IN THE SUPREME COURT OF FLORIDA

CASE NO. _____

BOBBY MARION FRANCIS,

Petitioner,

v.

THOMAS L. BARTON, Superintendent, Florida State Prison; HARRY K. SINGLETARY, Secretary, Florida Department of Corrections,

Respondents.

PETITION FOR HABEAS CORPUS AND EXTRAORDINARY RELIEF AND CONSOLIDATED MOTION FOR STAY OF EXECUTION

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Petitioner, BOBBY FRANCIS, respectfully petitions this Honorable Court for a writ of habeas corpus and extraordinary relief. Petitioner also consolidates in this submission a request for stay of execution. This petition presents initially a claim for relief based upon the United States Supreme Court's recent decision in Parker v. Dugger, 111 S.Ct. 731 (1991), which controls resolution of this action and warrants the granting of the requested relief. Thereafter, Petitioner submits certain other claims for relief which further demonstrate that the granting of relief is appropriate. In support of this application, Petitioner respectfully submits as follows:

TABLE OF CONTENTS

PROCEDURAL HISTORY

1. Mr. Francis was charged by indictment with capital murder (R. 12-13), entered a plea of not guilty, and was tried before a jury.

2. The jury found Mr. Francis guilty but reached a verdict recommending that the Court not impose a sentence of death but impose a sentence of life imprisonment. The verdict was overridden and a death sentence was imposed.

3. The original indictment was issued in Monroe County, Florida. The trial, judgment and sentence at issue in this proceeding were entered in Dade County, Florida, to which venue had been changed. As to the first trial, conducted in Monroe County, on June 20, 1978, the Florida Supreme Court relinquished jurisdiction to the trial court, which on June 11, 1979, vacated the judgment. As to the retrial, retrial was held in Monroe County, the Florida Supreme Court reversed the judgment on direct appeal, Francis v. State, 413 So.2d 1175 (1982), and venue was thereafter changed to Dade County.

4. As to the judgment and sentence at issue herein, Mr. Francis was retried in Dade County on March 22, 1983, and judgment of conviction was entered on March 29, 1983 (R. 1231). At sentencing, Mr. Francis personally requested of the Court that mitigating evidence be allowed on his behalf, correctional officers were called by the Court and heard as witnesses, and the jury thereafter reached a verdict of life imprisonment. This verdict was overridden (R. 1302).

5. The judgment and death sentence were affirmed on

direct appeal, Francis v. State, 473 So.2d 672 (1985), cert. denied, 106 S.Ct. 870 (1986), with one Justice (Overton, J.) writing a separate opinion indicating that the State's misconduct in this case "adversely affects the credibility of our justice system," Francis, 473 So.2d at 677, and one Justice (McDonald, J.) dissenting as to the override death sentence. Francis, 473 So.2d at 678.

6. Many of the courts which subsequently reviewed this case were troubled by it. These decisions can be summarized as follows. On October 15, 1987, Mr. Francis filed for relief pursuant to Fla. R. Crim. P. 3.850, relief was denied, and a divided Florida Supreme Court affirmed the denial of Rule 3.850 relief, Francis v. State, 529 So.2d 670 (Fla. 1988), over dissents which found resentencing to be appropriate. Francis, 529 So.2d at 674 (Barkett and Kogan, JJ., dissenting); Francis v. State, No. 71,443 (Fla. 1988) (Order denying rehearing) (Barkett and Kogan, JJ., dissenting). Habeas corpus relief was denied. Francis v. Dugger, 514 So.2d 1097 (Fla. 1987). Mr. Francis filed for habeas corpus relief in the United States District Court, the Court found various constitutional errors, but subsequently denied relief, Francis v. Dugger, 697 F.Supp. 472 (S.D.Fla. 1988), and the Eleventh Circuit thereafter affirmed, Francis v. Dugger, 908 F.2d 696 (11th Cir. 1990), although also finding constitutional error. See, e.g., Francis, 908 F.2d at 700-01 ("[P]resentation [by the State] of known false evidence is incompatible with 'rudimentary demands of justice' ... The State violated these principles when it (1) failed to disclose its 1983

agreement with [witness] Duncan (to assist in a 3.850 proceeding) and (2) did not take the steps necessary to correct Duncan's inaccurate testimony regarding the specifics of her agreement with the State.") Discretionary certiorari review was thereafter denied by the United States Supreme Court, over the dissents of Justices Blackmun and Marshall. Francis v. Dugger, 111 S.Ct. ___ (1991).

7. The Eleventh Circuit denied relief on Petitioner's jury override claim by relying on the very same opinion of that Court which the United States Supreme Court later reversed in Parker v. Dugger, 111 S.Ct. 73 (1991). See Francis, 908 F.2d at 704 (relying expressly on Parker v. Dugger, 876 F.2d 1470, 1473-76 [11th Cir. 1989].) The Supreme Court's decision in Parker sheds a new light on the question of the propriety of the jury override in this case and on the questions arising from the review which had been afforded the jury override issue previously. Counsel for Mr. Francis contacted the Office of the Governor before that office had learned that certiorari had been denied, and orally and by written submission requested that a death warrant temporarily not be issued in order to afford Petitioner the opportunity to fairly pursue relief on the Parker issue and other matters in the courts. Nevertheless, on May 14, 1991, a death warrant was issued.

8. Petitioner's execution has been scheduled for June 19, 1991, at 7:00 a.m.

9. Petitioner has also filed a motion to vacate and supporting application for stay of execution and memorandum in

the Circuit Court, and courtesy copies thereof are being forwarded to this Court with this petition.

JURISDICTION

This is an original action under Fla. R. App. P. 9.100(a). Jurisdiction is conferred on the Court pursuant to subsections 3(b)(7) and (9) of Article V of the Florida Constitution and by Rule 9.030(a)(3) of the Florid Rules of Appellate Procedure. Since the claims at issue involve the appellate review process, this Court has jurisdiction over the claims. See, e.g., Smith v. State, 400 So.2d 956, 960 (Fla. 1981); Wilson v. Wainwright, 474 So.2d 1163 (Fla. 1985); Baggett v. Wainwright, 229 So.2d 239, 243 (Fla. 1969).

Concerning habeas corpus review, this Court has explained that when presented with a claim addressed previously, the Court will "revisit a matter previously settled by the affirmance", if the claim involves "error that prejudicially denies fundamental constitutional rights . . . " Kennedy v. Wainwright, 483 So.2d 424, 426 (Fla. 1986). Such claims are presented herein. In accord with that analysis, in Jackson v. Dugger, 547 So.2d 1197 (Fla. 1989), the Court revisited and granted habeas corpus relief on an issue previously addressed "because all the pertinent facts are contained in the original record . . . ", Id. at 1199-1200 n.2, and an intervening decision of the United States Supreme Court called into question the earlier ruling. Here, the initial claim presented involves precisely the error found by the United States Supreme Court in Parker v. Dugger, 111 S.Ct. 731 (1991), and the intervening decision in Parker counsels careful and

judicious review in this proceeding, as it does the granting of relief. Parker was unavailable to Petitioner or this Court earlier, and was unavailable to Petitioner or the courts when the Eleventh Circuit denied relief, a denial expressly based on the lower court opinion in Parker, the very same opinion overruled by the United States Supreme Court. See Francis v. Dugger, 908 F.2d 696, 704 (11th Cir. 1990) (expressly relying on Parker v. Dugger, 876 F.2d 1470, 1473-76 [11th Cir. 1989].)

This case presents claims of fundamental constitutional error and claims based on intervening decisions of this Court and the United States Supreme Court. This petition also presents issues of ineffective assistance of counsel on appeal, warranting review by this Court. See Wilson v. Wainwright. The issues herein presented warrant the granting of a stay of execution and habeas corpus relief.

APPLICATION FOR STAY OF EXECUTION

As reflected in the Procedural History presented above, Petitioner sought an opportunity to litigate these issues on an expedited basis, but without the need for litigation under a death warrant. The Governor's office declined the request.

The issues are valid. There should be no serious dispute that they are, at a minimum, debatable among reasonable jurists, Barefoot v. Estelle, 463 U.S. 880 (1983), and demonstrate that Petitioner "might be entitled to relief." State v. Schaeffer, 467 So.2d 689, 699 (Fla. 1985). A stay of execution in order to afford Petitioner reasoned, judicious, and meaningful review of the claims herein presented is appropriate, and Petitioner

respectfully makes this request of the Court herein.

CLAIMS FOR RELIEF

By this submission, Petitioner asserts that the judgment and death sentence at issue herein violate the 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 below.

CLAIM I

THE OVERRIDE DEATH SENTENCE IN THIS CASE VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

Petitioner respectfully submits that in light of Parker v. Dugger, Cochran v. State, Cheshire v. State, and the other legal and factual matters discussed herein, it is appropriate to review the override death sentence in this cause, a death sentence which constitutes fundamental error. In light of the precedents herein discussed, Petitioner submits that the override of the jury's life verdict and its affirmance violated the sixth, eighth, and fourteenth amendments, and resulted in a death sentence that is unreliable, arbitrary, and capricious. Neither Parker, nor Cochran, nor Cheshire were available to Petitioner or the courts at the time that this override death sentence was affirmed. See Francis v. State, 473 So.2d 672 (Fla. 1985). Petitioner further respectfully requests that this claim not be considered in isolation, but that the significant claims related in subsequent portions of this submission be considered in conjunction with this issue, as they too pertain to the validity of this override death sentence.

The United States Supreme Court, in Parker v. Dugger, 111 S.Ct. 731 (1991), reversed the very decision of the Eleventh Circuit upon which a panel of the Court of Appeals had relied to deny relief on Mr. Francis' override claim. See Francis v. Dugger, 908 F.2d 696, 704 (11th Cir. 1990) (relying on Parker v. Dugger, 876 F.2d 1470, 1473-76 [11th Cir. 1989]). Mr. Francis, like Mr. Parker, presented to the jury and judge during the sentencing proceeding evidence which has been traditionally recognized as mitigating by the United States and Florida Supreme Courts, and, by the latter, as nonstatutory mitigating factors sufficient to establish a "reasonable basis" rendering improper a judicial override of a jury's verdict of life. Further, in Mr. Francis' case, unlike Parker, the sentencing court found the existence of a statutory mitigating factor under Florida's capital sentencing scheme, and the jurors could have made that finding. See State v. Francis, Trial Court Order and Sentence, p. 3 (finding no "significant history of prior criminal activity"); see also Fla. Stat. section 921.141. Further, the direct appeal in Mr. Francis' case (1985), like the one in Mr. Parker's case (1984), was determined by the Florida Supreme Court precisely during the time period (pre-1986) which the Court has acknowledged to involve an inconsistent application of the Tedder standard. See Cochran v. State, 547 So. 2d 928, 933 (Fla. 1989).[1] Today, in Florida, the override standard of Tedder v.

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[1]In Cochran, 547 So. 2d at 933, the Florida Supreme Court explained:

> During 1984-85, we affirmed on direct appeal

(continued...)

State, 922 So. 2d 908, 910 (Fla. 1975), "means precisely what it says," Cochran, 547 So. 2d at 933. At the time of Mr. Francis' and Mr. Parker's direct appeals, it did not, an inconsistent application which both the majority and dissenting opinions in Cochran acknowledged to raise eighth amendment questions concerning the application of the death penalty in override cases. Mr. Francis' case was not reviewed in light of the standards discussed in Parker, Cochran, and Cheshire (see infra).

The Supreme Court reversed the Eleventh Circuit's decision in Parker, the very decision relied upon by the panel to deny relief in Mr. Francis' case. The Supreme Court's starting point in Parker involved a determination of "what effect the Florida courts gave to the evidence petitioner presented in mitigation of his death sentence, and consequently [a determination of] whether

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[1](...continued)

> trial judge overrides in eleven of fifteen cases, seventy-three percent. By contrast, during 1986 and 1987, we have affirmed overrides in only two of eleven cases, less than twenty percent. This current reversal rate of over eighty percent is a strong indicator to judges that they should place less reliance on their independent weighing of aggravation and mitigation....
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> Clearly, since 1985 the Court has determined that Tedder means precisely what it says, that the judge must concur with the jury's life recommendation unless "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." Tedder, 322 So.2d at 910.

