do you remember what Wendy said she was wearing?

A. Jeans and a top and a pocket book.

Q. Jeans and a maroon or a red top?

A. Yes.

Q. And her purse.

A. Her purse.

Q. Okay. And Wendy saw her do that?

A. She said she seen Lisa getting into a car.

Q. And that was the afternoon that Lisa disappeared.

A. Yes. She said she seen it from her bus.

(Deposition of Barbara DeCarr, p. 45)(emphasis added).

The police report filed at the time of Lisa's disappearance verified that it was Wendy Chancey who had last seen Lisa on March 24, 1983:

> Interview: Compl. stated she last saw Lisa at the listed residence at the listed time. Compl. stated that everything was fine at home and has had no trouble with Lisa running away or anything. Compl. stated Lisa was having some trouble in school but nothing to cause her to runaway. Compl. checked with Lisa's friends and school for any information as to where she might be with negative results. Compl. stated that one of Lisa's friends told her that Lisa asked about Beach Place, but Compl. checked with Beach Place with negative results. Compl. stated Lisa did not take any of her belongings and gave no indication of wanting to leave.
>
> Interview: Witness [Wendy Chancey] stated she observed Lisa get into the suspect vehicle at 12th St and Osborne and was last scene heading North on 12th St. Witness could give no more information, but can identify the suspect vehicle.

(R. 542).

Mrs. DeCarr stated that she believed that Lisa had runaway to New York:

Q. Okay. Well, I'm talking about, during the days, did you stay at home primarily?

A. I stayed at home waiting for her.

Q. And during that period of time, did anyone tell you that they talked to Lisa?

A. Kathy said she had talked to her on the phone.

Q. Kathy Sample?

A. Yes.

Q. And that was in April?

A. Probably. They had skipped school that day.

Q. Excuse me?

A. They had skipped school that day. They were up by my son's, my little son's school.

Q. Who was, Kathy?

A. Kathy.

Q. She had skipped school?

A. Yes.

Q. And you saw her?

A. (Nods - yes.)

Q. And she told you she talked to Lisa.

A. Yes, sir.

Q. Did she tell you that Lisa was any place in particular?

A. She said she was in, she said that Lisa said to tell mom I love her. Tell Mrs. McKenzie I'm in New York. And eveythings fine.

Q. Who is Mrs. Mckenzie?

A. That is or was her teacher over at Middleton.

Q. And she specifically said tell Mrs. McKenzie --

A. Yes.

Q. -- that I'm in New York and everything is fine?

A. (Nods - yes.)

Q. Did Kathy also tell you that Lisa told her she was pregnant?

A. (No response.)

Q. During that conversation?

A. It could have been when she told me.

Q. This was in April the twenty-sixth, approximately?

A. Approximately.

(Deposition of Barbara DeCarr, pp. 41-43)(emphasis added).

Several of Lisa's friends reported seeing her the summer after her disappearance:

Q. Okay. And during the summer did anyone tell you that they had seen or heard from Lisa?

A. There were all different reports.

Q. All from friends of hers?

A. No. People I knew, and she knew them too.

Q. Would tell you that they had seen her somewhere?

A. Yes.

Q. Okay. Now, these aren't people that, that had never seen her before. You are talking about people who knew who she was?

A. Yes, sir.

(Deposition of Barbara DeCarr, p. 43)(emphasis added).

In fact, school records verified this. Notations contained in Lisa's school file stated:

March 23rd - caught smoking off campus - suspended [illegible] - parent arrives

25th - Mom says child ran away yesterday (24th). Thinks child may be pregnant.

3/29 - No word from Lisa. Authority feels okay. No report.

4/5 No contact

4/19 - Visited home vacated

4/20 Message, ph. Mom moved last week

4/21 - students said child call from N.Y. Is pregnant

(emphasis in original). Thus, according to the school records "students" - plural - heard from Lisa and reported she was pregnant. Even her mother at the time of her disappearance suspected she was pregnant.

In the closing of the guilt phase of Mr. Tompkins trial, the prosecutor stated:

> There are some names bandied about by Mr. Hernandez during his cross-examination of some of the witnesses. Don't let these names being thrown around sidetrack you, confusion you.

(R. 356).

> The right of an accused in a criminal trial due to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process. Mr. Justice Black writing for the Court in In Re Oliver, 333 U.S. 257, 273, 63 S.Ct. 499, 507, 92 L.Ed. 6782 (1948), identified these rights as among the minimum essentials of a fair trial:
>
> > A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense -- a right to his day in court -- are basic to our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.
> >
> > See also Morrisey v. Brewer, 408 U.S. 471, 488-89, 92 S. Ct. 2593, 2603-2604, 33 L.Ed.2d 484 (1972); Jenkins v. McKeithen, 395 U.S. 411, 428-29, 89 S.Ct. 1843, 1852-53, 23 L.Ed.2d 404 (1969); Specht v. Patterson, 386 U.S. 605, 610, 87 S.Ct. 1209, 1212, 18 L.Ed.2d 326 (1967).

Chambers v. Mississippi, 410 U.S. 284, 294-95 (1973). The United States Supreme Court has also stated:

> The rights to notice, confrontation, and compulsory process, when taken together, guarantee that a criminal charge may be answered in a manner now considered fundamental to the fair administration of American justice -- through the calling and interrogation of favorable witnesses, the

> cross-examination of adverse witnesses, and the orderly introduction of evidence. In short, the Amendment constitutionalizes the right in an adversary criminal trial to make a defense as we know it. (Emphasis added)

Faretta v. California, 422 U.S. 806, 818 (1975).

All of these fundamental rights are implicated in this issue. Counsel was not allowed to examine witnesses -- Detective Burke and Barbara DeCarr -- regarding mitigating and exculpatory evidence that they each knew about. There was considerable evidence never presented to the jury that Lisa was alive and wearing the clothes Mr. Tompkins reported later in the day. Evidence that she was alive even later also existed. This is particularly significant in light of the failure of the State to adequately identify the body of the victim, and determine the cause of death. Yet this evidence did not reach the jury by virtue of the trial court's application of the hearsay rule.

The United States Supreme Court has not hesitated to overturn conviction where evidentiary rulings or state action have encroached upon a defendant's fundamental constitutional right to present a defense. See Chambers v. Mississippi, supra; Rock v. Arkansas, 107 S. Ct. 2704 (1987); Crane v. Kentucky, 106 S. Ct. 2141 (1986). In fact, in Chambers the United States Supreme Court specifically addressed the invocation of the hearsay rule to thwart the introduction of exculpatory evidence. "[W]here constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." 410 U.S. at 302. This Court should not hesitate to overturn Mr. Tompkins' conviction now. The hearsay evidence should have been presented to the jury.

