IN THE SUPREME COURT OF FLORIDA

NO. 75631

BERNARD BOLENDER,

Petitioner,

v.

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

Respondent.

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

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

A. JURISDICTION

This is an original action under Fla. R. App. P. 9.100(a). This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents constitutional issues which directly concern the judgment of this Court during the appellate process, and the legality of Mr. Bolender's capital convictions and sentences of death. Mr. Bolender was sentenced to death, and on direct appeal this Court affirmed the judgment and sentence. Bolender v. State, 422 So. 2d 833 (Fla. 1982). Jurisdiction of this action lies in this Court, see, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein involved the appellate review process. See Wilson v. Wainwrisht, 474 So. 2d 1163 (Fla. 1985); Baggett v. Wainwrisht, 229 So. 2d 239, 243 (Fla. 1969); see also Johnson v. Wainwrisht, 498 So. 2d 938 (Fla. 1987); cf. Brown v. Wainwrisht, 392 So. 2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Bolender to raise the claims presented herein.

This Court has consistently maintained an especially vigilant control over capital cases, exercising a special scope of review, see Elledge v. State, 346 So. 2d 998, 1002 (Fla.

1977); Wilson v. Wainwright, 474 So. 2d at 1165, and has not hesitated in exercising its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital trial and sentencing proceedings. This petition presents substantial constitutional questions which go to the heart of the fundamental fairness and reliability of Mr. Bolender's capital convictions and sentences of death, and of this Court's appellate review.

As discussed herein, the ends of justice call on the Court to grant the relief sought in this case. The petition pleads claims involving fundamental constitutional error. See Dallas v. Wainwrisht, 175 So. 2d 785 (Fla. 1965); Palmes v. Wainwrisht, 460 So. 2d 362 (Fla. 1984). The petition includes claims predicated on significant, fundamental, and retroactive changes in constitutional law. See, e.g., Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989); Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987); Tafero v. Wainwright, 459 So. 2d 1034, 1035 (Fla. 1984); Edwards v. State, 393 So. 2d 597, 600 n.4 (Fla. 3d DCA), petition denied, 402 So. 2d 613 (Fla. 1981); cf. Witt v. State, 387 So. 2d 922 (Fla. 1980). The petition also involves claims of ineffective assistance of counsel on appeal. See Knight v. State, 394 So. 2d 997, 999 (Fla. 1981); Wilson v. Wainwrisht, supra; Johnson v. Wainwrisht, supra. These and other reasons demonstrate that the Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those herein

pled, is warranted in this action. As the petition shows, habeas corpus relief would be more than proper on the basis of Mr. Bolender's claims.

Mr. Bolender's claims are presented below. They demonstrate that habeas corpus relief is proper.

B. REQUEST FOR STAY OF EXECUTION

Mr. Bolender's petition includes a request that the Court stay his execution, presently scheduled for Wednesday, March 7, 1990. As will be shown, the issues presented are substantial and warrant a stay of execution. This Court has not hesitated to stay executions when warranted to ensure judicious consideration of the issues presented by petitioners litigating during the pendency of a death warrant. See Marek v. Duaaer (No. 73,175, Fla. Nov. 8, 1988); Gore v. Duaaer (No. 72,202, Fla. April 28, 1988); Riley v. Wainwright (No. 69,563, Fla., Nov. 3, 1986).

The claims presented by Mr. Bolender's petition are no less substantial than those involved in the cases cited above. He therefore respectfully urges that the Court enter an order staying his execution, and, thereafter, that the Court grant habeas corpus relief.

GROUNDS FOR HABEAS CORPUS RELIEF

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

CLAIM I

MR. BOLENDER WAS DENIED HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS BECAUSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE ON APPEAL

A. COUNSEL'S NON-ASSISTANCE ON APPEAL

The appellate level right to counsel also comprehends the sixth amendment right to effective assistance of counsel. Evitts v. Lucev, 105 S. Ct. **830** (1985). Appellate counsel must function as **"an** active advocate," Anders v. California, 386 U.S. **738, 744, 745** (1967), providing his client the "expert professional. . . assistance. . . necessary in a system governed by complex laws and rules and procedures. . . ." Lucev, **105** S. Ct. at **835** n.6.

Even a single, isolated error on the part of counsel may be

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

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

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

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

Appellate counsel here failed under these standards. The "adversarial testing process" did not work in Mr. Bolender's direct appeal. See Matire v. Wainwrisht, 811 F.2d 1430, 1438 (11th Cir. 1987), citing Strickland v. Washinston, 466 U.S. 668, 690 (1984). See also Johnson v. Wainwrisht, supra, 498 So. 2d 938; Wilson v. Wainwrisht, supra.

To prevail on his claim of ineffective assistance of appellate counsel Mr. Bolender must show: 1) deficient performance, and 2) prejudice. Matire v. Wainwrisht, 811 F.2d at 1435. Mr. Bolender can.

B. DEFICIENT PERFORMANCE

The deficiencies in counsel's performance during Mr. Bolender's direct appeal are manifold. In this capital case, involving four capital convictions and four death sentences, appellate counsel presented a total of twenty-two pages of argument and raised only four claims in his briefs to this Court. That counsel's performance was deficient becomes manifest when the four arguments contained in the twenty-two pages he submitted in this capital appeal are compared to the substantial issues

that counsel ineffectively ignored -- issues involving per se reversible error, and substantial claims for relief. Cf. Matire v. Wainwright, supra; Johnson v. Wainwright, supra; Wilson v. Wainwright, supra. Counsel's deficiencies here were (indeed could not but have been) based upon ignorance of the law.

C. PREJUDICE

What counsel ineffectively failed to discuss would have provided his client with relief. The non-raised issues (presented infra in the body of this petition) "leaped out upon even a casual reading of transcript." Matire, 811 F.2d at 1438. The claims involved clear, per se reversible error. See Johnson v. Wainwright, 498 So. 2d 939; Matire, 811 F.2d at 1438. All were fully cognizable: no trial-level contemporaneous objection bar applied for most involved fundamental error and/or challenges to the trial court's sentencing order. Such penalty phase claims (involving a sentencing court's orders) are always subject to the Florida Supreme Court's review on direct appeal.

The claims required no elaborate presentation. Counsel only had to direct the Court to the errors. See Johnson, supra, 498 So. 2d at 939; Wilson, supra, 474 So. 2d at 1165. The Court would have done the rest, pursuant to clear legal requirements which were and are open to no dispute (see infra). Mr. Bolender's convictions and sentences would have been reversed but for counsel's non-advocacy.

This case is rife with examples of claims which "leaped out

upon even a casual reading of transcript," Matire, supra, 811 F.2d at 1438, but which were ineffectively ignored by counsel. The claims are discussed in the body of this petition. On their merits, they demonstrate that relief is proper. By their substance, they demonstrate that appellate counsel's performance was deficient and prejudicial.

CLAIM II

MR. BOLENDER WAS DENIED HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS BECAUSE THE SENTENCING COURT USED IDENTICAL UNDERLYING PREDICATES TO FIND MULTIPLE AGGRAVATING CIRCUMSTANCES.

A. INTRODUCTION

This Court has consistently held that the "doubling" of aggravating circumstances is flatly improper. See Provence v. State, 337 So. 2d 783, 786 (Fla. 1976); Clark v. State, 379 So. 2d 97, 104 (Fla. 1980); Welty v. State, 402 So. 2d 1139 (Fla. 1981). In this case, the trial court order overriding the jury's life recommendation reflected this impermissible "doubling" regarding three sets of aggravating circumstances (robbery/pecuniary gain; avoiding arrest/hindering law enforcement; heinous, atrocious or cruel/cold, calculated and premeditated). These issues involve fundamental error. No contemporaneous objection rule can be applied, nor is any applicable to these sentencing-order-based claims. This Court should now correct the clear errors which were not corrected on direct appeal.

In overriding the jury's life recommendation, the trial court found eight aggravating circumstances (R. **228-33**). The court first found the "under sentence of imprisonment" and "creating great risk of death to many" aggravating factors applicable (R. **228-30**). As to the remaining six aggravating factors applied by the trial court, the sentencing order stated:

> (D)(F)The capital felony was committed during the perpetration of a robbery and kidnapping and was committed for pecuniary gain.
> The evidence revealed that the purpose of this incident had its roots in a plan by the defendant to rob the victims of a kilo of cocaine and any money they possessed. This was evidenced by the fact that the victims were held captive and tortured and threatened with death unless they revealed the whereabouts of some twenty **(20)** kilos of cocaine. At least one kilo of cocaine was taken from Scott Bennett at gun point, and more than two thousand dollars was removed from the car of one of the victims. This money, and the proceeds of the eventual sale of the cocaine (a kilo of cocaine being worth upwards of sixty five thousand dollars), was divided amongst the participants including the defendant. In addition, jewelry and other valuables were removed from the victims by force.
>
> (E)(G)The crimes for which the defendant has been sentenced was committed for the purpose of avoiding or preventing a lawful arrest and to disrupt or hinder the lawful exercise of law enforcement.
> The evidence is myriad as to the effort put forth by the defendant and others to make certain this crime went undetected. The defendant removed or caused to be removed carpeting, clothing, blood stains, fingerprints and any and all existing evidence that the crime had been committed. Numerous items were gathered and placed in bags and pillow cases and taken out of the

house to be destroyed. The defendant and others went so far as to attempt to destroy the bodies of the victims and all of the evidence gathered in the clean up procedure, by trying to set the car containing the bodies and the evidence on fire. The guns used by the defendant and others were dumped into a canal. All of the victims' clothing and identifying papers and items were removed from the bodies and attempts were made to destroy them in the fire. Witnesses such as Robert McCall and Diane Macker who aided the defendant in removing the evidence, were told to remain silent and not to tell the police anything concerning the incident, and arrangements were made to install new carpeting and to repaint the house to hide any evidence that the crime had occurred there. All of this activity was designed to prevent detection and any subsequent arrest of any of the individuals involved, and to hinder the police in their efforts to solve the crime.

