IN THE SUPREME COURT OF FLORIDA

NO. 73363

ROBERT DEWEY GLOCK, II,

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 APPLICATION FOR STAY OF EXECUTION PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

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

A. JURISDICTION

This is an original action under Fla. R. App. P. 9.100(a). This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents constitutional issues which directly concern the judgment of this Court during the appellate process, and the legality of Mr. Glock's capital conviction and sentence of death. See Glock v. State, 495 So. 2d 125 (Fla. 1986). Jurisdiction in this action lies in this Court, see, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein involved the appellate review process. See Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); see also Johnson v. Wainwright, 498 So. 2d 938 (Fla. 1987); cf. Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Glock to raise the claims presented herein. See, e.g., Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); Wilson, supra.

This Court has consistently maintained an especially vigilant control over capital cases, exercising a special scope of review, see 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. Wilson; Johnson; Downs; Riley. This petition presents substantial constitutional questions which go to the heart of the fundamental fairness and reliability of Mr. Glock's capital conviction and sentence of death, and of this Court's appellate review. Mr. Glock's

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

With regard to ineffective assistance, the challenged acts and omissions of Mr. Glock's appellate counsel occurred before this Court. This Court therefore has jurisdiction to entertain Mr. Glock's claims, Knight v. State, 394 So. 2d at 999, and, as will be shown, to grant habeas corpus relief. Wilson, supra; Johnson, supra. This and other Florida courts have consistently recognized that the Writ must issue where the constitutional right of appeal is thwarted on crucial and dispositive points due to the omissions or ineffectiveness of appointed counsel. See, e.g., Wilson v. Wainwright, supra, 474 So. 2d 1163; McCrae v.

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

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

B. REQUEST FOR STAY OF EXECUTION

Mr. Glock's petition includes a request that the Court stay his execution (presently scheduled for January 17, 1989. As will be shown, the issues presented are substantial and warrant a stay. This Court has not hesitated to stay executions when warranted to ensure judicious consideration of the issues presented by petitioners litigating during the pendency of a death warrant. See Riley v. Wainwright (No. 69,563, Fla., Nov. 3, 1986); Groover v. State (No. 68,845, Fla., June 3, 1986); Copeland v. State (Nos. 69,429 and 69,482, Fla., Oct. 16, 1986); Jones v. State (No. 67,835, Fla., Nov. 4, 1985); Bush v. State (Nos. 68,617 and 68,619, Fla., April 21, 1986); Spaziano v. State (No. 67,929, Fla., May 22, 1986); Mason v. State (No. 67,101, Fla., June 12, 1986). See also, Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987)(granting stay of execution and habeas corpus relief); Kennedy v. Wainwright, 483 So. 2d 426 (Fla.), cert. denied, 107 S. Ct. 291 (1986). Cf. State v. Sireci, 502 So. 2d 1221 (Fla. 1987); State v. Crews, 477 So. 2d 984 (Fla. 1985).

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

II. GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Robert Glock asserts that his convictions and his sentence of death were obtained and then affirmed during the Court's appellate review process in violation of his rights as guaranteed by the fourth, fifth, sixth, eighth and fourteenth amendments to the United States Constitution, and the corresponding provisions of the Florida Constitution, for each of the reasons set forth herein.

In Mr. Glock's case, substantial and fundamental errors occurred in both the guilt and penalty phases of trial. These errors were uncorrected by the appellate review process.

CLAIM I

MR. GLOCK WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL TO THIS COURT.

This case involved prejudicially ineffective assistance by Mr. Glock's appellate attorney. At the time of the direct appeal, the Court may not have realized how truly deficient counsel's performance was -- the Court may very well have considered the concessions in counsel's briefs as a reflection on the weakness of the case which could have been presented on Mr. Glock's behalf. As this Court has acknowledged, deficient performance by an appellate advocate will affect the way that a capital appellate case is reviewed by the Court, notwithstanding the Court's independent review of the record for error. See

Wilson v. Wainwright, 474 So. 2d 1162, 1165 (Fla. 1985).

Here, counsel failed to raise numerous preserved meritorious issues, misstated record facts, waived challenges to Mr. Glock's conviction, and specifically "abandoned" preserved substantial claims.

In the initial brief, appellate counsel concluded the Statement of the Case as follows:

> Appellant concedes that the guilt phase of the trial was conducted in accordance with Florida law as set forth in the various decisions cited in the record by the court below. In making this concession, Appellant would reserve the right to join in any argument made in the companion case, Puiatti versus the State of Florida based upon matters overlooked or misunderstood by Appellant's appeal counsel.
>
> The issues on this appeal are concerned with the propriety of imposing the death sentence, Appellant having repeatedly confessed his guilt in the murder of Mrs. Richie. The issues are whether the law and the facts of this case required severance of defendants during the penalty phase of the trial and whether the advisory verdict recommending Appellant's execution is valid, having been reached during judicial proceedings conducted during daylight hours of a non-juridicial day.

(Brief of Appellant, p. 12). Rather than act as an advocate for his client, counsel conceded his client's guilt, relying upon counsel for co-defendant Carl Puiatti to preserve Mr. Glock's rights and to advocate for Mr. Glock.

The State responded to appellate counsel's statement by filing a Motion to Require Appellant's Counsel to Make a Definite Decisions on which Issues to Raise. In response, appellate counsel noted that the State's motion was "well taken" (Appellant's Response to Appellee's Motion to Require Decision as to Additional Issues, p. 1), and filed a Notice of Abandonment of Certain Issues and a Notice of Joinder in certain arguments raised by Mr. Puiatti's counsel. This Court then ordered appellate counsel to file a supplemental brief "covering any other issues counsel wishes to raise." (Order of Mar. 25, 1985).

Only after being so ordered, appellate counsel then filed a Supplemental Brief, raising one challenge to Mr. Glock's conviction and two additional challenges to his death sentence.

In the Notice of Abandonment of Certain Issues mentioned above, appellate counsel stated, inter alia:

> Appellant abandons those issues asserted below regarding alleged prosecutorial misconduct during trial in the court below. The decision to abandon these issues is based upon Johnson v. State (Fla. 1983), 442 So. 2d 185, and Grant v. State (Fla. 1965) 171 So. 2d 361.
>
> Appellant abandons those issues asserted below regarding conflicts between the initial confessions made by Appellant and his codefendant below. The decision to abandon these issues is based upon Parker v. Randolph (1979) 442 U.S. 62, 99 S.Ct. 2132, 60 L.Ed.2d 713.

(Notice of Abandonment, p. 1). As demonstrated below in separate claims addressing these issues, counsel abandoned his client, for these are substantial claims which would have provided Mr. Glock with relief.

Counsel's concessions hurt -- counsel's non-advocacy had an effect. Consequently, in a case in which important and substantial claims for relief were apparent, the Court affirmed Mr. Glock's capital conviction and sentence of death.[1]

The appellate level right to counsel also comprehends the sixth amendment right to effective assistance of counsel. Evitts v. Lucey, 105 S. Ct. 830 (1985). Appellate counsel must function

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[1]There can be little doubt that the constitutionally mandated adversarial testing process did not function properly during Mr. Glock's direct appeal. Under these circumstances, the claims now urged here and in Mr. Glock's Rule 3.850 motion (filed before the lower court) should be considered on their merits at this juncture.

as "an active advocate," Anders v. California, 386 U.S. 738, 744, 745 (1967), providing his client the "expert professional. . . assistance. . . necessary in a system governed by complex laws and rules and procedures. . . ." Lucey, 105 S. Ct. at 835 n.6.

Even a single, isolated error on the part of counsel may be sufficient to establish that the defendant was denied effective assistance, Kimmelman v. Morrison, 106 S. Ct. 2574, at 2588 (1986); United States v. Cronic, 466 U.S. 648, 657 n.20 (1984), see also Johnson 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).

This Court in fact has explained that its "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 completely failed to act as an advocate for his client. The "adversarial testing process" simply did not work in this case. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987), citing Strickland v. Washington, 466 U.S. 668, 690 (1984). See also Johnson v. Wainwright, supra, 498 So. 2d 938; Wilson v. Wainwright, supra.

To prevail on his claim of ineffective assistance of appellate counsel Mr. Glock must show: 1) deficient performance, and 2) prejudice. Matire v. Wainwright, 811 F.2d at 1435. Mr. Glock does so herein.

That counsel's performance was deficient becomes simply irrefutable when the weakly presented issues contained in his presentation -- a presentation riddled with concessions -- 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.

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: trial counsel had preserved them; appellate counsel, however, ignored them. See Johnson v. Wainwright, supra.

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. Scott's

conviction and death sentence would have been reversed, but for counsel's non-advocacy. See, Wilson v. Wainwright, supra; Johnson v. Wainwright, supra; Matire v. Wainwright, supra. Habeas corpus relief is appropriate because of appellate counsel's ineffectiveness.

MR. GLOCK'S CLAIMS

Mr. Glock's claims, claims ignored by appellate counsel, reflect that there was no effective assistance in this case on direct appeal. On this basis alone, relief is now appropriate. Moreover, since the advocacy provided on direct appeal was so inadequate, Mr. Glock urges that the Court reach the claims at this juncture, and grant habeas corpus relief.

CLAIM II

THE ADMISSION OF CO-DEFENDANT PUIATTI'S CONFESSION AND OF HIS STATEMENTS DURING THE JOINT CONFESSION VIOLATED BRUTON V. UNITED STATES, 391 U.S. 123 (1968), AND DEPRIVED MR. GLOCK OF HIS RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Under Bruton v. United States, 391 U.S. 123 (1968), the admission of a co-defendant's confession at a joint trial violates the defendant's right to cross-examination under the Confrontation Clause of the sixth amendment, despite instructions that the jury is to consider that confession only against the co-defendant. Id., 391 U.S. at 126. Following Mr. Glock's direct appeal, the Supreme Court decided Cruz v. New York, 107 S. Ct. 1714 (1987), holding that the Bruton rule applies even when the defendant's own confession is admitted against him. Id., 107 S. Ct. at 1719.

Robert Glock and his co-defendant, Carl Puiatti, were jointly tried for first degree murder, kidnapping, and robbery. At that trial, three post-arrest statements were admitted: (1) a statement made by Mr. Glock on August 21, 1983, (2) a statement

made by Mr. Puiatti on August 21, 1983, and (3) a statement at which both defendants were present on August 24, 1983. The admission of Mr. Puiatti's statement and of the August 24 statement in this capital trial deprived Mr. Glock of his rights under the Confrontation Clause, his rights to due process, and his rights to a fair and reliable capital sentencing determination.

Mr. Glock and Mr. Puiatti were arrested on August 20, 1983, in Morristown, New Jersey (R. 1778). A computer check of the license of the car they were driving revealed that the car was stolen and its owner was a homicide victim in Florida (R. 1789). Florida authorities were notified (R. 1799), and arrived in New Jersey on August 21, 1983 (R. 1800).

During the evening of August 21, both Mr. Glock and Mr. Puiatti were interviewed concerning their knowledge of the homicide, and both defendants provided tape-recorded statements (R. 1830-32; 1836-38;).[2] Mr. Glock was interviewed first, and described the offense as follows:

Stahl	If you would, go into the whole story. Tell us exactly what you said before.
Robert	I don't know what the day was at the mall, but we were sitting beside the Belk Lindsay waiting for somebody to come out, that we could take a car. We saw the lady drive up in the Toyota, walked over to the car as she was getting out.
Stahl	Did she get into the mall Robert?
Robert	Into the mall parking lot.
Stahl	Did she go into the mall?

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[2] Edited versions of these tapes were admitted into evidence and were played for the jury at trial, but the tapes were not transcribed into the record (R. 1835, 1842). Undersigned counsel has attempted to obtain copies of the tapes which were played for the jury, but has been informed that an order from the trial court is necessary before the tapes will be copied. Thus, counsel does not know exactly what the jury heard and is relying upon transcripts of the statements obtained from trial counsel's file. See Attachments 1 and 2.

Robert No she didn't.

Stahl Ok. Then what happened?

Robert Then, as we walked up to the car, I pulled the gun out, .38 Special, out of the bag that I had it in, Carl pulled the .22 from his back pocket. I pointed the gun at her, told her to get back into the car and into the back seat. She did so. I moved over onto the passenger's side, Carl got in the driver's side and drove. We drove . . . .

Stahl Did you take any money from her at that particular point?

Robert No, as we were driving. We were or drove along 301, got out to 301, found out or I had been going through her purse and found she had $50.00 on her. I took the $50.00, went through her purse further and found she had a MAX 24 hour teller card and asked her where this bank was located and she told us and showed us how to get there. We turned around on 301 at the time and headed back into town. Went to

the bank and found the 24 hour teller was closed and she said she might be able to write a check and cash it there. So we did that, she wrote a check for $100.00 and she cashed it there. Then proceeded to 301 and headed down 301 and drove about 60 to 70 miles and come up to this orange grove where this dirt road was, started heading down this dirt road . . . .

Stahl When you come to 301, did you make a right onto this road, this dirt road, before you went into the orange grove?

Robert Yes it was, it was on the passenger's side that the road was on.

Stahl Ok. What did you do?

Robert We went up to this dirt road and to where some houses were and found that there were houses there and turned around. Come back up the dirt road and saw the orange grove there and the dirt road going to the orange grove. We drove down the grove to where a certain spot. I got out of the passenger's side, lift up the back seat, she asked

for her or I had already given her her purse and I.D. and everything. She asked for her glove and I gave her her glove.

Stahl What kind of glove?

Robert Baseball glove.

Stahl What else did she ask for.

Robert Her hat, cap.

Stahl Was she wearing it when she left the car? Or was she holding it?

Robert She was wearing it.

Stahl Did she have sunglasses on at that particular point?

Robert She did have glasses on.

Stahl Did you know the color of the clothing she was wearing?

Robert I don't remember, it was shorts. A short sleeved shirt.

Stahl Do you know the color of the cap she was wearing?

Robert No, I don't.

Stahl Then what happened, when you let her out of the car what happened?

Robert We, after we let her out, we drove down towards the, we turned around and went back towards the dirt road and Carl . . . .

Stahl Was she running from you?

Robert No she was standing there. She just stood there. We went or turned around and went back towards the dirt road. Carl stopped the car and suggest we had to shoot her because she could identify us. We turned around and went back towards her, Carl was on the side that she was on. He pulled the gun out which was laying beside him and fired either one or two shots, I forget how many it is. Both shots did hit.

Stahl Which gun was that?

Robert That was the .38

Stahl What foot barrel was it? Was it long or short?

Robert Long barrel. .38 Special, Colt.

Stahl Colt. OK. Go ahead. He fired two shots, did she fall?

Robert No she did not.

Stahl What happened after that?

Robert We kept on driving by her. He saw that she didn't fall and turned around and as we were heading back towards her, he told me that we were going to have to kill her. So he handed me the gun because she was was [sic] on the passenger's at the time.

Stahl What gun did he hand you?

Robert The .38

Stahl .38, ok, go ahead.

Robert As he passed her, I fired a shot. It hit.

Stahl And what did she do, did she fall?

Robert No, she did not.

Stahl What happened then.

Robert We drove by and turned around a gain [sic] and Carl took the gun and fired and when we come back by her again, we stopped and fired the rest of the shots. We kept on going after that.