The evidence at issue here had considerable significance. It was the crux of the defense proffered by defense counsel. It showed that Lisa DeCarr was alive days and months after she was allegedly killed. It support defense's claim that Lisa had

runaway wearing a maroon blouse and jeans. It supported the claim that due to an effort to disguise the fact that she was pregnant, Lisa had runaway. The jury should have been permitted to hear this testimony and evaluate the defendant's theory of the case.

The proceedings were fundamental unfair. The prosecutor used the absence of Wendy Chancey from the trial to his advantage by leading the jury to believe that her testimony would support the state's theory of the case. This was reversible error. Giglio v. United States, 405 U.S. 150 (1972).

This error undermined the reliability of the jury's guilt determination and prevented the jury from fully assessing the considerable exculpatory evidence. For each of the reasons discussed above the Court should vacate Mr. Tompkins' unconstitutional conviction.

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

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

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

CLAIM VI

MR. TOMPKINS' SENTENCE OF DEATH WAS FOUNDED UPON IMPERMISSIBLE "VICTIM IMPACT'' EVIDENCE, IN VIOLATION OF BOOTH V. MARYLAND, AND THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

The courts did not have the benefit of Booth v. Maryland, 107 S. Ct. 2529 (1987), at the time of Mr. Tompkins' trial and direct appeal. This Court has recently explained Booth's applicability to a Florida sentencing proceeding, writing:

> Scull raises one final issue on appeal. He alleges that the trial judge considered in his sentencing a victim impact statement (VIS) contained in the presentence investigation report (PSI). In doing so, Scull argues, the court violated the principles subsequently enunciated by the United States Supreme Court in Booth v. Maryland, 107 S.Ct. 2529 (1987). The VIS involved here contained pleas from Mejides' mother and Villegas' sister, detailing the torment each family has suffered since the murders and requesting that Scull receive the death penalty. They were somewhat less detailed and articulate than the VIS in Booth, but essentially they operate in the same way. Thev both injected irrelevant material into the sentencins proceedings.
>
> We believe that it was error for the trial judge to consider these statements. However, the record is unclear as to whether the judge considered the VIS in his sentencins or whether he merely examined it without actually considering it for purposes of ordering a sentence of death. We further note that counsel made no objections to consideration of the statements. Because such statements are usually contained in a PSI, it is unreasonable to expect judges to

> excise those portions of the report that are not proper for consideration. Under Booth, it is error to admit the VIS into evidence before the sentencins or advisory jury. Similarly, it is error for a sentencins judge to consider those statements as evidence of aggravating circumstances. However, when a judge merely sees a victim impact statement contained in a presentence investigation report, but does not consider the statements for purposes of sentencing, no error has been committed.

Scull v. State, 13 F.L.W. **545, 547-48** (Fla. Sept. **8, 1988)** (emphasis supplied).

As reflected by the clear record in Mr. Tompkins' case, the judge here heard and considered, in aggravation of sentence, the very constitutionally impermissible "victim impact" and "worth of victim" evidence which was condemned in Scull and in Booth. The jury and judge heard it, and had it argued before them.

The victim here was a child. That fact alone is enough to stir the passions and sympathies of the ultimate sentencers and great caution should be taken by those officers of the court trying a case such as this to insure that those passions are not deliberately aroused. A record transcript is cold and flat and cannot convey the expressions of the speakers, yet here even the printed word paints the portrait. From his opening statement and throughout the proceedings, the prosecutor repeatedly reminded the judge and the jurors that the victim was "a fifteen year old" girl (R. **109, 112, 118).**

In his penalty summation, the prosecutor argued:

> Lisa DeCarr suffered greatly that morning before the defendant dug her shallow grave and left her under that house, left her there, ladies and gentlemen, leaving her mother and her friend, Kathy Stevens, to wonder where she had gone.

(R. 445-446) (emphasis added).

The prosecutor argued that the wholly irrelevant factor that the victim's life was more valuable than the defendant's and for this reason death was an appropriate penalty:

> If Lisa DeCarr had had a choice to go to jail for life rather than die, what choice

would she have made? People want to live.

(R. 447).

Again the prosecutor argued the tender age of the victim as a reason for imposing a death sentence:

> There are the appropriate aggravating circumstances to recommend death. If is wasn't for this man, Wayne Tompkins, Lisa DeCarr, fifteen years old, would have her entire future ahead of her, but Lisa DeCarr is no more. She was on this earth for fifteen show years and then this man, Wayne Tompkins, destroyed her.

(R. 447-448).

The victim's mother testified about how Lisa's disappearance affected her:

> BY MR. BENITO:
>
> Q. Mrs. DeCarr, in June, **1984,** when you entered the hospital, the psychiatric ward at St. Joseph's, what had happened then?
>
> A. I had had a nervous breakdown.
>
> Q. At the time you had a nervous breakdown, at that time when you entered the hospital, Lisa was still missing, was she not?
>
> A. Yes, sir.
>
> * * *
>
> Q. Mr. Hernandez asked you why it didn't bother you when you found out Wayne was having an affair with somebody else, and you said it didn't. Why didn't it bother you?
>
> A. Nothing much mattered at that time.
>
> Q. After Lisa's disappearance?
>
> A. Yes, sir.

(R. **238-239).**

Victim impact information appears in the sentencing order. The court adopts the prosecutor's argument and refers to the victim as "the young girl" (R. **679).**

This was precisely the type of improper victim evidence held impermissible under Booth and Scull and prohibited by the eighth amendment. The ultimate sentencers needed little urging to

convince them to be sympathetic toward a child victim, yet the State reminded them again and again about this "little girl" (R. 443, 445). The State used that as the reason to take the life of Wayne Tompkins. The message was clear: the victim's character and her "potential" character were why Mr. Tompkins should be sentenced to die. The feelings of the victim's family were why Mr. Tompkins should be put to death. All this is flatly impermissible.

This record is replete with Booth eighth amendment error. The record, in fact, speaks for itself, and Mr. Tompkins urges the Court to consider it in its totality, for in its totality it reflects a plain and egregious violation of Booth v. Maryland.

At a capital sentencing proceeding, Booth v. Maryland, 107 S. Ct. 2529, 2535 (1987), requires the exclusion of evidence of "the presence or absence of emotional distress of the victim's family, or the victim's personal characteristics." The logic of Booth applies equally to situations where it is argued that the impact of the crime upon the family warrants the defendant's execution or where it is argued that the victim's good character makes the homicide more repugnant.

The victim's family in Booth "noted how deeply the [victims] would be missed," id. at 2531, explained the "painful, and devastating memory to them," id., spoke generally of how the crime had created "emotional and personal problems [to] the family members," id., and "emphasized the victim's outstanding personal qualities." Id. This evidence was presented through the introduction of a victim impact statement. The Supreme Court found the introduction of this information to violate the eighth amendment's mandate that any capital sentence be reliable. It violated the well established principle that the discretion to impose the death penalty must be "suitably directed and limited so as to minimize the risks of wholly arbitrary and capricious action."