(H)(I)These crimes were especially henious, atrocious and cruel, and were committed in a cold, calculated and premeditated manner without any pretense or moral or legal justification.

The victims in this case were accosted at gun point and forced to strip to their underwear and made to lie down on the floor where they were then bound and gagged. At one point one victim was forced to get dressed again and to help lure inside the home, Nicomedes Hernandez where once inside, Hernandez was subjected to the same treatment.

The victims were terrorized over a period of several hours with threats of death and great bodily harm, and were in fact tortured and maimed. The defendant and others used a hot knife to burn Nicomedes Hernandez on the back. In addition, Hernandez and Merino suffered slashes to their bodies from a knife wielded by the defendant in an effort to force them to talk and reveal the whereabouts of additional cocaine.

All victims were bound and gagged and were helpless to resist during this entire period. The defendant and others with total disregard

> for their victims, ignored their pleas for mercy and wrapped the victims in bedspreads and sheets and attempted to silence them by strangulation and kicking and beating them in the head with blunt instruments including a bat.
> Hernandez was also shot through the leg by the defendant in an effort to make him talk and reveal the whereabouts of cocaine.
> All the victims were repeatedly stabbed with knives about their body and Hernandez was in addition, shot in the head after he was placed in the car just prior to trying to burn the automobile.
> John Merino was wrapped in a bean bag chair and because he was still alive, breathed into his lungs Styrofoam pellets which surrounded his body.
> Gasoline was placed in and around the car and the area set on fire in an effort to destroy the bodies and the evidence. The presence of a high level of carbon monoxide in the body of Merino indicated he was still alive after being placed in the car, but would surely have been consumed with the others had the fire taken its course and not had been discovered by a passerby and extinguished.
> All of these acts by the defendant and others were done with cold, calculated premeditation designed to inflict the greatest amount of pain and suffering without regard for the basic humanistic concepts of mercy or dignity which one would show to even a wounded or suffering animal. Such acts by the defendant reflect a complete lack of pity or conscience.

(R. *230-33*)

On direct appeal, this Court interpreted the sentencing order as finding "all but one aggravating circumstance to apply," Bolender v. State, *422* So. *2d 833,* 837 (Fla. 1982), and held that the "under sentence" and "great risk" aggravating factors were improperly applied. Id. at *837-38.* However, the remaining aggravating factors, which all involved impermissible "doubling,"

were allowed to stand. Id. at 838. Thus, Mr. Bolender's death sentence -- imposed over the jury's life recommendation -- is entirely based upon "doubled" aggravating factors. This Court should now correct these fundamental errors.

B. ROBBERY/PECUNIARY GAIN

The sentencing order demonstrates that the trial court used identical underlying predicates to establish these two separate aggravating factors. The order states that the purpose of the incident was to rob the victims and that Mr. Bolender received a share of the proceeds of the robbery. In other words, according to the sentencing order, the robbery was committed for pecuniary sain.[1]

The sentencing order thus involved the classically condemned unconstitutional "doubling up" and overbroad application of aggravating factors. Mr. Bolender's sentences of death were and are fundamentally unreliable and unfair, and violate the eighth and fourteenth amendments. See Provence, 337 So. 2d at 786. Cf. Godfrev v. Georgia, 446 U.S. 420 (1980)(condemning overbroad application of aggravating factors). Such procedures violate the

[1]The improper doubling is not cured by the trial court's passing reference to kidnapping. The sentencing order demonstrates that the court relied on evidence that the victims were held captive as evidence of robbery: "This [i.e., the plan to rob the victims] was evidenced by the fact that the victims were held captive and tortured and threatened with death unless they revealed the whereabouts of some twenty (20) kilos of cocaine" (R. 230) (emphasis added).

constitutional mandate that a sentence of death not be arbitrarily imposed, and that the application of aggravating factors "genuinely narrow the class of persons eligible for the death penalty." Zant v. Stephens, 462 U.S. 862, 876 (1983).

In Mr. Bolender's case, these improperly doubled aggravating circumstances were relied upon in overriding the jury's life recommendation. This error thus cannot be characterized as harmless.

C. AVOIDING ARREST/HINDERING LAW ENFORCEMENT

The sentencing order also demonstrates that the trial court relied on identical factual predicates to establish these two separate aggravating factors. The order states that the two factors apply and recites only **one** set of facts in support of these **two** findings, making no distinction between the two factors.

This Court has consistently held that use of the "same incidents" as a basis for finding both the avoiding arrest and hindering law enforcement aggravating factors constitutes the "doubling-up of aggravating circumstances [which] violates the rule in Provence." White v. State, 403 So. 2d 331, 338 (Fla. 1981); Welty, supra, 402 So. 2d at 1164; Francois v. State, 407 So. 2d 885, 891 (Fla. 1981); Kennedy v. State, 455 So. 2d 351, 354 (Fla. 1984); Thomas v. State, 456 So. 2d 454, 459 (Fla. 1984). This is precisely what occurred in Mr. Bolender's case,

in violation of the eighth and fourteenth amendments.[2]

This type of "doubling" is also unconstitutional; it also renders a capital sentencing proceeding fundamentally unreliable and unfair. See Welty, supra; Clark, supra. It also results in unconstitutionally overbroad application of aggravating circumstances, supra, Godfrey, supra, and fails to genuinely narrow the class of persons eligible for death. The result is an improper capital sentence, particularly in a case in which the jury unanimously reaches a verdict of life.

D. HEINOUS, ATROCIOUS OR CRUEL/COLD, CALCULATED AND PREMEDITATED

Similarly, the sentencing order demonstrates that the trial court relied upon a single predicate in applying these aggravating factors. The order's summary regarding the application of these two factors establishes that the court made no distinction between them: "All of these acts by the defendant and others were done with cold, calculated premeditation designed

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[2]Neither the avoiding arrest nor hindering law enforcement aggravating factors should have been applied in Mr. Bolender's case. The sentencing order clearly bases the application of both factors on events which occurred after the homicides were completed. This is contrary to the plain language of the statute, see Fla. Stat. section 921.141(5)(e), (g), to this Court's established standards, see, e.g., Herzog v. State, 439 So. 2d 1372, 1380 (Fla. 1983); cf. Blair v. State, 406 So. 2d 1106, 1109 (Fla. 1981), and to the eighth and fourteenth amendments. This issue is discussed in other portions of this petition.

to inflict the greatest amount of pain and suffering" (R. 233).

In assessing the applicability of aggravating factors, this Court consistently distinguishes between the cold, calculated and premeditated factor and the heinous, atrocious or cruel factor, requiring "distinct proof as to each factor." Hill v. State, 422 So. 2d 816, 819 (Fla. 1982). In Hardwick v. State, 521 So. 2d 1071, 1076 (Fla. 1988), the Court approved the cold, calculated factor because the facts established the "calculation and prearranged design" and "heightened premeditation necessary for this aggravating factor." At the same time, the Court approved the heinous, atrocious or cruel factor, based on different facts and a different limiting construction. Id. The Court explained that these two factors require "separate predicates"; "[t]he factor of heinous, atrocious and cruel arises from the means actually employed in the killing; the factor of cold, calculated and premeditated refers to the degree of calculation and planning that preceded the killing." Id. at 1077.

As with the factors discussed in preceding sections, the heinous, atrocious or cruel and cold, calculated and premeditated aggravating factors were impermissibly "doubled" in Mr. Bolender's case. This type of "doubling" is also unconstitutional, also renders a capital sentencing proceeding fundamentally unreliable and unfair, also results in the unconstitutionally overbroad application of aggravating circumstances, and also fails to genuinely narrow the class of

persons eligible for death. The result is an improper death sentence in a jury-override case.