Prior to the Florida Supreme Court's observations in Cochran, Justice Marshall and former Justice Brennan had written that "appealing a 'life override' under Florida's capital sentencing scheme is akin to Russian Roulette," Engle v. Florida, 485 U.S. 924, 99 L.Ed.2d 256, 260 (1988)(Marshall and Brennan, JJ., dissenting from the denial of certioari), a sentiment echoed by the discussion of the majority and dissenting opinions in Cochran.

his death sentence meets federal constitutional requirements." Parker, 111 S.Ct. at 733. The Eleventh Circuit surely did not review Mr. Francis' case in light of these standards, and did not review the actual effect given to the mitigation by the sentencing court and Florida Supreme Court on appeal when deciding whether the override and the affirmance were arbitrary or unreliable. Neither did the Florida Supreme Court majority on appeal review this case in light of the standards discussed in Parker, Cochran, and Cheshire, as the majority's opinion reflects. Nor did the trial court, when determining whether an override was appropriate, review this case in light of these standards. The impact of these recent precedents on this case warrants careful and judicious review of the propriety of this override death sentence.

The nonstatutory mitigation presented by Mr. Francis at sentencing (discussed in subsequent portions of this submission) has been acknowledged as valid mitigating evidence by the United States Supreme Court, Skipper v. South Carolina, 476 U.S. 1 (1986), as a "significant factor in mitigation" by the Florida Supreme Court, Cooper v. Dugger, 526 So. 2d 900, 902 (Fla. 1988) ("Unquestionably, a defendant's potential for rehabilitation is a significant factor in mitigation"), and as evidence establishing a reasonable basis under Tedder supporting a jury's verdict of life. McCampbell v. State, 421 So. 2d 1072, 1075-76 (Fla. 1982). And here, there was mitigation which established a "reasonable basis" beyond the Skipper evidence, evidence to which Justice McDonald spoke in his dissent on direct appeal, but which the

majority apparently misapprehended, as was the case in Parker (see infra). As in Parker, although in Mr. Francis' case it is also apparent that the Florida Supreme Court has recognized in other cases that evidence such as that presented by the Petitioner was sufficient to preclude an override of the jury's verdict of life, "precisely what effect" the Florida Supreme Court gave to the mitigating evidence involved in the Petitioner's own case when it affirmed the override is not at all apparent. The effect of the mitigation on the jury's decision was misapprehended by the majority (see infra). The mitigating effect of the evidence presented and argued at sentencing was nowhere acknowledged in the Florida Supreme Court's opinion on direct appeal, see Francis v. State, 473 So. 2d 672, 676-77 (Fla. 1985), nor was any discussion therein presented concerning the effect of the mitigating evidence on the reasonableness of the jury's verdict (other than in Justice McDonald's dissent), nor did the opinion discuss why the mitigation was insufficient to establish a "reasonable basis" in this case although similar mitigation has been held to establish such a basis in other cases, nor was the effect of the evidence discussed in any other opinion of the Supreme Court addressing Mr. Francis' case.[2]

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[2] In a subsequent decision on a petition for writ of habeas corpus in Mr. Francis' case, issued prior to Parker and Cochran, the Florida Supreme Court held that "the record is clear that the trial court in its sentencing order explicitly considered the mitigating evidence that petitioner was a model prisoner," Francis v. Dugger, 514 So. 2d 1097 (Fla. 1987). Nowhere, however, not on direct appeal and not in the habeas opinion, has the Florida Supreme Court ever discussed the effect of the actual mitigation in Mr. Francis' case nor why it is that the mitigation should not be deemed sufficient to establish a "reasonable basis" for the jury's (continued...)

The direct appeal majority opinion suffered from a misapprehension of the sentencing record similar to the one involved in Parker. The majority opinion suggested that the jury's verdict was "the result of the highly emotional closing argument of defense counsel ... which amounted to a non-legal sermon..." Francis, 473 So.2d at 676. In reality, the "sermon" was only a small, concluding portion of defense counsel's argument. Counsel's argument was ten record pages in length (R. 1275-1284). He devoted the first page to an introduction (R. 1275); the bulk of the presentation (six pages) was devoted to the aggravating and mitigating factors, including the nonstatutory mitigation; only then did counsel turn to an argument, initially intended to stress the significance of the jury's role (R. 1282), based on the "cup of forgiveness" in the last pages (R. 1283-84). Counsel argued that the aggravating factors were either inapplicable or did not carry great weight, and specifically responded to the State's arguments on the aggravation (see, e.g., R. 1279, "Now, for the State to stand here and argue that because Titus Walters was a confidential innformant that Mr. Francis committed a homicide for that purpose, that's in contradiction to the entire theory of the

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[2](...continued)
recommendation of life in this case although similar evidence was found to establish a "reasonable basis" precluding a jury override in other cases. That the trial court considered the mitigating evidence does not mean that the appellate court considered it fairly and meaningfully, nor does it mean that the trial court considered its effect on the reasonableness of the jury's verdict, Cheshire v. State, 568 So.2d 908, 911 (Fla. 1990), nor does it mean that the appellate court considered that effect. This omission is especially important in light of the majority's misapprehension of the record, discussed immediately below.

State's case .... It wasn't done to hinder his function as a C.I. He was a tattletale, that's true, but the State's theory that Mr. Francis has done anything to hinder a governmental exercise is wrong."). He then turned to the mitigation, statutory and nonstatutory. He expressly argued, for example, on the evidence that "there's no prior history of any violent criminal activity" (R. 1280). He argued, echoing Justice McDonald's dissenting opinion on direct appeal, on the basis of the roles of the accomplices (R. 1280), argued that "you can consider the fact that the defendant was an accomplice", that others were convicted of the homicide, and that "as far as who commanded who, I don't know, but this is a matter that may be considered by you as a mitigating factor" (R. 1280). He expressly referrred to and argued on the basis of the corrections officers' mitigating testimony (described below): "[Y]ou can consider the testimony of these two -- two gentlemen ... [I]f Bobby Francis is going to hinder a governmental function, he could simply allow a riot to occur in that jail and possibly escape. He hasn't done that. In fact, he's prevented the homicide of officers or serious injuries to officers by other inmates. He's been a diplomat, he's been a model prisoner. These things you can consider ...." (R. 1281) (emphasis added). The core of counsel's presentation was far from premised on a "non-legal sermon." The core of the argument was founded on reasonable, valid mitigation, upon which the jury had heard evidence (see infra, quoting the record evidence). The direct appeal majority's view that the jury's life verdict may have been based on a "non-legal" argument

involves a similar misapprehension of what the record actually reflects concerning how the mitigation was treated at sentencing as that cited by the Supreme Court in Parker v. Dugger (where the Florida Supreme Court believed mitigation had not been found although it had been). Indeed, in his summation, the prosecutor (who like defense counsel went through the aggravating and mitigating circumstances after presenting an introduction and before presenting a conclusion about the significance and difficulty of the jury's role) conceded "I respectfully submit to you that there are mitigating circumstances which you can consider also" (R. 1272), and further stated "And finally, any other aspect of the defendant's character or record in any other circumstance of the offense or anything else you feel might be mitigation such as the testimony you have heard. I agree that some of that might apply to this instance" (R. 1273-74). The focus before the jury, from both sides, was on the aggravation and mitigation, and the State agreed that the latter existed. The direct appeal majority's belief that what was before the jury was "non-legal" was founded on a misapprehension of the record. Because of this misapprehension, the review afforded to Mr. Francis on direct appeal suffered from deficiencies similar to the review afforded in Parker.

The trial court's sentencing order, like the Florida Supreme Court's opinion, did not discuss the specifics of the nonstatutory mitigating evidence at all -- here, employing language similar to the language employed by the trial judge in Parker, the sentencing court wrote only: "It's the opinion of

the Court that the mitigation factors and strong recommendations of the jury do not outweigh the significant strong factors as to aggravation that justify the imposition of the sentence of death." State v. Francis, Order and Sentence, p. 4. The trial court found a statutory mitigating factor, heard the nonstatutory mitigation, yet did not cite to the Tedder standard (see Cheshire, discussed infra), nor did it explain why the jury could not have reasonably relied on the mitigation, nor why it was that the mitigation was not a "reasonable basis" under Tedder supporting the jury's verdict of life in this case although similar mitigation has been found to support the jury's verdict of life in other cases. As in Cheshire, the trial court erroneously did not analyze the significance of the mitigation to the jury's life verdict, see Cheshire v. State, 568 So.2d 908, 911 (Fla. 1990) ("the trial court's role is solely to determine whether the evidence in the record was sufficient to form a basis upon which reasonable jurors could rely in recommending life imprisonment"), but relied on its own beliefs regarding the sentence.

Given the review of the trial court and Florida Supreme Court, here, as in Parker, it is by no means apparent that the state courts provided to the mitigating evidence (much of it uncontroverted and conceded by the State) presented by Mr. Francis the mitigating effect which the eighth amendment requires when the jury's verdict of life was overturned and the override was affirmed. And as Cochran and Cheshire reflect, this override death sentence would not be sustained under the current

application of the Tedder standard. But Tedder was inconsistenntly applied at the time of Petitioner's direct appeal. Cochran. In Spaziano v. Florida, the Court relied on the Florida Supreme Court's appellate review function in override cases, and cited the requirement of meaningful appellate review as a "crucial protection" afforded to capital defendants under Florida law. Spaziano, 468 U.S. 447, 465 (1984). The United States Supreme Court has in fact "emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally." Parker, 111 S.Ct. at 739, citing Clemons v. Mississippi, 494 U.S. ___, 110 S.Ct. 1441 (1990), and Gregg v. Georgia, 428 U.S. 153 (1976). The Florida Supreme Court has indicated that "Tedder means precisely what it says" today, Cochran, but that Tedder was inconsistently applied at the time of Mr. Francis' and Mr. Parker's direct appeals. Cochran, 547 So. 2d at 933. The "crucial protection" of appellate review and of the Tedder standard, relied upon in Spaziano, have not been consistently applied in Florida -- Mr. Francis' case is a good example. In Cochran, the majority and dissent agreed that the inconsistency raises questions under the eighth amendment. Mr. Francis has asserted that in his particular case the assurances upon which the Court relied in Spaziano were not fulfilled. This claim warrants careful and judicious review. After all, the jury override procedure in Florida is constitutionally valid only to the extent that it is utilized within specific reliable procedural parameters, and so long as it does not lead to

unreliable, capricious, or arbitrary capital sentencing results. Spaziano v. Florida, 468 U.S. 447, 465 (1984). The eighth amendment requires that "significant safeguard[s]," Spaziano, be applied to the override process.

Where, as in this case and in Parker, the record is misapprehended, the results cannot be deemed reliable. If the jury override here, and the method by which it was sustained, is acceptable under the eighth amendment and Florida's capital sentencing statute, then "the application of the jury override procedure has resulted in arbitrary . . . application of the death penalty . . . in this particular case." Spaziano. To allow the override to stand in this case would be to validate a procedure providing no meaningful basis upon which to distinguish between those persons who receive life (when a judge does not override, or when an override is reversed) and those who receive death. This violates the eighth and fourteenth amendments.

A. THE STANDARDS ATTENDANT TO FLORIDA'S JURY OVERRIDE PROCEDURE

The nature of Florida's capital sentencing process ascribes a role to the sentencing jury that is central and "fundamental", Riley v. Wainwright, 517 So. 2d 656, 657-58 (Fla. 1988), representing the judgment of the community. A Florida sentencing jury's recommendation of life is entitled to "great weight," and can only be overturned by a sentencing judge if "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975) (emphasis supplied). If, as

here, a jury recommendation of life is supported by a "reasonable basis" in the record -- such as valid (and in this case uncontroverted) mitigating factors -- that jury recommendation should not be overridden. Ferry v. State, 507 So. 2d 1373, 1376-77 (Fla. 1987); Wasko v. State, 505 So. 2d 1314, 1318 (Fla. 1987); Brookings v. State, 495 So. 2d 135, 142-43 (Fla. 1986); Cheshire, 568 So.2d at 910-12; Tedder, 322 So. 2d at 910. Cf. Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1989). "If facts are evident on the record upon which a reasonable juror could rely to recommend life imprisonment, then the trial court errs in overriding the life recommendation." Cheshire v. State, 508 So.2d 908, 911 (Fla. 1990), citing Freeman v. State, 547 So.2d 125, 129 (Fla. 1989), and Tedder. Such facts are present in the record of Mr. Francis' case, and defense counsel argued them to the jury. "The existence of discernible mitigating circumstances is strong evidence that [the jurors'] recommendation was reasonable." Cheshire, 568 So.2d at 914 (McDonald, J., concurring). "The test to be applied by the judge is whether the facts are such that the jury's recommendation is reasonable and not whether the judge would reach the same result." Id. (McDonald, J.) See also Hall v. State, 541 So.2d 1125, 1128 (Fla. 1989) (same). "The benefit of any doubt on the reasonableness of a recommendation of life must be given the defendant." Cheshire, 568 So.2d at 914 (McDonald, J., concurring). This "reasonable basis" standard is the nature of the sentencing process under Florida law in cases in which the jury reaches a verdict of life. The United States Supreme Court recognized the Tedder standard as a "significant safeguard"

provided to capital defendants in Florida, and the Court relied on it to find the sentencing process in Florida constitutionally valid. Spaziano, 468 U.S. at 465. But here, as in Parker, the standard was misapplied.