Stahl How many shots did you fire? Approximately at that time?

Robert At that time?

Stahl Yea, when you or before you left.

Robert All that was left in the gun except for one.

Stahl Did she fall on the ground at that particular time?

Robert Yes she did. She staggered a few steps and then fell.

Stahl Ok. Then what?

Robert And then we drove away. Back down to the highway.

(Att. 1)(emphasis added).

Mr. Puiatti was then interviewed and explained his involvement in the offense as follows:

Carl . . . So the next day, we were kind of low on money, we were waiting at the mall and a woman in an orange Toyota Corolla, pulled in . . .

Stahl Where?

Carl At the mall.

Stahl Which side of the mall, do you recall where it was located?

Carl Ah, shoot . . . no I really don't.

Stahl Was it Belk Lindsay or . . . .

Carl Yea, it was next to that, next to Belk Lindsay.

Stahl Alright. Then what happened.

Carl Ah . . .

Stahl Did she get into the mall?

Carl No, she had just pulled in . . .

Stahl Yea, and what did you do?

Carl [Bobby] had the bag with the gun in it.

Stahl Which gun?

Carl The .38 Special. We went up to her and forced her into the car.

Stahl Which seat?

Carl In the back seat.

Stahl Where did you sit?

Carl I drove.

Stahl Where did [Bobby] sit?

Carl Passenger's seat.

Stahl Then what happened?

Carl Then we ah, she had $ 50.00 on her, we took it and we went it and went to some bank and she cashed for a $ 100.00, so we took it. We kept going and going. . . .

Stahl Let's back up a little. Did you sign that check or did she?

Carl She signed it.

Stahl Ok. Go ahead.

Carl We kept going and we found this deserted place, road, and I really

don't know, recall. . .

Stahl What route did you take when you left Bradenton?

Carl Three (3) something, 321, I don't remember.

Stahl It wasn't I-75?

Carl No.

Stahl Ok. Go ahead.

Carl So we pulled off in this dirt road, it was like by an Orange Grove, I remember that. And she had her purse and asked to get out of the car and then she asked for her husband's baseball glove and we gave it to her . . . and I . . . .

Stahl Did she have a hat or some sort of tennis cap? Did she have it on?

Carl I don't remember, I don't think so.

Stahl Did she have her sunglasses on when she left?

Carl No.

Stahl Do you recall what she was wearing?

Carl Shorts and a top.

Stahl What color?

Carl Shorts were about tan and I don't remember. . .

Stahl Then what happened. She got out of the car and . . .?

Carl And I started to drive away. And Bobby say's hey man we have to kill her. And we went back and caught the ___?____ I didn't want to. We drove back there and acted like we were, I asked her for the rings.

Stahl Was she already out of the car when you asked her for the rings.

Carl Yes.

Stahl Then what happened, did she take the rings off that point?

Carl Yes and gave then to me. And I shot her in the shoulder.

Stahl Was that the first shot, what gun did you use?

Carl The .38.

Stahl Is that the same gun you stole?

Carl Yes.

Stahl Is that the same gun the State Trooper in New Jersey found?

Carl Yes

Stahl In the glove compartment?

Carl Yes.

Stahl And that's the same gun you shot her with?

Carl Yes

Stahl And that gun is identified as what?

Carl Colt .38 Special.

Stahl What length barrell?

Carl It was long, I don't know.

Stahl Ok. So you shot her in the shoulder the first time?

Carl Yes.

Stahl Then what happened?

Carl I took off and Bobby thought she was still standing and told me to go back, so I said ok and I turned around and went back and I shot her again.

Stahl Where?

Carl In the chest area.

Stahl Ok. Then what happened?

Carl She kind of went behind those bushes and Bobby took the gun from me. . .

Stahl Which gun?

Carl The .38, the Special.

Stahl ok.

Carl The same one and he shot her or shot at her when she was in the bushes, I don't know if he hit her or not, but then she came out and he shot her I think two more times.

Stahl Then what happened?

Carl She walked a little bit and then I think fell.

Stahl In all this time you didn't have any ammunition [sic] for the Derringer?

Carl No sir.

Stahl How many shots did you fire?

Carl I think about five (5).

Stahl Did you reload the gun?

Carl No.

Stahl Did you unload it there at the scene or place?

Carl What do you mean?

Stahl Did you eject the shells from the gun?

Carl I think so, there, yes.

Stahl Did you drop them on the ground?

Carl I think he did, Bobby did.

Stahl Ok. Then what happened? Did you see her fall to the ground.

Carl When we started to take off, she walked a few feet and fell to the ground, yes.

Stahl Then what happened?

Carl Then we took off, got back on the road.

(Att. 2)(emphasis added).

After being transported to Florida on August 24, 1983, Mr. Glock and Mr. Puiatti were taken to the Pasco County Sheriff's Office, where they each provided a written statement to law enforcement (R. 1844-45; 1847). Later that same evening, Mr. Glock and Mr. Puiatti participated in an oral statement to law enforcement which was transcribed by a court reporter (R. 1853). In that statement, Mr. Puiatti described the events, with occasional interjections by Mr. Glock:

> By Detective Stahl: Question: Okay. Carl, you can go ahead.
>
> Mr. Puiatti: Okay. We walked to a Shop and Go Store near Bradenton and called a taxicab to take us to the mall. We got to the mall about 8:00 o'clock that morning,

and, uh, hung around until it opened. And that day we watched a couple of movies in the mall and we were kind of looking around in the parking lot for a customer to come in to try to get their car. We had no luck that day.

That night, later that night, we tried to hitchhike out of town and tried for a couple of hours, and it was about 1:00 o'clock in the morning and we had no luck. So there was a truck parked over by the mall and it was open, so we went in and slept for a few hours until that morning.

Detective Wiggins: I need to interrupt. What was the date on this?

Mr. Puiatti: This was Monday.,

Detective Wiggins: Monday. Do you remember what date it was?

Mr. Puiatti: The 15th.

Detective Wiggins: The 15th.

Mr. Puiatti: The 15th, yeah. It was Monday.

Okay. The following morning, which was Tuesday, the 16th, we went and got something to eat. And we were getting very low on money, so we waited around the mall parking lot until it opened again. And I'm not sure of the exact time.

Do you remember the time when she came?

Mr. Glock: Whenever she came by?

Mr. Puiatti: Yeah.

Mr. Glock: It was approximately 10:20 - 10:30.

Mr. Puiatti: About 10:30 that morning a woman pulled into the mall parking lot in a - interrupted --

Detective Stahl: What location was that at the mall?

Mr. Puiatti: It was by, uh, something Lindsey.

Mr. Glock: Belk-Lindsey.

Mr. Puiatti: Belk-Lindsey Store, and there was a J.C. Penny close to it.

Mr. Glock: Super-X Drugs was -- interrupted.

Mr. Puiatti: Yeah, Super-X Drugs was there, too.

And, anyway, she pulled in in an orange 1977 Toyota SR-5 Corolla. That's what it was, Corolla.

At that time when she pulled in she had opened the door and started to get out of the car, and Robert had a handbag with a .38 in it and went up to her, put the gun on her, and she started to scream. And he told her to get in the backseat.

At that time I got in the car and started -- and got behind the driver's wheel and started to pull out of the mall.

At that time Robert went through her purse and found fifty dollars and also found that she had a, uh, bank account. So she's offering to go to her bank and withdraw some money for us, and we -- so we went to the Palmetto Bank on Palmetto Avenue and withdraw a hundred dollars in four twenties and two tens. She wrote out a check, and we went through the drive-through and withdrew it.

By Detective Stahl: Question: Who was operating the car at that time?

Mr. Puiatti: I was operating the car at that time.

Question: Where were you sitting at, Robert, in the car?

Mr. Glock: In the driver -- I mean in the passenger's seat.

Question: Where was the female?

Mr. Puiatti: Right behind me. She was sitting right behind me, the driver.

Question: Can you describe this person?

Mr. Puiatti: I would say maybe five/six, hundred and forty pounds, a hundred thirty pounds, reddish hair. She had tan shorts on with a white blouse and sandals on and, uh, uh, cap on, but the kind like a sun cap that had nothing in the middle, and reddish hair.

Question: Okay.

Mr. Glock: Large plastic rimmed glasses, also.

Detective Wiggins: Do you remember what color the cap was?

Mr. Puiatti: Blue, I believe.

Mr. Glock: Blue with either yellow or white trim.

Mr. Puiatti: White trim.

Okay. At that time after we left the bank we got on 301 heading north. We proceeded to drive to -- what was the name of around that area -- to about five miles before Dade City, and found a dirt road by orange groves.

I pulled in the dirt road by the orange groves and made a left turn into the orange groves. At that time we drove down the dirt road to the end where we saw a street, so we turned around and came back and stopped about not quite halfway through, let her out of the car, gave her her purse and her husband's baseball glove. And I asked her for her wedding band and diamond ring she had on.

Detective Wiggins: Can I interrupt you? Who gave her the glove?

Mr. Puiatti: I did.

Detective Wiggins: You gave her the glove?

Mr. Puiatti: Yes.

Detective Wiggins: Where was the glove located?

Mr. Puiatti: In the backseat.

Detective Wiggins: Do you know approximately?

Mr. Puiatti: On the back floor.

By Detective Stahl: Question: She requested this glove; didn't she?

Mr. Puiatti: Yeah, she requested that and it was her husband's glove, baseball mitt, and she also had her purse.

Mr. Glock: She requested the hat at that time also.

Detective Wiggins: She hadn't had the hat on before she requested it at that time?

Mr. Glock: (Negative headshake).

By Detective Stahl: Question: Then what happened when you let her out of the car?

Mr. Puiatti: Okay. We left her and started to take off. And as we were taking off, we started talking back and forth, and Robert said to me that he thought that we should shoot her. And after going back and forth a little bit, I agreed, and turned the car around.

Then we drove up next to her and acted

like we were looking for directions, and I shot her in the right -- right by the right shoulder, and drove off.

When I was driving off, Robert noticed that she was still standing.

Mr. Glock: There were two shots fired at her, and then -- interrupted --

Mr. Puiatti: You tell it.

Mr. Glock: When we first turned around and came back toward her on the first time, he shot the first time and hit her in the shoulder, the right shoulder, and then fired a second time. I don't know if the second time he hit her or that was when he missed her and hit the tree or whatever.

Mr. Puiatti: Yeah.

Mr. Glock: I don't know if he missed the second shot or not.

Mr. Puiatti: Yeah. It was because -- interrupted --

By Detective Stahl: Question: You agree with that, Carl?

Mr. Puiatti: Yeah.

Question: Go ahead, Bobby.

Mr. Glock: Then we kept on driving, and I noticed that she was still standing. Carl turned around and handed me the gun at that time and drove back by her, and I fired a shot. No, I fired two shots at that time.

Mr. Puiatti: Yeah.

Mr. Glock: I fired two shots. Uh, then we kept on driving back by, turned around again, (pausing).

Mr. Puiatti: Went back by again, stopped, (pausing).

Mr. Glock: Yeah. Stopped and turned around and headed back toward her.

Mr. Puiatti: (Affirmative nod.)

Detective Wiggins: She was still standing?

Mr. Glock: I only fired one shot at that time. Only fired two shots the whole time.

Mr. Puiatti: Three.

By Detective Stahl: Question: I just want to interrupt you. Carl, at the time

when you said you shot her once in the shoulder, then you shot in the chest; didn't you?

Mr. Puiatti: Yes, I shot her twice.

Mr. Glock: It was the third shot that you missed.

Mr. Puiatti: So those first two, yeah.

Question: So you shot her twice, Carl.

Mr. Puiatti: Yes.

Question: Once in the shoulder, you said (interrupted).

Mr. Puiatti: And once in the chest area.

Question: Chest. And how many times -- how many shots did you -- (interrupted.)

Mr. Glock: Two.

Question: So how many shots in total did you fire?

Mr. Glock: Me?

Question: Yeah.

Mr. Glock: Two.

Question: And -- (pausing)

Mr. Puiatti: Altogether, five. One missed.

Question: One missed. So that was a total of five shots?

Mr. Glock: The sixth shot got hung up in the gun and we didn't worry about it.

Question: Okay. And how many times did you go back now?

Mr. Glock: We passed by her once - twice - three times.

Question: Three times you went back and on the third time what happened?

Mr. Glock: That's when I fired my second and final shot, and that's when she -- as we were driving away after the last shot, she fell over.

Mr. Puiatti: She walked about ten yards and then fell over.

Question: And then -- proceed. Continue with what happened.

Mr. Puiatti: Okay. Then we drove out of the orange grove and got back onto 301.

(R. 1910 - 1919)(emphasis added).

Before trial, Mr. Glock's attorney filed a Motion for Severance of Defendants, stating in part:

> 3. Certain statements and admissions made by the co-Defendant which may be admissible against the co-Defendant makes [sic] reference to the Accused but are not admissible against the Accused.
>
> 4. A severance is necessary to promote a fair determination of the guilt or innocence of the Accused for the following reasons:
>
> a) Evidence admissible against the co-Defendant is not admissible against the Accused.
>
> . . . .
>
> d) There is a possibility of jury confusion as to different standards of responsibility and as to whom particular pieces of evidence apply.
>
> e) The co-Defendant may introduce evidence that the Accused is solely responsible for the crimes charged.

(R., Vol. II, no page number).

At a hearing on the Motion to Sever, trial counsel argued that the tape-recorded statement made in New Jersey and portions of the joint statement were not admissible against Mr. Glock (R. 340-41, 347), and that their admission would violate Bruton (R. 343, 347). Trial counsel also pointed out that if the statements were admitted at the guilt-innocence phase of trial, "the jury is going to have these statements or what they hear from these statements not only for the purpose of determining guilt or innocence but for the purpose of making a recommendation on the penalty phase of the case." (R. 356).

The trial court denied the Motion to Sever, finding as to the Bruton ground of that motion:

> Mr. Glock also complains that certain statements and admissions made by his co-defendant, Mr. Puiatti, may be used by the State but are not admissible against him. Bruton v. United States. . . . Pursuant to Rule 3.152(b)(2), Fla. R. Crim. P., the State

> has indicated that it intends to introduce at the joint trial of the defendants, the statements made by each defendant in New Jersey on August 21, 1983, and the joint statement made by the defendants on August 24, 1983, in Dade City, Florida. The State has furnished the court a copy of the transcript of the statements made in New Jersey and the court has reviewed a transcript of the joint statements contained in the court file.
>
> A review of these statements indicate [sic] that all of these statements are "interlocking," that is, all of these statements affirm substantially the same material facts of the offenses charged. State v. Stubbs, 239 So. 2d 241 (Fla. 1970); Parker v. Randolph, 442 U.S. 62 . . . (1979); Damon v. State, 397 So. 2d 1224 (Fla. App. 3d 1981). In fact, the only disagreement found in the statements is that in the statements made by the defendants in New Jersey each of the defendants said it was the other who first suggested shooting the victim. However, even that disagreement seems to have been resolved in the joint statement made later in Florida. In any event, the fact that a co-defendant's statement is "predictably more exculpatory concerning immaterial details of the crime does not render its admission in any meaningful sense harmful to his case." Damon v. State, id. at 1226.