E. CONCLUSION

At least three aggravating circumstances should not have been applied in this case,[3] in addition to the two which this Court struck on direct appeal. Thus, at the most, only three aggravating circumstances should have been considered in this case -- a case involving the override of a jury's life recommendation. The balance which would have been reached without the improper aggravating factors would have been quite different than the balance resulting from these uncorrected errors, as the jury's life recommendation demonstrates. In fact, before the jury, the prosecutor argued that only four, "possibly" five, aggravating circumstances were applicable (R. 1387; see also R. 1382 [prosecutor conceding to jury that hindering law enforcement factor does not apply]). Without the improper "doubling" utilized by the trial court, the jury concluded that life was the appropriate sentence. The improper "doubling" skewed the trial court's balancing, and resulted in an arbitrary

[3]The avoiding arrest and hindering law enforcement aggravating circumstances were themselves unconstitutionally applied in this case, as discussed in other portions of this petition. Thus, although the improper "doubling" of these two factors should have, at least, resulted in the striking of one of them, in fact both factors should have been stricken.

and unreliable death sentence.

This Court has emphasized that sentencing orders must reflect that "the trial court imposed the death sentence based on a 'well reasoned application' of the aggravating and mitigating factors." Rhodes v. State, 547 So. 2d 1201, 1207 (Fla. 1989), quoting Van Royal v. State, 497 So. 2d 625, 628 (Fla. 1986); see also State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973)(sentencing findings should reflect a "reasoned judgment" by the trial court). In Mr. Bolender's case, the sentencing order does not reflect the required "well-reasoned application" of aggravating factors, but the wholesale, uncritical application of multiple factors based on identical underlying predicates. This violates this Court's precedents, as well as the eighth and fourteenth amendments. At the time of Mr. Bolender's direct appeal, this Court had clearly established that the "doubling" of aggravating circumstances is impermissible. These errors "leaped out," Matire, from the record, but appellate counsel failed to bring them to this Court's attention. Mr. Bolender was thus deprived of the reversal to which he was entitled. This Court should now correct these fundamental errors. Relief is proper.

CLAIM III

THE APPLICATION OF THE AVOIDING ARREST AND HINDERING LAW ENFORCEMENT AGGRAVATING CIRCUMSTANCES IN THIS CASE VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS.

In overriding the jury's life recommendation, the trial

court found the existence of the aggravating factors involving avoiding arrest and hindering law enforcement (R. 231-32). The trial court's findings regarding these two aggravating circumstances relied solely upon events occurring after the victims' deaths, contrary to the plain language of the statute, **see** Fla. Stat. section 921.141(5)(e), (g), and to this Court's settled precedents. See e.g., Riley v. State, 366 So. 2d 19, 22 (Fla. 1978); Menendez v. State, 368 So. 2d 1278, 1282 (Fla. 1979); Herzog v. State, 439 So. 2d 1372, 1379 (Fla. 1983); cf. Blair v. State, 406 So. 2d 1106, 1109 (Fla. 1981). As a result, these aggravating factors were overbroadly applied, **see** Godfrey v. Georgia, 446 U.S. 420 (1980); Maynard v. Cartwright, 108 S. Ct. 1853 (1988), and failed to genuinely narrow the class of persons eligible for the death sentence. **See** Zant v. Stephens, 462 U.S. 862, 876 (1983). Mr. Bolender is entitled to relief, for his death sentence in this jury override was imposed in violation of the eighth and fourteenth amendments.

Regarding the application of these two aggravating circumstances, the trial court's sentencing order stated:

> The crimes for which the defendant has been sentenced was committed for the purpose of avoiding or preventing a lawful arrest and to disrupt or hinder the lawful exercise of law enforcement.
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> The evidence is myriad as to the effort put forth by the defendant and others to make certain this crime went undetected. The defendant removed or caused to be removed carpeting, clothing, blood stains, fingerprints and any and all existing

> evidence that the crime had been committed. Numerous items were gathered and placed in bags and pillow cases and taken out of the house to be destroyed. The defendant and others went so far as to attempt to destroy the bodies of the victims and all of the evidence gathered in the clean up procedure, by trying to set the car containing the bodies and the evidence on fire. The guns used by the defendant and others were dumped into a canal. All of the victims' clothing and identifying papers and items were removed from the bodies and attempts were made to destroy them in the fire. Witnesses such as Robert McCall and Diane Macker who aided the defendant in removing the evidence, were told to remain silent and not to tell the police anything concerning the incident, and arrangements were made to install new carpeting and to repaint the house to hide any evidence that the crime had occurred there. All of this activity was designed to prevent detection and any subsequent arrest of any of the individuals involved, and to hinder the police in their efforts to solve the crime.

(R. 231-32). As is clear from the court's findings, all of the events upon which the court relied occurred after the victims' deaths.

Florida's capital sentencing statute provides that these two aggravating circumstances apply when:

> (e) The capital felony was committed for the purpose of avoiding or preventing a lawful or effecting an escape from custody.
>
> . . . .
>
> (g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

Fla. Stat. 921.141(5)(e), (g) (emphasis added). The plain

language of the statute clearly contemplates that these factors apply when the homicide is committed for either of these reasons. That is, for either of these factors to apply, the motive for the homicide must be either to avoid arrest or to hinder enforcement of the laws.

The trial court's findings in Mr. Bolender's case, however, demonstrate that the court relied upon events which were intended to conceal the homicides and not upon events which provided a motive for the homicides. A similar issue arose in Herzog, supra, where the trial court applied the avoiding arrest aggravating factor based on the facts that the defendant took the victim's body to a desolate area and set it on fire and that the defendant misled the police when he was questioned in an attempt to avoid detection. Herzog, 439 So. 2d at 1379. Holding that this factor is only applicable when the victim is a law enforcement officer or when "the dominant motive of the murder was for the elimination of witnesses," this Court held that the factor was improperly applied under the facts found by the trial court in Herzog. Id.

As indicated in Herzog, this Court has provided a limiting construction of the avoiding arrest aggravating circumstance. The decisions of this Court have often discussed the similarities or factual overlap inherent in the avoiding arrest and hindering law enforcement aggravating circumstances. See, e.g., Francois v. State, 407 So. 2d 885, 891 (Fla. 1981); Blair v. State, 406

So. 2d 1103, 1108 (Fla. 1981); White v. State, 403 So. 2d 331 (Fla. 1981). Thus, this Court's decisions construing section 921.141(5)(e) are also instructive in construing section 921.141(5)(g). Those decisions demonstrate the impropriety of the application of these two aggravators in this case.

In Menendez v. State, 368 So. 2d 1278 (Fla. 1979), ~~appeal~~ after remand, 419 So. 2d 312 (Fla. 1982), this Court, in vacating a death sentence, held that where the facts fail to establish that the dominant or only motive for the homicide was the elimination of witnesses, the finding of the aggravating circumstance of avoiding arrest is improper. Id. at 1282, citing Riley v. State, 366 So. 2d 19 (Fla. 1978). Accord Clark v. State, 443 So. 2d 973, 977 (Fla. 1983); Pope v. State, 441 So. 2d 1073, 1076 (Fla. 1983); Herzog v. State, 439 So. 2d 1372, 1378-79 (Fla. 1983); White v. State, supra. Under the facts of this case, it cannot be said that the dominant or only motivating reason for the homicide in question was elimination of witnesses, or that the trial court based its application of this circumstance on such facts.

The majority of cases construing the hindering law enforcement aggravating circumstance concern homicides of police officers in uniform engaged in their lawful duties. See Jones v. State, 440 So. 2d 570 (Fla. 1983); Tafero v. State, 403 So. 2d 355 (Fla. 1981), cert. denied, 455 U.S. 983 (1982); Sonser v. State, 322 So. 2d 481 (Fla. 1975), vacated on other grounds sub

nom. Sonser v. Florida, 430 U.S. 952 (1977). In those cases where the victim of the homicide was a civilian, this Court has sustained the finding of this aggravating circumstance only where the motivation of disrupting or hindering governmental function and law enforcement was manifest from the facts. See Barclay v. State, 343 So. 2d 1266 (Fla. 1977).

Under the facts of this case, and in light of the jury's recommendation of a life sentence, it cannot be said that it has been established beyond and to the exclusion of every reasonable doubt that the motivation for the offense was to avoid arrest or to disrupt governmental function or hinder law enforcement and, accordingly, these aggravating circumstances could not be properly found by the trial court. Indeed, the prosecutor informed the jury that the avoiding arrest factor was only "arguable" (R. 1381), and conceded that the hindering law enforcement factor did not apply (R. 1382). The trial court did not apply this Court's limiting constructions of these two aggravating circumstances but relied upon events occurring after the homicides.

The trial court's application of these factors thus violated the eighth amendment and rendered the jury override unreliable and arbitrary. The factors were applied overbroadly, directly contrary to the statute and settled standards articulated by this Court. Godfrey; Cartwright. This issue was presented on direct appeal, but this Court failed to apply its settled standards and

thus affirmed the application of these aggravators. This fundamental error should now be corrected. Relief is proper.