B. THE OVERRIDE IN MR. FRANCIS' CASE RESULTED IN AN ARBITRARILY, CAPRICIOUSLY, AND UNRELIABLY IMPOSED DEATH SENTENCE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS, WHILE IT IS BY NO MEANS CLEAR THAT THE CONSTITUTIONALLY REQUIRED EFFECT WAS PROVIDED TO THE MITIGATION WHICH THE PETITIONER PRESENTED

There should be no dispute that taking actions which save the lives of corrections officers and prevent injury to officers and inmates are precisely the type of mitigating factors recently delineated as "[v]alid nonstatutory mitigating circumstances" in Campbell v. State, 571 So.2d 415, 419 n.4 (Fla. 1990). See id., 419 n.4 ("2) Contribution to community or society . . . 3) . . . potential for rehabilitation; good prison record . . . 5) . . . humanitarian deeds"). "Unquestionably, a defendant's potential for rehabilitation is a significant factor in mitigation", Cooper v. State, 526 So.2d 900, 902 (Fla. 1988); Mr. Francis showed that potential, and a great deal more. And there were other recognized, valid mitigting factors which this case presented. See, e.g. Francis, 473 So. 2d at 678 (McDonald, J., dissenting on sentence, finding "reasonable grounds [in this case] for a jury to recommend life").

Mr. Francis was a different person eight years later than he was at the time of the offense. Evidence such as the following was heard at sentencing:

DIRECT EXAMINATION

BY MR. ZENOBI [DEFENSE COUNSEL]:

Q Mr. Jordan, would you please state your full name and occupation?

A Rochester Jordan. Corrections and Rehabilitation Officer.

Q By whom are you employed, sir?

A Dade County Corrections and Rehabilitation.

Q And how long have you been employed by them?

A Approximately two years and three months.

Q And what is your job at the present time, sir?

A To make sure that the inmates are protected, taken care of, fed, whatnot, taken to court, clinic and whatnot and security.

Q And where do you work, sir?

A Fourth floor at the main jail.

Q Is that the Dade County Jail?

A Yes, sir.

Q While you've been working there, have you had in that jail Mr. Bobby Francis?

A Could you repeat that, please?

Q While you have been working there, have you had as part of your population Mr. Bobby Francis?

A Yes, I have.

Q Do you see him in court today?

A Yes.

Q Point him out.

A The young man sitting at the table over there on the left (indicating).

Q All right.

THE COURT: So noted.

BY MR. ZENOBI:

Q Mr. Jordan, Officer Jordan, can you tell the ladies and gentlemen of the jury what kind of member of the population Mr. Francis has been since he's been in the Dade County Jail and if there's any specific incidents where he may have helped you or other officers out?

A Well, Mr. Francis, he has been a rather well-behaved inmate inside the facility.

I, myself, have never encountered any problems with him and there has been a few incidents where there are guys in the cells that are making weapons to attack one another and he would let us know what happened.

Q Now do you know what kind of weapons those are?

A Well, the inmates, they get plastic razors from the Commissary and what they do is they take the blade out of it, melt the plastic down a little and stick the blade in it.

This they can use to cut a person up or one of the officers.

This, I think, may have prevented one of us from being injured or someone in the cell.

Q And has this been Mr. Francis' intervention that this has been avoided?

A Yes, sir.

Q All right.

Have you, personally, been grateful for this, sir?

A Yes, I have, because maybe it possibly might have been intended on being used on myself or one of the other officers on the floor.

Q So, is it or is it not a fact that Mr. Francis has been in an integrated cell, in other words, black and white?

A Yes, it is.

Q And has he done anything to maintain peace within that cell?

A He's done quite a lot, sir.

Q Can you explain to the ladies and gentlemen of the jury what he has done and how many times, sir, and what your feelings are about it?

A Well, to exactly say how many times he has done it, I really couldn't say, but there has been instances where once you get so many different nationalities of people in the cell, everybody gets into their own cliches and you have different groups trying to control the others.

Mr. Francis here, when he sees this happening, he says something to someone and we, more or less, determine who the violent ones and the agitators are and we remove them.

This way we keep harmony in the cell and we keep the dangerous individuals to ourselves and the other ones off the floor.

Q What has Mr. Francis' role been among his fellow inmates?

A Well, I look at him as being in a good role.

Q During the time that you knew Bobby Francis in the Dade County Jail, did you have any problem with him that you could tell the ladies and gentlemen of the jury?

A No problems whatsoever.

MR. ZENOBI: I tender the witness.

* * *

DIRECT EXAMINATION

BY MR. ZENOBI:

Q Sir, may we have your name?

A My name is Michael Dave Smith.

Q And, sir, where are you employed?

A The Miami--Dade Correctional.

Q And who are you employed by, sir?

A Dade County. Dade County Jail. I'm a counselor on the fourth floor.

Q And how long have you been a counsel on the

fourth floor?

A About a year now.

Q Sir, during the past year in the Dade County Jail as counselor, what have been your duties, sir?

A Well, I've been on the fourth floor over two years now, two and a half years.

I've only been a counselor a year and my basic duties are just about everything.

I handle the Commissary, personal problems, see that the inmates get to the law library, get clothing, phone calls, whatever, a whole bunch of things.

Q Do you have contact with the inmates at the Dade County Jail?

A Yes.

Q Where is the Dade County Jail in relation to the courthouse?

A Where is it?

Q Right.

A Right across the street.

Q Do you have any interest in Bobby Francis, other than professional, sir?

A Only professional.

Q Do you see Mr. Francis in court?

A Yes.

Q Can you point him out.

A He's the gentleman over there (indicating).

Q The gentleman right here (indicating)?

A Yes.

THE COURT: So noted.

MR. ZENOBI: Thank you.

BY MR. ZENOBI:

Q During the past year, sir, did you come into contact with Bobby Francis on a weekly basis?

A Every day.

Q And were you his counselor, sir?

A Yes.

Q Now, as we asked Officer Jordan, can you please tell the ladies and gentlemen of the jury what kind of an inmate Mr. Francis was?

A Bobby is no problem.

I've known Bobby since he's been here.

I had no problems with him.

Basically the same as Officer Jordan says, he's been no problem.

When there are problems in the cell, he brings it to the attention of the officers or myself and I go in, we talk, and we try to settle the problem among ourselves, you know, the inmates, and we decide if this inmate can cope in the cell or not.

If not, then we try to relocate him.

Q You're not talking about Mr. Francis when you say--

A Well, it's usually him that's the mediator in the cell.

If there's a problem, he's the guy that's in the middle.

We usually try to keep down serious problems.

Q All right.

And has he been a help to you, sir?

A Yes, he has.

Q Do you recall any specific indicents or instances where he has headed off or intervened in a particular problem that would have caused injury or, perhaps, even death to anyone?

A I think once.

Well, I know once there was.

I think they had a trusty in the cell and these trusties have access outside of the cell to the kitchen and other areas in the jail.

Somehow, I think, a knife or a fork had been taken into the cell and was hidden in the air conditioning duct and he brought this to the attention of the officers and the location of the handmade weapon and a shakedown was conducted and we found items, contraband.

Q From what you saw, was the intervention and counsel of Mr. Francis a possible way to head off some injury to either an officer or another inmate?

A Yes.

Q And might this have resulted in the death of someone?

A It possibly could have.

Q And what is your opinion of Mr. Francis as an inmate, sir?

A I consider him a role model.

We have no problem.

His cell was one of the cells we had the least problem with.

MR. ZENOBI: I'll tender the witness.

(R. 1248-60)(emphasis added). The State presented nothing to rebut this evidence, and conceded it established valid mitigation in closing argument at sentencing. After hearing the evidence at trial, this evidence, and the arguments of counsel describing these and other mitigating factors, Mr. Francis' jurors reached a verdict of life imprisonment.

As the United States Supreme Court has held, such testimony, especially coming from corrections officials, is strong mitigating evidence:

> The testimony of more disinterested witnesses -- and, in particular, of jailers who would have no particular reason to be favorably disposed toward one of their charges -- would quite naturally be given . . . great[] weight by the jury.

Skipper v. South Carolina, 476 U.S. 1, 106 S. Ct. 1669, 1673 (1986). See also Cooper v. Dugger, 526 So. 2d 900, 902 (Fla. 1988)("potential for rehabilitation is a significant factor in mitigation"); Valle v. State, 502 So. 2d 1225, 1226 (Fla. 1987) (same); McCampbell v. State, 421 So. 2d 1072, 1075 (Fla. 1982); Jones v. Dugger, 867 F.2d 1277, 1280 (11th Cir. 1989)("The Court in Skipper held that precluding the jury from considering evidence of the accused's good behavior during the seven months he spent in jail awaiting trial could not possibly be considered harmless . . . Similarly, in the case before us 'it appears reasonably likely that the exclusion of evidence bearing upon the petitioner's behavior in jail (and hence, upon his likely future behavior in prison) may have affected the jury's decision to impose the death sentence' . . . Accordingly, the Lockett error was not harmless."). In Jones, the jury was not allowed to give effect to the mitigation because it was not instructed to consider it, and relief (resentencing) was therefore granted. In Mr. Francis' case, the jury considered it and voted for life. The trial judge overrode, however, and the Florida Supreme Court affirmed without ever explaining why this mitigating evidence was not a reasonable basis supporting the jury's life sentence verdict in Mr. Francis' case although similar mitigation had been found a "reasonable basis" in other cases. Nowhere did the trial court or Florida Supreme Court discuss what effect was being

given to this compelling evidence, or explain why it should be given a different effect in this case than in others, or say that a jury decision based thereon would be unreasonable, or say much of anything at all about it. As noted previously, the Florida Supreme Court relied on the misapprehension that counsel's argument and the jury's resulting verdict were based on "non-legal" matters. The record, however, reflects that there was classically recognized mitigation before the jury, on which defense counsel expressly asked the jury to rely in his argument.

The trial court also expressly found, as statutory mitigation, that Mr. Francis did not have a "significant history of prior criminal activity." (R. 923 [Sentencing Order]).[3]

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[3] On direct appeal, the Florida Supreme Court wrote that the trial court's finding on this mitigating factor could have been "based on its belief that it could not consider the fact that Francis had been convicted of a felony because that conviction occurred subsequent to the murder in question." Francis, 473 So. 2d at 677. The court also stated that Mr. Francis' trial judge "was not precluded from determining that this was a not a mitigating factor." Francis, 473 So. 2d at 677. The Court, however, again apparently misconstrued the record. First, as to Mr. Francis' history, the prosecutor conceded that it did not support aggravation because "the State has not presented any evidence such as that [prior history of violence], so I ask you ... to ignore that aggravating circumstance..." (R. 1264). The only evidence concerning prior history of criminal activity involved one drug conviction and, to be sure, Mr. Francis was convicted on it after his arrest on the homicide. The State argued against the statutory mitigator because of that one conviction, while defense counsel argued that the statutory mitigator (concerning whether the prior criminal history is significant) should apply because "there's no prior history of any violent criminal activity" (R. 1280). The statutory mitigator speaks to a "significant" prior history, see Fla. Stat. section 921,141, and the trial court was certainly not precluded from making a finding in Mr. Francis' favor on this mitigator on this record (i.e., that the history was not "significant"). Indeed, the Florida Supreme Court did not say that the trial court was so precluded. The language of the sentencing order reflects that the judge did not consider as sufficient to establish a "significant" history of prior criminal activity the

(continued...)

There was additional, valid, reasonable mitigation:

> One has to consider the circumstances of the event, the family connections, the nature of the victim, the treatment of others involved.

Francis, 473 So. 2d at 678 (McDonald, J., dissenting on sentence) (emphasis supplied). Cf. Brookings v. State, 495 So. 2d 135, 142-43 (Fla. 1986)(disparate treatment afforded accomplices is a reasonable basis for a jury life recommendation and a valid mitigating factor demonstrating impropriety of override); McCampbell v. State, 421 So. 2d 1072 (Fla. 1982) (same); Downs v. Dugger, 514 So. 2d 1069, 1072 (Fla. 1987) (disparate treatment afforded accomplice is a valid mitigating factor). Defense counsel so argued. Indeed, of the various participants, although others confessed that they were the actual perpetrators, only Mr. Francis was sentenced to death. This too is valid mitigation.