(R., Vol. II, no page number).

At trial, the court ruled that Mr. Glock's August 21 tape-recorded statement was not admissible against Mr. Puiatti and that Mr. Puiatti's August 21 tape-recorded statement was not admissible against Mr. Glock (R. 1835). The court received both statements into evidence (R. 1833, 1841), and the tapes were played for the jury (R. 1835, 1842).

Before the tape of Mr. Puiatti's statement was played, trial counsel renewed the Motion to Sever, stating that admission of the tape constituted a violation of Bruton (R. 1839-40). The court denied the motion (R. 1840), and instructed the jury, "you are not to consider this tape to be any evidence against Mr. Glock." (R. 1841).

When the State moved to introduce the August 24 written statement of Mr. Puiatti, defense counsel again renewed the motion to sever, stating that a curative instruction would be

insufficient to cure the violation of Mr. Glock's rights (R. 1849). The trial court received the statement in evidence, and instructed the jury, "this is a written statement by Mr. Puiatti. And you are not to consider this as any evidence against Mr. Glock." (R. 1849-50). That statement was not read to the jury, but was provided to the jury during deliberations (R. 1849).

Later in the trial, the State asked the court reporter who transcribed the August 24 statement to read that statement to the jury (R. 1899). At the subsequent bench conference, the State moved the statement into evidence, but the court denied that request (R. 1902). In a pretrial hearing, the court had indicated that it would probably not permit providing the jury with a transcript of the statement because of the "[u]ndue impression it might make." (R. 716).

At the bench conference, defense counsel renewed Mr. Glock's Motion to Sever because "[s]ome parts of the statement constitute a violation of the Bruton Rule. Specifically it's a part that's very critical, the actual shooting, in that statement." (R. 1902). The court denied the motion (R. 1903), and the statement was read to the jury (R. 1905-43).

A. The Admission of Mr. Puiatti's Statements Violated Mr. Glock's Rights Under the Confrontation Clause

In Cruz v. New York, 107 S. Ct 1714 (1987), the United States Supreme Court reviewed the rationale of the Bruton rule and answered a question about which confusion had existed since the Court's plurality opinion in Parker v. Randolph, 442 U.S. 62 (1979):

> The Confrontation Clause of the Sixth Amendment guarantees the right of a criminal defendant "to be confronted with the witnesses against him." We have held that the guarantee, extended against the States by the Fourteenth Amendment, includes the right to cross-examine witnesses. See Pointer v. Texas, 380 U.S. 400, 404, 85 S.CT. 1065, 1068, 13 L.Ed.2D 923 (1965). Where two or more defendants are tried jointly,

therefore, the pretrial confession of one of them that implicates the others is not admissible against the others unless the confessing defendant waives his Fifth Amendments rights so as to permit cross-examination.

Ordinarily, a witness is considered to be a witness "against" a defendant for purposes of the Confrontation Clause only if his testimony is part of the body of evidence that the jury may consider in assessing his guilt. Therefore, a witness whose testimony is introduced in a joint trial with the limiting instruction that it be used only to assess the guilt of one of the defendants will not be considered to be a witness "against" the other defendants. In Bruton, however, we held that this principle will not be applied to validate, under the Confrontation Clause, introduction of a nontestifying codefendant's confession implicating the defendant, with instructions that the jury should disregard the confession insofar as its consideration of the defendant's guilt is concerned. We said:

> "[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect...." 391 U.S., at 135-136, 88 S. Ct., at 1627-1628 (citations omitted).

We had occasion to revisit this issue in Parker, which resembled Bruton in all major respects save one: Each of the jointly tried defendants had himself confessed, his own confession was introduced against him, and his confession recited essentially the same facts as those of his nontestifying codefendants. The plurality of four Justices found no Sixth Amendment violation. It understood Bruton to hold that the Confrontation Clause is violated only when introduction of a codefendant's confession is "devastating" to the defendant's case. When the defendant has himself confessed, the plurality reasoned, "[his] case has already been devastated," 442 U.S., at 75, n. 7, 99 S. Ct., at 2140, n. 7 (plurality opinion), so that the codefendant's confession "will seldom, if ever, be of the 'devastating' character referred to in Bruton," and

> impeaching that confession on cross-examination "would likely yield small advantage," id., at 73, 99 S.C.T at 2139. Thus, the plurality would have held Bruton inapplicable to cases involving interlocking confessions. The four remaining Justices participating in the case disagreed, subscribing to the view expressed by Justice BLACKMAN that introduction of the defendant's own interlockging confession might, in some cases, render the violation of the Confrontation Clause harmless, but could not cause introduction of the nontestifying codefendant's confession not to constitute a violation. ID., at 77-80, 99 S.Ct., at 2141-2142 (BLACKMUN, J., concurring in part and concurring in judgment). (Justice BLACKMUN alone went on to find that the interlocking confession did make the error harmless in the case before the Court, thereby producing a majority for affirmance of the convictions. Id., at 80-81, 99 S.CT., at 2142-2143.) We face again today the issue on which the Court was evenly divided in Parker.
>
> We adopt the approach espoused by Justice BLACKMUN. While "devastating" practical effect was one of the factors that Bruton considered in assessing whether the Confrontation Clause might sometimes require departure from the general rule that jury instructions suffice to exclude improper testimony, 391 U.S., at 136, 88 S.Ct., at 1628, it did not suggest that the existence of such an effect should be assessed on a case-by-case basis. Rather, that factor was one of the justifications for excepting from the general rule the entire category of codefendant confessions that implicate the defendant in the crime. It is impossible to imagine why there should be excluded from that category, as generally not "devastating," codefendant confessions that "interlock" with the defendant's own confession. "[T]he infinite variability of inculpatory statements (whether made by defendants or codefendants), and of their likely effect on juries, makes [the assumption that an interlocking confession will preclude devastation] untenable." Parker, 442 U.S., at 84, 99 S.Ct., at 2145 (STEVENS, J., dissenting).

Cruz, 107 S. Ct. at 1717-18.

It is clear after Cruz that admission of a codefendant's confession at a joint trial violates the defendant's Confrontation Clause rights, even when the defendant's "interlocking" confession is admitted. Thus, despite a limiting instruction and despite the admission of Mr. Glock's statements, the admission of Mr. Puiatti's August 21 statement and portions

of the August 24 statement violated the Bruton rule.

Bruton forbids the introduction of a nontestifying codefendant's confession which is not directly admissible against the defendant. Cruz, 107 S. Ct. at 1719. Because a codefendant's confession is presumptively unreliable, Ohio v. Roberts, 448 U.S. 56, 66 (1980), it is directly admissible against the defendant only if the confession bears sufficient "indicia of reliability." Lee v. Illinois, 106 S. Ct. 2056, 2063 (1986). This is so because the Confrontation Clause only permits the introduction of "trustworthy" hearsay:

> In Roberts, we recognized that even if certain hearsay evidence does not fall within "a firmly rooted hearsay exception" and is thus presumptively unreliable and inadmissible for Confrontation Clause purposes, it may nonetheless meet Confrontation Clause reliability standards if it is supported by a "showing of particularized guarantees of trustworthiness." 448 U.S., at 66, 100 S.Ct., at 2539. However, we also emphasized that "[r]eflecting its underlying purpose to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence, the Clause countenances only hearsay marked with such trustworthiness that 'there is no material departure from the reason of the general rule.'" Id., at 65, 100 S. Ct., at 2539, quoting Snyder v. Massachusetts, 291 U.S. 97, 107, 54 S. Ct. 330, 333, 78 L.Ed.2d 674 (19340.

Lee, 106 S. Ct. at 2063-64. There is a "weighty presumption against the admission of such uncross-examined evidence." Lee, 106 S. Ct. at 2065.

In assessing the reliability of a codefendant's confession, a court should examine factors such as the circumstances surrounding the confession, the discrepancies between the codefendant's and defendant's statements, and whether those discrepancies involve significant issues in dispute at trial. Lee, 106 S. Ct. at 2064-65.

In Mr. Glock's case, law enforcement officers interviewed Mr. Puiatti on August 21, 1983, after they had already obtained a

confession from Mr. Glock. At trial, the interviewing detective explained how Mr. Puiatti's confession came about:

> Q When Mr. Puiatti first spoke with you, what did Mr. Puiatti say?
>
> A At first Mr. Puiatti denied being involved in any homicide. And stated that he was picked up at his house by Mr. Glock. And that was all he knew.
>
> Q What did you say in response to that?
>
> A I advised Mr. Puiatti that I had already obtained the confession from Mr. Glock.
>
> And he told me, I was square one as to exactly what had occurred. And a short time after that, a moment was when Mr. Puiatti -- then Mr. Puiatti stated that he would tell us the truth as to what occurred.

(R. 1837). Another detective present at the interview testified:

> Q Okay. How did the conversation with Mr. Puiatti start?
>
> A Mr. Puiatti agreed to talk about what had occurred, and he had initially went into recite or reiterate the story that he had previously told me.
>
> Q That Glock had picked him up in the car?
>
> A Yes.
>
> Q When he made that statement, what happened?
>
> A He was stopped by Detective Stahl, who advised him that Mr. Glock had given a statement concerning the incident.
>
> Q What happened?
>
> A At this time Mr. Puiatti just sat back in the chair at the table we were seated at. And the whole room was quiet for a good solid minute. He then advised that he would give a statement.

(R. 1805).

At the pretrial suppression hearing, Mr. Puiatti testified regarding the circumstances surrounding his August 21 confession:

> Q Carl, do you recall that pause that the detectives testified about on Wednesday, they talked about a pause which occurred during questioning by Detective Quinlan, Detective Stahl and Detective Wiggins on August 21 of 1983?
>
> A Yes, sir, I do.

Q Carl, what was it that prompted you to pause?

A Well, before I paused, Detective Stahl had gotten up and had told me that Robert Glock had already given him a statement, and he got closer to me and stood over me and said that he didn't come all the way from Florida to hear a bunch of lies, pointing his finger at me.

Q Then what happened?

A Then I just hung my head, looked toward the ground, and there was a moment of silence around the room.

Q Who spoke to you next?

A Detective-Sergeant Quinlan who was seated to my left, and he said to me, "Carl, it would be in your best interest to cooperate with these gentlemen." At which time I decided that it would be in my best interest to cooperate with them, judging by what Detective Quinlan had said, and thought it would keep me out of the electric chair if I did.

(R. 624-25).

Q Now, Mr. Eble asked you about the pause that you talked about. What story did you tell them before the pause occurred?

A I hadn't really told them much of any story, sir, just that -- what I had originally said when I was put in -- brought into custody.

Q Is that the one about being picked up by Glock and that you weren't with him when the car was stolen?

A Yes, sir.

Q And then what? You said Detective Stahl said what to you?

A Detective Stahl told me that he had already gotten a statement from Mr. Glock, and he got right in my face pointing his finger at me, told me he didn't come all the way from Florida to hear a bunch of lies.

Q Did he holler at you?

A He raised his voice, yes, sir. Not in a hollering manner, but he raised his voice, and he is, to me, a very imposing figure.

Q Well, in other words it wasn't a normal conversation, not like I'm talking to you right now.

A No, it wasn't.

Q You say he raised his voice but he didn't holler?

A Yes.

Q You said he pointed his finger at you.

A Yes, sir.

Q How close did he get to you?

A He was standing. I was seated and he was standing over me, maybe about right there (indicating).

Q Was there a table between you?

A No, sir.

Q All right. And what did he say to you about Mr. Glock?

A He told me that Mr. Glock had given him a statement and started naming off some things that Mr. Glock had said on his statement.

Q He told you what Mr. Glock had said?

A Yes, sir.

Q What did he say Mr. Glock had said?

A Things related to the crime.

Q What -- what I'm trying to get is why did you change your mind and decide to tell another -- the true story?

A Because Detective-Sergeant Quinlan told me it would be in my best interest to cooperate.

Q I thought that happened later.

A That happened before I gave the statement of what happened. It happened right after Detective Stahl said that to me and I looked down at the ground, that's when the -- Sergeant Quinlan said to me, "Carl, it would be in your best interest to cooperate with these gentlemen."

Q Why did you look down at the ground? What was the pause for?

A No special reason. Just to think for a minute.

Q Figured they had you and you might as well tell them; right?

A No.

Q Why?

A I looked down at the ground because naturally I was a little upset that Mr. Glock had given them a statement.

(R. 632-34).

At the August 21 statement, then, Mr. Puiatti had been confronted with the fact that Mr. Glock had confessed, had been told "[t]hings related to the crime" which Mr. Glock had said, and was "a little upset that Mr. Glock had given them a statement." He had initially denied involvement in the offense and obviously intended to maintain that denial until he was confronted with Mr. Glock's confession. As explained in Lee, supra, Mr. Puiatti knew the "jig was up":

> The unsworn statement was given in response to the questions of police, who, having already interrogated Lee, no doubt knew what they were looking for, and the statement was not tested in any manner by contemporaneous cross-examination by counsel, or its equivalent. Although, as the State points out, the confession was found to be voluntary for Fifth Amendment purposes, such a finding does not bear on the question of whether the confession was also free from any desire, motive or impulse Thomas may have had either to mitigate the appearance of his own culpability by spreading the blame or to overstate Lee's involvement in retaliation for her having implicated him in the murders. It is worth noting that the record indicates that Thomas not only had a theoretical motive to distort the facts to Lee's detriment, but that he was actively considering the possibility of becoming her adversary: prior to trial, Thomas contemplated becoming a witness for the State against Lee. This record evidence documents a reality of the criminal process, namely that once partners in a crime recognize that the "jig is up," they tend to lose any identity of interest and immediately become antagonists, rather than accomplices.

Lee, 106 S. Ct. at 2064. As in Lee, the circumstances surrounding Mr. Puiatti's August 21 confession do not rebut the presumption of unreliability.

Mr. Glock's and Mr. Puiatti's August 21 confessions also differed in several significant respects. Mr. Glock stated that it was Mr. Puiatti's idea to shoot the victim and that it was Mr.

Puiatti who kept noticing that the victim was still standing and who decided they should shoot her again (see Att. 1). Mr. Puiatti said just the opposite -- that it was Mr. Glock's idea to shoot the victim, that he (Mr. Puiatti) did not want to shoot her, and that it was Mr. Glock who noticed she was still standing and who told Mr. Puiatti to go back (see Att. 2). Clearly, in a first degree murder trial, these discrepancies involve significant issues regarding Mr. Glock's and Mr. Puiatti's relative roles in the offense and regarding premeditation.