CLAIM IV

THE FLORIDA SUPREME COURT'S FAILURE TO REMAND FOR RESENTENCING AFTER STRIKING TWO AGGRAVATING CIRCUMSTANCES ON DIRECT APPEAL IN THIS JURY OVERRIDE CASE DENIED MR. BOLENDER THE PROTECTIONS AFFORDED UNDER FLORIDA'S CAPITAL SENTENCING STATUTE, AND VIOLATED DUE PROCESS, EQUAL PROTECTION, AND THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

The trial court sentenced Mr. Bolender to death on the basis of eight aggravating circumstances (R. 228-33). However, on direct appeal, this Court invalidated two of the aggravating circumstances found by the trial court. Bolender v. State, 422 So. 2d 833, 837-38 (Fla. 1982).

This Court's failure to reverse and remand for resentencing directly conflicts with this Court's standards. In Elledse v. State, 346 So. 2d 998, 1003 (Fla. 1977), this Court held that if improper aggravating circumstances are found, "then regardless of the existence of other authorized aggravating factors we must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death." Accordingly, it is respectfully submitted that reversal is required when mitigation may be present and an aggravating factor is struck, Elledse, supra, or even when mitigation is not found and an aggravating factor is struck. Alvin v. State, 548 So. 2d 1112 (Fla. 1989); Schafer v. State,

537 So. 2d 988 (Fla. 1989); Nibert v. State, 508 So. 2d 1 (Fla. 1987). In this case, the jury unanimously voted for life. However, the trial judge never assessed whether an override would be appropriate solely in light of proper aggravating factors.

In Mr. Bolender's case, the trial court imposed death on the basis of eight aggravating circumstances, overriding the jury's unanimous life recommendation. As in Alvin, supra, there is no way to know if the trial judge would have imposed death in the absence of these aggravating circumstances. As in Alvin, Schafer, Nibert, and Elledge, this Court should have remanded for resentencing so that the trial judge could have properly reweighed aggravation and mitigation. The failure to remand for resentencing deprived Mr. Bolender of his rights to due process and equal protection by denying him the liberty interest created by Florida's capital sentencing statute. See Vitek v. Jones, 445 U.S. 480 (1980); Hicks v. Oklahoma, 447 U.S. 343 (1980). This is particularly significant in this case, for the six remaining aggravating factors were impermissibly "doubled." Without the unauthorized aggravating factors which this Court struck on direct appeal, the trial court's weighing process could have been significantly altered.

The Florida Supreme Court is not the sentencer under Florida law. Reweighing by the sentencer is what the law requires and what should have been ordered. As the in banc Ninth Circuit Court of Appeals has explained in a related context:

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

Adamson v. Ricketts, 865 F.2d 1011, 1036 (9th Cir. 1988)(in banc). The United States Supreme Court has granted certiorari in Clemons v. Mississippi, 109 S. Ct. 3184 (1989), to consider the very questions at issue here: whether the eighth amendment permits an appellate court to save a sentence of death by reweighing aggravating and mitigating factors where the authority for capital sentencing under state law rests exclusively with the trial court sentencer.

In Florida, the trial court (jury and judge) is the only body authorized to weigh aggravating circumstances against mitigating circumstances. In Mr. Bolender's case, the Florida Supreme Court took over that function, although it is the duty of the judge to engage in a meaningful weighing of aggravating and mitigating circumstances before imposing a death sentence. See, e.g., Nibert v. State, 508 So. 2d 1 (Fla. 1987); Muehleman v. State, 503 So. 2d 310 (Fla. 1987); Van Royal v. State, 497 So. 2d 625 (Fla. 1986).

The failure to remand for resentencing deprived Mr. Bolender

of his rights to due process and equal protection and violated the sixth, eighth, and fourteenth amendments. This Honorable Court should exercise its inherent jurisdiction and habeas corpus authority to remedy this error in this capital proceeding. See Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985).

CLAIM V

RECENT DECISIONS FROM THIS COURT MARE MANIFEST THAT THE JURY OVERRIDE IN MR. BOLENDER'S CASE RESULTED IN AN ARBITRARILY, CAPRICIOUSLY, AND UNRELIABLY IMPOSED SENTENCE OF DEATH, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

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 freakish and arbitrary capital sentencing. Spaziano v. Florida, 468 U.S. 447, 465 (1984).

The override in this case was constitutionally wrong. The override in this case would not be allowed to stand today, thus demonstrating the unreliability and arbitrariness of Mr. Bolender's sentence of death.

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 or discriminatory application of the death penalty . . . in general . . . [and] in this particular case."

Spaziano, supra. To allow the override to stand in this case would indeed 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. Even though this issue was raised on direct appeal and rejected by this Court, this issue involves a claim of fundamental error challenging the unreliability of Mr. Bolender's death sentences. This Honorable Court has acknowledged that its override analysis has changed since the time that the override in Mr. Bolender's case was affirmed. Cochran v. State, 547 So. 2d 928 (Fla. 1989). Review at this juncture is appropriate.

1. ~~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); Mann v. Dugger, 844 F.2d 1446, 1452-1454 (11th Cir. 1988)(in banc), representing the judgment of the community. Id. 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). See also Mann, 844 F.2d at 1450-51 (and cases cited therein).

The standard established under Florida law is thus that if a jury recommendation of life is supported by any reasonable basis in the record that jury recommendation cannot be overridden. See Mann, supra, 844 F.2d at 1450-54 (and cases cited therein); see also, 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); Tedder, supra, 322 So. 2d at 910. Cf. Hall v. State, 541 So. 2d 1125 (Fla. 1989). This is "the nature of the sentencing process," Mann, supra, 844 F.2d at 1455 n.10, under Florida law. This standard has in fact been recognized by the United States Supreme Court as a "significant safeguard" provided to a Florida capital defendant. Spaziano, supra, 468 U.S. at 465.

2. The Override in Mr. Bolender's Case Resulted in an Arbitrarily, Capriciously, and Unreliably Imposed Death Sentence, in Violation of the Eighth and Fourteenth Amendments

Mr. Bolender's jury recommended that he be sentenced to life. However, although mitigation was present in the record, and although there was a reasonable basis for the jury's recommendation, the trial judge ignored the law and imposed death. This Court then did not apply its standards in affirming that sentence. See Bolender v. State, 422 So. 2d 833 (Fla. 1982). The record here demonstrates many reasonable bases for

life. The jury's unanimous verdict of life should not have been disturbed.

Under the law as it now exists, if a Florida jury recommends life, death may not be imposed if there is any "reasonable basis in the record" for the recommendation. Mann v. Dugger, 844 F.2d 1446, 1450-54 (11th Cir. 1988) (in banc); Ferry v. State, 507 So. 2d 1373, 1376 (Fla. 1987); see also Hansbroush v. State, 509 So. 2d 1081, 1086 (Fla. 1987) ("a reasonable basis for the jury to recommend life" cannot be overridden); Wasko v. State, 505 So. 2d 1314, 1318 (Fla. 1987) (no override "unless **no** reasonable basis exists for the opinion").

Here, "reasonable people could differ as to the propriety of the death penalty in this case, [and thus] the jury's recommendation of life must stand." Brookings v. State, 495 So. 2d 135, 143 (Fla. 1986). There were numerous valid and eminently reasonable nonstatutory mitigating factors in this case. Moreover, the jury could quite reasonably have reached different conclusions regarding aggravation, particularly in light of the numerous improprieties in the trial court's findings regarding aggravation. See supra. Whatever balance the trial judge may have struck, the jury's balancing and resulting life recommendation, were undeniably reasonable under Florida law. See Mann, supra, 844 F.2d at 1450-55; Ferry, supra; Wasko, supra. The trial judge, however, did not provide Mr. Bolender with the right which the law clearly afforded him: the right not to have

a reasonable jury verdict overturned.

In fact, the trial judge failed to even explain ~~why the jury~~ had no rational basis for its recommendation, as ~~Tedder~~ requires. A jury life recommendation magnifies the sentencing judge's duty to actually consider statutory and nonstatutory mitigating factors, because the usual presumption in Florida that death is the proper sentence upon proof of one or more aggravating factors does not apply (and indeed is reversed) when a jury recommendation for a life sentence has been made. Williams v. State, 386 So. 2d 538, 543 (Fla. 1980).[4]

The Court's sentencing order mentioned that the case was before the court after a) the conviction of the defendant and b) the jury's recommendation of life imprisonment, and the Order then continues with a listing of the aggravating and mitigating circumstances. The Tedder standard was not mentioned, and, the jury was mentioned only in passing. The judge found eight statutory aggravating circumstances, of which two were struck by this Court on direct appeal, and of which the remaining six involved numerous errors in their application. See supra. The judge then considered only statutory mitigation,

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[4]The judge considering an override must weigh aggravating circumstances "against the recommendation of the jury." Lewis v. State, 398 So. 2d 432, 439 (Fla. 1981). The overriding judge must make findings that explain why the jury was unreasonable, why no reasonable person could differ, and why death is proper. Tedder, supra. Neither this procedure, nor the substantive "no reasonable juror" determination, occurred in this case.

weighed statutory aggravation and mitigation, and imposed death. The judge made no findings regarding the unreasonableness of the jury, and did not explain why the jury's recommendation was not entitled to great weight. The judge did not consider the nonstatutory mitigation in the record, nonstatutory mitigation which formed an eminently reasonable basis for the jury's recommendation of life.