In Booth the Court stated: "Although this court normally will defer to a state legislature's determination of what factors are relevant to the sentencing decision, the Constitution places some limits on this discretion." Booth, supra, at 2532. The Court ruled that the sentencer was required to render an "individualized determination" of what the proper sentence should be in a capital case. This determination should turn on the "character of the individual and the circumstances of the crime." See also Zant v. Stephens, 462 U.S. 862, 879 (1983); Eddings v. Oklahoma, 455 U.S. 104, 112 (1982). The Court in Booth noted that a state statute such as the one there at issue "must be scrutinized to ensure that the evidence has some bearing on the defendant's 'personal responsibility and moral guilt.' Enmund v. Florida, 458 U.S. 782, 801 (1982)." Booth, supra, at 2533. A contrary approach would run the risk that the death penalty will be imposed because of considerations that are "constitutionally impermissible or totally irrelevant to the sentencing process." Booth, supra; cf. Zant v. Stephens, supra, 462 U.S. at 885.

As the Booth court explained: "Certainly the degree to which a family is willing and able to express its grief is irrelevant to the decision whether a defendant, who may merit the death penalty, should live or die." Id. Thus the Booth Court concluded that "the presence or absence of emotional distress of the victim's family, or the victim's personal characteristics are not proper sentencing considerations in a capital case." Id. at 2535. These are the very same impermissible considerations urged (and urged to a far more extensive degree) and relied upon by the jury and judge in Mr. Tompkins' case. Here, as in Booth, the victim impact information "serve[d] no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant." Id. Since a decision to impose the death penalty must "be, and appear to be, based on reason rather than caprice or emotion," Gardner

v. Florida, 430 U.S. 349, 358 (1977)(Stevens, J.), such efforts to fan the flames "is inconsistent with the reasoned decision making" required in a capital case. Booth, supra at 2536.

The Booth court concluded the decision to impose a death sentence could not "turn on the perception that the victim was a sterling member of the community rather than someone of questionable character." Id. at 2534. To permit such information to be injected into the sentencing process would violate the eighth and fourteenth amendments because there would be no "'principled way to distinguish [cases] in which the death penalty was imposed from the many cases in which it was not.' Godfrey v. Georgia, 446 U.S. 420, 433 (1980)(opinion of Stewart, J.)." Booth, supra, 107 S. Ct. at 2534. This principle was abrogated in Mr. Tompkins' case.5

As stated, both the jury and judge relied on improper victim impact evidence in sentencing Mr. Tompkins to death. Cf. Scull, supra. Mr. Tompkins' sentence violates Booth. The burden of establishing that the error had no effect on the sentencing decision rests upon the State. See Booth, supra; cf. Caldwell v. Mississippi, 105 S. Ct. 2633, 2646 (1985). That burden can be

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[5] A sentence of death cannot stand when it results from prosecutorial comments or judicial instructions which *may* mislead the jury into imposing a sentence of death, Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633 (1985), Wilson v. Kemp, 777 F.2d 621, 626 (11th Cir. 1985), reh. denied, 784 F.2d 404 (11th Cir. 1986), and a capital defendant must not be sentenced to die by a jury which may have "failed to give its decision the independent and unprejudiced consideration the law requires." Wilson, 777 F.2d at 21, quoting Drake v. Kemp, 762 F.2d 1449, 1460 (11th Cir. 1985)(in banc); see also Potts v. Zant, 734 F.2d 526 (11th Cir. 1984). In short, a sentencing proceeding is flatly unreliable when the jurors are misled as to their role in the sentencing proceeding or as to the matters which they must consider in making their determination of what is the proper sentence under the circumstances. Wilson; Caldwell.

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

carried only on a showing of no effect beyond a reasonable doubt. Compare Chapman v. California, 386 U.S. 18 (1967), with Caldwell v. Mississippi, supra, and Booth v. Marvland, supra.

In a case involving such extensive and pervasive violations of the eighth amendment, the State cannot carry this burden with regard to the errors at issue in Mr. Tompkins' case. Accordingly, Mr. Tompkins is entitled to a new sentencing proceeding at which evidence of victim impact will be precluded from the sentencer's consideration. This case presents gross, fundamental eighth amendment error. Mr. Tompkins respectfully urges that the Court correct it.

This error undermined the reliability of the jury's sentencing determination and allowed the jury to consider improper factors while making their sentencing decision. For each of the reasons discussed above the Court should vacate Mr. Tompkins' unconstitutional sentence of death.

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

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

based on long-settled Florida and federal constitutional standards.

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

CLAIM VII

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE AS AN ISSUE TRIAL COUNSEL'S MULTIFACETED OBJECTIONS TO THE STATE'S INTRODUCTION AND USE IN EVIDENCE, OF DUPLICITOUS GROTESQUE AND INFLAMMATORY PHOTOGRAPHS OF THE VICTIM.

During the guilt phase of Mr. Tompkins capital trial, the state introduced into evidence grotesque and duplicitous photographs of the victim. Defense counsel objected to the introduction of these highly inflammatory photographs but appellate counsel failed to litigate this claim on direct appeal.

When the victim's body was discovered it had decomposed beyond recognition. All that remained was a skeleton. The photographs introduced by the state were highly inflammatory and completely irrelevant to any disputed issue at trial. The victim's identity could not be discerned from the skeletal remains depicted in the photographs. These grotesque pictures of the victim were introduced for sole purpose of inciting the passion of the jury and thereby prejudicing Mr. Tompkins trial.

Photographs of the crime are usually admitted into evidence when relevant to any matter that is in dispute, such as when they establish the element of intent, or the circumstances of death. See Adams v. State, 412 So.2d 850, 854 (Fla. 1982)(photographs relevant to show crime scene, premeditation and the circumstances

of death)); Booker v. State, 397 So.2d 910,914 (photographs relevant to show intent and circumstances of death). In order to establish an exception to the normal rule allowing admission of photographs, the defendant must demonstrate that the trial court committed "clear abuse" when it received a prejudicial photograph into evidence. Duest. v. State, 462 So.2d 446 (Fla. 1985).

Photographs should be excluded when they demonstrate something so shocking that the risk of prejudice outweighs its relevancy. Alford v. State, 307 So.2d 433, 441-442 (Fla. 1975) cert. denied, 428 U.S. 912 (1976). Photographs should also be excluded when they are repetitious or "duplicitous". Alford, supra (admission of photographs was proper when there were no duplications); Adams, supra (exclusion of two additional photographs was properly based on the trial court's exercise of reasonably judgment to prohibit the introduction of "duplicitous photographs"); see also Mazzarra v. State, 437 So.2d 716, 718-719 (Fla. 1st DCA 1983)(gruesome photographs admissible when they are not repetitious).

The photographs presented in this case were not merely repetitive and cumulative, but were grotesque and inflammatory. The State's use of these photographs distorted the actual evidence against Mr. Tompkins.