Thus, as in Lee, the significant discrepancies between the statements do not overcome the presumptive unreliability of Mr. Puiatti's confession:

> We also reject Illinois' second basis for establishing reliability, namely that because Lee and Thomas' confessions "interlock" on some points, Thomas' confession should be deemed trustworthy in its entirety. Obviously, when codefendants' confessions are identical in all material respects, the likelihood that they are accurate is significantly increased. But a confession is not necessarily rendered reliable simply because some of the facts it contains "interlock" with the facts in the defendant's statement. See Parker v. Randolph, 442 U.S. 62, 79, 99 S. Ct. 2132, 2142, 60 L.Ed.2d 713 (1979)(BLACKMUN, J., concurring in part and concurring in the judgment). The true danger inherent in this type of hearsay, is, in fact, its selective reliability. As we have consistently recognized, a codefendant's confession is presumptively unreliable as to the passages detailing the defendant's conduct or culpability because those passages may well be the product of the codefendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another. If those portions of the codefendant's purportedly "interlocking" statement which bear to any significant degree on the defendant's participation in the crime are not thoroughly substantiated by the defendant's own confession, the admission of the statement poses too serious a threat to the accuracy of the verdict to be countenanced by the Sixth Amendment. In other words, when the discrepancies between the statements are not insignificant, the codefendant's confession may not be admitted.
>
> In this case, the confessions overlap in their factual recitations to a great extent. However, they clearly diverge with respect to Lee's participation in the planning of her

> Aunt's death, Lee's facilitation of the murder of Odessa, and certain factual circumstances relevant to the couple's premeditation.
>
> . . . .
>
> The subjects upon which these two confessions do not "interlock" cannot in any way be characterized as irrelevant or trivial. The discrepancies between the two go to the very issues in dispute at trial: the roles played by the two defendants in the killing of Odessa, and the question of premeditation in the killing of Aunt Beedie.

Lee, 106 S. Ct. at 2065.

The same analysis applies to the objected-to portions of the August 24 statement. During that statement, Mr. Puiatti dominates the conversation and once again stated that it was Mr. Glock's idea to shoot the victim, that he (Mr. Puiatti) only agreed to do so after "going back and forth," and that it was Mr. Glock who noticed that the victim was still standing. Mr. Puiatti had been in continuous custody and obviously still had an interest in exculpating himself. During extensive and significant portions of the August 24 statement, Mr. Glock sat silent, while Mr. Puiatti related his versions of the events. See Hall v. Wainwright, 559 F.2d 964, 965 n.4 (5th Cir. 1977).

Under Lee, supra, Mr. Puiatti's statements clearly did not bear sufficient "indicia of reliability" to be independently admissible against Mr. Glock. Their admission thus violated Bruton and Cruz, and deprived Mr. Glock of his sixth, eighth, and fourteenth amendment rights.

B. The Bruton Violation Was Not Harmless

A Bruton violation can be harmless. Cruz, 107 S. Ct. at 1719. The analysis of harmlessness is distinguished from the analysis of whether a codefendant's confession is sufficiently reliable to be independently admissible against the defendant. Id. at 1718-19. In fact, the reliability of the codefendant's confession "cannot conceivably be relevant to whether, assuming

[the confession] cannot be admitted, the jury is likely to obey the instruction to disregard it, or the jury's failure to obey is likely to be inconsequential." Cruz, 107 S. Ct. at 1719.

Thus, even when the defendant's confession is admitted and interlocks in some respects with the codefendant's confession, the introduction of the codefendant's confession is not necessarily harmless. Cruz, 107 S. Ct. at 1718-19. The question under Bruton is whether the jury is likely to obey its instructions to compartmentalize the confessions and the defendants, considering each confession only against the defendant who made the confession. Id. If the confessions "interlock" to some degree, the likelihood of harm is much greater than if the confessions are "positively incompatible." Id. at 1718. Here, it is clear that the confessions described the same series of events, making it likely that the jury would thus have been unable to follow its instructions to keep the confessions and defendants separate.

C. The Error Herein Deprived Mr. Glock of Due Process

The denial of the right of confrontation which occurred because of the Bruton violation in Mr. Glock's case deprived Mr. Glock of due process as guaranteed by the fourteenth amendment.

As discussed above, the introduction of Mr. Puiatti's statements at his and Mr. Glock's joint trial violated the Bruton rule, which is designed to protect a defendant's rights under the Confrontation Clause. The United States Supreme Court long ago established that the deprivation of Confrontation Clause rights also constitutes a deprivation of due process: "we have expressly declared that to deprive an accused the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law." Pointer v. Texas, 380 U.S. 400, 405 (1965). Mr. Glock was denied his rights to due process.

D. The Introduction of Mr. Puiatti's Statements Deprived Mr. Glock of His Eighth Amendment Rights to a Fair, Reliable, and Individualized Capital Sentencing Determination

It is clearly established that a capital defendant has a fundamental right to a fair, reliable and individualized capital sentencing determination. See Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Lockett v. Ohio, 438 U.S. 586 (1976); Zant v. Stephens, 462 U.S. 862 (1983); Caldwell v. Mississippi, 472 U.S. 320 (1985); Mills v. Maryland, 108 S. Ct. 1860 (1988).

Mr. Glock was denied these fundamental rights when Mr. Puiatti's statements were introduced at their joint trial. As noted above, the foundation of the Bruton rule against the admission of codefendant' statements in joint trials is the likelihood of juror confusion regarding against which defendant a statement may be considered. Bruton, supra; Cruz, supra.

As pointed out by defense counsel in argument on the Motion to Sever (R. 356), this confusion extends to the penalty phase of a capital trial. The error is especially egregious in Mr. Glock's case because Mr. Puiatti said that it was Mr. Glock who decided they should shoot the victim and who told Mr. Puiatti to go back to the victim. As discussed in Claim III, infra, Mr. Puiatti's counsel relied upon Mr. Puiatti's statements to infer that Mr. Glock lied about his role in the offense and to cross-examine Mr. Glock's mental health expert at the penalty phase. These statements were thus highly relevant to central capital sentencing issues such as the relative roles of the defendants and premeditation.

The key question here is whether the Bruton error may have affected the sentencing decision. Obviously, the burden of establishing that the error had no effect on the sentencing decision rests upon the State. See Caldwell v. Mississippi, supra. That burden can only be carried on a showing of no effect

beyond a reasonable doubt. Compare Chapman v. California, 386 U.S. 18 (1967), with Caldwell, supra. The State cannot carry this, or any burden of harmlessness, with regard to the Bruton error in Mr. Glock's case.

E. This Claim is Cognizable in These Proceedings

The right of confrontation has long been recognized as a "fundamental right," Pointer v. Texas, 380 U.S. 400, 403 (1965). As the Court held in Pointer:

> There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.

Pointer, 380 U.S. at 405. Mr. Glock was denied this fundamental right. Such fundamental errors are cognizable in Florida collateral proceedings. See, e.g., Palmes v. Wainwright, 460 So. 2d 362, 365 (Fla. 1984); Nova v. State, 439 SO. 2d 255, 261 (Fla. App. 1983).

Trial counsel's unreasonable and prejudicial actions in "abandoning" this preserved, fundamental, and substantial error constituted ineffective assistance. No tactical decision can be ascribed to counsel's failure to urge the claim. No procedural bar precluded review of this issue. See Johnson v. Wainwright, supra, 498 So. 2d 938. Trial counsel cited the appropriate authority, Braton, supra, and time and again objected before the lower court. Appellate counsel's failure apparently was based on a totally unreasonable view -- that the plurality opinion in Parker v. Randolph, 442 U.S. 62 (1979), controlled the resolution of this issue. The unreasonableness of counsel's actions is amply demonstrated by the Supreme Court's issuance of Cruz, which rejected the plurality's position in Parker.

Cruz v. New York, 107 S. Ct. 1714 91987), did not exist at the time of Mr. Glock's trial or direct appeal. In Witt v. State, 387 So. 2d 922 (Fla. 1980), cert. denied, 449 U.S. 1067 (1980), this Court held that state post-conviction relief is available to a litigant on the basis of a "change of law" which:

> (a) emanates from [the Florida Supreme] Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance.

Witt, 387 So. 2d at 922. The Court also noted that usually such "changes of law" will be the type that "necessitate retroactive application." Id. at 929. See also Adams v. Dugger, 816 F.2d 1493, 1496-97 (11th Cir. 1987). Cruz fully meets each of these requirements.

Cruz is obviously fundamental, constitutional, and retroactive. See Puiatti v. State, 521 So. 2d 1106 (Fla. 1988). And Cruz is a "change in law." Compare Puiatti v. State, 495 So. 2d 128 (Fla. 1986), vacated, 107 S. Ct. 1950 (1987), with Puiatti v. State, 521 So. 2d 1106 (Fla. 1988). Consequently, Cruz makes Mr. Glock's claim now fully cognizable in Florida collateral proceedings.

Mr. Glock's conviction and sentence of death were imposed in violation of the sixth, eighth, and fourteenth amendments. That error should now be corrected. The writ should issue.

CLAIM III

THE TRIAL COURT'S DENIAL OF A SEVERANCE AT BOTH THE GUILT AND PENALTY PHASES OF TRIAL DEPRIVED MR. GLOCK OF HIS RIGHTS TO A FUNDAMENTALLY FAIR TRIAL AND VIOLATED THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Mr. Glock and his codefendant, Carl Puiatti were tried jointly. Before trial, Mr. Glock's trial counsel filed a motion to sever, stating in part:

> 3. Certain statements and admissions made by the co-defendant which may be admissible against the co-defendant makes reference to the accused but are not

admissible against the accused.

4. A severance is necessary to promote a fair determination of the guilt or innocence of the accused for the following reasons:

a) Evidence admissible against the co-defendant is not admissible against the accused.

b) There is a possibility of antagonistic defenses.

c) One defendant may testify and the other not, thus calling attention to one defendant exercising his rights against self-incrimination.

d) There is a possibility of jury confusion as to different standards of responsibility and as to whom particular pieces of evidence apply.

e) The co-defendant may introduce evidence that the accused is solely responsible for the crimes charged.

5. The accused is now prejudiced in the preparation of his case and will be further prejudiced at a joint trial because the codefendant has not filed reciprocal discovery and has not advised counsel for the accused of his possible witness, defenses, including reliance on the defense of insanity (see attached letter to counsel for accused which has not been answered).

(R., Vol. II, no page number).

The court denied the severance, but noted that the motion could be raised again (R., Vol. II, no page number). Defense counsel repeatedly requested a severance throughout the trial and penalty phase (See, e.g., R. 1839, 1849, 1860, 1876, 1902, 2113, 2266, 2354). All those requests were denied.

Under Florida law, severance of joint defendants is proper when it is necessary to a "fair determination of each defendant's guilt or innocence":

> Rule 3.152(b)(1) directs the trial court to order severance whenever necessary "to promote a fair determination of the guilt or innocence of one of more defendants. . . ." As we stated in Menendez v. State, 368 So. 2d 1278 (Fla. 1979), and in Crum v. State, 398 So. 2d 810 (Fla. 1981), this rule is consistent with the American Bar Association standards relating to joinder and severance in criminal trials. The object of the rule

> is not to provide defendants with an absolute right, upon request, to separate trials when they blame each other for the crime. Rather, the rule is designed to assure a fair determination of each defendant's guilt or innocence. This fair determination may be achieved when all the relevant evidence regarding the criminal offense is presented in such a manner that the jury can distinguish the evidence relating to each defendant's acts, conduct, and statements and can then apply the law intelligently and without confusion to determine the individual defendant's guilt or innocence. The rule allows the trial court, in its discretion, to grant severance when the jury could be confused or improperly influenced by evidence which applies to only one of several defendants.
>
> A type of evidence that can cause confusion is the confession of a defendant which, by implication, affects a codefendant, but which the jury is supposed to consider only as to the confessing defendant and not as to the others. A severance is always required in this circumstance. Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L.Ed.2d 476 (1968).

McCray v. State, 416 So. 2d 804 (Fla. 1982). An examination of the guilt and penalty phase proceedings demonstrates that Mr. Glock was not provided a "fair determination" as to guilt or punishment.

Clearly, Mr. Glock was entitled to a severance based upon the State's introduction of codefendant Puiatti's statements in violation of Bruton (see Claim I, specifically incorporated herein). As stated in McCray, this is exactly the "type of evidence that can cause [jury] confusion." Introduction of Mr. Puiatti's statements undoubtedly prejudiced Mr. Glock, for in those statements Mr. Puiatti asserted that it was Mr. Glock's idea to shoot the victim and to return to her when she did not fall (see App. 17, 18; see also Claim I).

As defense counsel pointed out in the pretrial hearing on the Motion to Sever (R. 343), during trial it became clear that Mr. Glock faced prosecution not only by the State but also by his codefendant. At a bench conference during the testimony of the lead detective, counsel for Mr. Puiatti announced his intention

"of making it clear that Mr. Glock is a liar. That he is responsible for Mrs. Richie's death" (R. 1859). Defense counsel renewed the Motion to Sever, which was denied (R. 1860-61).

During cross-examination of the detective, Mr. Puiattti's counsel did indeed try to show that Mr. Glock was a "liar". To do this, counsel relied upon Mr. Puiatti's August 21 statement, Mr. Glock's August 21 statement, and the August 24 statement. Counsel's point was that Mr. Puiatti's August 21 statement was true, while Mr. Glock's was not:

> Q So the taped statement is what Mr. Puiatti told you, when he told you that he was going to tell the truth?
>
> A. Yes.
>
> Q. Mr. Glock told you on his statement didn't he, didn't you ask him on that tape recording, if that was the truth and Mr. Glock was telling you the truth?
>
> A. Yes, I asked him that.
>
> . . .
>
> Q. Just answer my question. What Mr. Glock told you on the taped statement, was that -- what he told you was that he was telling the truth on that, and he said that it was Mr. Puiatti's idea to kill Mrs. Ritchie, correct?
>
> A. Correct.
>
> Q. Now, you also were present when Mr. Glock gave a statement to a court reporter, who was doing much like what Mrs. Bishop is doing here, under oath, here in Florida, correct?
>
> A. Yes.
>
> Q. And both young men were present at the same time, correct?
>
> A. Yes.
>
> . . .
>
> Q. What Mr. Puiatti told you on the taped statement, what he said was the truth, was that it was Mr. Glock's idea to kill Mrs. Ritchie, correct?
>
> A. That's correct.
>
> Q. When the two of them were at the Sheriff's Department and gave the court

reporter the statement under oath, didn't Mr. Glock agree that Mr. Puiatti was telling the truth about that?

A. It was Glock's idea, and Puiatti went along with it after he kicked it around.

Q. Isn't that right, that when he got down here in front of the court reporter, he gave you a different statement than what he said before, and admitted that it was his idea to kill Mrs. Ritchie.

A. Yes.

. . .

Q. Okay. Mr. Stahl, on that tape recording of the way I heard that tape recording, and maybe I missed it, the way that I heard that tape recording was that the way that Mr. Glock described the shooting, was that Puiatti shot first, Glock shot the second time and Puiatti shot the third time?

A. Correct sir.

Q. Mr. Glock told you that was the truth on that taped statement, didn't he?

A. Yes he did.

Q. And again, you hadn't told Mr. Puiatti that Glock was trying to put the blame on him for shooting her last, did you?

A. No I didn't.

Q. Mr. Puiatti told you that he was going to tell the truth, didn't he?

A. Yes he did.

Q. And Mr. Puiatti told you on that taped statement that he shot the first time, and the second time, but then Glock grabbed the gun and finished off Mrs. Richie. Shot and killed her. Isn't that what he said, that he took the gun and shot Mrs. Ritchie, emptied the gun into her?

A. That was the third time.

Q. Right, when you got back down to Florida, and in front of the court reporter, when the two of them were sitting there together, didn't Mr. Glock agree that Mr. Puiatti was telling the truth? That it was Mr. Glock who shot last, that he grabbed the gun and shot Mrs. Richie?