There were thus valid, recognized, and reasonable mitigating factors in this case, a case involving three aggravating factors, one of which was expressly found to be "not applicable"

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[3](...continued)
fact that Mr. Francis had this one drug conviction. The trial court thus believed that the capital offense was mitigated by the statutory factor of lack of a significant history of prior criminal activity. See Fla. Stat. section 921.141. The jury similarly could have reasonably believed that one drug conviction does not establish a significant history of prior criminal activity, especially since no violence was involved, as counsel argued. The Florida Supreme Court itself did not say that the trial judge or jury were precluded from making this finding, only that the trial judge did not have to make it. The jury and judge were asked to find this statutory mitigator and the judge expressly did so. Relying on the ordinary meaning of "significant" and "history," Mr. Francis' jurors could quite reasonably have concluded that this statutory mitigating circumstance applied, and the Florida Supreme Court did not say that the jurors could not have so concluded. On this record, such a conclusion would not have been unreasonable, and such a conclusion would have provided a "reasonable basis" for the jury's life recommendation.

(hindering governmental function/witness elimination) by the trial judge at the second trial, although based on the same prosecutorial argument as that presented at the third trial, and one of which (cold/calculated) was applied retroactively. The jury's balancing and resulting life recommendation, Tedder, was certainly reasonable under Florida law. Hall, 541 So. 2d 1125; McCampbell; Cheshire. It could not reliably and fairly be deemed otherwise. Cheshire. Mr. Francis, however, was deprived of the right which Florida law afforded him -- the right not to have a reasonable jury verdict overturned.

The trial court never stated why the jury had no rational basis for its recommendation. See Cheshire. In Florida, the usual presumption that death is the proper sentence upon proof of one or more aggravating factors does not apply (and indeed is reversed) when the jury recommends a life sentence. Williams v. State, 386 So. 2d 538, 543 (Fla. 1980). "[U]nder Tedder, the trial court's role is solely to determine whether the evidence in the record was sufficient to form a basis upon which reasonable jurors could rely in recommending life imprisonment." Cheshire v. State, 568 So.2d at 911. There certainly was such evidence here. The Florida Supreme Court's failure to apply the Cheshire standard in this case would be difficult to comprehend, except for the misapprehension of the record which is apparent from the Florida Supreme Court's opinion on direct appeal. Moreover, as the Florida Supreme Court has now indicated, the Tedder standard was inconsistently applied during the time of Mr. Francis' direct appeal. Cochran. Thus, despite the prominence of Skipper

mitigating evidence before the jury, and the other mitigation discussed above, the override was sustained. Cf. Parker.

Mr. Francis had a "liberty interest," afforded under Florida's capital sentencing scheme, not to have a jury verdict which was based on a "reasonable basis" overturned. See Vitek v. Jones, 445 U.S. 480, 488-89 (1980)(state-created liberty interest is one that fourteenth amendment preserves against arbitrary deprivation by the State); Hicks v. Oklahoma, 447 U.S. 343 (1980)(same). Neither the eighth amendment, nor due process, nor equal protection can be squared with the fact that Florida law afforded Mr. Francis the right to an affirmance of the jury's life recommendation, under the facts and circumstances of this case, while the right was unreliably withdrawn, on the basis of a misapprehension. Cf. Parker; Evitts v. Lucey, 469 U.S. 387, 400-01 (1985); Johnson v. Avery, 393 U.S. 483, 488 (1969); Smith v. Bennett, 305 U.S. 708, 713 (1961).

If a jury recommends life, death may not be imposed if there is a "reasonable basis" discernible in the record for the recommendation. Stevens v. State, 552 So.2d 1082, 1085 (Fla. 1989); Ferry v. State, 507 So. 2d 1373, 1376-77 (Fla. 1987); see also Hansbrough v. State, 509 So. 2d 1081, 1086 (Fla. 1987)(if "a reasonable basis for the jury to recommend life" exists, the jury's verdict should be sustained); Cheshire. The evidence before the jurors here has been recognized by various courts (including the Florida Supreme Court) as establishing valid mitigation and as a "reasonbale basis" making a jury override improper under Florida's capital sentencing scheme. The

inconsistency between the application of Tedder in Mr. Francis' case and in other cases discussed herein presents serious questions concerning the constitutional reliability of this death sentence.

Rehabilitation, taking actions which saved officers' lives, helping maintain order, and being a model prisoner were all testified to by correctional officers (R. 1248-60), and that provides a reasonable basis. Co-defendants with state deals who admitted that they planned to "walk" demonstrated disparate treatment, and provided a reasonable basis. The circumstances of the event, the family connections, the nature of the victim, and the treatment of others involved provided a reasonable basis, Francis v. State, 473 So. 2d at 678 (MacDonald, J., dissenting on sentence), as did the lack of a significant prior criminal history -- one drug conviction. Protecting one's female friends also mitigated. Defense counsel argued such factors, and the Florida Supreme Court misperceived the record in believing that he did not. Parker.

The override was apparently predicated, however, upon what the judge felt, and not upon any analysis of whether there was a reasonable basis for the jury to recommend life. That is not the law. Cheshire, 568 So.2d at 911 ("[U]nder Tedder, the trial court's role is solely to determine whether the evidence in the record was sufficient to form a basis upon which reasonable jurors could rely in recommending life imprisonment.")

> The state, however, suggests that the override was proper here because the trial court judge is the ultimate sentencer and his sentencing order represents a reasonable weighing of the relevant aggravating and

> mitigating circumstances. According to the state's theory, this Court should view a trial court's sentencing order with a presumption of correctness and, when the order is reasonable, this Court should uphold the trial court's sentence of death. We reject the state's suggestion. Under the state's theory there would be little or no need for a jury's advisory recommendation since this Court would need to focus only on whether the sentence imposed by the trial court was reasonable. This is not the law. Sub judice, the jury's recommendation of life was reasonably based on valid mitigating factors. The fact that reasonable people could differ on what penalty should be imposed in this case renders the override improper.

Ferry v. State, 507 So. 2d 1373, 1376-77 (Fla. 1987)(emphasis added).

The override was then sustained on appeal on the basis of a misapprehension of the sentencing record similar to the one involved in Parker v. Dugger. The Eleventh Circuit then denied relief in this case relying on that Court's opinion in Parker v. Dugger, an opinion expressly overruled by the United States Supreme Court. In light of the recently issued decision in Parker, reconsideration of this override death sentence is appropriate in Mr. Francis' case.

If the jury override here, and the method by which it was sustained, is acceptable under the Florida statute, then "the application of the jury override procedure has resulted in arbitrary ... application of the death penalty . . . in this particular case." Spaziano. The method by which the override was allowed to stand in this case involves an error very much akin to the error involved in Parker, and validates a procedure that provides no meaningful basis upon which to distinguish between those persons who receive life (when a judge does not override, or when an override is reversed) and those who receive

death. This death sentence cannot be deemed reliable and not arbitrary. It violates the eighth and fourteenth amendments. This claim is certainly not insubstantial. Mr. Francis prays that relief be granted.

CLAIM II

THE FINDING OF THE HINDERING LAW ENFORCEMENT/ WITNESS ELIMINATION AGGRAVATOR IN THIS JURY OVERRIDE CASE VIOLATES ASHE V. SWENSON AND THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN FAILING TO RAISE THIS CLAIM ON APPEAL

On the same arguments presented by the State at the third trial, hindering governmental function/witness elimination was expressly found to be "not applicable" as an aggravating factor by the trial court at the second trial (See Second Trial Sentencing Record at pp. 21-22 [prosecutor's argument for this aggravator]; Second Trial Sentencing Order at p. 2 ("7. That the crime for which the Defendant is to be sentenced to death was committed to disrupt or hinder the lawful exercise of any governmental function of [sic] the [e]nforcement of laws: found not to be applicable." [emphasis added]). As defense counsel pointed out in his argument in the third trial, "Now, for the State to stand here and argue that because Titus Walters was a confidential informant that Mr. Francis committed a homcide for that purpose, that's in contradiction to the entire theory of the State's case [that the homicide occurred because Walters had physically assaulted Opal Lee and Charlene Duncan][4] . . . The

[4] See R. 335, 656, 658, 963-64, 1000-01, 1002-06, 966-67 (involving evidence presented by the State that the offense (continued...)

reason Titus Walters was killed was for revenge, pure and simple. It wasn't done to hinder his function as a CI. He was a tattletale, that's true, but the State's theory that Mr. Francis has done anything to hinder a governmental exercise is wrong . . . Not this. It's just not the case" (R. 1279-80).

Although this aggravator was expressly found to be "not applicable" in the findings of the court at the second trial, it was found to be one of the three aggravating factors at the third trial. The State's and courts' reliance on a purported desire of Mr. Francis to kill Titus Walters because he was an informant in a drug case was error as a matter of law.[5]

Because the ultimate fact in dispute -- the applicability of this aggravator -- had been determined in Mr. Francis' favor by the express finding of a court of competent jurisdiction at the second trial, settled double jeopardy and collateral estoppel principles foreclosed a finding on this aggravator against Mr. Francis at the third trial. In Ashe v. Swenson 397 U.S. 436 (1970), the Supreme Court held the fifth amendment's Double

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[4](...continued)
occurred because of the victim's physical attack on the women). See also R. 1002-06 (Charlene Duncan felt her life was in danger); R. 335, 656, 658, 963-69, 1000-01 (Walters tries to run the women over with a car, shoots at them with a handgun, and threatens the women and beats them to the point that Opal Lee's face was swollen and bruised); R. 349 (Opal Lee: "You see my lip").

[5] In his motion to vacate, filed this date in the trial court, Mr. Francis has also presented a claim not unrelated to this one that the testimony and arguments presented by the State to support this aggravator involved the knowing use of misleading testimony. Therein, Mr. Francis has set forth the chronology and facts supporting his request for an evidentiary hearing on the claim. See Lightbourne v. Dugger, 549 So.2d 1354, 1365 (Fla. 1989). Those facts plainly demonstrate the inapplicability of this aggravator.

Jeopardy Clause to include the corollary doctrine of collateral estoppel in criminal proceedings. The Ashe court held that collateral estoppel in a criminal case "means simply that when an issue of ultimate fact has once been determined" the issue "cannot again be litigated" in that case by the same parties. Ashe, 397 U.S. at 443. "Ashe requires that a defendant not be forced to defend against charges or factual allegations which he overcame in an earlier trial." Delap v. Dugger, 890 F.2d 285, 314 (11th Cir. 1989), citing Ashe v. Swenson, 397 U.S. 436 (1970), and Albert v. Montgomery, 732 F.2d 865, 869 (11th Cir. 1984). The collateral estoppel/double jeopardy bar to forcing a criminal defendant to defend against factual allegations he overcame in an earlier proceeding has been applied in various criminal contexts. See De La Rosa v. Lynaugh, 817 F.2d 259, 268 (5th Cir. 1987); United States v. Schwartz, 785 F.2d 673, 681-82 (9th Cir. 11986); United States v. Dowling, 855 F.2d 114, 120-22 (3rd Cir. 1988); United States v. Corley, 824 F.2d 931, 937 (11th Cir. 1987); United States v. Gornto, 792 F.2d 1028, 1031 (11th Cir. 1986); Albert v. Montgomery, 732 F.2d 865, 869 (11th Cir. 1984).

In order for the double jeopardy/collateral estoppel doctrine to apply, Ashe requires that two conditions must be satisfied. Both are met in this case. First, the second prosecution must involve the same parties as the first prosecution, Ashe, 397 U.S. at 443, clearly the situation in Mr. Francis' case. Second, the prior determination must have been part of a valid and final ruling. Id. Here, the ruling,

rendered in the second trial, that the aggravator did not apply was valid, it was a finding, and it was a final judgment or ruling on a disputed issue of ultimate fact concerning the applicability of the aggravator. Significantly, the collateral estoppel doctrine applies to "ultimate" as well as "evidentiary" issues. See Johnson v. Estelle, 506 F.2d 347, 349 (5th Cir. 1975); Wingate v. Wainwright, 464 F.2d 209, 213 (5th Cir. 1972).

This case does not involve a situation where the aggravator was not at issue or not asserted by the State in the previous proceeding, nor a situatiion where no finding one way or the other on the applicability of the aggravator was made by the sentencing court in the prior proceeding. The State asserted and argued it, in a manner similar to what was argued at the third trial. A court of competent jurisdiction was asked to make a finding thereon, and the court did -- it made an express finding in Mr. Francis' favor that the aggravator was "not applicable."

Since the issue of the applicability of the aggravator was found in Mr. Francis' favor at the second trial, it was constitutional error for it to be asserted, and for a finding against Mr. Francis to be made on this factor, at the third trial

Claims of double jeopardy error are fundnamental in nature, and waiver of such claims is not generally countenanced because of the interests that the double jeopardy clause seeks to protect -- the power of the state "to hale the defendant into court" repeatedly on the same question. See Blackledge v. Perry, 417 U.S. 21, 30-31 (1974); Menna v. New York, 423 U.S. 61 (1975). Such claims, by their very nature, involve error that

prejudicially denies fundamental constitutional rights. Kennedy v. Wainwright, 483 So.2d 424, 426 (Fla. 1983). Fundamental error can be corrected at any point in the judicial process. The error should have been corrected on direct appeal. The error can and should now be corrected, particularly in light of how this aggravator likely skewed the weighing process in this override case.