The override was thus predicated upon what the judge felt, and not upon any analysis of why there was no reasonable basis for the jury. That is not the law:

> 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, 507 So. 2d at 1376-77 (emphasis added). Despite the presence of mitigation, this Court sustained the override. Bolender v. State, supra. This was a fundamental error of law, an error which deprived Mr. Bolender of his eighth amendment

rights.

Under Tedder, the trial judge could override a jury's verdict of life only when "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." 322 So. 2d at 910. Under the Florida Supreme Court's recent interpretations of the Tedder standard, a trial judge may not override a jury's verdict of life when there is a "reasonable basis" for that verdict. Mr. Bolender's jury had an eminently reasonable basis for its life recommendation, e.g., the victim's actions (they had planned to rob and kill Mr. Bolender, and were lurking armed before the incident) cf. Francis v. State, 473 So. 2d 672, 678 (Fla. 1985)(McDonald, J., dissenting); the nature of the offense (the victims had been planning a "rip off" during a long transaction); the disparate treatment afforded to the codefendants (neither Macker nor Thompson will ever be on death row, and Macker is on the streets today, having been released). It is equally apparent that those "significant safeguards" recognized by the Spaziano court were not enforced in Mr. Bolender's case, and that "application of the jury override procedure has resulted in arbitrary [and] discriminatory application of the death penalty" in this case. Spaziano, 104 S. Ct. at 3165. If the trial judge's override of this unanimous jury recommendation for life passes muster, the United States Supreme Court can no longer be confident that the Florida Supreme Court still "takes that [Tedder] standard

seriously." Spaziano, 104 S. Ct. at 3165.

The override scheme and the application of the Tedder standard were upheld in Spaziano on the basis of the "significant safeguard" provided by the Tedder standard, the Court's satisfaction that the Florida Supreme Court took that standard seriously, and the lack of evidence that the Florida Supreme Court had failed in its responsibility to perform meaningful appellate review. Spaziano, supra, 468 U.S. at 465-66. Mr. Bolender's claim is that in his case the assurances upon which the Court relied in Spaziano have not been fulfilled. On the contrary, although a "reasonable basis" for the jury's life recommendation was present, the trial judge overrode that recommendation, the trial court failed to provide Mr. Bolender the "significant safeguard" of the Tedder standard, and failed to take that standard seriously.

This Court discussed this issue Cochran v. State, 547 So. 2d 928 (Fla. 1989). In Cochran both the majority and the dissent agreed that the Tedder standard has been inconsistently applied. Dissenting from the reversal of the override in Cochran, Chief Justice Ehrlich cited three cases in which overrides were affirmed despite the presence of information which could have influenced the jury to recommend life, and argued that a "mechanistic application" of the Tedder standard "would have resulted in reversals of the death sentences in these cases." Cochran, supra. Though Chief Justice Ehrlich argued that the

Tedder standard as construed today and as applied by the majority in Cochran is wrong and that the court should return to the standard employed in the earlier cases which he cited, he correctly noted that the shift in the standard has resulted in an eighth amendment violation under Furman v. Georsia, 408 U.S. 238 (1972). Cochran, supra. In response to Chief Justice Ehrlich's dissent, the majority wrote:

> Finally, we agree with the dissent that "legal precedent consists more in what courts do than in what they **say."** However, in expounding upon this point to prove that Tedder has not been applied with the force suggested by its language, the dissent draws entirely from cases occurring in 1984 or earlier. This is not indicative of what the present court does, as Justice Shaw noted in his special concurrence to Grossman v. State, 525 So.2d 833, 851 (Fla. 1988)(Shaw, J., specially concurring):
>
> > During 1984-85, we affirmed on direct appeal 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 . . . .
>
> 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.

Today, "Tedder means precisely what it **says."** At the time

of Mr. Bolender's direct appeal, Tedder did not mean what it said, although the United States Supreme Court relied upon Tedder and the Florida Supreme Court's assurances that it would give the Tedder standard effect in upholding the validity of Florida's jury override scheme. Today, Mr. Bolender's death sentence would not be affirmed. This is arbitrary. This is capricious. This is not a reliable result. This death sentence violates the eighth and fourteenth amendments.

The trial court's override is constitutionally improper for the foregoing reasons, and also because it found in aggravation one aggravating circumstance which was not even argued to the jury: hindering enforcement of law. See Bullinston v. Missouri, 451 U.S. 430 (1981). On direct appeal, two aggravators, great risk of death to many persons and under sentence of imprisonment, were struck. Mr. Bolender's case at that point should have been reversed for resentencing. Stevens v. State, 14 F.L.W. 513 (Fla. 1989).[5] The override is also improper because of the trial judge's failure to employ the Tedder standard (or even to make any reference of it), and for the sentencing judge's failure to recognize the nonstatutory mitigation appearing plainly on the record. Hitchcock v. Dusser, 481 U.S. 393 (1987); Lockett v.

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[5]Clemons v. Mississippi, 109 S. Ct. 3184, 45 Cr. L. 4067 (1989), is now pending certiorari in the United States Supreme Court on a much less persuasive issue. Mr. Bolender's execution should at least be stayed until resolution of Clemons.

Ohio, 438 U.S. 586 (1978). The trial court's override is thus based on improper aggravation, the failure to recognize mitigation,' and the refusal to abide by proper override principles. Relief is appropriate.

CLAIM VI

THE TRIAL COURT'S INSTRUCTIONS AT THE GUILT PHASE DIRECTED A VERDICT FOR THE STATE, IN VIOLATION OF DUE PROCESS AND THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

At the guilt phase of Mr. Bolender's trial, the court began its instructions by informing the jury:

> There is no argument in this case but that a homicide did take place on that date or those dates and that it occurred in Dade County.
>
> Obviously the balance of the issues are for your determination.

(R. 1324). Because these instructions told Mr. Bolender's jury that "a homicide did take place," the instructions effectively informed the jury that the elements of homicide -- the victims are dead; their deaths resulted from the act or agency of another: the defendant caused the deaths -- had been established. The instructions thus directed a verdict for the State, in violation of fundamental principles of due process and the fifth, sixth, eighth, and fourteenth amendments.

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[6]Mr. Bolender's case involves a substantial claim for relief pursuant to Hitchcock v. Dugger which, under these Court's rules, has been presented pursuant to Fla. R. Crim. P. 3.850, and is currently before the Rule 3.850 trial court.

This Court has long held that criminal defendants have a fundamental right to have a properly instructed jury determine whether all elements of the charge have been established:

> It is an inherent and indispensable requisite of a fair and impartial trial under the protective powers of our Federal and State Constitutions as contained in the due process of law clauses that a defendant be accorded the right to have a Court correctly and intelligently instruct the jury on the essential and material elements of the crime charged and required to be proven by competent evidence. Such protection afforded an accused cannot be treated with impunity under the guise of "harmless error". See Henderson v. State, **155** Fla. **487,20 So.2d 649;** Motley v. State, **155** Fla. **545,20 So.2d 798;** Croft v. State, **117** Fla. **832,158 So. 454** and others.

Gerds v. State, **64** So. 2d **915, 916** (Fla. **1953).** Instructions which **"invade[]** the province of the jury to the extent of taking from it the determination of every element of the offense charged" are impermissible because **"[i]t** is elementary that every element of a criminal offense must be proved sufficiently to satisfy the jury (not the court) of its existence." Henderson v. State, 20 So. 2d **649, 651** (Fla. **1945).**

This Court's holdings in this regard are consistent with the Untied States Constitution. It is fundamental that due process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime for which he is **charged."** In re Winship, **397** U.S. **358, 364 (1970).** Thus, the Due Process Clause "prohibits the State from using [instructions] that have the effect of relieving the State

of its burden of persuasion beyond a reasonable doubt of every essential element of a crime." Francis v. Franklin, 105 S. Ct. 1965, 1970 (1985).

The instructions here were patent error under In re Winship, supra. The instructions informed the jury that the victims' deaths were caused by another person and that the person who caused the deaths was Mr. Bolender. These issues are specifically questions of fact for the jury to resolve, but the instruction removed these questions from the jury's consideration. Under the instructions given, the jury could have convicted a capital defendant on less than proof beyond a reasonable doubt of these essential elements of the offense. This was fundamental constitutional error, and deprived Mr. Bolender of his fifth, sixth, eighth, and fourteenth amendment rights. See Mullaney v. Wilbur, 421 U.S. 684 (1975); Taylor v. Kentucky, 436 U.S. 478 (1978); Sandstrom v. Montana, 442 U.S. 510 (1979). The trial court here essentially directed the verdict for the State on these central issues although it is settled that "a trial judge is prohibited from . . . directing the jury to come forward with [a verdict of guilty] . . . regardless of how overwhelming the evidence may point in that direction." Rose v. Clark, 106 S.Ct. 3101, 3106 (1986), citing United States v. Martin Linen Supply Company, 430 U.S. 564, 572-73 (1977). The trial court wholly relieved the State of its burden of proof: this is classic fundamental error.