A. It was a little conflict there, because -- Puiatti said he shot the first time and then -- Glock said he shot the second time. He didn't know whether he shot once or two times. And then I had to

question Puiatti about that, and Puiatti said he shot the first time, he shot her in the chest and in the shoulder. And the second time in the chest.

And Glock said that he finished the rounds on the third time.

Q. So it was Mr. Glock who finally downed her? And in front of the court reporter, he admitted that Mr. Puiatti told the truth the whole time, and it was he who took the gun and emptied the gun into Mrs. Ritchie?

A. Correct. That was the finish.

. . .

Q. It was Mr. Glock who rifled through the purse of Mrs. Ritchie wasn't it?

A. Yes.

Q. And that's why Mr. Puiatti couldn't identify anything that was in the purse, or that came out of the purse, because he hadn't seen it?

A. From my understanding, yes.

. . .

[Q] Do you recall Mr. Stahl, how Mr. Puiatti also told you that Mr. Glock used to talk alot? He used to talk so much, incessantly talking, or something to that effect? And it would drive Mr. Puiatti nuts?

A. He did say something to that effect, and that he spoke incessantly.

Q. And that Mr. Glock drove him nuts with his incessant talking?

A. Constant talking, yes.

(R. 1864-71). Mr. Puiatti's counsel followed through on his promise to attempt to show Mr. Glock was a "liar" and to show Mr. Puiatti's August 21 statement was the true account of the offense. Thus, the statement which was not supposed to be evidence against Mr. Glock -- Mr. Puiatti's August 21 statement -- was used by the co-defendant to attack Mr. Glock.

Following this witness's testimony, Mr. Glock's counsel again renewed the Motion to Sever based on "What has become obvious, that Mr. Glock has been tried not only by the State, but by Mr. Puiatti's counsel" and "based on what we have heard on the

statements" (R. 1876-77). The motion was denied (R. 1877).

During closing argument, Mr. Puiatti's counsel continued his attack on Mr. Glock based on Mr. Puiatti's taped statement:

> [MR. EBLE:] . . . Detective Stahl also told you one more thing I think it's important to think about. Carl turned to him on the airplane and complained about Mr. Glock being an incessant talker, talking constantly, and that it drove him nuts.
>
> I submit to you, ladies and gentlemen, that there is something wrong with Mr. Glock.
>
> . . .
>
> The incessant talking of Mr. Glock, Mr. Puiatti snapping, saying he didn't want to, he didn't want to, and something snapped.
>
> MR. VAN ALLEN: Objection. There is no evidence he said I don't want to, I don't want to. It's only --
>
> MR. EBLE: <u>It's on the tape recorded statement</u>. I believe the jury can remember what's there and what's not.
>
> THE COURT: I don't remember.
>
> MR. EBLE: I submit it's on the tape recorded statement.
>
> You have everything there that Mr. Puiatti said. Think back to the tape recorder statement. I think it's back there. Ladies and gentlemen, you can have the testimony played back. You can have the Court Reporter read it back if you don't remember it yourself.

(R. 2056-59).

Mr. Puiatti's counsel clearly encouraged the jury to consider Mr. Puiatti's August 21 statement -- which was admitted only aginst Mr. Puiatti -- as evidence that Mr. Glock was a liar and that Mr. Glock was primarily responsible for the offense. Thus, although the State was not permitted to use that statement against Mr. Glock, counsel for Mr. Puiatti did.

The prejudice to Mr. Glock resulting from the joint trial continued into the penalty phase. During the testimony of a psychologist called on Mr. Glock's behalf, counsel for Mr. Puiatti continued to emphasize Puiatti's statement that the

shooting was Mr. Glock's idea. Mr. Puiatti's counsel asked whether the psychologist's findings were consistent with the fact that the shooting was Mr. Glock's idea (R. 2264). Defense counsel objected, pointing out that that "fact" came from Mr. Puiatti's August 21 statement, which was not in evidence against Mr. Glock, and that the August 24, statement said the defendants discussed the shooting (R. 2264-66). Defense counsel renewed the Motion to Sever (R. 2266). The motion and objection were overruled (R. 2266), and Mr. Puiatti's counsel was allowed to continue questioning the witness based on facts from Mr. Puiatti's August 21 statement (R. 2267-69).

In closing argument at the penalty phase, the State urged the jury to consider Mr. Glock and Mr. Puiatti as "two peas in a pod" (R. 2403), and argued that "there's no reasons to treat them any differently . . . . They are very, very similar." (R. 2404).

The State also argued that the jury should not find the mental health testimony presented by both Mr. Glock and Mr. Puiatti credible because "[a]ll the doctors said is that Mr. Glock and Mr. Puiatti did not have anti-social personalities" (R. 2407). While one of Mr. Puiatti's experts had testified that Mr. Puiatti did not have an anti-social personality (R. 2158), no such testimony was presented by Mr. Glock's mental health witness (See R. 2239-70).

In instructing the jury at the penalty phase, the court informed the jury that their task was to advise the court regarding "what punishement should be imposed upon Mr. Glock and Mr. Puiatti" (R. 2443). The court then provided the jury with a single list of aggravating and mitigating circumstances applicable to both defendants (R. 2443-44).

Clearly, the actions of Mr. Puiatti's counsel, the State, and the court during the penalty phase deprived Mr. Glock of his eighth amendment rights to a fair, reliable, and individualized capital sentencing determination. The failure to grant a

severance resulted in the jury being presented with improper, inaccurate, and misleading argument and information. See Caldwell v. Mississippi, 105 S. Ct. 2633 (1985).

Trial counsel had renewed his motion to sever time and again. This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Glock's trial and death sentence. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings. See Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error. Habeas corpus relief is proper.

CLAIM IV

THE TRIAL COURT'S UNCONSTITUTIONAL SHIFTING OF THE BURDEN OF PROOF IN ITS INSTRUCTIONS AT SENTENCING, AND ITS APPLICATION OF THIS SAME IMPROPER STANDARD IN IMPOSING SENTENCE, DEPRIVED MR. GLOCK OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW, AS WELL AS HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

Robert Glock was sentenced to death by a sentencing judge who presumed that death was appropriate once one or more aggravating circumstances were established, unless Mr. Glock overcame that presumption by showing that mitigating circumstances outweighed aggravating circumstances. In his sentencing order, the judge recited his understanding of the law:

> "When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances. . . ." State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973).

(App. 13, Findings in Support of Sentences, p. 2).

As the Eleventh Circuit has recently explained, the presumption discussed in Dixon may be an appropriate appellate review standard, but is constitutionally impermissible when employed by the sentencing authority:

The Florida Supreme Court, sitting as an appellate body, has consistently stated that it will presume a sentence of death to be appropriate when one or more valid aggravating factors exists, even if the other aggravating factors relied upon by the sentencer are found to be improper. See, e.g., White v. State, 446 So.2d 1031, 1037 (Fla. 1984)("When there are one or more valid aggravating factors which support a death sentence, in the absence of any mitigating factors, death is presumed to be the appropriate penalty."). In the present case, the terminology that death is presumed appropriate seeped into the sentencing instructions given by the trial judge. The jury was instructed:

> When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided.

Jackson contends that such an instruction amounts to a constitutional error. We agree.

It is true that in Ford v. Strickland, 696 F.2d 804 (11th Cir.)(enbanc), cert. denied, 464 U.S. 865, 104 S.Ct. 201, 78 L.Ed.2d 176 (1983), this court upheld the Florida Supreme Court's practice of not requiring resentencing even after the Court determined that some aggravating circumstances found by the jury lacked evidentiary support. AS we explained, the Florida Supreme Court's "presumption" that a death sentence should be affirmed due to the existence of five aggravating circumstances and no mitigating circumstances "seems very like the application of a harmless error rule." Id. at 815.

In this case, however, the jury was instructed that death was presumed to be the appropriate penalty. Justice McDonald of the Florida Supreme Court has astutely pointed out the problems created when such a presumption is relied upon by the sentencing authority:

> I would like to comment on the reference in the majority opinion to State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 [94 S.Ct. 1950, 40 L.Ed.2d 295](1974). I do not embrace the language from that opinion recited in this majority opinion as "when one or more of the aggravating circumstances is found death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances." If that language is restricted to the role of this Court in reviewing death sentences

> imposed by the trial court, it is acceptable. But I fear that it is construed by the trial judges as a directive to impose the death penalty if an aggravating factor exists that is not clearly overridden by a statutory mitigating factor. The death sentence is proper in many cases. But it is the most severe and final penalty of all and should, in my judgment, be exercised with extreme care. I am unwilling to say that a trial judge should presume death to be the proper sentence simply because a statutory aggravating factor exists that has not been overcome by a mitigating factor.

Randolph v. State, No. 54-869 (Fla. Nov. 10, 1983)(LEXIS, States library, Fla. file) (McDonald, J., dissenting), withdrawn, 463 So. 2d 186 (Fla. 1984), cert. denied, 473 U.S. 907, 105 S. Ct. 3533, 87 L.Ed.2d 656 (1985).

Such a presumption, if employed at the level of the sentencer, vitiates the individualized sentencing determination required by the Eighth Amendment. The Supreme Court has "emphasized repeatedly . . . [that] it is essential that the capital-sentencing decision allows for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense." Roberts v. Louisiana, 431 U.S. 633, 637, 97 S.Ct. 1993, 1995, 52 L.Ed.2d 637 (1977)(per curiam). The question is whether a sentencing procedure "'create[d] the risk that the death penalty w[ould] be imposed in spite of factors which may call for a less severe penalty.'" Sumner v. Shuman, ___ U.S. ____, 107 S. Ct. 2716, 2726, 97 L.Ed.2d 56 (1987)(quoting Lockett v. Ohio, 438 U.S. 586, 608, 98 S.Ct. 2954, 2966, 57 L.Ed.2d 973 (1978)(plurality opinion)); see also Peek v. Kemp, 784 F.2d 1479, 1488 (11th Cir. 1986)(en banc)(criticizing jury instruction in Spivey v. Zant, 661 F.2d 464 (5th Cir. Unit B. Nov. 1961), cert. denied, 458 U.S. 1111, 102 S.Ct. 3495, 73 L.Ed.2d 1374 (1982), because that instruction "may well have skewed the jury towards death and misled the jury with respect to its absolute discretion to grant mercy regardless of the existence of 'aggravating' evidence"). The jury instruction in this case created precisely that risk.

Presumptions in the context of criminal proceedings have traditionally been viewed as constitutionally suspect. Sandstrom v. Montana, 442 U.S. 510, 99 S. Ct. 2450, 61 L.Ed.2d 344 (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, ___ U.S. ___, 107 S. Ct. 1821, 95 L.Ed.2d 347 (1987); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 969, 71 L.Ed. 2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). In considering the constitutionality of Florida's capital sentencing scheme, the Supreme Court unambiguously declared:

> While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of Furman are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.
>
> The directions given to judge and jury by the Florida statute are sufficiently clear and precise to enable various aggravating circumstances to be weighed against the mitigating ones. As a result, the trial court's sentencing discretion is guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed.

Proffitt v. Florida, 428 U.S. 242, 258, 96 S.Ct. 2960, 2969, 49 L.Ed.2d 913 (1976). Rather than follow Florida's scheme of balancing aggravating and mitigating circumstances as described in Proffitt, 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, 96 S.Ct. 2978, 49 L. Ed. 2d 944 (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, 96 S.Ct. 2909, 2932, 49 L.Ed.2d 859 (1976)(sentencing authority's discretion must "be suitably directed and limited so as to minimize tthe

> risk of wholly arbitrary and capricious action").

Jackson v. Dugger, 837 F. 2d 1469, 1473-74 (11th Cir. 1988).

In Mr. Glock's case, the sentencing judge presumed that death was appropriate unless the mitigating circumstances outweighed the aggravating circumstances and believed that if Mr. Glock did not meet this burden, death was "mandated by Florida law." (R. 2617). The application of this improper standard violated the eighth and fourteenth amendments and deprived Mr. Glock of his rights to due process and equal protection and of his fundamental right to a fair, reliable, and individualized capital sentencing determination.

The Florida Supreme Court has held that shifting the burden to the defendant to establish that the mitigating circumstances outweigh the aggravating circumstances would conflict with the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), as well as with State v. Dixon, 283 So. 2d 1 (Fla. 1973). Arango v. State, 411 So. 2d 172 (1982). In Arango, the Florida Supreme Court held that a capital sentencing jury must be

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

Accord State v. Dixon, 283 So. 2d 1 (Fla. 1973).

Mr. Glock's sentencing proceeding did not follow this straightforward due process and eighth amendment requirement. Rather, Mr. Glock's sentencing jury was specifically instructed that Mr. Glock bore the burden of proof on the issue of whether he should live or die and his sentencing judge employed this unconstitutional standard in sentencing him to death. According to the instructions given to Mr. Glock's jury, the State needed only to show that aggravating circumstances existed sufficient to justify imposition of the death penalty, at which point it became

the defense's burden to show that mitigation outweighed the aggravating circumstances proved by the State, before a life sentence could be recommended. Nowhere was the jury correctly instructed that before a death sentence could be imposed, the State must prove that the aggravating circumstances outweighed the mitigating circumstances. Cf. Arango, supra.

At the beginning of the penalty phase of the trial, the court told the jury that the mitigating circumstances must outweigh the aggravating circumstances. The jury was erroneously advised that:

> [T]he State and the defendants may present evidence relative to the nature of the crimes and the character of the defendants. You are instructed that this evidence when considered with the evidence that you have already heard is presented in order that you might determine, first, whether sufficient aggravating circumstances exist that would justify the imposition of the death penalty; and, secondly, whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any.

(R. 2140)(emphasis added).

At the penalty phase charge conference, defense counsel requested an instruction which properly stated the burden of proof (R. 2359-60). The proposed instruction stated:

> If you find that there are sufficient aggravating circumstances that would justify the impostion of the death penalty, then you must consider the evidence in mitigation. It will be your duty to determine whether there are sufficient aggravating circumstances to outweigh the mitigating circumstances beyond and to the exclusion of a reasonable doubt.
>
> (Omit from Standard Instructions the following: "whether there are mitigating circumstances sufficient to outweight [sic] the aggravating circumstances, if any.")
>
> State v. Dixon, 283 So.2d 1, 9 (Fla. 1973)

(App. 19). At the charge conference, counsel argued that the instruction was necessary to inform the jury "that it is their responsibility to determine that the aggravating circumstances outweigh the mitigating circumstances beyond and to the exclusion

of every reasonable doubt." (R. 2360). The court denied the requested instruction (R. 2361).

During closing argument at the penalty phase, the State informed the jury that the court would instruct them:

> [S]hould you find sufficient aggravating circumstances do exist, it will then by your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.

(R. 2394).

This misstatement of the burden of proof was repeated by the court, to the jury, during the instructions given immediately prior to penalty phase deliberations. The jury was instructed:

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

(R. 2442)(emphasis added).

> If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole for twenty-five years.
>
> Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that would out weigh the aggravating circumstances.

(R. 2443-44)(emphasis added). Defense counsel maintained his previous objection and requested instruction (R. 2448).