When the State sought to introduce the first of many pictures of the victim's skeletal remains, defense counsel voiced an objection:

> MR. BENITO: I would like this marked as State's Exhibit Number 8 for identification purposes.
>
> [State's Exhibit 8 was marked.]
>
> MR. HERNANDEZ: May we approach the bench Your Honor?
>
> THE COURT: Approach the bench.
>
> [There was a discussion at the bar as follows]:

> MR. HERNANDEZ: Your Honor, for the record and with respect to this photograph, and I believe there are other photographs that are coming in that depict the skeletal remains of the victim or the alleged victim.
>
> I would object to their admissibility on the basis that they are inflammatory and prejudicial, gory, things of that nature, and that they are not necessarily of probative value for the purpose of proving their case.

(R. 147-148). The objection was overruled (R. **149).**

The State's photographic presentation included four pictures of the decomposed remains of the victim. These photographs were duplicitous, irrelevant, and inflammatory. If the photographs had any probative value, this could have been demonstrated through the use of one photograph. This limitation on the numbers of photographs presented would have minimized their prejudicial effect on the jury.

The first photograph introduced by the state shows the victim lying in the grave (R. **148,** Exhibit **8).** The second photograph introduced by the state also show the entire body of the victim, but this picture shows her body after it was removed from the grave. (R. **149, 151,** Exhibit **9).** Then, the state proceeded to introduce close-ups of isolated parts of the victim's body. These pictures were clearly duplicitous, since the photographs of the victim's entire body obviously depicted what was shown in the close-ups.

Not only were the close-ups duplicitous, they were gory. Exhibit **10** was a picture of the victim's skull **--** there was vegetation growing from the skull. (R. **152).** Exhibit **11** was another photograph of the skull (R. **153).** Clearly there was no reason to introduce two photographs that depicted the same thing.

Trial counsel for Mr. Tompkins objected to the introduction of all these photographs. (R. **148, 149, 150).** Mr. Tompkins trial judge clearly abused his discretion when he declined to restrict the state's use of these several close-up photographs of various parts of the victim's body.

counsel raised objections to the number of photographs, but the trial judge declined to limit in any way the State's evidence. This constituted a clear abuse of discretion and would have been a reversible error had appellate counsel been alert and capitalized on the multifaceted and well preserved trial record fashioned by trial counsel in this regard.

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

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

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

Mr. Tompkins' conviction and sentence and sentence of death were imposed in violation of the sixth, eighth, and fourteenth amendments. That error must be corrected now, by means of habeas relief.

CLAIM VIII

MR. TOMPKINS' DEATH SENTENCE RESTED UPON AN UNCONSTITUTIONAL AUTOMATIC AGGRAVATING CIRCUMSTANCE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

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

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

In this case, the jury did not specify whether Mr. Tompkins was convicted of felony murder or premeditated murder. The verdict was unspecified (R. 401). However, the jury had been instructed by the state and the court that they could find Mr. Tompkins guilty of first degree felony murder based on the underlying felony of attempted sexual battery (R. 384). The State relied extensively on the felony murder theory and argued that the victim was killed in the course of an attempted sexual

battery. The jury received instructions on both theories and returned a first degree murder verdict (R. 401). During the penalty phase the jury was instructed that it was an aggravating circumstance of the homicide occurred during the course of a felony.

Since felony murder was most likely the basis of Mr. Tompkins' conviction, the subsequent death sentence is unlawful. Cf. Stromberg v. California, 283 U.S. 359 (1931). This is because the death penalty in this case was predicated upon an unreliable automatic finding of a statutory aggravating circumstance -- the very felony murder finding that formed the basis for conviction. The imposition of an automatic death penalty upon conviction of first-degree murder violates the eighth and fourteenth amendments, as was recently stated by the United States Supreme Court in Sumner v. Shuman, 107 S. Ct. 2716 (1987). In this case, felony murder was found as a statutory aggravating circumstance. ("The capital felony was committed while the defendant was engaged in an attempt to commit rape." (R. 679)). The sentencer was entitled automatically to return a death sentence upon a finding of guilt of first degree (felony) murder. Everv felony murder would involve, by necessity, the finding of a statutory aggravating circumstance, a fact which, under the particulars of Florida's statute, violates the eighth amendment: an automatic aggravating circumstance is created which does not narrow ("[A]n aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty . . . ." Zant v. Stephens, 462 U.S. 862, 876 (1983)). In short, since Mr. Tompkins was convicted for felony murder, he then faced statutory aggravation for felony murder. This is too circular a system to meaningfully differentiate between who

should live and who should die, and it violates the eighth and fourteenth amendments.[6]

Trial counsel filed a pretrial motion raising this objection (R. 646). However, the Court did not remedy this error.

The United States Supreme Court recently addressed a similar challenge in Lowenfield v. Phelps, 108 S. Ct. 546 (1988). In Lowenfield, petitioner was convicted of first degree murder under Louisiana law which required a finding that he had "a specific intent to kill to inflict great bodily harm upon more than one person," which was the exact aggravating circumstance used to sentence him to death. The United States Supreme Court found that the definition of first degree murder under Louisiana law that was found in Lowenfield provided the narrowing necessary for eighth amendment reliability:

> To pass constitutional muster, a capital-sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1983); cf. Gress v. Georgia, 428 U.S. 153 (1976). Under the capital sentencing laws of most States, the jury is required during the sentencing phase to find at least one aggravating circumstance before it may impose death. Id., at 162-164 (reviewing Georgia sentencing scheme): Proffitt v. Florida, 428 U.S. 242, 247-250 (1976)(reviewing Florida sentencing scheme). By doing so, the jury narrows the class of persons eligible for the death penalty accordins to an objective legislative definition. Zant, supra, at 878 ("[S]tatutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty").
>
> In Zant v. Stephens, supra, we upheld a sentence of death imposed pursuant to the

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[6]Certainly, resolution of the issue presented in Blystone v. Pennsylvania, 44 Cr. L. 4210, cert. sranted (March 27, 1989), has important implications as to this claim. This automatic aggravating circumstance shifted the burden to the defense to prove mitigation. The circumstance also added "weight" to the death side which Mr. Tompkins had to offset. See Claim I, supra.

Georgia capital sentencing statute, under which "the finding of an aggravating circumstance does not play any role in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty." 462 U.S., at 874. We found no constitutional deficiency in that scheme because the aggravating circumstances did all that the Constitution requires.