Ineffective Assistance on Appeal

Appellate counsel certainly had Ashe and its progeny available to him. In failing to raise the claim, he provided prejudicially deficient assistance on appeal, undermining confidence in the outcome of the Court's review of this override death sentence. In any event, this claim involves fundamental error of a constitutional magnitude, and the error can and should be corrected in this proceeding.

CLAIM III

THE STATE'S RACIALLY DISCRIMINATORY EXERCISE OF PEREMPTORY STRIKES TO EXCLUDE BLACK JURORS VIOLATED MR. FRANCIS' RIGHTS UNDER ARTICLE I, §§ 2,9 AND 16(A) OF THE FLORIDA CONSTITUTION AND UNDER THE UNITED STATES CONSTITUTION, AND APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE ON DIRECT APPEAL

In State v. Neil, 457 So.2d 481 (Fla. 1984), this Court recognized that the Florida Constitution's guarantee of the right to trial before an impartial jury is violated when the prosecution uses peremptory challenges to exclude prospective jurors on the basis of race. This landmark decision, which foreshadowed the United States Supreme Court's decision in Batson v. Kentucky, 476 U.S. 79 (1986), sought to eliminate a source of

discrimination within the judicial system, discrimination which is "most pernicious because it is 'a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others.'". Id. at 88, quoting Strauder v. West Virginia, 100 U.S. 303, 308 (1880). In the instant case, the State violated the rights of Mr. Francis (and of black prospective jurors) by exercising peremptory challenges in a blatantly discriminatory fashion. Mr. Francis was and is entitled to a new trial before a neutral and impartial jury, selected in a manner free from racial discrimination. Trial counsel properly preserved this claim. Appellate counsel, however, failed to raise it, rendering his assistance on appeal ineffective. See, e.g., Wilson v. Wainwright, 474 So.2d 1163 (Fla. 1985); see also Matire v. Wainwright, 811 F.2d 1430 (11th Cir. 1987).

A. The Prosecutor's Racially Discriminatory Exercise of Peremptory Challenges

Mr. Francis is black. Towards the end of voir dire, the prosecutor exercised three peremptory challenges, excusing prospective jurors Muhammad, Hill and Hall. Defense counsel promptly objected to the State's systematic exclusion of black jurors, pointing out that of the eight challenges the State had exercised, five were against black jurors, including prospective jurors Bullard and Payne, who had been excused earlier (R. 251). The Court asked the prosecution to respond. The prosecutor proceeded to offer the following reasons for his strikes:

> Specific reasons, Mr. (sic) Hill has a brother that was accused of a crime in the past and we think that's significant. Mrs. Hall, I don't think I have a

particular reason, only that there were some other jurors preferred over Mrs. Hall -- Mr. Hall, I'm sorry.

I believe he's the one from Las Vegas that has the bumper sticker on his car about gamblers.

Yes.

I did excuse Mr. Muhammad. I don't have any particular reason for Mr. Muhammad.

[DEFENSE COUNSEL]: Not one question was asked of Mr. Muhammad by either side.

[PROSECUTOR]: I didn't care for Mr. Muhammad.

Not that he was black, I didn't particularly care for him.

(R. 252-53) (emphasis added). As defense counsel pointed out, no questions were asked of Mr. Muhammad, nor did he say a single word during voir dire.[6]

Without requiring any further showing, the court denied Mr. Francis' objection (R. 253). After further protest from defense counsel, the court took judicial notice that Mr. Muhammad was "wearing a hat and attire that is unsuited for a juror" (R. 254). Subsequently, the prosecution used peremptory challenges to exclude two additional black prospective jurors, explaining that Mr. Rains had a sister who had been incarcerated and had been kicked by a policeman, and that Ms. Carter had a brother who had been convicted of murder and had witnessed a murder committed by

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[6] The prosecutor's assertion that Mrs. Hill had a brother convicted of a crime is not clearly supported by the record. It is based on the following exchange:

[DEFENSE COUNSEL]: We had someone else who said they were the victim or someone had been -- in the back row.

Mrs. Hill.

MS. HILL: My brother way back in '60 -- well, he lived in Georgia.

(R. 239). It appears that Mrs. Hill was stating that her brother was a victim of a crime in 1960, not that he was the perpetrator of a crime.

her cousin (R. 256).[7] Thus, seven of the ten jurors excused by the State were black.

Under Neil v. State, 457 So.2d 481 (Fla. 1984), and Slappy v. State, 522 So.2d 18 (Fla. 1988), the prosecution's exercise of its peremptories to exclude black jurors violated Mr. Francis' right to be tried by an impartial jury, guaranteed by Article I, § 16(a) of the Florida Constitution, and his right to equal protection of the laws, guaranteed by Article I, § 2 of the Florida Constitution and the Fourteenth Amendment to the United States Constitution. In Neil, this Court held that neither the State nor the defense may use peremptory challenges to exclude prospective jurors because of their race. Neil, 457 So.2d at 486-87.[8] In Slappy, this Court clarified the standards of proof to be used in evaluating claims of Neil violations.

The Slappy court began its analysis by recognizing the paramount need to insure that the jury selection process is free of bias. Bias in the jury selection process both deprives the parties of their right to an impartial jury and the excluded citizens of their right to serve on the jury, and also gives "official sanction to irrational prejudice." Slappy, 522 So.2d at 20. Cf. Batson v. Kentucky, 476 U.S. 79, 86-88 (1986) (racial

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[7] Apparently, four black jurors were seated after the court adopted the unique procedure of replacing black jurors stricken by the State with other black jurors from the venire (R. 257-60).

[8] No question of the retroactive application of Neil is involved in the instant case. Neil was decided in 1984, and Mr. Francis' direct appeal was denied in 1985. Francis v. State, 473 So.2d 672 (Fla. 1985). Neil applies to all cases pending on direct appeal at the time it becomes final. Castillo v. State, 486 So.2d 565 (Fla. 1986).

discrimination in selection of the venire denies the defendant "the protection that a trial by jury is intended to secure," "unconstitutionally discriminate[s] against the excluded juror," and "undermine[s] public confidence in the fairness of our system of justice.") Even where the decision to exercise a peremptory challenge is open to some level of scrutiny, however, "the nature of the peremptory challenge makes it uniquely suited to masking discriminatory motives." Slappy, 522 So.2d at 20.

Accordingly, in consideration of whether a prima facie showing of a Neil violation has been made, any doubt must be resolved in the complaining party's favor. Id. at 22. Once a prima facie showing has been made,

> Neil imposes upon the other party an obligation to rebut the inference created when the defense met its burden of persuasion. This rebuttal must consist of a "clear and reasonably specific" racially neutral explanation of "legitimate reasons" for the state's use of its peremptory challenges.
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> * * *
>
> . . . In order to permit the questioned challenge, the trial judge must conclude that the proffered reasons are, first, neutral and reasonable, and, second, not a pretext.

Id., quoting Batson, 476 U.S. at 96-98 & n.20. In order to give guidance to courts determining whether the reasons offered for the challenge are legitimate and race neutral, this Court set forth five factors, the presence of any of which "will tend to show that the state's reasons are not actually supported by the record or are an impermissible pretest." Id. These reasons include "failure to examine the juror or perfunctory examination," and the offering of an explanation "unrelated to the facts of the case." Id.

Under the Neil test, it is clear that Mr. Francis was deprived of his right to a fair and impartial jury, selected by a process free of the taint of racial discrimination. First, there can be little doubt that Mr. Francis made the prima facie showing, and any doubt must be resolved in favor of Mr. Francis. See Tillman v. State, 522 So.2d 14, 17 (Fla. 1988); Slappy. The prosecution exercised five of its first eight peremptory challenges to exclude black jurors (R. 251), one of whom the state had not questioned (Muhammad). This is sufficient to make the prima facie showing under. See, e.g., Slappy, 522 So.2d at 23 (pattern of using peremptory challenges to exclude minority jurors "whom the state had failed even to question" satisfied prima facie showing); Tillman, 522 So.2d at 16-17 (prosecution excluded four black jurors); Thompson v. State, 548 So.2d 198, 202 (Fla. 1989) (doubt whether challenges exercised improperly requires inquiry into reasons for challenges).

Moreover, as in Thompson, the record reflects that the trial judge himself entertained doubts about the propriety of the State's challenges. The judge first requested a response from the State to the defendant's objection (R. 252), which was hardly necessary unless the court was concerned about the possible systematic exclusion of black jurors. The court then took the extraordinary step, despite the fact that it denied the objection, of replacing challenged black jurors with black jurors from the venire (R. 254-60). Clearly, the court would not have taken such a step unless it was concerned about the appearance, at the very least, of improper exclusion of black jurors. Given

that this case was tried before Neil, that in itself is a clear indication that the trial court "entertained serious doubts as to whether the state was improperly exercising its peremptory challenges." Thompson, 548 So.2d at 202.

Second, the State totally failed to meet its burden of showing that its reasons for exercising the challenges were race neutral, reasonable, and not a pretext. With respect to juror Muhammad, the State did not even attempt to offer a legitimate, race neutral explanation for its challenge, merely stating that the prosecutor "didn't particularly care for him" (R. 253). This is no explanation at all. As defense counsel pointed out, not a single question had been asked of juror Muhammad. Here, as in Slappy, the State's "utter failure to question ... [the challenged juror] renders the state's explanation immediately suspect." Slappy, 522 So.2d at 23.[9]

With respect to juror Hill, the prosecutor was confused as to her sex, and offered the explanation that she had a "brother that was accused of a crime in the past." (R. 252). As set forth above, this explanation is not clearly supported from the record. Even if it is assumed that juror Hill did indicate that her

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[9] The trial judge's volunteering of reasons why juror Muhammad could be stricken (R. 254) does not remedy the prosecution's failure to offer a legitimate race neutral explanation. Tillman, 522 So.2d at 16-17. Moreover, the judge's proffered explanation that Mr. Muhammad's attire was unsuitable is not itself a legitimate, race neutral explanation. This reason was "unrelated to the facts of the case," Slappy, 522 So.2d at 22, and a similar explanation was rejected as a pretext in Roundtree v. State, 546 So.2d 1042, 1044-45 (Fla. 1989) (juror was wearing "pointy New York shoes"). As this Court noted in Slappy, a judge's "'own conscious or unconscious racism may lead him to accept [a pretextual] explanation as well supported.'" Slappy, 522 So.2d at 23, quoting Batson, 476 U.S. at 106 (Marshall, J., concurring)(emphasis added).

brother was accused of a crime in Georgia in 1960, the proffered reason is a pretext. The reason has nothing to do with the facts of the case, and relates to an event over twenty years old at the time of the trial. Moreover, the prosecutor made no attempt to ask any additional questions of juror Hill, determine whether the putative offense was a serious one, or whether it would affect juror Hill's ability to be fair and impartial in Mr. Francis' case.

The reason offered for excluding juror Hall is even more clearly pretextual. As with juror Muhammad, the prosecution first offered no explanation, other than the fact that he liked other jurors better (R. 252), an explanation that is clearly not race neutral. (It is no more race neutral than would be an employer's explanation that he did not hire a qualified black applicant because he liked white applicants better). As an afterthought, the prosecutor mentioned that juror Hall had a "bumper sticker on his car about gamblers" (R. 252).[10] Mr. Hall's ownership of a bumper sticker about gamblers had nothing to do with the facts of the case, nor did it give rise to any reason to believe that juror Hall could not be impartial. Particularly given the fact that the prosecutor could at first offer no explanation for his challenge, see Blackshear v. State, 521 So.2d 1083, 1084 (Fla. 1988), it is nothing more than an afterthought, a pretext for exclusion of a black juror.

In addition to these jurors, the prosecution offered no

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[10] Mr. Hall indicated that he got the bumper sticker on a single trip to Las Vegas, and that he did not gamble much (R. 187, 192).

explanation for its exclusion of jurors Bullard and Payne. Once doubt is raised as to the propriety of the exclusion of any black juror, the prosecution must "explain each one of the allegedly discriminatory challenges." Williams v. State, 574 So.2d 136, 137 (Fla. 1991) (emphasis in original). This Court cannot be expected to review the record to determine if there were valid bases for the challenges; the explanation must come from the State. Bryant v. State, 565 So.2d 1298, 1301 (Fla. 1990).