At the sentencing hearing held several weeks after the conclusion of the trial, the court found that one mitigating circumstance and three aggravating circumstances applied to Mr. Glock. The court then imposed the death sentence, explaining:

> And in weighing this mitigating factor that I find for Mr. Glock, and the aggravating factors that I find, I'm convinced that the sentence of death is

mandated by Florida law.

(R. 2617)(emphasis added).

The court also relied upon the misstatement of the burden of proof provided to the jury in its sentencing order. Prior to stating its findings, the court discussed the law applicable to the sentencing determination, quoting the following passage:

> "When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances. . . ." State v. Dixon, 283 So.2d 1, 9 (Fla. 1973).

(App. 13, Findings in Support of Sentences, p. 2).

The jury instructions and the court's improper shifting of the burden of proof violated the eighth amendment, Arango and Dixon, supra, and Mullaney v. Wilbur, 421 U.S. 684 (1975). The burden of proof was shifted to Mr. Glock on the central sentencing issue of whether he should live or die. This unconstitutional shift of the burden violated Mr. Glock's due process rights under Mullaney, supra. See also Sandstrom v. Montana, 442 U.S. 510 (1979); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988), cert. denied, 108 S. Ct. 2005 (1988). Moreover, the application of this unconstitutional standard at the sentencing phase violated Mr. Glock'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 Jackson, supra; Arango v. State, supra; State v. Dixon, 383 So. 2d 1 (Fla. 1973); see also Arango v. Wainwright, 716 F.2d 1353, 1354 n.1 (11th Cir. 1983).

The argument and instructions presented the sentencing jury with misleading and inaccurate information and thus violated Caldwell v. Mississippi, 105 S. Ct. 2633 (1985), as well. The instructions "perverted [the sentencer's determination] concerning the ultimate question of whether in fact [Robert Glock should be sentenced to death]." Smith v. Murray, 106 S. Ct. 2661, 2668 (1986)(emphasis in original). Reasonable jurors could

interpret the instructions as creating a presumption in favor of death. Mills v. Maryland, 108 S. Ct. 1860 (1988).

The trial court's instructions and the court's application of this unconstitutional standard allowed Mr. Glock to be sentenced to death without ever requiring the State to prove that death was the appropriate sentence. Once an aggravating circumstance was established, death was presumed unless and until the defense overcame that presumption and showed that the mitigating circumstances outweighed the aggravating circumstances. See Mills, supra. Mr. Glock was deprived of rights which, even in an ordinary misdemeanor, are mandated as a matter of fundamental fairness. See In re Winship, 397 U.S. 358 (1970). Mr. Glock's death sentence resulted from a proceeding at which the "truth-finding fuction" was "substantially impair[ed]." Ivan v. City of New York, 407 U.S. 203, 205 (1972). His sentence of death therefore violates the eighth and fourteenth amendments and must be vacated.

No tactical decision can be ascribed to counsel's failures to urge the claim. No procedural bar precluded review of this issue. See Johnston v. Wainwright, supra, 498 So. 2d 938. Appellate counsel's failure deprived Mr. Glock of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra.

Mr. Glock respectfully urges that the Court now grant a stay of execution and the relief to which these precedents demonstrate his entitlement.

CLAIM V

MR. GLOCK'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS WERE DENIIED BY IMPROPER CONSIDERATION OF THE VICTIM'S CHARACTER AND VICTIM IMPACT INFORMATION.

Throughout this trial, the jury was subjected to sympathetic information about the victim's character, her home life, and her

"tragedy". Often this was done subtly but more often it was a blatant, improper comment that never should have gone to the jury.

During opening statements, Mr. Van Allen, one of the prosecuting attorneys, told the jury that they would hear from two "friends" of Sharilyn Richie's Reverend Manuel and Reverend Franklin (R. 1642). Van Allen then told the jury they would also hear from the victim's husband, Larry Richie, who would describe his frantic search for his wiife. Van Allen said:

> He began calling around, calling every friend that he could think of where she could have gone.

(R. 1644). Finally, Van Allen told the jury "the story of what is probably most any woman's nightmare." (R. 1648).

A record transcript is cold and flat and cannot convey the tone of voice or the accompanying expression of the speaker. But it is clear from the words themselves and especially from the objections of Mr. Puiatti's attorney that this opening statement was emotionally charged and designed to win sympathy for the victim. Mr. Eble objected to the reference to the minister testifying, saying that by having the ministers testify as to identification, the inference would be that the victim is a "churchgoer" and "a good woman." Mr. Eble argued this was intended to "poison the jury and appeal to their sympathies in this case." (R. 1654). It was also clear from Mr. Eble's objection to the statement that Mr. Van Allen's tone and mannerism conveyed a sense of urgency with regard to Mr. Richie.

> . . . his comments relative to Mr. Ritchie, in reference to Mr. Ritchie's panic that he was frantically trying to call everybody. . .

(R. 1654). Finally, Mr. Elbe objected to the comment about "every woman's nightmare." (R. 1655). As Mr. Elbe clearly pointed out, this was all intended to inflame and impassion the jury. Mr. Glock's counsel joined these objections, but the Judge overruled the objection and denied the motion for mistrial (R.

1655).

Counsel for both defendants even offered to stipulate to the identity of the victim in an attempt to keep out testimony of the ministers and hence attempt to cure the improper statements (R. 1732). The State refused the stipulation. Clearly, the only purpose in having the "ministers" identify the victim was to show that Mrs. Richie was a "good, church-going" person. The Court permitted this improper testimony.

Through the testimony of Reverend Franklin, the State introduced a photo of the victim "all dressed up in nice clothing" (R. 1735). Again, the state's purpose was to evoke sympathy for the victim.

Over objection, the State called the victim's husband, Larry Richie, to testify. He had no testimony to offer that was not cumulative so the State's only purpose was to evoke sympathy for him over the "murder of his wife" (R. 1753-1755). Again, the record transcript cannot show the demeanor of the witness, nor can it capture voice intonation or expression. Even though the State "promised" that Mr. Richie "would not break down" (R. 1755) it is not difficult to imagine how sympathetic the witness appeared to the jury. When his testimony was clearly cumulative, there was no reason for his appearance before the jury except to inject emotionalism into their verdict.

The State made sure its point was pressed home to the jury by introducing the entire contents of the victim's purse, including photographs of her family and her appointment calendar (R. 1822). The calendar really gave a portrait of this lady since it documented her daily events. The defense counsel objected on grounds of relevency and undue prejudice but the court permitted all this to be admitted, hence to be taken to the jury room during deliberation (R. 1827).

All of this was improper information placed before the jury, deliberately designed to influence the juror's decisions through

emotional consideration. Clearly under Booth v. Maryland, 107 S. Ct. 2529 (1987), admission of this kind of evidence is a violation of the eighth amendment.

Under Booth v. Maryland, 107 S. Ct. 2529 (1987), the eighth amendment is violated by the presentation of such victim impact information. Part of the rationale used by the Court in this decision was that the jury must make an "individualized determination" of whether the defendant in question should be executed, based on "the character of the individual and the circumstances of the crime." Booth, supra at 2532. Cf. Scull v. State, No. 68,919 (Fla., Sept. 8, 1988).

It was clearly improper for the State to try to make the victim's "good character" and the effect of the victim's death on her family an issue here, particularly when there had been no evidence to support such argument. See Booth, supra; see also Vela v. Estelle, 708 F. 2d 954 (5th Cir. 1983).

Additionally, the Court not only had this evidence to consider at sentencing but had been provided with a pre-sentence investigation report that included the following:

> STATEMENT OF LARRY RITCHIE - 4-17-84
>
> Mr. Ritchie described his relationship with his wife as being a "very happy relationship, we were deeply in love". Describes the impact of this loss as "total devastation, I felt that I had been cheated of a loved one. Our overall relationship could be described as "joyful" and now I feel incomplete. My total lifestyle is changed, I don't like living alone.
>
> While describing the impact on other family members Mr. Ritchie advised that the loss "nearly destroyed her mother". "I have a deep heartache for the other family members and I hope to always keep in contact with them. I fear that my family ties with them have been endangered and that I will grow away from them through time.
>
> In regards to his personal feelings and recommendation for disposition, Mr. Ritchie was adamant about enclosing Bible scriptures as part of his statement. Mr. Ritchie advised that he felt we were living in a "society in breakdown" and that the defendants should "be executed in order to

> uphold standards so that we could live in an orderly society". "I don't hate them, I only hate what they have done". "Our laws are based on the Bible and we should follow it."
>
> Genesis 9: 6 "Whoever sheds the blood of man, by man shall his blood be shed; for in the image of God has God made man." NIV
>
> Exodus 21:12 "Anyone who strikes a man and kills him shall surely be put to death." NIV
>
> Proverbs 6:16,17 "Six things the Lord hates . . . hands that shed innocent blood." NIV
>
> "She died from the circumstances she feared the most".

(App. 11).

In Scull v. State, No. 68,919 (Fla. Sept 8, 1988), the Florida Supreme Court held that it was error for the trial judge to consider victim-impact statements since it "injected irrelevant material into the sentencing proceedings." Scull, slip op. at 9.

This claim involves fundamental constitutional error which goes to the fairness of Mr. Glock's trial and death sentence. The court should now correct this error.

This victim impact information should never have been considered by the jury nor by the Judge. To have done so violated Mr. Glock's eighth and fourteenth amendment rights. Additionally, Booth and Scull represent a significant change in the law since Mr. Glock's trial and sentence, and relief should be granted.

CLAIM VI

> THE PROSECUTOR'S ARGUMENT IN CLOSING AT THE GUILT PHASE OF MR. GLOCK'S CAPITAL TRIAL THAT PREMEDITATION IS PRESUMED BY LAW DEPRIVED MR. GLOCK OF DUE PROCESS AND EQUAL PROTECTION AND OF HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Glock was charged with premeditated murder. The State proceeded on both premeditated and felony murder theories, and the jury was instructed on both theories (R. 2075-76), over

defense objection (R. 1964). The jury returned a general verdict finding Mr. Glock guilty of first-degree murder (R. 2105).

During closing argument at the guilt-innocence phase, the prosecutor argued to the jury:

> The other type of first-degree murder -- and both of these theories are available to you -- is a thing called felony murder. And under a theory of felony murder, it is not necessary to prove premeditation because the law presumes premeditation.
>
> . . . .
>
> [T]he law does not require proof of premeditation. Premeditation is presumed. And, if every element is met, the verdict should be that of guilty of first-degree murder without proof of premeditation because the law presumes it.

(R. 2031-32).

Defense counsel objected to this argument (R. 2032-33). The trial court overruled the objection, stating, "that's the law" (R. 2032).

Following the objection, the prosecutor continued, "As I was saying, the law presumes premeditation under the theory of felony murder. . . " (R. 2033).

The prosecutor's comments were not "the law." In Florida, "it is the commission of a homicide in conjunction with intent to commit the felony which supplants the requirement of premeditation for first-degree murder. . . ." Bryant v. State, 412 So. 2d 347, 350 (Fla. 1982)(emphasis added). As such, felony murder is an exception to the premeditation requirement:

> In its most basic form, the historic felony murder rule mechanically defines as murder any homicide committed while perpetrating or attempting a felony. It stands as an exception to the general rule that murder is homicide with the specific intent of malice aforethought. Under the felony murder rule, state of mind is immaterial. Even an accidental killing during a felony is murder.

Adams v. State, 341 So. 2d 765, 767-68 (Fla. 1976).

The prosecutor's comments were a misstatement of the law, and it was error for the trial court to fail to correct them.

The comments told the jury that if the jury believed Mr. Glock participated in the underlying felony, Mr. Glock, had premeditated the victim's death. This is not the law, and the court's failure to correct the prosecutor's comments permitted the jury to decide that Mr. Glock premeditated the victim's death without requiring the State to prove premeditation.

The fundamental constitutional mandate articulated in In re Winship, 397 U.S. 358, 364 (1970), "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." Employing an evidentiary presumption to shift the burden of proof to a criminal defendant on an essential element of an offense "denigrates the interests found critical in Winship." Mullaney v. Wilbur, 421 U.S. 684, 698 (1975). The Due Process Clause "prohibits the State from using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime." Franklin v. Francis,, supra, 105 S. Ct. 1965, 1970 (1985).

This fundamental constitutional impropriety is precisely what happened here, for there can be no doubt that a reasonable juror would understand the prosecutor's comments as creating an impermissible presumption on the critical element of premeditation. 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 a mandatory presumption such as the one herein at issue. Franklin, 105 S. Ct. at 1973-74. 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 Stromberg v. California, 283 U.S. 359 (1931). Nothing in the trial court's instructions in this case in any way explained,

corrected, or cured the incorrect and improper comments.

The prosecutor's uncorrected, inaccurate comments relieved the State of its burden to prove Mr. Glock's guilt beyond a reasonable doubt. Mullaney, supra; Winship, supra. The jurors were permitted to presume premeditation and rely upon an impermissible presumption in deciding Mr. Glock's guilt.

Moreover, the prosecutor's misleading and inaccurate comments could not but have also spilled over into the jury's penalty phase deliberations. There, of course, the issue of premeditation was crucial. There, according to the prosecutor's comments, the jurors could presume premeditation on Mr. Glock's part without the State ever having been required to prove it.

The prosecutor's uncorrected comments presented the sentencing jury with misleading and inaccurate information and thus violated Caldwell v. Mississippi, 105 S. Ct. 2633 (1985). The comments allowed the jury to sentence Mr. Glock to death without ever requiring the State to prove that death was the appropriate sentence.

The key question is whether the prosecutor's comments may have affected the sentencing decision. Obviously, the burden of establishing that the error had no effect on the sentencing decision rests upon the State. See Caldwell, supra. The State cannot carry this, or any burden of harmlessness, with regard to the improper, inaccurate, and misleading comments involved in Mr. Glock's case.

This claim is properly brought pursuant to the Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. No tactical decision can be ascribed to counsel's failure to urge the claim. No procedural bar precluded review of this issue. See Johnson v. Wainwright, supra, 498 So. 2d 938.

Mr. Glock's sentence of death was imposed in violation of the eighth and fourteenth amendments. Relief is proper.

CLAIM VII

MR. GLOCK WAS DENIED AN INDIVIDUALIZED AND RELIABLE SENTENCING DETERMINATION AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS WHEN THE COURT REFUSED TO PROVIDE THE JURY WITH PROPER INSTRUCTIONS NECESSAARY TO GUIDE AND CHANNEL THE JURY'S DISCRETION IN ASSESSING THE AGGRAVATING CIRCUMSTANCES.