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

> "While Texas has not adopted a list of statutory aggravating circumstances the existence of which can justify the imposition of the death penalty as have Georgia and Florida, its action in narrowins the categories of murders for which a death sentence may ever be imposed serves much the same purpose . . . . In fact, each of the five classes of murders made capital by the Texas statute is encompassed in Georgia and Florida by one or more of their statutory assravatins circumstances . . . . Thus, in essence, the Texas statute requires that the jury find the existence of a statutory aggravating circumstance before the death penalty may be imposed. So far as consideration of aggravating circumstances is concerned, therefore, the principal

> difference between Texas and the other two States is that the death penalty is an available sentencing option--even potentially--for a smaller class of murders in Texas." **428** U.S., at **270-271** (citations omitted).
>
> It seems clear to us from this discussion that the narrowing function required for a regime of capital punishment may be provided in either of these two ways: The legislature may itself narrow the definition of capital offenses, as Texas and Louisiana have done, so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowins by jury findings of assravating circumstances at the penalty phase. See also Zant, supra, at **876,** n. 13, discussing Jurek and concluding, **"in** Texas, aggravating and mitigating circumstances were not considered at the same stage of the criminal prosecution."

Id. at 554-55 (emphasis added).

In Louisiana, the narrowing of the class of death eligible defendants is embraced in the statutory definition of murder, whereas in Florida the narrowing of the class of death eligible defendants is defined by the application of specific aggravating circumstances at sentencing. Thus, if narrowing occurs either in the conviction stage (as in Louisiana and Texas) **or** at the sentencing phase (as in Florida and Georgia), then the statute may satisfy the eighth amendment as written. However, as applied, the operation of Florida law in this case did not provide constitutionally adequate narrowing at either phase, because conviction **and** aggravation were predicated upon a non-legitimate narrower **--** felony murder.

The conviction-narrower state schemes require something more than felony murder at guilt-innocence. Louisiana requires intent to kill. Texas requires intentional and knowing murders. This narrows. Here, however, Florida allows a first-degree murder conviction based upon a finding that does not legitimately narrow **--** felony murder. The Florida death penalty scheme approved in Proffitt fails to operate when the defendant is convicted of felony murder. Once the defendant is convicted of felony murder,

the application of a statutory aggravating circumstance is automatic. The automatic application of all aggravating circumstance fails to constitutionally narrow the class of death eligible defendants.

Clearly, "the possibility of bloodshed is inherent in the commission of any violent felony, and . . . is foreseen," Tison v. Arizona, 107 S. Ct. 1676, 1684 (1987), but armed robbery, for example, is nevertheless an offense "for which the death penalty is plainly excessive." Id. at 1683. With felony-murder as the narrower in this case, neither the conviction nor the statutory aggravating circumstance meet constitutional requirements. Mr. Tompkins' conviction and sentence required only a finding that he committed a felony during which a killing occurred, and no finding of intent to kill was necessary. There is no constitutionally valid criteria for distinguishing Mr. Tompkins' sentence from those who have committed felony (or, more importantly, premeditated) murder and not received death.

This analysis cannot be sidestepped by any appellate finding of premeditation. Neither the Florida Supreme Court, nor any other court, can determine conclusively that there was a premeditation finding, since that is a question for the jury. See Stromberg; supra. If the basis for the conviction may result in an unconstitutional sentence, then a new sentencing hearing is necessary. See Stromberg, supra. Consequently, since a felony-murder conviction in this case has collateral constitutional consequences (i.e. automatic aggravating circumstance, failure to narrow), the state court's, or any other court's, finding of premeditation is directly at odds with the jury's finding.

The jury did not find premeditation. "To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined by the trial court." Cole v. Arkansas, 333 U.S. 196, 202 (1948). The principle that

an appellate court cannot utilize a basis for review of a conviction different from that which was litigated and determined by the trial court applies with equal force to the penalty phase of a capital proceeding. In Presnell v. Georgia, 439 U.S. 14 (1978), the United States Supreme Court reversed a death sentence where there had been no jury finding of an aggravating circumstance, but the Georgia Supreme Court held on appeal there was sufficient evidence to support a separate aggravating circumstance on the record before it. Citing the above quote from Cole v. Arkansas, the United States Supreme Court reversed, holding:

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

Presnell, 439 U.S. at 18.

During closing arguments the state advanced the felony murder theory explaining that this theory of first degree murder was applicable when there was insufficient evidence to show premeditation:

> Not only was this a first degree intentional premeditated killing, but under the felony murder theory the State has also proven first-degree murder under that theory.
>
> The State may proceed under both theories of the first degree murder law even though the indictment reads, in this particular case, premeditated murder; the jury can still convict the defendant under the felony murder theory.
>
> As clearly as this was an intentional, premeditated killing, it was also a first-degree felony murder.
>
> The Judge will instruct you on the law of first-degree felony murder. He will tell you before you can find the defendant guilty of first-degree felony murder, the State must prove the following three elements beyond a reasonable doubt:
>
> 1. The victim is dead.
>
> That's been proved.

2. The death occurred as a consequence of and while the defendant was attempting to commit sexual battery.

Clearly the defendant was intending to have sex with her that day. He attempted to. She fought him, and it cost her her life.

3. The State mush show beyond a reasonable doubt, under the felony murder theory, that the defendant was the person who actually killed the victim.

The evidence has shown that beyond any reasonable doubt. Clearly, all three elements of the first-degree murder rule have been proven and, remember, in order to convict under this theory, it is not necessary for the State to prove that the defendant has a premeditated design or intent to kill.

(R. 337-339).

The jury did not specify its verdict, returning only a verdict that convicted of "first degree murder" (R. 402). The underlying felony, however, was used to aggravate the offense allowing the imposition of a death sentence without more.

The Lowenfield violation is demonstrated by the closing argument of the prosecutor during the penalty phase. The State argued that the jury had already found one aggravating circumstance merely because the defendant was convicted based on the theory of felony murder.

The second aggravating circumstance which the State contends applies in this particular case would be as cited in the statute, the capital felony was committed while the defendant was engaged in an attempt to commit a rape.

That is a very important, sufficient, aggravating circumstance. Not only did he murder this young girl but prior to strangling her, he tried to rape her. That should be given strong consideration by this jury. That is an important aggravating circumstance. His motive for killing her was because this fifteen-year old girl resisted his sexual advances.

A fifteen-year old girl resisted his sexual advances, so he tried to rape her and then he murdered her. There are two right there, ladies and gentlemen.

(R. 444). The jury's verdict for first degree murder

impermissibly allowed the mandatory application of a statutory aggravating circumstance. Under the instructions, jurors could have reasonably concluded that Mr. Tompkins had the burden of establishing mitigation which outweighed the aggravation. See Claim I, supra.

The imposition of the death sentence based on a felony murder conviction and the statutory aggravating factor that the crime was committed during the course of attempted sexual battery improperly allowed the imposition of a presumptive death sentence. The Florida capital sentencing has passed constitutional muster because the consideration of aggravating factors narrows the class of defendants that may receive a death sentence. See Proffitt, supra. Since Mr. Tompkins was convicted of felony murder the application of the aggravating circumstance did not serve this constitutionally mandated function.