Issues regarding error in jury instructions are analyzed according to "what a reasonable juror could have understood the charge as meaning." Franklin, supra, 105 S. Ct at 1972. If a reasonable juror could have understood the instructions as directing a verdict for the prosecution, the instructions do not comport with due process requirements.

This fundamental constitutional impropriety is precisely what happened here, for there can be no doubt that a reasonable juror would understand the instruction at issue as informing them that Mr. Bolender was guilty of homicide. In this regard it is noteworthy that standard instructions on the defendant's presumption of innocence and on the State's duty to prove every element of the offense beyond a reasonable doubt are not sufficient to cure the error produced by an instruction such as the one herein at issue. Franklin, 105 S. Ct. at 1973-74. Likewise, language elsewhere in the instructions that "merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." Id. at 1975. If a "reasonable possibility of an unconstitutional understanding exists," id. at 1976, n.8, the resulting guilty verdict must be set aside. Id.; see also Strombers v. California, 283 U.S. 359 (1931). Nothing in the trial court's other instructions in this case in any way explained, corrected, or cured the infirm instruction. When a judge directs a verdict in favor of the prosecution, such action cannot be viewed as

harmless error. Gerds, supra; United States v. Goetz, **746 705, 709** (11th Cir. **1984).** This is **so** because of the jury's fundamental role in a criminal trial:

> [The jury's] overriding responsibility is to stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction. For this reason, a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict, see Sparf & Hansen v. United States, **156** U.S. 51, **195,** 15 **S.** Ct. **273, 294, 39** L.Ed. **343 (1895);** Carpenters v. United States, **330** U.S. **395, 498, 67 S.** Ct. **775, 782, 91** L.Ed. **973 (1947),** regardless of how overwhelmingly the evidence may point in that direction. The trial judge is thereby barred from attempting to override or interfere with the jurors' independent judgment in a manner contrary to the interests of the accused.

United States v. Martin Linen Supply Co., **430** U.S. **564, 572-73 (1977).**

The jury instructions in Mr. Bolender's case constituted fundamental error, which was **per se** reversible. When error **such** as occurred here amounts to a denial of due process, no contemporaneous objection rule precludes raising that error on appeal. **See** Castor v. State, **365** So. 2d **701, 704** n. **7** (Fla. **1978).** Appellate counsel's failure to raise this issue deprived Mr. Bolender of the reversal to which he was entitled. This Court should now correct the fundamental error discussed herein. Relief is proper.

CLAIM VII

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

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

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

921.141(5)(i), Florida Statutes.

The U.S. Supreme Court has stated that:

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

Zant v. Stephens, **462** U.S. **862, 877 (1983).** Thus, aggravating circumstances that are defined and imposed too broadly fail to satisfy eighth and fourteenth amendment requirements.

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

be imposed due to the uniqueness of the death penalty:

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

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

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

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

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

408 So. 2d at 1032. The court in McCray stated:

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

416 So. 2d at 807.

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

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

Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987). The Florida Supreme Court's subsequent decisions have plainly recognized that cold, calculated and premeditated requires proof beyond a reasonable doubt of a "careful plan or prearranged design." See Mitchell v. State, 527 So. 2d 179, 182 (Fla. 1988)("the cold,

calculated and premeditated factor [] requir[es] a careful plan or prearranged design."); Jackson v. State, 530 So. 2d 269, 273 (Fla. 1988)(application of aggravating circumstance "error under the principles we recently enunciated in Rogers.").

Because Mr. Bolender's trial judge did not have the benefit of the narrowing definition set forth in Rosers, his sentence therefore violates the eighth and fourteenth amendments. The judge did not apply any "heightened" premeditation as required by McCray, supra; in fact the judge applied no standard at all to this aggravator, but "doubled" it up with the heinous, atrocious or cruel aggravating factor.

What occurred here is precisely what the eighth amendment was found to prohibit in Maynard v. Cartwrisht, 108 S. Ct. 1853 (1988). It is respectfully urged that this Honorable Court should now correct Mr. Bolender's death sentence, a sentence which violates the eighth amendment principle of Cartwright, sunra.

The error denied Mr. Bolender an individualized and reliable capital sentencing determination, particularly since the trial court overrode the jury's life recommendation. Knight v. Dugger, 863 F.2d 705, 710 (11th Cir. 1989). This Court reviewed this aggravator on direct appeal, but failed to apply the construction of Rosers, McCray, and Cartwrisht. The Court should remedy this fundamental error at this juncture.

CLAIM VIII

THE "HEINOUS, ATROCIOUS AND CRUEL" AGGRAVATING CIRCUMSTANCE WAS APPLIED TO PETITIONER'S CASE WITHOUT ARTICULATION OR APPLICATION OF A NARROWING PRINCIPLE, IN VIOLATION OF MAYNARD V. CARTWRIGHT AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

Petitioner was sentenced to death based on a finding that the murder was "especially heinous, atrocious, and cruel." Such a vaguely worded aggravating circumstance is impermissible under the eighth and fourteenth amendments unless the sentencer is provided with and the courts articulate and apply a "narrowing principle" which goes beyond merely reciting the specific facts that may support the finding of such an aggravating circumstance in the particular case. Maynard v. Cartwrisht, 108 S. Ct. 1853 (1988). No court in this case articulated and applied a "narrowing principle" to the "heinous, atrocious, and cruel" aggravating circumstance. No limiting construction was provided to the jury, and thus it can be presumed that the sentencing judge applied none himself. Zeigler V. Dugger, 524 So.2d 419, 420 (Fla. 1988). supra. Accordingly, petitioner's death sentence violates the eighth and fourteenth amendments.

In Proffitt v. Florida, 428 U.S. 242, 255-56 (1976), the United States Supreme Court construed Florida's use of an "especially heinous, atrocious, or cruel" aggravating circumstance to be "directed only at 'the conscienceless or pitiless crime which is unnecessarily torturous to the victim.'

State v. Dixon, 283 So. 2d [1,] 9 [(1973)]." This narrowing construction was not applied in Mr. Bolender's case.

In Maynard v. Cartwright, 108 S. Ct. at 1859, the United States Supreme Court held that the narrowing construction could not be fulfilled by a mere recitation of the evidence which supported the finding of that aggravating circumstance. In Maynard v. Cartwright, the defendant had been sentenced to death under Oklahoma law based in part on the finding that the crime was "especially heinous, atrocious, or cruel." Id. at 1856. There, as here, the jury had not been given any instructions to guide its discretion in applying this aggravating circumstance. Id. at 1859. In particular, the United States Supreme Court held that the use of the word "especially" did not cure the overbreadth of the aggravating factor. Id. There, as here, the sentencer's unchanneled discretion was not cured by any limiting construction thereafter applied by a reviewing court. Specifically, the Court held that the Oklahoma courts' "conclusions that on these facts the jury's verdict that the murder was especially heinous, atrocious, or cruel was supportable did not cure the constitutional infirmity of the aggravating circumstance." Id. In short, the Court held that mere recitation of the facts of the particular case is not enough; a "narrowing principle to apply to those facts" must be articulated and actually applied. Mr. Bolender's case is identical to Cartwright. Id.

It was not until the decision in Cartwrisht that the United States Supreme Court made it clear that courts imposing and reviewing death sentences must both articulate a narrowing principle and apply that principle to the specific facts of the case before them. Until Cartwriaht, the United States Supreme Court had approved a factual comparison of cases without requiring the articulation and application of a narrowinq principle. See Proffitt V. Florida, 428 U.S. at 258. The Florida Supreme Court followed suit. Cartwrisht demonstrates that that analysis was erroneous.

In this case, the courts failed to articulate and apply any "narrowing principle" to cure the unconstitutional overbreadth of the "especially heinous, atrocious and **cruel"** aggravator. First, the trial court gave the jury no guidance to channel their discretion in applying this factor. The "especially heinous, atrocious and cruel" factor in this case is indistinguishable from the **"especially** heinous, atrocious, or cruel" language condemned as overbroad in Maynard V. Cartwriaht.

Second, in his sentencing order (R. 1255), the trial court merely articulated facts in support of this aggravator, without articulating and applying any "narrowing **principle."** Here, as in Adamson **v.** Ricketts, 865 F.2d 1011, 1036 (9th Cir. 1988), the trial court's recitation of facts supporting a finding of the "heinous, cruel and depraved" circumstance was insufficient to cure the constitutional infirmity: the trial court failed to

apply a narrowing principle to those facts. "[T]he Supreme Court has repeatedly emphasized [that] it is the suitably directed discretion of the sentencing body which protects against arbitrary and capricious capital sentencing." Id. (emphasis in original)(citations omitted).

Finally, in the direct appeal, the Florida Supreme Court affirmed the application of this aggravator without discussion. 422 So.2d 833 (Fla. 1982). Of course, the articulation and application of a narrowing principle by that Court alone would not be sufficient to cure the unconstitutional overbreadth of the "heinous, atrocious and cruel" aggravator. See Adamson v. Ricketts, 865 F.2d at 1036 ("a reviewing court has no way to determine how a particular sentencing body would have exercised its discretion had it considered and applied appropriately limited statutory terms"). But the Florida Supreme Court did not even do that.