At the penalty phase charge conference, defense counsel requested a special instruction relating to section 921.145(5)(i), Fla. Stat. The following occurred:

> MRS. GARRETT: Okay. This motion in limine, No. 10, is addressed to Section 921.145(5)i, which is the capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.
>
> Again, I cited a case law that has elaborated upon the aggravating circumstances. As Your Honor is aware, the cases have held that we used to use the mere level of premeditation required for premeditated murder. That would be an impermissible aggravating circumstance because it would be coming from the circumstances of the offense itself. The Combs case held the level of premeditation required for proof of this aggravating circumstance must be more than that required for a premeditated murder. That's the statement of law provided in Combs. This was elaborated upon in the Jent and McRay cases, which state that the level of premeditation must be cold, calculated and premeditated. it must be in a premeditated -- as McRay states where even where an accused robbed a store owner's van, than shot him as he sat in the van. In other words, simple premeditation did not establish the element of aggravating circumstances because there's an enhanced level of premeditation that's required for proof of this aggravating circumstance; and, of course, my argument is that in this case the level of premeditation is not enhanced such as would be -- I believe the Combs case talks about execution type slaying, and those factual basis and, of course, this is not the situation here.
>
> MR. TROGOLO: I would request to join in that motion orally on behalf of Mr. Glock and adopt it.
>
> THE COURT: I'm going to deny that motion, also.

(R. 2135-36).

At a subsequent charge conference, counsel reviewed their requests for more detailed instructions on various aggravating circumstances. The defense requested the following instruction:

> The State may not rely upon a single aspect of the offense to establish more than a single aggravating circumstance. Therefore, if you find that two or more of the aggravating circumstances are supported by a single aspect of the offense, you may only consider that as supporting a single aggravating circumstance.
>
> (Provence v. State, 337 So.2d 783, 786 (Fla. 1976).

(R. 2363; App. 19). The following colloquy occurred:

> MRS. GARRETT: No. 6 is an explanation to the jury that a single aspect of the offense cannot establish more than one aggravating circumstance. I'm sure Your Honor is familiar with this principle -- in other words, in order to prevent the jury from considering more aggravating circumstances than are appropriate under the law.
>
> THE COURT: Provence doesn't say it's applicable to the jury. I think it's to the Judge.
>
> MR. COLE: To the Judge.
>
> MRS. GARRETT: I don't think the cases establish whether it's a principle for the jury or the Judge although I have Provence here.
>
> THE COURT: Certainly, the Judge has -- I don't believe Provence speaks to what the jury has done.
>
> MRS. GARRETT: I think it talks about appropriateness of aggravating circumstances under a particular situation without making reference to the Judge or jury. It just talks about what is appropriate since the jury is the finder of fact to the extent of their advisory sentence we think it is important that they understand the principles on which they can find aggravating circumstances.
>
> I believe it would be improper for a jury to dabble in reaching its conclusions as it would be for the Court to dabble in reaching its conclusion.
>
> MR. TROGOLO: On Mr. Glock's behalf, I would join in requesting Defendant's Proposed Jury Instruction No. 6 and adopt the arguments of Mrs. Garrett.

> THE COURT: Deny the motion, Mrs. Garrett. You can rest assured that the Court in sentencing will observe the Provence rule.

(R. 2363-64). See also Hopper v. Evans, 456 U.S. 605, 609 (1982); White v. State, 403 So. 2d 331 (Fla. 1981).

Counsel also requested as their "Proposed Jury Instructions" # 8 and 9, a detailed charge on "heinous, atrocious or cruel":

> While all murders are heinous, this aggravating factor contemplates the conscienceless, pitiless, or unnecessarily torturous crime which is accompanied by such additional acts as to set it apart from the norm of capital felonies.
>
> White v. State, 403 So.2d 331, 338 (Fla. 1981); State v. Dixon, 283 So.2d 1, (Fla. 1978).
>
> "Atrocious" means outrageously wicked and vile. "Cruel" means designed to inflict a high degree of pain, or with utter indifference to or even enjoyment of the suffering of others.
>
> Magill v. State, 428 So.2d 649, 6 (Fla. 1983); State v. Dixon, 283 So.2d 1, (Fla. 1978).

(App. 19). In relation to these requests, the following colloquy ensued:

> MRS. GARRETT: Your Honor, there's a jury instruction -- I've provided some instruction on its insertion. It means to allude to the aggravating factors of heinous, atrocious and cruel. This cites the principle of White and Dixon, which explains the appropriateness or under what circumstances that type factor is appropriate or should be found, and this, again, is the principle of, cited from the language of White, and I provided the Court with the pages. It says while all murders are heinous, this aggravating factor contemplates the conscienceless, pitiless or unnecessarily torturous crime as to set it apart from the norm of capital felonies -- with this aggravating factor, it is very important that the jury have some kind of explanatory instruction. It is somewhat difficult to understand. In language that is for attorneys it is an attempt of art, but for lay people it is perhaps not as clear, and this is very much the active principle of the Florida Supreme Court in applying that circumstance. I think it would be very helpful to the jury to understand the context under which this particular aggravating circumstance is appropriate.

> MR. TROGOLO: Your Honor, I would join in requesting the Defendant's Proposed Jury Instruction No. 8 and adopt the argument.
>
> THE COURT: Deny that. I think it is adequately covered in the standard instruction.
>
> MRS. GARRETT: Your Honor, No. 9 also contains the language meant to modify the standard instruction and explains again. I notice the language particularly with this instruction is difficult to follow, and these terms have developed very narrow and specific meaning within the case law of the state. I think it could be appropriate under the circumstances to provide that definition to the jury to assist them and provide them some structure in reaching their verdict which is the structure provided by the law of the state.
>
> MR. TROGOLO: On Mr. Glock's behalf, I would join in requesting Defendant's Proposed Jury Instruction No. 9 and adopt the argument.
>
> THE COURT: Deny that also.

(R. 2365-2366)(emphasis added).

Next, counsel requested an instruction regarding the "avoiding arrest" aggravating circumstance (R. 2367). Counsel requested that the jury be informed:

> Where the victim is not a law enforcement officer, proof of the required intent to avoid arrest and detection must be very strong.
>
> Riley v. State, 366 So. 2d 19, 22 (Fla. 1979);
> Armstrong v. State, 399 So. 2d 935 (Fla. 1981).

(App. 19). The request was denied (R. 2367).

Lastly, counsel, as they had earlier, requested a "Proposed Jury Instruction #11" relating to the "cold, calculated and premeditated" aggravator:

> To establish this factor, the State must prove heightened premeditation and cold calculation beyond that required for mere premeditated murder.
>
> White v. State, ___ So.2d ___ (Fla. 1984)(9 FLW 2); Cannaday v. State, 427 So.2d 723 (Fla. 1983).

In support of this request, counsel argued:

> MRS. GARRETT: Instruction No. 11 is aimed to the aggravating factors of which is No. 9 on the instructions -- mainly, cold, calculating and in a premeditated manner. This is an instruction which is to explainn to the jury the standard of proof on this particular factor and to make clear to the jury that the mere finding of premeditation as one might have in a first degree murder does not in and of itself alone provide the basis for this [sic] aggravating circumstance, which I think, Your Honor, is very important and necessary to continue or to effectuate the constitution or to insure the constitutionality of the death penalty in the statutes.
>
> The Florida Supreme Court has said that without this modification interpretation of the aggravating factors of cold, calculated and premeditated, the death penalty could be unconstituional [sic]. To permit the jury to consider it without more would render the death penalty unconstitutional.
>
> MR. TROGOLO: On Mr. Glock's behalf, I would join in the request of Defendant's Proposed Jury Instruction No. 11.
>
> THE COURT: Deny that.

(R. 2367-68)(emphasis added).

At the penalty phase, the court instructed the jury regarding aggravating circumstances as follows:

> Now, the aggravating circumstances that you may consider are limited to any of the following that are established by the evidence.
>
> First is that the crime for which the defendant is to be sentenced was committed while he was engaged in the commission or flight after committing or attempting to commit the crime of kidnapping.
>
> Second, the crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
>
> Third, the crime for which the defendant is to be sentenced was committed for financial gain.
>
> Four, the crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel.
>
> And, fifth, the crime for which the defendant is to be sentenced was committed in

> a cold, calculated and premeditated manner without any pretense of moral or legal justification.

(R. 2443).

In its Findings in Support of Sentences, the court found that the "avoiding arrest," "financial gain," and "cold, calculated and premeditated" aggravating circumstances had been established (R., Vol. II). The court did not find "heinous, atrocious, or cruel" as an aggravating circumstance, stating:

> (b) That this murder was especially heinous, atrocious and cruel. Again, the facts in this case that would support a finding of this aggravating circumstance, were also necessary to support this court's finding that this murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. Again this court believes that its finding is the more appropriate. See Halliwell v. State, 323 So.2d 557 (Fla. 1975); Tedder v. State, 322 So.2d 19 (Fla. 1979); Menendez v. State, 368 So.2d 1278 (Fla. 1978); Lewis v. State, 377 So.2d 640 (Fla. 1980).

(R., Vol. II)(emphasis added).

A trial judge has the responsibility to correctly charge the jury on the applicable law. See generally, Smith v. State, 424 So. 2d 726, 731-32 (Fla. 1982); Wilson v. State, 344 So. 2d 1315, 1317 (Fla. 2d DCA 1977); Bacon v. State, 346 So. 2d 629, 631 (Fla. 2d DCA 1977); Williams v. State, 366 So. 2d 817, 819 (Fla. 3d DCA 1979). A judge's duty to correctly charge a jury is no less applicable when it involves a sentencing jury in a capital case. This is so since the jury plays a critical role in Florida's capital sentencing scheme. Cf. Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633, 2639 (1985); see Fead v. State, 512 So. 2d 176 (Fla. 1987)(Florida jury has primary responsibility for sentencing). To fulfill that role, it is axiomatic that their recommendation, as well as the sentence itself, be soundly based on the correct and applicable law. This cannot occur, however, when the trial judge can effectively influence the outcome, as the judge did in this case, by failing

to provide the jury with proper instruction as to the pertinent aggravating factors.

An aggravating circumstance performs the crucial function in a capital sentencing scheme of narrowing the class eligible for the death penalty. It is a standard established by the legislature to guide the sentencer in choosing between life imprisonment and the imposition of death. An aggravating circumstance is in essence a legislative determination that a particular murder with the circumstances present is different, and that this difference reasonably justifies "the imposition of a more severe sentence," Zant v. Stephens, 462 U.S. 862 (1983). See also Tedder v. State, 322 So. 2d at 910.

The United States Supreme Court's recent decision in Maynard v. Cartwright, 108 S. Ct. 1853 (1988), held that the use of the aggravating circumstance in a capital case that the killing was "especially heinous, atrocious, or cruel" violates the eighth amendment in the absence of a limiting construction of that phrase which sufficiently channels the sentencer's discretion so as to minimize the risk of "arbitrary and capricious action." Id. at 1859.

In Proffitt v. Florida, 428 U.S. 242 (1976), the Supreme Court approved the Florida Supreme Court's construction of this aggravating circumstance on the premise that this provision is directed only at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." Id. at 255-56. Oklahoma, from which Maynard v. Cartwright was spawned, had adopted the unnecessarily torturous element through its wholesale adoption of Florida's construction of "heinous, atrocious or cruel" as set out in State v. Dixon, 283 So. 2d at 9.

The construction and limiting language pertinent to this aggravating circumstance and approved in Proffitt was not utilized at the jury sentencing phase of Mr. Glock's case. The jury was simply instructed that one of the aggravating

circumstances to consider was whether the capital felony was especially heinous, atrocious or cruel (R. 2443). Mr. Glock's jury, therefore, was not guided or channelled in using their discretion.

The trial court's sentencing findings demonstrate that the failure to provide the jury with instructions defining the "heinous, atrocious, or cruel" and "cold, calculated, and premeditated" aggravating circumstances and prohibiting the "doubling" of aggravating circumstances based in identical factual bases left the jury's sentencing discretion virtually unfettered. While the court did not "double", the jury was permitted to do so.

Further, the "cold, calculated, and premeditated" and "avoiding arrest" aggravating circumstances demanded the same kind of limiting and explicative language as that which Maynard v. Cartwright stated was necessary with regard to the "heinous, atrocious or cruel" aggravating circumstance. The refusal to give it when requested renders application of these circumstances subject to the same attack found meritorious in Cartwright. The Supreme Court's eighth amendment analysis fully applies to Mr. Glock's case and the result here should be the same as in Cartwright.

Had the jury been instructed properly concerning aggravating circumstances, the result could have been very different. A life sentence was warranted. To permit trial judges the opportunity to refuse to accurately charge juries on aggravating factors is to tolerate a capital sentencing that is skewed toward death rather than life. 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"). Rather than "genuinely narrow[ing] the class if persons eligible for the death penalty," Zant v. Stephens, 103 S. Ct. at 1742, here the statute's

application broadened the class and enhanced the likelihood of a death recommendation due to the incomplete instructions on aggravating circumstances.

What occurred was fundamental error. The fundamental unfairness in this instance rendered Mr. Glock's capital sentencing proceeding unreliable. Rather than channelling sentencing discretion to avoid arbitrary and capricious results, Hopper v. Evans, 456 U.S. at 611, and narrowing the class of persons eligible for death, Zant v. Stephens, 462 U.S. at 877, the erroneous instruction on the aggravating circumstances worked just the opposite. No tactical decision can be ascribed to counsel's failure to urge the claim. No procedural bar precluded review of the issue. See Johnson v. Wainwright, supra, 498 So. 2d at 938. Mr. Glock is entitled to relief under the eighth and fourteenth amendments. A stay of execution and habeas corpus relief are warranted.

CLAIM VIII

A GOLDEN RULE VIOLATION DURING THE PROSECUTOR'S OPENING ARGUMENT AND AN INFLAMMATORY REMARK DURING THE CLOSING ARGUMENT CONSTITUTED MISCONDUCT AT THE TRIAL RESULTING IN A PROCEEDING WHICH WAS FUNDAMENTALLY UNFAIR AND UNRELIABLE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

A. THE GOLDEN RULE VIOLATION

Referring to the tragic circumstances that befell the victim, the prosecutor in his opening statement characterized the events surrounding the night in question as "any woman's nightmare . . . ." (R. 1648).

Immediately following completion of the prosecutor's opening, defense counsel objected to this remark and moved for a mistrial. The following exchange ensued:

> And thirdly, which he stated during his opening statement, which I consider to be a violation of the rule, and inflammatory, is the reference made to "every woman's

nightmare". There is five women on the jury, your Honor, and he asks them to put themselves in her shoes. And it is highly immaterial and highly prejudicial. And on the basis of those three, I would be moving for a mistrial at this time on behalf of Mr. Puiatti.

BY MR. TROGOLO: I would join in the objection of Mr. Eble's, and join in the Motion for a mistrial on the same grounds.

BY THE COURT: Motion denied, objections are overruled.

BY MR. EBLE: Your Honor, would you give the cautionary instruction to the jury in that the prosecutor's comments are not evidence in this case and that anything -- (interrupted).

BY THE COURT: We have done that.

BY MR. EBLE: I would ask for a renewal of that instruction, in light of Mr. Van Allen's comments.

BY THE COURT: That will be denied.

(R. 1654-55).

The following day, counsel were compelled to renew their respective motions as to this one remark. Although the judge apparently did not regard the misconduct as that significant, the press on the other hand felt the remark was "good copy" and at least two newspapers saw fit to print the remark as a headline.

MR. EBLE: Yes, Your Honor, we do.

Your Honor, at this time I have a copy of the city and state edition of the St. Petersburg Times, so I'd like to introduce this into evidence. Excuse me, sir, for purposes of this Motion, and also a copy of the East Pasco Tribune dated Friday, March 23, 1984, East Pasco section of the newspaper of the Tampa Tribune, that is designed strictly for Pasco County residents who live on the east side of the county which is where Dade City is located.