It is clear under Florida law that if an aggravating circumstance is improperly found and any mitigating circumstances are present, as is the case here, a new sentencing proceeding must be held because it is impossible to know the weight given to the improper aggravator by the jury. Elledse, supra. If a reasonable basis for a life recommendation exists in the record, a new sentencing must be ordered. Hall v. State, 14 F.L.W. 101 (Fla. March 9, 1989). Here, the sentencing judge identified a mitigating circumstance which clearly could have served as a reasonable basis for a life recommendation. Since the death sentence was improperly premised in part upon the jury's consideration of in-the-course-of-attempted-sexual-battery aggravating circumstance Mr. Tompkins' death sentence is unconstitutional.

This error determined the reliability of the jury's sentencing determination. For each of the reasons discussed above the Court should vacate Mr. Tompkins' unconstitutional sentence of death.

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

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

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

CLAIM IX

ARGUMENT, INSTRUCTION AND COMMENT BY THE PROSECUTOR AND COURT THROUGHOUT THE COURSE OF THE PROCEEDINGS RESULTING IN WAYNE TOMPKINS' SENTENCE OF DEATH DIMINSHED HIS CAPITAL JURY'S SENSE OF RESPONSIBILITY FOR THE AWESOME CAPITAL SENTENCING TASK THAT THE LAW WOULD CALL ON THEM TO PERFORM, AND MISLED AND MISINFORMED THEM AS TO THEIR PROPER ROLE, IN VIOLATION OF MR. TOMPKINS' RIGHTS TO AN INDIVIDUALIZED AND RELIABLE CAPITAL SENTENCING DETERMINATION, AND IN VIOLATION OF CALDWELL V. MISSISSIPPI AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

In Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(en banc), cert. denied, 44 Cr. L. 4192 (1988), relief was granted to a capital habeas corpus petitioner presenting a Caldwell v. Mississippi claim involving prosecutorial and judicial comments and instructions which diminished the jury's sense of responsibility and violated the eighth amendment in the identical way in which the comments and instructions discussed below violated Mr. Tompkins' eighth amendment rights. Wayne Tompkins should be entitled to relief under Mann, for there is no discernible difference between the two cases. A contrary result would result in the totally arbitrary and freakish imposition of the death penalty and violate the eighth amendment principles.

Caldwell v. Mississippi, 472 U.S. 320 (1985), involved prosecutorial/judicial diminution of a capital jury's sense of responsibility which is far surpassed by the jury-diminishing statements made during Mr. Tompkins' trial. The en banc Eleventh Circuit in Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988), cert. denied 44 Cir. L. 4192 (March 6, 1989), and Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988), determined that Caldwell assuredly does apply to a Florida capital sentencing proceeding and that when either judicial instructions or prosecutorial comments minimize the jury's role relief is warranted. See Mann, supra. Caldwell involves the most essential eighth amendment requirements to the validity of any death sentence: that such a sentence be individualized (i.e., not based on factors having

nothing to do with the character of the offender or circumstances of the offense), and that such a sentence be ~~reliable~~. Id., 105 S. Ct. at 2645-46.

At all trials there are only a few occasions when jurors learn of their proper role. At voir dire, the prospective jurors are informed by counsel and, on occasion, by the judge about what is expected of them. When lawyers address the jurors at the close of the trial or a segment of the trial, they are allowed to give insights into the jurors' responsibility. Finally, the judge's instructions inform the jury of its duty. In Mr. Tompkins' case, as in Mann v. Dusser, at each of those stages, the jurors heard statements from the judge and/or prosecutor which diminished their sense of responsibility for the awesome capital sentencing task that the law would call on them to perform.

Throughout the proceedings, the court and prosecutor frequently made statements about the difference between the jurors' responsibility at the guilt-innocence phase of the trial and their non-responsibility at the sentencing phase. As to guilt or innocence, they were told they were the only ones who would determine the facts. As to sentencing, however, they were told that they merely recommended a sentence to the judge.

Mann v. Dusser makes clear that proceedings such as those resulting in Mr. Tompkins' sentence of death violate Caldwell and the eighth amendment. In Mann, as in Mr. Tompkins' case, the prosecutor sought to lessen the jurors' sense of responsibility during voir dire and repeated his effort to minimize their sense of responsibility during his closing argument. In Mann, the en banc Eleventh Circuit held that "the Florida [sentencing] jury plays an important role in the Florida sentencing scheme," 844 F.2d at 1454, and thus:

> Because the jury's recommendation is significant . . . the concerns voiced in Caldwell are triggered when a Florida

> sentencing jury is misled into believing that its role is unimportant. Under such circumstances, a real danger exists that a resulting death sentence will be based at least in part on the determination of a decisionmaker that has been misled as to the nature of its responsibility. Such a sentence, because it results from a formula involving a factor that is tainted by an impermissible bias in favor of death, necessarily violates the eighth amendment requirement of reliability in capital sentencing.

Id. at **1454-55**. The comments and arguments provided to Mr. Tompkins' jurors were as egregious as those in Mann and went far beyond those condemned in Caldwell. Pertinent examples are reproduced immediately below.

From the very start of the trial the role of the jury in sentencing was trivialized in a steady stream of misstatements. The jury was repeatedly told it was the court -- not the jury -- that decides the sentence (R. **55-58, 439-441, 448**). What was emphasized to Mr. Tompkins' jury was not, as required, that the jury's sentencing role is integral, central and critical. Rather they were told the "final decision" was the judge's (R. **407, 452**) and that the jury only makes a **"recommendation."**

The State misinformed the jury concerning the seriousness of their role in determining whether Mr. Tompkins' lived or was put to death. The prosecutor told the entire venire panel from which Mr. Tompkins' jury was selected:

> If the jury convicts the defendant of first-degree murder, then the trial proceeds to a second phase and in the second phase, the jury has what is known as an advisory role and it would be by majority vote in the second phase; and by that majority vote, you would determine if you should recommend to Judge Coe that the defendant should die in Florida's electric chair or be sentenced to life imprisonment.

(R. 56) The prosecutor continued in this vein:

> The ultimate decision as to the possible punishment is made by the judge in a particular case. That is just a brief explanation as to the two phases a first-degree murder case has.

> It's important, then, since you will have an advisory role if the defendant is convicted of first-degree murder, to determine each juror's opinion as to capital punishment.

(R. **56).**

The jury was lulled into a false and improper sense of non-responsibility for determining the sentence:

> Now, Judge Coe has instructed you, ladies and gentlemen, that during this phase of the proceedings you are to render an advisory sentence to the Court as to which punishment Judge Coe should impose upon the defendant for first-degree murder of Lisa DeCarr, that punishment being either death in Florida's electric chair or life imprisonment without the possibility of parole for twenty-five years.
>
> **. . . .**
>
> Judge Coe [] makes the ultimate decision as to whether Wayne Tompkins will live or die.