Accordingly, petitioner was sentenced to death on the basis of an aggravating circumstance which was unconstitutionally applied under the eighth and fourteenth amendments. The constitutional infirmity of the "heinous, atrocious and cruel" aggravator requires resentencing. Habeas corpus relief is appropriate.

CLAIM IX

THE SENTENCING PROCEDURE EMPLOYED BY THE TRIAL COURT SHIFTED THE BURDEN TO MR. BOLENDER TO ESTABLISH THAT LIFE WAS THE APPROPRIATE SENTENCE AND RESTRICTED FULL CONSIDERATION OF MITIGATING CIRCUMSTANCES TO THOSE WHICH OUTWEIGHED AGGRAVATING CIRCUMSTANCES, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

In sentencing Mr. Bolender to death, the trial court shifted the burden to Mr. Bolender to establish that death was not appropriate and limited consideration of mitigating factors to those which outweighed the aggravating factors. The court's sentencing order stated:

> [T]he inescapable conclusion of the Court is that sufficient Aggravating Circumstances exist and that no Mitigating Circumstances exist which could possibly outweigh the Aggravating Circumstances.

(R. 235). The order thus reflects that the court required Mr. Bolender to establish mitigation that outweighed the aggravation (i.e., to prove that life was appropriate) and that the court failed to consider mitigation which did not outweigh aggravation.

The procedure reflected in the sentencing order is consistent with the manner in which the judge instructed the jury. At the penalty phase, the jury was instructed that in deciding what sentence to recommend the jury was to determine "whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist" (R. **1391).** Although instructed

with this burden-shifting standard, the jury recommended life. However, the instructions demonstrate the procedure employed by the judge in imposing death. See Zeigler v. Duaaer, 524 So. 2d 419, 420 (Fla. 1988)("it is presumed that the judge's perception of the law coincided with the manner in which the jury was instructed").

Sentencing procedures such as that employed by the trial judge here, which shift to the defendant the burden of proving that life is the appropriate sentence, violate the principles of Mullanev v. Wilbur, 421 U.S. 684 (1975), as the Court of Appeals for the Ninth Circuit recently held in Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(in banc). In Adamson, the Ninth Circuit held that because the Arizona death penalty statute "imposes a presumption of death on the defendant," the statute deprives a capital defendant of his eighth amendment rights to an individualized and reliable sentencing determination. Adamson, supra, 865 F.2d at 1041-44.

What occurred in Adamson is precisely what occurred in Mr. Bolender's case. The trial judge's sentencing procedure violated the eighth and fourteenth amendments, Mullanev v. Wilbur, 421 U.S. 684 (1975), Lockett v. Ohio, 438 U.S. 586 (1978), and Mills v. Maryland, 108 S. Ct. 1860 (1988). The burden of proof was shifted to Mr. Bolender on the central sentencing issue of whether he should live or die. This unconstitutional burden-shifting violated Mr. Bolender's due process and eighth amendment

rights. See Mullaney, supra. See also Sandstrom v. Montana, 442 U.S. 510 (1979); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988).

Moreover, the application of that unconstitutional standard at the sentencing phase violated Mr. Bolender's rights to a fundamentally fair and reliable capital sentencing determination, i.e., one which is not infected by arbitrary, misleading and/or capricious factors. See Adamson, supra; Jackson, supra. The trial court's sentencing procedure presumed death was the appropriate sentence and plainly shifted to Mr. Bolender the burden to prove that he should receive a life sentence.[7] But "presumptive" death sentences have been long condemned by this Court. See Woodson v. North Carolina, 428 U.S. 280 (1976); Sumner v. Shuman, 107 S. Ct. 2716 (1987).[8] The

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[7]The Constitution simply does not permit presumptive death sentences and does not permit requiring the defendant to establish that mitigation outweighs aggravation, i.e., to establish that life is the appropriate sentence. Due process and the eighth amendment require the State to establish that death is the appropriate sentence, i.e., that aggravation outweighs mitigation. If any presumption is to be employed in capital sentencing, that presumption should be the same as is employed in every other setting where liberty, property, or life are at stake -- that the defendant is presumed innocent (of the sentence in this case) until the State establishes otherwise. The procedure employed to sentence Mr. Bolender to death presumed death appropriate once any aggravating factor was established, and thus rendered the case in mitigation of sentence a nullity. Cf. Penry v. Lynaugh, 109 S. Ct. 2934, 2951 (1989).

[8]Presumptive death sentences are unconstitutional because

(footnote 8 continued on the next page)

burden-shifting also unconstitutionally restricted the judge's ability to "fully consider" and "give effect to" the statutory and nonstatutory mitigating factors before him. Penry v. Lynaugh, 109 S. Ct. 2934, 2951 (1989). See n.8, supra. It thus violated the eighth amendment's mandate that any capital sentencing decision be individualized and reliable.

(footnote 8 continued from the previous page)

"the fundamental respect for humanity underlying the Eighth Amendment requires that the defendant be able to present any relevant mitigating evidence that could justify a [sentence less than death]." Shuman, supra, 107 S. Ct. at 2727. A capital defendant must be allowed to present any evidence regarding his or her character and background and the circumstances of the offense which calls for a sentence less than death, Lockett v. Ohio, 438 U.S. 586 (1978), and a capital sentencer must be able to "full[y] consider[]" and "give effect to" that evidence. Penry v. Lynaugh, 109 S. Ct. 2934, 2951 (1989); Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); Eddings v. Oklahoma, 455 U.S. 104 (1982). When a capital sentencer's view of the law or procedure to be followed in determining the sentence does not provide for "full consideration" or for "giv[ing] effect to" mitigating evidence, the sentencing process does not conform to the eighth amendment. Penry; Lockett; Hitchcock; Eddings; Mills v. Maryland, 108 S. Ct. 1860 (1988).

This is precisely the effect which resulted from the burden-shifting presumption applied in Mr. Bolender's case. In believing that the mitigating circumstances must outweigh aggravating circumstances before he could impose life, the judge effectively held that once aggravating circumstances were established, he need not consider mitigating circumstances unless those mitigating circumstances outweighed the aggravating circumstances. This judge was thus constrained in his consideration of mitigating evidence. Hitchcock; Penry, supra; Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(in banc). This procedure did not allow for a "reasoned moral response" to the issues at Mr. Bolender's sentencing or permit the judge to "fully" consider and "give effect to" the mitigation. Penry, supra.

Under Florida law, and specifically under the presumption employed here, once one of the statutory aggravating circumstances is found, by definition sufficient aggravation exists to impose death. Here, the procedure employed by the trial court made it clear that the defendant had the burden of production **and** the burden of persuasion of the existence of mitigation, **and** then the burden of persuasion as to whether the mitigation outweighs the aggravation. Certainly, the standard used here does not allow for a reliable and individualized capital sentencing determination.

Certiorari has been granted in the case of Bovde v. California, **109 S.** Ct. **2447 (1989),** in which the United States Supreme Court will review whether it is appropriate for a capital sentencer to employ a standard that if aggravating circumstances outweigh mitigating circumstances, the sentencer **"shall"** impose a sentence of death. The question in Bovde is whether such a standard constrains a capital sentencer's discretion to impose life or constrains the sentencer's ability to fully consider evidence in mitigation. The question therein presented is obviously similar to the question raised by Petitioner herein.

Indeed, the presumption employed in Mr. Bolender's case is a more egregious abrogation of eighth amendment individualized sentencing principles than the standard at issue in Bovde. In this case, the sentencer believed that he was required to impose death once an aggravating circumstance was established and that

mitigation could only be fully considered if it was **"sufficient"** to outweigh aggravation. Cf. Penry, supra. This rendered this sentence of death violative of the eighth amendment requirement that such a sentence be individualized and reliable.

Another case which should affect proper resolution of Petitioner's case is Saffle v. Parks, **109** S. Ct. **1930 (1989).** The question presented in Parks concerns whether the sentencer must understand that sympathy for the defendant may be considered at the penalty phase. See Parks v. Brown, **860** F.2d **1545** (10th Cir. 1988)(in banc). In Petitioner's case, the sentencing judge believed that mitigation had to outweigh aggravation before it could be **"fully"** considered and given effect. Penry, supra. There is nothing in the procedure employed by the trial judge which would allow for a life sentence solely based on the sympathy resulting from the "totality of the circumstances," Dixon v. State, **283** So. 2d **1,** 10 (Fla. 1973), considered, regardless of whether mitigation outweighed aggravation.

The presumption applied in Mr. Bolender's case effectively barred the judge from considering the statutory and nonstatutory mitigation that was present before it. This flies in the face of eighth amendment jurisprudence. See Hitchcock V. Dugger, 107 S. Ct. **1821 (1987);** Lockett v. Ohio, **438** U.S. **586 (1978).** The eighth amendment requires an individualized assessment of the appropriateness of the death penalty. Lockett, supra. Petitioner was denied an individualized and reliable capital

sentencing determination because only the mitigation which outweighed the aggravation was to be given "full" consideration. See Penry, supra.