None of these challenges were exercised on the basis of legitimate, race neutral reasons, supported by the record and not offered as a pretext. The trial court made no findings that any of them were so exercised. Instead, it simply denied the defendant's objection to the exercise of the challenges (R. 253). This ruling is consistent with the trial court's previously expressed belief (R. 252) that in order to show a systematic exclusion of black jurors, the defendant was required to show a pattern of conduct extending over more than one case. Compare Swain v. Alabama, 380 U.S.202 (1965), with Neil.

Therefore, it is clear that the State's use of peremptory challenges to exclude five (5) black jurors violated Mr. Francis' rights under Neil. As this Court held in Slappy, the exclusion of even a single black juror for discriminatory reasons violates the defendant's rights to equal protection of the law and an impartial jury. Slappy, 522 So.2d at 21. Moreover, the fact that other black jurors served on the panel is insignificant.

> "We know ... that number alone is not dispositive, nor even the fact that a member of the minority in question has been seated as a juror or alternative." Slappy, at 21 (citations omitted). If

> one juror has been improperly excused because of race, it does not matter that one juror was not so excluded. Such insidious discrimination cannot be tolerated within the judicial system

Tillman v. State, 522 So.2d at 17 (emphasis added).

The State unlawfully injected racial discrimination into the jury selection process. Mr. Francis is entitled to a new trial before a properly selected jury.

B. Ineffective Assistance of Appellate Counsel

A habeas corpus petition is the appropriate vehicle for raising claims of ineffective assistance of appellate counsel. Fitzpatrick v. Wainwright, 490 So.2d 938 (Fla. 1986). In order to prevail, the petitioner must identify a specific act or omission by appellate counsel which constituted a serious deficiency and which prejudiced the petitioner by undermining the essential fairness and reliability of the appeal. Fitzpatrick, 490 So.2d at 940. In this case, appellate counsel's failure to raise the Neil claim on direct appeal was deficient performance, and undermines confidence in the outcome of Mr. Francis' appeal.

The initial brief on behalf of Mr. Francis was filed on June 4, 1984, less than four months before Neil was decided on September 27, 1984. Competent counsel should have been aware that the issue was one which this Court would soon address. This is shown most clearly by the fact that the Third District Court of Appeal (sitting in Miami, where Mr. Francis' counsel practiced) had certified the issue presented in Neil as an issue of great public importance in 1983. Neil v. State, 433 So.2d 51, 52 (Fla. 3DCA 1983). Accordingly, it should have been clear to competent counsel that this Court was considering the issue. See

Fla. Const., Art. V § 3(b)(4); Fla. R. App. P. 9.030 (2)(A)(v).

This Court's decision in Neil was also foreshadowed by analogous decisions from other jurisdictions, particularly People v. Wheeler, 22 Cal.3d 258, 583 P.2d 748 (1978), and Commonwealth v. Soares, 377 Mass. 461, 387 N.W.2d 499, cert. denied, 444 U.S. 881 (1979). See Neil, 457 So.2d at 483-85. Competent appellate counsel would have recognized that given the District Court of Appeals' and Florida Supreme Court's consideration of the issue, the claim of racially discriminatory exclusion of black jurors was meritorious and would likely lead to the granting of a new trial. The Neil claim was well preserved by defense counsel's objection (R. 251-52), and was apparent on the face of the record.

Moreover, appellate counsel had ample opportunity to raise the Neil issue after Neil was decided. Oral argument in Mr. Francis' case was held on January 10, 1983, over three months after Neil was decided. In that intervening time, competent counsel would have read Neil and realized that Mr. Francis was entitled to relief under Neil, given the record of the voir dire proceedings in this case. Competent counsel would then have filed a motion under Florida Rules of Appellate Procedure 9.300 to supplement the brief to raise a Neil claim. Counsel's duty of providing effective appellate representation, including the duty to know and use applicable case law, see Wilson v. Wainwright, 474 So.2d 1162, 1163 (Fla. 1985), does not cease once the appellate briefs are filed.

Appellate counsel's failure to bring this clear and well

preserved error to this Court's attention on direct appeal undermines confidence in the fairness and correctness of the outcome of the appeal. Id. If Mr. Francis' Neil claim had been presented to this Court, it is not just reasonably likely that the outcome would have been different, it is virtually certain. Mr. Francis has shown clear Neil error. Jack Neil's counsel raised a claim of such error, and his conviction was reversed. Bobby Francis' counsel neglected to raise such a claim, even after Neil had been decided. Mr. Francis' conviction and sentence were affirmed, and he now faces electrocution. Such a result cannot be tolerated in a case where the jury selection process was infected by racial discrimination. This Court should reverse Mr. Francis' conviction based on the clear violation of his rights to equal protection of the laws, trial by an impartial jury, and effective appellate counsel.

CLAIM IV

MR. FRANCIS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL, AND THE PRIOR DISPOSITION OF THIS CLAIM WAS FUNDAMENTALLY IN ERROR

By his former trial defense counsel's own admission, there should be no question that Mr. Francis was denied the effective assistance of counsel at the penalty phase of his capital trial. However, the Florida Supreme Court denied relief by relying on an analysis that since the jury recommended life imprisonment, counsel should not be deemed ineffective. However, inconsistently, the Florida Supreme Court had held on direct appeal that counsel had attained the life recommendation from the jury on the basis of a "non-legal" argument, and, since the

jury's verdict was overridden and the override affirmed, that counsel had not provided "legal" evidence in support of the recommendation. The dissenting opinions on the claim of ineffective assistance of counsel, Francis, 529 So. 2d at 674-79, explained in detail why the Court's analysis was erroneous, see, e.g., id. at 674 ("I cannot conclude, as the majority suggests, that the jury's life recommendation in this case excuses any and all of counsel's manifest and prejudicial deficiencies. Such a position means that what may have been a fluke at trial . . . now renders counsel's performance non-reviewable by this Court"), and why, on the record in this override case (including former counsel's testimony), the Petitioner had established deficient performance and prejudice sufficient to undermine confidence in the proceedings' results -- i.e., in the trial court's decision to override, and the Supreme Court's affirmance of the override. See e.g., Francis v. State, 529 So.2d at 674-75 and 675 n.2 ("The record before us discloses that trial counsel . . . made . . . virtually no effort to obtain mitigating evidence on behalf of his client. The only witnesses called in the case for mitigation . . . were summoned only when Francis himself asked for the court's intervention after the sentencing hearing had commenced . . . "; counsel only learned of the importance of mitigating evidence in a capital case after Mr. Francis' trial, when he represented William Middleton, a capital petitioner, in post-conviction proceedings). After denying post-conviction relief in Mr. Francis' case, the Florida Supreme Court itself rendered a decision in a jury override case involving a claim of ineffective

assistance of counsel which adopted the analysis of the dissenting opinions in Francis. Stevens v. State, 552 So. 2d 1082 (Fla. 1989). Mr. Francis' case is remarkably like Stevens, which altered the analysis employed by the majority in Francis. Stevens demonstrates that the Court fundamentally erred in its prior resolution, and that reconsideration is therefore appropriate. See Kennedy v. Wainwright, 483 So.2d 424, 426 (Fla. 1986) (Reconsideration of prior resolution permitted when Petitioner demonstrates that prior resolution of constitutional claim prejudicially denied fundamental constitutional rights).

An important question presented by this case which requires resolution is whether an attorney who by his own admission conducted inadequate preparation for the sentencing phase of a capital trial can be deemed to have performed effectively when what that same attorney did at sentencing is held to be insufficient to preclude an override of the jury's verdict. There was substantial mitigation here which did not reach the judge and jury because of what counsel himself acknowledged -- that he did not adequately prepare for sentencing -- while the absence of this evidence does undermine confidence in the jury override. See Francis, 529 So. 2d at 629 (Barkett and Kogan, JJ., dissenting); Stevens v. State. Moreover, the analysis of the mental health claims involved in this action --- the trial court's finding in support of Dr. Mutter (who the State had called at the 3.850 hearing), and against Dr. Merikangas (who Mr. Francis had called) and its affirmance on appeal, see Francis, 529 So.2d at 673 -- cannot be deemed reliable or supported by

competent evidence since Dr. Mutter never examined Mr. Francis. Providing opinions on neurological and psychiatric issues without conducing any examination of the patient whatsoever (and based on looking at the individual, who was sitting at counsel table, from the witness stand) by no means comports with the standards of care of the mental health professions or what the law requires in order for expert opinion testimony to be deemed reliable and admissible. The facts submitted herein so demonstrate.

This override sentence of death is fundamentally unreliable because of trial counsel's failure to develop evidence in mitigation, although such evidence was available. Counsel's failure was not based on any reasonable tactic or strategy, but simply on a failure to investigate and prepare. Had counsel investigated, prepared, and presented the available mitigating evidence, that evidence would have provided more than a reasonable basis for the jury's life recommendation and would have precluded a judicial override of that life recommendation or resulted in the Florida Supreme Court's reversal of the override. See Stevens; Francis, 529 So. 2d at 679 (Barkett and Kogan, JJ., dissenting). As in Stevens, however, counsel relied on a belief concerning the trial judge, instead of on an investigation of mitigation. In Stevens, counsel believed that the judge would impose death no matter what, and therefore failed to develop and present mitigation. In Francis, counsel believed that the trial judge would not impose death, and therefore failed to develop and present mitigation. In both cases, counsel's actions cannot be deemed to be based on a "reasoned professional judgment." See

Stevens, 552 So.2d at 1082. As the Supreme Court held in Stevens, relying on the dissents in Francis, "when counsel fails to develop a case in mitigation, the weighing process is necessarily skewed in favor of the aggravating factors argued by the State." Stevens, 552 So.2d at 1082, citing Francis v. State, 529 So.2d at 677 (Barkett and Kogan, JJ., dissenting). Here as in Stevens the failure to appropriately investigate and prepare for sentencing was not based on a tactic, and here as in Stevens, the failure to prepare for sentencing was a prejudicial deficiency. See Stevens, 552 So.2d at 1087 ("It should be beyond cavil that an attorney who fails altogether to make any preparations for the penalty phase of a capital murder trial deprives his client of reasonably effective assistance of counsel by any objective standard of reasonableness"), quoting Blake v. Kemp, 758 F.2d 523, 533 (11th Cir. 1985). The analysis attendant to ineffective assistance of counsel claims in cases involving life overrides related in Stevens was not, however, employed by the majority in Francis. Reconsideration is appropriate.

The correctional officers testified in this case because Mr. Francis asked the trial judge that they be allowed to testify and not because of actions by counsel. Counsel's actions in this case were not founded on proper investigation and preparation, or even on a "reasoned" or "informed" decision that investigation should not be pursued. Counsel himself testified that he would have used evidence such as that presented at the evidentiary hearing at the sentencing, but that he had not prepared it

because he believed the judge would not impose death and because, at the time, he did not realize the significance of presenting mitigating evidence for the jury's and court's consideration in a capital case. Such a determination is at odds with the holdings in Kimmelman v. Morrison, 106 S. Ct. 2574 (1986), Stevens, and Strickland v. Washington, 466 U.S. 668 (1984), itself. Former trial counsel himself testified that no "tactics" or "strategies" were involved, and that there was no decision not to investigate, much less so an "informed" decision. Under such circumstances no "strategy" or "tactic" can be ascribed to counsel's actions. See Harris v. Dugger, 874 F.2d 756, 763 (11th Cir. 1989)("[P]rior to the day of sentencing, neither [defense] lawyer had investigated Harris' . . . background, leading to their total . . . ignorance about the type of mitigation evidence available to them. Such ignorance precluded [defense counsel] from making strategic decisions on whether to introduce testimony from Harris' friends and relatives."); Middleton v. Dugger, 849 F.2d 491, 494 (11th Cir. 1988)(no tactical decision where defense counsel "simply failed" to investigate). See also Nixon v. Newsome, 888 F.2d 112, 116 (11th Cir. 1989)(rejecting the State's argument that defense counsel had a strategic reason for his omissions because counsel had not investigated). A failure to investigate such as occurred in Mr. Francis' case precludes defense counsel from making informed strategic decisions. See Stevens; Deutscher v. Whitley, 884 F.2d 1152 (9th Cir. 1989); Evans v. Lewis, 855 F.2d 631 (9th Cir. 1988). Just as importantly, counsel here testified that he had no such tactic or strategy, that he did not know how

to develop mitigation at the time he defended Mr. Francis and did not realize then why mitigation was important, and that, without investigation, he was ignorant of Mr. Francis' history. No tactic was related by counsel for failing to develop either background or mental health mitigation. To the contrary, counsel acknowledged that he would have used such evidence.