(R. **439-440).**

Rather than stressing that the jury's sentencing decision is integral, and will stand unless patently unreasonable, the court and the prosecutor stressed to Mr. Tompkins' jury that the "final decision" was the courts. The court told the jury, for example:

> THE COURT: Ladies and gentlemen of the jury, it is now your duty to advise the Court as to what punishment should be imposed upon the defendant for his crime of murder in the first degree. As you have been told, the final decision has to what punishment shall be imposed is my responsibility; however, it is your duty to follow the law that will now be given you by the Court and render to me an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty**...**

(R. **452).** The prosecutor repeated this theme:

> As a result, this jury has more than enough evidence to recommend to Judge Coe to sentence Wayne Tompkins to death.

(R. **441-44).**

Again and again, the jury was told it is the judge who **"pronounces"** sentence (E.g., R. **55-58. 439-441, 448, 452).** The jury, as if their sentencing determination were but a political

straw poll, were told that they were simply making a recommendation (R. 448), providing a view which could be taken for whatever it was worth by the true sentencing authority who carried the entire responsibility on his shoulders -- the judge. At the guilt-innocence phase, the jury was instructed: "You are not to concern yourself with any penalty in the event you return a verdict of murder in the first degree." (R. 390). Then, at sentencing, they were time and again instructed that their role was merely advisory and only a recommendation which could be accepted or rejected as the sentencing judge saw fit.

These instructions, and the trial judge's earlier comments, like the instructions in Mann, "expressly put the court's imprimatur on the prosecutor's previous misleading statements." Id. at 1458. Cf. Mann, 844 F.2d at 1458 ("[A]s you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge." [Emphasis in original]).

In a capital case, the jurors are placed "in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice . . . Given such a situation, the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role." Caldwell v. Mississippi, 105 S. Ct. 2633, 2641-42 (1985)(emphasis supplied). When we understand these factors, we can appreciate why comments and instructions such as those provided to Mr. Tompkins' jurors, and condemned in Mann, served to diminish their sense of responsibility, and why the State cannot show that the comments at issue had "no effect" on their deliberations. Caldwell, 105 S. Ct. at 2645-46.

The comments here at issue were not isolated, but were made by prosecutor and judge at every stage of the proceedings. They were heard throughout, and they formed a common theme: the judge had the final and sole responsibility, while the critical role of

the jury was substantially minimized. The prosecutor's and the judge's comments allowed the jury to attach less significance to their sentencing verdict, and therefore enhanced the risk of an unreliable death sentence. Mann v. Dusser; Caldwell v. Mississippi. Indeed, there can be little doubt that the egregiousness of the jury-minimizing comments here at issue and of the judge's own comments and instructions surpassed what was condemned in Caldwell.

Under Caldwell the central question is whether the prosecutor's comments minimized the jury's sense of responsibility. See Mann, 844 F.2d at 1456. If so, then the reviewing court must determine whether the trial judge sufficiently corrected the prosecutor's misrepresentation. Id. Applying these questions to Mann, the en banc Court of Appeals found that the prosecutor did mislead or at least confuse the jury and that the trial court did not correct the misapprehension. Applying these same questions to Mr. Tompkins' case, it is obvious that the jury was equally misled by the prosecutor, and that the prosecutor's persistent misleading and jury minimizing statements were not adequately remedied by the trial court. In fact, the trial court compounded the error.

Under Florida's capital statute, the jury has the primary responsibility for sentencing. At the sentencing phase of a Florida capital trial, the jury plays a critical role. See Mann, supra; see also Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975); Brookings v. State, 495 So. 2d 135 (Fla. 1986); Garcia v. State, 492 So. 2d 360 (Fla. 1986); Wasko v. State, 505 So. 2d 1314 (Fla. 1987); Ferry v. State, 507 So. 2d 1373 (Fla. 1987); Fead v. State, 512 So. 2d 176 (Fla. 1987); Hall v. State, 14 F.L.W. 101 (Fla. 1989). Thus, the intimation that a capital sentencing judge has the sole responsibility for the imposition of sentence, or is in any way free to impose whatever sentence he or she sees fit, irrespective of the sentencing jury's own decision, is

inaccurate, and is a misstatement of the law. See Mann v. Dugger, 844 F.2d at 1450-55 (discussing critical role of jury in Florida capital sentencing scheme). The judge's role, after all, is not that of the "sole" or "ultimate" sentencer. Rather, it is to serve as a "buffer where the jury allows emotion to override the duty of a deliberate determination" of the appropriate sentence. Cooper v. State, 336 So. 2d 1133, 1140 (Fla. 1976). While Florida requires the sentencing judge to independently weigh the aggravating and mitigating circumstances and render sentence, the jury's recommendation, which represents the judgment of the community, is entitled to great weight. Mann, supra; McCampbell v. State, 421 So. 2d 1072, 1075 (Fla. 1982). The jury's sentencing verdict may be overturned by the judge only if the facts are "so clear and convincing that virtually no reasonable person could differ." Tedder, 322 So. 2d at 910. Mr. Tompkins' jury, however, was led to believe that its determination meant very little, as the judge was free to impose whatever sentence he wished. Cf. Mann v. Dugger.

In Caldwell, 105 S. Ct. 2633, the Court held "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death lies elsewhere," id., 105 S. Ct. at 2639, and that therefore prosecutorial arguments which tended to diminish the role and responsibility of a capital sentencing jury violated the eighth amendment. Because the "view of its role in the capital sentencing procedure" imparted to the jury by the improper and misleading argument was "fundamentally incompatible with the eighth amendment's heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case,'" the Court vacated Caldwell's death sentence. Caldwell, 105 S. Ct. at 2645. The same vice is apparent in Mr. Tompkins' case, and Mr. Tompkins is entitled to the same relief.

The constitutional vice condemned by the Caldwell Court is not only the substantial unreliability that comments such as the ones at issue in Mr. Tompkins' case inject into the capital sentencing proceeding, but also the danger of bias in favor of the death penalty which such "state-induced suggestions that the sentencing jury may shift its sense of responsibility'' creates. Id. at 2640. A jury which is unconvinced that death is the appropriate punishment might nevertheless vote to impose death as an expression of its "extreme disapproval of the defendant's acts" if it holds the mistaken belief that its deliberate error will be corrected by the 'ultimate' sentencer, and is thus more likely to impose death regardless of the presence of circumstances calling for a lesser sentence. See Caldwell, 105 S. Ct. at 2641. Moreover, a jury "confronted with the truly awesome responsibility of decreeing death for a fellow human," McGautha v. California, 402 U.S. 183, 208 (1971), might find a diminution of its role and responsibility for sentencing attractive. Caldwell, 105 S. Ct. at 2641-42. As the Caldwell Court explained:

> In evaluating the prejudicial effect of the prosecutor's argument, we must also recognize that the argument offers jurors a view of their role which might frequently be highly attractive. A capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument on the issue of whether another should die, and they are asked to decide that issue on behalf of the community. Moreover, they are given only partial guidance as to how their judgment should be exercised, leaving them with substantial discretion. Given such a situation, the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danser that the jury will in fact choose to minimize its role. Indeed, one could easily imagine that in a case in which the jury is divided on the proper sentence, the presence of appellate review [or judge sentencing] could effectively be used as an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless give in.