Most recently, the United States Supreme Court addressed this issue in Penry v. Lynaugh, 109 S. Ct. 2934 (1989), and reaffirmed the principles previously enunciated in Lockett and Eddinss v. Oklahoma, 455 U.S. 104 (1982):

> In Eddinss v. Oklahoma, 455 U.S. 104 (1982), a majority of the Court reaffirmed that a sentencer may not be precluded from considering, and may not refuse to consider, any relevant mitigating evidence offered by the defendant as the basis for a sentence less than death. In Eddings, the Oklahoma death penalty statute permitted the defendant to introduce evidence of any mitigating circumstance but the sentencing judge concluded, as a matter of law, that he was unable to consider mitigating evidence of the youthful defendant's troubled family history, beatings by a harsh father, and emotional disturbance. Applying Lockett, we held that "[j]just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence." Id., at 113-114 (emphasis in original). In that case, "it was as if the trial judge had instructed a jury to disregard the mitigating evidence [the defendant] proffered on his behalf." Id., at 114.
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> * * * *
>
> Moreover, Eddinss makes clear that it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence. Hitchcock v. Dugger, 481 U.S. 393 (1987). Only then can we be sure that the sentencer has treated the defendant as a

> "uniquely individual human being[g]" and has made a reliable determination that death is the appropriate sentence. Woodson, 428 U.S., at 304, 305. "Thus, the sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character, and crime." California v. Brown, suara, at 545 (concurring opinion)(emphasis in original).

Penry, suara, 109 S. Ct. at 2951.

It is not sufficient that a capital defendant be allowed to introduce evidence in support of mitigating circumstances: "[t]he sentencer must also be able to consider and give effect to that evidence in imposing sentence." Penry, suara, 109 S. Ct. at 2951. The judge here, however, believed death was presumptively the proper penalty unless the mitigation outweighed the aggravation. Under Florida law, however, a life sentence is appropriate whenever the mitigation provides a "reasonable basis" for determining that a sentence of less than death is warranted. Hall v. State, 541 So. 2d 1125 (Fla. 1989). Thus, the judge here could have imposed life, but could not but have thought himself precluded from doing so by the presumption placed upon Petitioner.

The application of a presumption of death violates eighth amendment principles:

> Presumptions in the context of criminal proceedings have traditionally been viewed as constitutionally suspect. Sandstrom v. Montana, 442 U.S. 510 (1979); Francis v. Franklin, 471 U.S. 307 (1985). When such a presumption is employed in sentencing instructions given in a capital case, the risk of infecting the jury's determination is

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

Jackson v. Dusser, 837 F.2d 1469, 1474 (11th Cir. 1988), cert. denied, 108 S. Ct. 2005 (1988). The error was particularly egregious in Mr. Bolender's case, a case in which mitigating evidence was present.

The rules derived from Lockett v. Ohio, 438 U.S. 586 98 S. Ct. 2854, (1978), "are now well established . . . ." Skipper v. South Carolina, 476 U.S. 1, 4 (1986). See also Hitchcock v. Dusser, 107 S. Ct 1821 (1987). These rules require that the

sentencer:

a. "not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death," Lockett v. Ohio, 438 U.S. at 604 (emphasis in original);

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

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

This burden shifting denied Mr. Bolender the individualized consideration of mitigating factors which Lockett, Eddings, and Penry v. Lynaugh require. The judge did not "fully" and independently "give effect" to the mitigating factors which were reflected in the record and which may have established a reasonable basis for a life sentence.

These errors undermined the reliability of the judge's sentencing determination and prevented the judge from assessing the mitigation present in the record. No contemporaneous objecton rule bars consideration of this sentencing-order-based claim. Mr. Bolender's death sentence is unreliable, particularly in light of the jury's unanimous verdict of life. Relief is

proper.

CLAIM X

MR. BOLENDER'S DEATH SENTENCE RESTS UPON *AN* UNCONSTITUTIONAL AUTOMATIC AGGRAVATING CIRCUMSTANCE, IN CONTRAVENTION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

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

Mr. Bolender was charged with first-degree murder in the "usual form": murder "from a premeditated design to effect the death of" the victim in violation of Florida Statute 782.04 (R. 3-4). An indictment such as this which "tracked the statute" charges felony murder: section 782.04 is the felony murder statute in Florida. Lightbourne v. State, 438 So. 2d 380, 384 (Fla. 1983).

However, it is impossible to determine whether the guilty

verdict in this case rested on premeditated or felony murder grounds. The jury received instructions on both theories, the prosecutor argued both, and a general verdict was returned.

If felony murder was the basis of Mr. Bolender's conviction, then the subsequent death sentence is unlawful. Cf. Strombers v. California, 283 U.S. 359 (1931). This is so because the death penalty in this case was predicated upon an unreliable automatic finding of a statutory aggravating circumstance -- the very felony murder finding that formed the basis for conviction. Automatic death penalties upon conviction of first-degree murder violate the eighth and fourteenth amendments, as was recently stated by the United States Supreme Court in Sumner v. Shuman, 107 S. Ct. 2716 (1987). In this case, felony murder was found as a statutory aggravating circumstance. ("The capital felony was committed during the perpetration of a robbery and kidnapping" (R. 230)). The sentencer was entitled automatically to return a death sentence upon a finding of guilt of first degree (felony) murder. Every felony-murder would involve, by necessity, the finding of a statutory aggravating circumstance, a fact which, under the particulars of Florida's statute, violates the eighth amendment: an automatic aggravating circumstance is created which does not narrow ("[A]n aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty . . . ." Zant v. Stephens, 462 U.S. 862, 876 (1983)). In short, if Mr. Bolender was convicted for felony murder, he

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

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

> TO pass constitutional muster, a capital-sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1983); cf. Gregg v. Georgia, 428 U.S. 153 (1976). Under the capital sentencing laws of most States, the jury is required during the sentencing phase to find at least one aggravating circumstance before it may impose death. Id., at 162-164 (reviewing Georgia sentencing scheme); Proffitt v. Florida, 428 U.S. 242, 247-250 (1976) (reviewing Florida sentencing scheme). By doing so, the jury narrows the class of persons eligible for the death penalty according to an objective

legislative definition. Zant, supra, at 878 ("[S]tatutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty").

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

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

between the Texas scheme, on the one hand, and the Georgia and Florida schemes discussed in the cases of Gresq, supra, and Proffitt, supra:

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

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

Id. at 554-55 (emphasis added).

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

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

Clearly, "the possibility of bloodshed is inherent in the commission of any violent felony, and . . . is foreseen," Tison v. Arizona, 107 S. Ct. 1676, 1684 (1987), but armed robbery, for example, is nevertheless an offense "for which the death penalty is plainly excessive," Id. at 1683. The same is true of kidnapping. Eberhart v. Georgia, 433 U.S. 2944 (1977). With felony-murder as the narrower in this case, neither the conviction nor the statutory aggravating circumstance meet constitutional requirements. There are no constitutionally valid criteria for distinguishing Mr. Bolender's sentence from those

who have committed felony (or, more importantly, premeditated) murder and not received death.

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

The jury did not specifically find premeditation (R. 208-11). "To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined by the trial court." Cole v. Arkansas, 333 U.S. 196, 202 (1948). The principle that an appellate court cannot utilize a basis for review of a conviction different from that which was litigated and determined by the trial court applies with equal force to the penalty phase of a capital proceeding. In Presnell v. Georgia, 439 U.S. 14 (1978), the United States Supreme Court reversed a death sentence where there had been no jury finding of an aggravating circumstance, but the Georgia Supreme Court held on appeal there was sufficient evidence to support a separate aggravating circumstance on the record before it. Citing the

above quote from Cole v. Arkansas, the United States Supreme Court reversed, holding:

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

Presnell, 439 U.S. at 18. Here, felony-murder could have been the basis; under the eighth and fourteenth amendments, Mr. Bolender's sentence of death should not be allowed to stand.

Lowenfield represents a significant change in eighth amendment jurisprudence. It was unavailable in earlier proceedings. The merits of the claim are before the Court. Relief should be granted.

~~CONCLUSION AND RELIEF SOUGHT~~

WHEREFORE, Bernard Bolender, through counsel, respectfully urges that the Court issue its Writ of habeas corpus and vacate his unconstitutional convictions and sentences of death. He also prays that the Court stay his execution on the basis of, and in order to fully determine, the significant claims herein presented. Since this action also presents questions of fact, Mr. Bolender urges that the Court relinquish jurisdiction to the trial court, or assign the case to an appropriate authority, for the resolution of the evidentiary factual questions attendant to his claims, including, inter alia, questions regarding counsel's deficient performance and prejudice.

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

Respectfully submitted,

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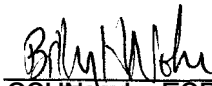
By: 
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded by U.S. Mail, first class, postage prepaid to Fariba Komeily, Assistant Attorney General, Suite N-921, 401 N.W. Second Avenue, Miami, Florida 33128, this 5th day of March, 1990.

Attorney