Not only must defense counsel investigate in order to make reasoned "strategic" decisions, but also counsel must make reasonable decisions. Counsel testified that he had not prepared and that the omissions were not based on a tactic. Given the nature of Florida law (i.e., that an override of a jury's life recommendation is improper if that recommendation is supported by a "reasonable basis"), defense counsel had a duty to investigate potential mitigation for the penalty phase, and the failure to do so was unreasonable. Stevens. In a case such as this one, where mitigation exists and can be pursued, defense counsel has a minimal duty to consider it -- to conduct some investigation -- before acting. See Francis, 529 So. 2d at 674-79 (Barkett and Kogan, JJ., dissenting); Stevens v. State, 552 So. 2d 1082, 1085-88 (Fla. 1989). Here, counsel testified that he had no "strategy," and that he had no reason for not developing and presenting mitigating evidence; he simply did not prepare. By not investigating and preparing -- and thereon developing a reasonable strategy -- defense counsel failed to provide ample evidence that would have without question established a reasonable basis for the jury's life recommendation.

As to prejudice, the prior disposition of this case cannot

be squared with the applicable override law, and was fundamentally errroneous. The available evidence which counsel unreasonably failed to investigate, prepare and present established ample, recognized mitigation, which certainly would have precluded an override. See Francis, 529 So. 2d at 674-79 (Barkett and Kogan, JJ.) (citing and discussing those precedents). Evidence of brain damage is such a reasonable basis. Carter v. State, 560 So. 2d 1166 (Fla. 1990).[11] Evidence of childhood trauma and an unstable family environment is mitigating. Campbell v. State, 571 So.2d 415, 419 n.4 (Fla. 1990); Stevens v. State, 552 So. 2d 1082, 1086 (Fla. 1989); Eddings v. Oklahoma, 455 U.S. 104 (1982). Evidence of a diminished capacity is mitigating. Penry v. Lynaugh, 109 S. Ct. 2934 (1989). Of course, evidence that the defendant has been a model prisoner or has the potential for good behavior in prison is mitigating. Skipper v. South Carolina, 476 U.S. 1 (1986).[12]

An effective defense attorney's objective at a Florida capital sentencing proceeding is to obtain a life sentence from the judge. In order to do that, at a minimum, defense counsel is responsible for providing "a reasonable basis in the record" for a life recommendation from the jury where it is available. See

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[11] Here, had counsel investigated, he would have known of the difficulty of Mr. Francis' birth, the injuries to his head at birth and in his youth, and the drinking of his mother while pregnant with Mr. Francis. The witnesses at the 3.850 hearing, readily available at sentencing, had no hesitancy in providing this evidence.

[12] Such evidence was presented at Mr. Francis' penalty phase, and it was presented at the insistence of Mr. Francis himself, through the testimony of local jail officials, and not as a result of actions by defense counsel.

Hansbrough v. State, 509 So. 2d 1081, 1086 (Fla. 1987)(a jury recommendation of life may not be overridden if there exists "a reasonable basis for the jury to recommend life"); see also Stevens v. State. In Mr. Francis' case, ample mitigation existed which would have provided a "reasonable basis" for a jury recommendation of life. As to the mitigation concerning Mr. Francis' background, no findings or explanation were provided by the trial court as to why such evidence would not have established a reasonable basis supporting the jury's decision. Cf. Cheshire v. State; Stevens v. State. As to the mental health mitigation, as the discussion presented below demonstrates, the trial court employed an inappropriate construction to deny relief -- Dr. Mutter's opinion was not competent evidence, as he never examined or even saw Mr. Francis, and thus the procedures he employed did not comport with the standard of care of the mental health professions (see infra).[13] As to each aspect of the mitigation introduced by Mr. Francis at the 3.850 hearing, the proper override analysis was never applied. See Cheshire, 568 So.2d at 911 ("[U]nder Tedder, the trial court's role is solely to determine whether the evidence in the record was sufficient to form a basis upon which reasonable jurors could rely in recommending life imprisonment" (emphasis added)); Stevens, 552 So.2d at 1086 ("Although a trial judge may not believe the evidence presented in mitigation or find it persuasive, others may .... It takes more than a difference of opinion for a trial

[13] Indeed, Dr. Mutter's rendering of opinions without examining the patient would not be defensible in a civil malpractice action. Surely a capital defendant deserves no less of a protection.

judge to override a jury's life recommendation ...."); Hall v. State, 541 So.2d 1125, 1128 (Fla. 1989) (It makes no difference that the trial judge stated that he would have imposed death notwithstanding the mitigation; the proper standard is whether the jury would have had a reasonable basis supporting a life sentence). The standards of Hall, Cheshire, and Stevens were not applied in the review previously afforded to the ineffective assistance of counsel claim in this case. Stevens has revised the analysis of the majority in Francis, and demonstrates that the claim warrants reconsideration, as the prior analysis was fundamentally in error.

Where, as here, a reasonable basis for life exists and defense counsel without a tactic or strategy fails to present it, ineffective assistance is shown, as the Florida Supreme Court acknowledged, accepting the position of the dissenting Justices in Mr. Francis' case, in Stevens, an opinion issued after the Florida Supreme Court's ruling in Mr. Francis' case. See Stevens v. State, 552 So. 2d at 1087. Where, as here, a petitioner presents sufficient evidence "to undermine [the court's] confidence in the trial judge's decision to reject the jury's recommendation of life," relief is appropriate. Stevens, 552 So.2d at 1087; see also Porter v. Wainwright, 805 F.2d 930, 935-36 (11th Cir. 1986). That standard was not applied when Mr. Francis' case was reviewed.

Indeed an attorney's ineffectiveness in allowing a jury's life recommendation to be overturned, when mitigation exists which supports a verdict of life, demonstrates ineffective

assistance to an even greater degree than cases wherein the jury recommends death. This is so because in cases where the jury recommends life all an effective attorney needs to do is place in the record a "reasonable basis" for that life recommendation. See Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975); Ferry v. State, 507 So. 2d 1373, 1376-77 (Fla. 1987). An attorney who fails to meet this requirement of Florida law, with no reason and based on a lack of preparation, cannot but be deemed ineffective. Stevens. This is especially so in a case such as Mr. Francis', a case involving mitigation which was available for presentation at the time of trial and which was never investigated or developed by defense counsel, without a tactic or strategy. The areas of mitigation which counsel failed to develop, investigate or present included the following.

1. Bobby Francis' childhood and adolescence was a period of great neglect, abuse and limited opportunity, which would have provided a reasonable basis for a life sentence

Family members, expert social workers, and others were available but never contacted by counsel to show that a reasonable basis for life existed. An orphan, Bobby Francis' young life was one of abuse, neglect, impoverishment, discrimination and a hopeless dead-end environment in segregated Liberty City and Overtown, Miami. All of the information presented at the state court post-conviction hearing came from individuals who testified as they would have testifed at sentencing, but counsel did not seek their information or assistance.

Bobby Francis had absolutely no control over the circumstances in which he grew up. His mother, Mame, died in a sudden, tragic and inexplicable manner (although probably from complications of alcoholism) in Bobby's presence. Responsibility for raising Bobby and his three siblings then fell to Bertha Johnson, Mame's sister. Bertha Johnson testified at the evidentiary hearing that her sister was on her way from Georgia to Florida by bus with young Bobby and his baby sister when Mame suddenly died. After burying her sister in Georgia, Bertha took Bobby, his two sisters, and his brother in to live with her and her two children (PC-R. 106-108).

Queen, Bobby's baby sister, clearly remembers reading (and hearing) over and over again the newspaper account of their mother's sudden and bizarre death:

> Q. What did that article say . . .?
>
> A. Well, the article read that woman and two children was on bus and it said little boy was saying, "Mamma wake up, wake up, you are smothering the baby, you are smothering the baby," and at the time apparently someone that was working on the bus heard Bobby hollering "you are smothering the baby," and they came over there.
>
> When they came over there they saw her slumped over me and she was dead.
>
> And then someone asked the little boy where do you live and he said some pink house on the corner.
>
> Q. Do you know that house?
>
> A. No, I don't know anything about it.
>
> Q. How old were you then?
>
> A. Four months old.

(PC-R. 121-122)(emphasis added). Queen also remembers that Bobby

could not discuss his mother as he grew up, despite her urging him to do so (PC-R. 30).

Once Bobby and his siblings moved to Bertha's house, their childhood was infected by the poverty, oppression and racism of the 1950's and 1960's that visited all inhabitants of the Overtown and Liberty City neighborhoods of that era. Bertha testified that she came from Sherman, Georgia to Overtown in 1947 and later moved to Liberty City. Bertha had no money in Georgia and came to Florida because she had heard "that you made good money in Florida," but soon learned that she was unable to pay rent and support a family (PC-R. 101-103).

In those years, young black males, like Bobby, who lived in Overtown and Liberty City had no help, and had no options available to them. The state circuit court also heard the testimony of Sister Rose Martin, a sister in the Catholic Church and principal of St. Francis Xavier Elementary School in Miami, who would have testified originally regarding the conditions and environment in which Bobby Francis grew up. According to her testimony, in the 1950's when Bobby was growing up, social services and special programs to assist the community's black children were non-existent. Sister Rose Martin explained that the poverty and chaotic, distressed family units characteristic in that area at that time adversely affect children's development and judgment, and were significant factors contributing to children's inability to find and serve meaningful roles in the community and society in later years (PC-R. 53-54).

Georgia Ayers, also a long-time resident of the area, and

currently Executive Director of the Alternative Programs Incorporated, which attempts to divert boys from the criminal justice system, also testified regarding the environment in which Bobby was raised. In the 1950's and 1960's, Ms. Ayers worked in Overtown and lived in Liberty City. She testified that in the 1950's and 1960's, those two areas of Miami were segregated communities in which people lived in "shotgun houses" or public "concrete monsters" and from which black people could not escape because no outside help was available. At that time "injustices [were] heaped upon black people," especially young black men who once they had any trouble with the law were foreclosed from getting a job and trying to better themselves. The drug problems were "horrendous," again particularly for young black men (PC-R. 155-58).

Bobby was one of the young black male victims of Liberty City and Overtown. He never had adequate food and proper clothing. Bertha, barely able to provide for her own family (PC-R 103), was overwhelmed when Mame's four children unexpectedly became her responsibility. Although she needed help to take care of Mame's children, Bertha was not able to collect welfare money for Bobby and his siblings (PC-R. 108-09), and food, even if it was available, was barely edible. It sometimes tasted like "dog food" (PC-R. 124).

Not only was Bobby subjected to the harsh, unrelenting conditions of Overtown and Liberty City during his formative years, but also he was deprived of love and nurturing. Queen, his sister, testified that Bobby got the least of everything and

was persistently mistreated. There was no affection in the family, and "[i]t was a real strict, strict life. A house with no love . . . ." (PC-R. 129).

Leroy, the man in Bertha's life during Bobby's childhood and young adult years, created and maintained an atmosphere of violence and fear in the household. All the household members described his abusive and drunken behavior. Bobby's sister Queen testified that Leroy would fight with Bertha about her check because he wanted to spend the money on liquor. Leroy would hit Bertha and "slap her around" in the presence of the children, and once shot at her during an argument. Everyone in the family was afraid of Leroy (PC-R. 125-27).

Bertha Johnson testified at the evidentiary hearing that the children were afraid of Leroy, and that sometimes Bertha had to move out of the house to get away from him. Finally, Bertha moved out for good because she "had enough of him." (PC-R. 113-14). Carrie Saintlat, who was once married to Bertha's son and lived with the family, testified that Leroy would get drunk and violent, and that Bertha was afraid of him (PC-R. 136-37).

The absence of love and warmth in Bobby's childhood home was not solely the result of poverty, a drunken stepfather, and poor parenting skills. Bobby was an abused child, and he was abused by several members of his adopted family. Queen described one incident in which Bertha tied Bobby to the Spanish lime tree in the backyard, wet him with the garden hose, and then beat him with a broken broomstick, and another incident in which Bertha's son Joe shot at Bobby's feet with a B-B gun, making Bobby dance

around and cry (PC-R. 127-28). Bobby was also the victim of Leroy's cruelty, as Carrie Saintlat explained:

A. Well, his stepfather, Leroy, was sort of a cruel man.

Q. What do you mean?

A. Well, he would beat him and run him away from the house and they would lock the food up in the refrigerator.

Q. How would he beat him?

A. He would beat him with the belt.

Q. Hard, not hard?

A. Yes, hard.

Q. Would it leave marks?

A. Yes, Bobby would run, you know, run outside.

Q. Would the belt leave marks or not?

A. Yes.

Q. Where?

A. Whips on him across his back, you know.

Q. And his bottom?

A. His back mostly because he would just beat him across the head and back, wherever.

Q. What would Bobby do that would deserve this?

A. Nothing really, because Bobby was a young fellow, I guess he was between 11 and 12 years old and there wasn't too much that he could have done.

He was just treated different from the rest of the kids that were there.