Id. at 2641-42 (emphasis supplied).

The comments and instructions here went a step further -- they were not isolated, as were those in Caldwell, but as in Mann were heard by the jurors at each stage of the proceedings. These cases teach that, given comments such as those provided to Mr. Tompkins' capital jury, the State must demonstrate that the statements at issue had "no effect" on the jury's sentencing verdict. Id. at 2646. This the State cannot do. Here the significance of the jury's role was minimized, and the comments at issue created a danger of bias in favor of the death penalty. Had the jury not been misled and misinformed as to their proper role, had their sense of responsibility not been minimized, and had they consequently voted for life, such a verdict, for a number of reasons, could not have been overridden -- for example, the evidence of non-statutory mitigation was more than a "reasonable basis" which would have precluded an override. See Hall v. State, 14 F.L.W. 101 (Fla. 1989); Brookings v. State, supra, 495 So. 2d 135; McCampbell v. State, supra, 421 So. 2d at 1075. The Caldwell violations here assuredly had an effect on the ultimate sentence. This case, therefore, presents the very danger discussed in Caldwell: that the jury may have voted for death because of the misinformation it had received. This case also presents a classic example of a case where no Caldwell error can be deemed to have had "no effect" on the verdict.

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

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Tompkins' death sentence. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which

undermine confidence in the fairness and correctness of capital proceedings, see Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error.

Moreover, the claim is now properly brought pursuant to the Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. This issue involved a classic violation of longstanding principles of Florida law. See Pait v. State, 112 So. 2d 380, 383-84 (Fla. 1959); and Breedlove v. State, 413 So. 2d 1 (Fla. 1982). It virtually "leaped out upon even a casual reading of transcript." Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). This clear claim of per se error required no elaborate presentation -- counsel only had to direct this Court to the issue. The court would have done the rest, based on long-settled Florida and federal constitutional standards.

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

CONCLUSION AND RELIEF SOUGHT

Claims I, 11, 111, IV, VI, VII, and IX, set out above, all involve, inter alia, ineffective assistance of appellate counsel, as well as fundamental error. The appellate level right to counsel also comprehends the sixth amendment right to effective assistance of counsel. Evitts v. Lucey, 105 S. Ct. 830 (1985). Appellate counsel must function as "an active advocate," Anders v. California, 386 U.S. 738, 744, 745 (1967), providing his client the expert professional. . . assistance. . . necessary in

a system governed by complex laws and rules and procedures. . . ." Lucey, 105 S. Ct. at 835 n.6.

Even a single, isolated error on the part of counsel may be sufficient to establish that the defendant was denied effective assistance, Kimmelman v. Morrison, 106 S. Ct. 2574, 2588 (1986); United States v. Cronic, 466 U.S.S 648, 657 n.20 (1984); see also Johnson (Paul) v. Wainwright, 498 So. 2d 938 (Fla. 1987), notwithstanding the fact that in other aspects counsel's performance may have been **"effective".** Washinston v. Watkins, 655 F.2d 1346, 1355 (5th Cir.), reh. denied with opinion, 662 F.2d 1116 (1981).

Moreover, as this Court has explained, the Court's "independent review" of the record in capital cases neither can cure nor undo the harm caused by an appellate attorney's deficiencies:

> It is true that we have imposed upon ourselves the duty to independently examine each death penalty case. However, we will be the first to agree that our judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate. It is the unique role that advocate to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deviations from due process. Advocacy is an art, not a science. We cannot, in hindsight, precisely measure the impact of counsel's failure to urge his client's best claims. Nor can we predict the outcome of a new appeal at which petitioner will recieve adequate representation. We are convinced, as a final result of examination of the original record and appeal and of petitioner's present prayer for relief that our confidence in the correctness and fairness of the result has been undermined.

Wilson v. Wainwright, 474 So. 2d 1162, 1165 (Fla. 1985). **"The** basic requirement of due process," therefore, **'is** that a defendant be represented in court, at every level, by an advocate who represents his client zealously within the bouds of the law." Id. at 1164 (emphasis supplied).

Appellate counsel here failed to act as an advocate for his client. As in Matire v. Wainwrisht, 811 F.2d 1430, 1438 (11th Cir. 1987), there simply was no reason here for counsel to fail to urge meritorious claims for relief. Counsel ineffectively and through ignorance of the facts and law simply failed to urge them on direct appeal. As in Matire, Mr. Tompkins is entitled to relief. See also, Wilson v. Wainwrisht, supra; Johnson v. Wainwrisht, supra. The "adversarial testing process" failed during Mr. Tompkins' direct appeal -- because counsel failed. Matire at 1438, citing Strickland v. Washinston, 466 U.S. 668, 690 (1984).

To prevail on his claim of ineffective assistance of appellate counsel Mr. Tompkins must show: 1) deficient performance, and 2) prejudice. Matire, 811 F.2d at 1435; Wilson, supra. As the foregoing discussion illustrates, Mr. Tompkins has.

There are also presented as independent claims raising matters of fundamental error and, or are predicated upon significant changes in the law. Because the forgoing claims present substantial constitional questions which go to the heart of the fundamental fairness and reliability of Mr. Tompkins' capital conviction and sentence of death, and of this Court's appellate review, they should be determined on their merits. At this time, a stay of execution, and a remand to an appropriate trial level tribunal for the requisite findings on contested evidentiary issues of fact -- including inter alia appellate counsel's deficient performance, -- should be ordered. The relief sought herein should be granted.

WHEREFORE, Wayne Tompkins through counsel, respectfully urges that the Court issue its writ of habeas corpus and vacate his unconstitutional conviction and sentence of death. He also prays that the Court stay his execution on the basis of, and in order to fully determine, the significant claims herein

presented. Since this action also presents question of fact, Mr. Tompkins urges that the Court relinquish jurisdiction to the trial court, or assign the case to an appropriate authority, for the resolution of the evidentiary factual question attendant to his claims, including inter alia, questions regarding counsel's deficient performance and prejudice.

Mr. Tompkins urges that the Court grant him habeas corpus relief, or alternatively, a new appeal, for all the reasons set forth herein, and that the Court grant all other and further relief which the Court may deem just and proper.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by first class, U. S. Mail, postage prepaid to Robert Butterworth, Attorney General, Office of the Attorney General, Department of Legal Affairs, Park Trammel Building, **1313** Tampa Street, Tampa, Florida **33602**, this 1st day of May, **1989**.

_____
Attorney