Q. Did the other kids get beatings like that?

A. No.

Q. How often did it happen?

A. Well, as often, when he could catch Bobby at

home.

Bobby would stay outside, keep from coming in, he would try to come in after he had gone to bed at night.

Q. Leroy?

A. Yes.

(PC-R. 134-135)(emphasis added). Bobby was also severly neglected, deprived of food and clothing. According to Carrie Saintlat, "Bobby wasn't treated so well for a kid. And half of the time he didn't have the proper shoes or clothes to wear to school." Because Leroy would drive Bobby away from home, Bobby "didn't have food half of the time" and Carrie would "slip and feed him" (PC-R. 134). As Queen described it, Bobby was forced to wear the same clothes almost every day (PC-R. 123). In fact, Bobby was so poorly dressed that eventually he would stay away from school because of his embarrassment, and resorted to putting cardboard in the bottom of his shoes (PC-R. 138-39).

Whenever there was food in the house, it was hoarded and kept under lock and key by Bertha and Leroy. Bobby could not get to it, and so did not eat properly. Bobby got "[m]aybe one [meal a day], some days none" (PC-R. 138).

Bobby witnessed his mother's death at age six. An orphan, he then moved to inner city segregated Miami, where he got one meal a day, wore cardboard in his shoes, had little or no real clothing, was beaten and kept from his house by his abusive, drunken stepfather, was tied to a tree and beaten by his aunt, and was presented no option for leaving that setting and culture. Any or all of this would have provided a reasonable basis for

life, but it was not presented. The State offered no refutation to it, and presented no reason why it could or should not have been presented. Counsel, for no tactical reason, simply failed to do it, as he acknowledged.

2. Mental Health Mitigation

The mental condition of a capital defendant is a critical factor for sentencer consideration. Trial counsel sought no mental health evaluation of Mr. Francis. Had he conducted a background investigation, counsel would have discovered that Mr. Francis' mother was alcoholic, and that her excessive drinking damaged Bobby in utero, as he would have discovered that the circumstances of Mr. Francis' upbringing had effects on his functioning.

Dr. Merikangas, a qualified mental health practitioner who has special training, skill, and experience in neurology, examined Mr. Francis and testified at the 3.850 hearing (PC-R. 31-36). Dr. Merikangas also has specific expertise regarding alcohol and its effects (PC-R. 36-38). He is a respected neurologist and psychiatrist, and in his examination he employed the procedures recognized as appropriate by mental health professionals.

To rebut the testimony of Dr. Merikangas, the State called Dr. Mutter. Dr. Mutter never examined Mr. Francis. He never saw him, and thus -- in providing opinions on issues of neurology without examining the individual -- failed to meet the standard of care of the mental health professions. See Kaplan and Sadock, Comprehensive Textbook of Psychiatry, 4th Ed. (an examination of

the patient is the first step in any neurologic or psychiatric assessment); Report of Dr. Phillips (appended hereto); Report of Dr. Carbonell (appended hereto). Without examining Mr. Francis, Dr. Mutter's conclusions were not reliable, and it was error for the courts to rely on them. The opinions Dr. Mutter provided could not be deemed to be based on "facts or data ... of a type reasonably relied upon by experts," Fla. Stat. sections 90.704; 90.702, since the expert did not take even the first step to a proper assessment -- an examination of the patient. The opinion, therefore, was not competent evidence on which to base a denial of relief.

Dr. Merikangas evaluated Bobby Francis concerning his neuropsychiatric condition and considered whether that condition would have any relevance to mitigating circumstances (PC-R. 36). To perform this evaluation competently, Dr. Merikangas consulted extensive records and documents regarding Mr. Francis and his background (PC-R. 38-40). Dr. Merikangas performed a neurological examination of Mr. Francis and conducted an interview with him (PC-R. 40-43).

During the examination, Dr. Merikangas noted that Mr. Francis "has a very peculiar shape of his face and skull" (something observable to lay people such as defense counsel) and suffers from hypertelorism, a condition in which the eyes are too far apart and protruding. Mr. Francis also has an abnormal skeletal formation in the roof of his mouth which is present in some cases of congenital brain damage, neurodevelopmental malformations of his ears, and hyperextendable fingers.

Abnormalities such as those observed by Dr. Merikangas are typical of people who have been exposed to excessive amounts of alcohol while they are in the mother's womb. The neurological examination also revealed that something is wrong with the sensory pathways on the left side of Mr. Francis' brain (PC-R. 43-47). Since he never examined Mr. Francis, Dr. Mutter could not assess these conditions reasonably or professionally.

During the time that Dr. Merikangas spent with Mr. Francis, he also conducted a psychiatric interview of him. Bobby Francis did not appear mentally retarded, but Dr. Merikangas observed that he was not as intelligent as he appeared (See PC-R. at 60-61), a fact confirmed by recent testing (see Report of Dr. Carbonell). His intelligence quotient, however, is not related to the presence or absence of neurological dysfunction because a person can be intelligent and neurologically impaired at the same time (PC-R. 47-48). Dr. Mutter's testimony that people with fetal alcohol syndrome are mentally retarded is simply not the case, as the mental health professions recognize. See Kaplan and Sadock, Comprehensive Textbook of Psychiatry, 4th Ed.; Report of Dr. Carbonell (appended hereto); Report of Dr. Phillips (appended hereto).

Based on all this information -- the evaluation and interview, the records and documents, and the doctor's training and experience -- Dr. Merikangas concluded that Bobby Francis suffered from brain damage/fetal alcohol syndrome (PC-R. 48). As Dr. Merikangas explained, fetal alcohol syndrome is a neurological condition which affects an individual's ability to

act in a volitional and rational manner:

Q. What does that [fetal alcohol syndrome] mean?

A. This is constellation of things that include a difficulty with the emotional life, difficulty with behavioral control, difficulty with attention span and these people generally have school and social difficulties that is so associated with physical abnormalities that I have already mentioned the characteristic facial expression other neurological findings and based upon this facial appearance and the history which includes his heavy alcoholism and other possibly also mother and possibly the fair low birth weight need of special care in school, failing grades and his possible other malformations which might include a heart problem, I didn't have the equipment to fully evaluate, that I believe he suffers from this syndrome of fetal alcoholic syndrome.

* * * *

Q. Most lay people and professionals in the field of law are familiar with psychiatric condition perhaps having an effect on criminal responsibility.

How is it that a neurological condition if at all can have any effect on individual's ability to act in a volitional matter?

A. Well, I think that lawyers may not be totally aware of it, but there certainly is a very common neurologic condition of responsibility, Alzheimers or senile dementia, this is a state where people have absolutely no memory at all and are violent and dangerous acts without any volitionality to understand what they're doing with dementia.

Q. Is that a psychiatric condition?

A. Well, it's a neurological one it's also psychiatric and the psychiatric diagnosis classification that would be called organic brain syndrome fetal alcoholic syndrome is also is a major cause of mental retardation even when it does not result in lowered I.Q. which is the definition of retardation it causes difficulties with impulsive behavior with the basic lack of judgment and reasoning, with increased higher activity in childhood that interferes with learning. Children with this have a tremendous increased difficulty with authority, with rules, with the law with learnings and it is certainly a brain influence that reduces volition and understanding.

Q. Volition and understanding is that what you said, Doctor?

A. Yes.

Q. What about leading to violence and/or abberational behavior?

A. It is quite frequent that it results in that.

(PC-R. 48-51).

The critical importance of Dr. Merikangas' diagnosis of Bobby Francis' condition relates to the penalty phase of this trial. Fetal alcohol syndrome (i.e., brain damage) affects an individual's capacity to appreciate the consequences of his or her conduct. Dr. Merikangas explained:

Q. Finally, Doctor, are you familiar at least generally or roughly with the Florida death penalty statute in its list of mitigating and aggravating circumstances?

A. Yes, I am.

Q. The report that you stated to the Court dated October 14th, 1987. Which is contained in the appendix to a motion that was filed here before the Court, indicates an opinion with regard to Mr. Francis' capacity to appreciate the criminality of his actions, et cetera, I want to be absolutely certain, are you saying that this gentleman was insane at the time of the offense?

A. No, I am not.

Q. What are you saying?

A. I am saying that he is a brain damaged and defective individual. And that his capacity is thereby diminished. I was not questioned about legal insanity at the time of the offense.

But that based upon his neurologic condition he's not a normal human being in that he has in my opinion the diminished capacity.

Q. Is that his fault?

A. No, it isn't, it's unfortunate that it was

his mother's fault.

Q. And how does that have an affect and I may be getting repetitive if I am I will be happy to be cut off by you or any of the other participants here how does that affect his capacity to understand what he is doing, control what he is doing, act in a fully and normal volitional manner like it would be hoped all of us listening and speaking here today could act.

* * * *

A. Yes, I am saying that the relationship is very complicated and one could not go predict certainly from maternal drinking the outcome of a child one could say seeing a child who has brain damage from birth on the bases of excessive intake of alcohol by the mother and knowing Mr. Marion's history of what amount to a very deprived and underprivileged and probably abused background if I can believe the reports that I have read here I'm sure that there is a great deal of truth to the poor upbringing that children who are brain damaged or less able to form the what we would call the abstract reasoning and the judgment and the internal stability to learn from experience and that they may learn things which are quite at odds with the generally accepted norm in that their perception of what is right and wrong may be wrong not only because of the diminished mental capacity because of simply being brought up in ways that cause them to act in ways which we might consider antisocial they may believe this is the right way to act and to engage in career behavior which is beyond fringes of normal legal behavior, but really not be aware that this is something unusual.

Their damaged brain this is how they learn to adapt and to not benefit from experience and schooling as normal people do.

(PC-R. 56-60). People who suffer from brain damage have problems with emotional lability, impulse control, and judgment, factors relevant to the circumtances of this offense. Such evidence is without question relevant to an assessment of the appropriateness of sentence, and it provides a reasonable basis for a jury's verdict, whether the trial judge credits it or not. See Carter v. State, 560 So.2d 1166, 1168-69 (Fla. 1990) (although some people may disagree with the evidence of brain damage, other

reasonable people may agree with it, and a reasonable basis for the jury's verdict of life was therefore established).

In order to counter Dr. Merikangas' account, the State called Dr. Mutter, a psychiatrist who often testifies for the State in Florida capital proceedings, and a doctor who, unlike Dr. Merikangas, does not practice neurology. As noted, Dr. Mutter never examined Mr. Francis. Significantly, while he disagreed with Dr. Merikangas' conclusions, he agreed that the abnormalities which Dr. Merikangas noted in his examination of Mr. Francis were signs of fetal alcohol syndrome (PC-R. 190-96). But the problem with Dr. Mutter's ultimate opinion rested on his failure to examine the patient, a failure which (professionally and as a matter of evidentiary proof) rendered the opinion inadequate and invalid. The reports of Dr. Phillips (a highly qualified neurologist and psychiatrist) and Dr. Carbonell (a highly qualified neuropsychologist who recently tested Mr. Francis) are appended hereto and incorporated herein. Their analysis tellingly speak to the iadequacies of Dr. Mutter's account; he failed to employ the steps appropriate under the recognized standards of care by mental health practitioners, and his opinions therefore could not be deemed reliable.

The Rule 3.850 hearing judge found in favor of Dr. Mutter, a finding which did not account for the professional inadequacies discussed above. Just as, if not more, significantly, the finding does not comport with Stevens, Cheshire, Carter or Hall. The relevant question is whether mental health testimony such as Dr. Merikangas' would have provided a "reasonable basis," Carter;

Cheshire, for a jury recommendation of life, and not whether the trial judge agreed with what the defense's or the State's experts had to say. See Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1989)(the central question regarding error in a Florida capital sentencing proceeding is whether the evidence proffered by the petitioner would have provided a reasonable mitigating basis for the jury's consideration, irrespective of the weight which the judge may have ascribed to the proffered evidence); Stevens (same); Carter (same); Cheshire (same).

3. Conclusion

The prior disposition of this claim involves error that prejudicially denied fundamental constitutional rights. Kennedy v. Wainwright, 483 So.2d 424, 426 (Fla. 1986). That disposition is in conflict with Stevens, Hall, and Cheshire. Stevens was decided by the Florida Supreme Court after Mr. Francis' case and adopted the position of the dissenting opinions in Francis. Reconsideration is appropriate.

CONCLUSION

For the reasons set forth above, Mr. Francis respectfully requests that the writ of habeas corpus, a stay of execution, and all other and further relief that this Honorable Court deems just and proper be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery/facsimile transmission/United States Mail, first class, postage prepaid, to Ralph Barreira, Assistant Attorney General, Department of Legal Affairs, 401 N.W. Second Avenue, Suite 921N, Miami, Florida 33128, this 17th day of June, 1991.

Attorney