Your Honor, at this time if I may approach the bench, sir.

THE COURT: Yes, sir.

MR. EBLE: I'm not sure if the Court has had a chance to read the headlines in the East Pasco Tribune or the City and State section of the St. Petersburg Times. I'd ask to introduce both of these as part of the record and for the purpose of this Motion at

> this time I'd like to renew the objection to Mr. Van Allen's opening statement wherein he referred to this crime as "Any woman's nightmare."
>
> Your Honor, that clearly violates the Golden Rule of putting the women in this panel into the shoes of the victim.
>
> Secondly, Your Honor, a comment like that can only be designed to inflame the jury and prejudice them against the defendants in this case. It has clearly caught a lot of attention. It is now a headline in the newspaper. I'd be renewing my Motion and objection and move for mistrial on the basis of Mr. Van Allen's opening comments, Your Honor.

(R. 1882-83)(emphasis added). Counsel for Mr. Glock joined in the objection and motion for mistrial (R. 1884).

The court refused to let counsel offer the newspapers as exhibits for purposes of appellate review, and denied once again the motions for a mistrial and for a curative instruction (R. 1885).

B. THE CLOSING ARGUMENT INFLAMMATORY REMARK

Speaking metaphorically, the prosecutor presented the following picture of the events that initiated the evening in question:

> You have two boys, 20 and 22. They go to this mall. Why? Looking for a victim. They are looking for a car. Who did they pick on. Some strapping young teenager? Sharilyn Ritchie. It's like the hungry wolves circling around a rabbit someplace who has no idea what's about to happen, and when the time is right they pounce upon their prey.

(R. 2043)(emphasis added).

C. ANALYSIS OF THE CLAIM

> The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Conversely, it must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law.

Bertolotti v. State, 476 So. 2d 130, 134 (Fla. 1985)(emphasis added).

Under the Florida Supreme Court's decision in Bertolotti v. State, supra, violations of the so called "Golden Rule" whereby the prosecutor invites the jury to assume the horrible position of the victim, including having them imagine the victim's pain, are clearly prohibited. Id. at 133. Garron v. State, No. 67,986 (Fla. May 19, 1988)(slip op. 10-11) (prosecutorial misconduct in penalty stage involving, inter alia, Golden Rule violation, constituted egregious conduct).

Prejudicial name calling or exhorting the jury to view the defendant as akin to a dangerous animal is also looked at with a dim view by the appellate courts. Darden v. State, 329 So. 2d 287. See also Robinson v. State, No. 68,971 (Fla. Jan. 28, 1988)(slip op. at 10)(deliberate attempt to insinuate defendant had a habit of preying on white women constituted an impermissible appeal to bias and prejudice).

D. THE FUNDAMENTALLY UNFAIR SENTENCE OF DEATH

A sentence of death cannot stand when it results from prosecutorial comments which may mislead the jury into believing that it must sentence the defendant to death. Wilson v. Kemp, 777 F.2d 621, 626 (11th Cir. 1985), reh. denied, 784 F.2d 404 (11th Cir. 1986). A defendant must not be sentenced to die by a jury which may have "failed to give its decision the independent and unprejudiced consideration the law requires." Wilson, 777 F.2d at 621, quoting, Drake v. Kemp, 762 F.2d 1449, 1460 (11th Cir. 1985) (en banc); see also, Potts v. Zant, 734 F.2d 526 (11th Cir. 1984). In short, a sentencing proceeding is flatly unreliable when the jurors' sense of responsibility for their sentencing decision is diminished. Wilson; Caldwell v. Mississippi, 105 S. Ct. 2633 (1985).

The "outrage" of a jury deliberately whipped into an

emotional frenzy, a frenzy whose natural outlet could only be the cathartic infliction of death, is clearly not relevant to any sentencing issue, and consequently violates the eighth amendment.

The statements herein considered separately or together demonstrate the quintessential case of a prosecutor who has overstepped the bounds of zealous advocacy and entered into the zone of misconduct. The jury was being improperly urged to impose the death sentence on the basis of irrelevant and emotional considerations which were outside the scope of their deliberations. The improper remarks in the opening and closing arguments aroused such passion and were so prejudicial that neither retraction nor rebuke could destroy their influence and a new trial should be granted. More importantly, these arguemnts stand in stark violation of the eighth amendment for they rendered the sentence of death wholly unreliable -- they directed the jury to impose death on the basis of factors unrelated to 1) the character of the defendant, and 2) the circumstances of the offense. Zant v. Stephens, 462 U.S. 862, 879 (1983).

No tactical decision can be ascribed to counsel's failure to urge the claim. No procedural bar precluded review of this issue. See Johnson v. Wainwright, supra, 498 So. 2d at 938.

Mr. Glock's conviction and sentence are fundamentally unfair and unreliable. Mr. Glock is entitled to a stay of execution and a hearing on his post-conviction motion for relief.

CLAIM IX

THE JOINT SENTENCING PROCEEDING AND THE TRIAL COURT'S JOINT SENTENCING ORDER DEPRIVED MR. GLOCK OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

Sentencing procedures in capital cases must ensure "heightened reliability in the determination that death is the appropriate punishment." Woodson v. North Carolina, 428 U.S. 280, 305 (1976). See also Gardner v. Florida, 430 U.S. 360 (1977).

The central purpose of these requirements is to prevent the "unacceptable risk that 'the death penalty may be meted out arbitrarily or capriciously' or through 'whim or mistake.'" Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633 (1985) (O'Connor, J., concurring), quoting California v. Ramos, 463 U.S. 992, 999 (1983).

Essential to assuring that a death sentence is not imposed arbitrarily or capriciously is the need for an "individualized determination" of whether an individual should be executed, weighing such factors as "the character of the individual and the circumstances of the crime." Zant v. Stephens, 462 U.S. 862, 879 (1983) (emphasis in original). See also Booth v. Maryland, 107 S. Ct. 2529 (1987); Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982). In imposing the penalty of death, it is vital that the sentencer consider only those factors which directly pertain to the defendant's "personal responsibility and moral guilt." Enmund v. Florida, 458 U.S. 782, 801 (1982). A contrary approach would create the risk that the death penalty will be imposed because of considerations that are "constitutionally impermissible or totally irrelevant to the sentencing process." Zant v. Stephens, supra, at 885.

These fundamental substantive and procedural requirements were not met in Mr. Glock's case. Rather, Mr. Glock was subjected to a sentencing proceeding at which his co-defendant's actions and mental state were utilized to sentence Mr. Glock to death. The procedure resulting in Mr. Glock's sentence of death simply cannot be squared with the Due Process Clause, the Confrontation Clause, the right to counsel, or the eighth amendment, and resentencing is proper.

Mr. Glock and his codefendant, Carl Puiatti, were tried jointly. Prior to the penalty phase, defense counsel renewed his earlier Motion to Sever (R. 2113), which was denied (R. 2114). Thus, the penalty phase was also conducted jointly.

At the penalty phase, Mr. Glock was subject to attack not only by the State but also by his codefendant. See Claim II. Further, the State argued that Mr. Glock and Mr. Puiatti were "two peas in a pod" (R. 2403), who should be treated the same (R. 2404). The jury obliged, recommending death for both defendants by the same vote (R. 2452).

In imposing sentence, the court relied upon evidence relevant only to codefendant Puiatti, such as Mr. Puiatti's August 21 statement, failed to delineate which evidence supported which finding as to each defendant, and failed to distinguish between the defendants:

> 1. Section 921.141(5)(e), Florida Statutes. This murder was committed for the purpose of avoiding or preventing a lawful arrest. The statements of each defendant, introduced during trial, indicated that they killed the victim, Mrs. Richie, to prevent her from identifying them. Fitzpatrick v. State, 437 So. 2d 1072 (Fla. 1983); Lightbourne v. State, 438 SO. 2d 380 (Fla. 1983). Defendant Puiatti conceded the existence of this aggravating circumstance.
>
> 2. Section 921.141(5)(f), Florida Statutes. The capital felony was committed for pecuniary gain. This murder was the culmination of a series of crimes in which the defendants kidnapped Mrs. Richie by force in a shopping center parking lot in Bradenton, Florida, and then by threatening her with a firearm, robbed her of the money she was carrying and made her obtain other money for them by cashing checks, robbed her of the jewelry she was wearing, and robbed her of her automobile. Fitzpatrick v. State, 437 So. 2d 1072 (Fla. 1983). Defendant Puiatti also conceded the existence of this aggravating circumstance.
>
> 3. Section 921.141(5)(i), Florida Statutes. This murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. According to their statements, the two defendants calmly discussed killing Mrs. Richie. After determining that killing her was appropriate for their plans, Mr. Puiatti turned the car around, drove up to or by Mrs. Richie, shot her and drove on. They watched her carefully; and when she did not fall down, Mr. Puiatti turned the car around and again drove by Mrs. Richie, shooting her again, and driving on. They again carefully watched Mrs. Richie; and when she again did not fall down, Mr. Puiatti again turned the

car around and again drove by Mrs. Richie. This time Mr. Glock took the firearm from Mr. Puiatti and shot Mrs. Richie. After being shot on this third pass, Mrs. Richie apparently fell, and the defendants begin satisfied she was dead, drove north in her stolen automobile. Not only did these two defendants coldly and jointly premeditate this murder, but they kept returning to shoot her again when their initial efforts to kill her appeared to have failed.

It appears that these defendants did not even attempt to rationalize that Mrs. Richie had wronged them in any way, or had failed to accede to any of their demands, or for any reason deserved to be killed. It appears that there was no pretense whatsoever of any moral or legal justification for this murder. It appears that these defendants simply reasoned that Mrs. Richie could identify them if she lived, but could not if she died.

It would be difficult to imagine a more cold, calculated or premeditated killing. Combs v. State, 403 So. 2d 418 (Fla. 1981); Lightbourne v. State, 438 So. 2d 380 (Fla. 1983).

. . . .

2. Section 921.141(6)(b), Florida Statutes. This court finds that neither of these defendants were under the influence of any extreme mental or emotional disturbance. It may be true, as counsel for these defendants argued, that these defendants did not experience a "good night's sleep" the night before the murder, but there was no credible evidence whatsoever to support a finding that either of these defendants suffered from any disturbance that would mitigate a calculated, premeditated murder. See also paragraphs numbered "5", "6" and "7" below. This circumstance does not exist.

3. Section 921.141(6)(c), Florida Statutes. There was no evidence nor even any argument that Mrs. Richie was in any way a participant in the defendants' conduct or consented to the murder or any of the acts that preceded the murder. This circumstance does not exist.

4. Section 921.141(6)(d), Florida Statutes. It was not even argued that either defendant was an accomplice in this murder which was committed by another person nor that the participation of either defendant was relatively minor. This circumstance does not exist.

5. Section 921.141(6)(e), Florida Statutes. This court finds that neither of these defendants acted under extreme duress or under the substantial domination of another

person. Psychologists for both defendants testified that in their opinions, it was only the unique chemistry created by the association of these two defendants that allowed or caused them to commit this murder. Each psychologist also testified that each defendant was dominated in this murder by the other.

This court is convinced that without the ego support given by each of these defendants to the other, that neither of them would have had the personality strength to have committed this murder, or the crimes leading to the murder, alone.

However, there is no evidence, other than the rationalized opinions of these two psychologists, to support any finding that either of these defendants dominated the other. They were both about the same age and the same intelligence. They both had about the same education. They were both raised in middle class surroundings. The opinions by the two psychologists that each respective defendant was dominated by the other are simply devoid of credibility.

6. Section 921.141(6)(f), Florida Statutes. This court finds that the capacity of neither defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. In fact, this court finds that the capacity of neither defendant to either conform his conduct to the requirements of law or to appreciate the criminality of his conduct was impaired to any relevant extent.

It is true that both psychologists and the psychiatrist who testified in this case expressed opinions that the requirements of law. Dr. Mussenden justified this opinion about Mr. Glock on the chemistry created by the association of these two defendants. Dr. Meadows and Dr. DelBeato justified their opinions on medical speculations that Mr. Puiatti had some dysfunction in his brain. Dr. DelBeato testified that his psychological testing (on which both he and Dr. Meadows founded their opinions) was often used by neurosurgeons and neurologists to form differential diagnoses. But differential diagnoses are not used by physicians to justify treatment, only to narrow th possible diagnoses for further medical testing.

Furthermore, there was no independent evidence whatsoever introduced that would in any way support the opinions of these three professionals that the capacity of eithe rof these defendants to either appreciate that cold, calculated, premeditated murder was

criminal or conduct himself in such manner so as to not coldly and calculatedly murder Mrs. Richie was to any relevant extent impaired.

In fact, the conduct of these defendants before and after this murder clearly indicates that they knew the criminality of this conduct and were able to rob and kidnap people without killing them. They had kidnapped a man in Sarasota the day before they kidnapped Mrs. Richie, robbed him of his money and his car and threw him out in the woods without killing him. And a few days after they killed Mrs. Richie, they robbed a couple in a motel in North or South Carolina without killing them. They used the same firearm in both other instances that they used to kill Mrs. Richie.

7. Section 921.141(6)(g), Florida Statutes. At the time of this murder, Mr. Puiatti was 20 years old; and Mr. Glock was 22 years old. Both defendants were old enough that the chronological age of neither of them constitutes a mitigating circumstance. Miller v. State, 415 So. 2d 1262, (Fla. 19820; Simmons v. State, 419 So. 2d 316 (Fla. 1982); Quince v. State, 414 So. 2d 185 (Fla. 19820; Peek v. State, 395 So. 2d 492 (Fla. 1980).

However, counsel for both defendants argue that the testimony of the respective psychologists and psychiatrist indicates that each of these defendants function at about 10-12 years of age. This court finds that the opinions of these two psychologists and this psychiatrist about the functional age of these defendants is inconsistent with the other evidence in this case and therefore lack credibility.

The statements of these defendants, including the tape recorded statements, which were introduced at trial clearly demonstrate that both of these defendants are reasonably for their chronological age. The planning an execution of these series of crimes also indicate maturity, although some naivete. Furthermore, Mr. PUiatti, at sentencing, made a statement to this court that showed some appreciable level of maturity and social conscience.

This court finds that both the chronological ages and the emotional ages of each of these defendants are mature enough as to not be a relevant mitigating factor.

Both defendants argued that this court should consider their confessions as a non-statutory mitigating factor. This request was troubling to this court. Those confessions probably did make this case easier to prosecute. In fact, this court, several

> years ago, justified a life sentence for a Mr. Daniel Fortune in part because he pled guilty to first degree murder and testified against his codefendants, Messrs. Ogden and Mollica. In that case, however, Mr. Fortune testified for a promise by the State that the State would not ask for a death sentence for him, an agreement to which this court did not accede.
>
> The instant case is different. This court is convinced that both of these defendants hoped they would be spared a death sentence by confessing. However, no one promised them that a death sentence would not be imposed, or even demanded, in exchange for their confessions.
>
> This court must admit that it did weight the fact of the confessions favorable to the defendants in reaching its judgment to sentence these defendants to death, but does not believe their confessions should be counted as a mitigating factor.
>
> There was expert testimony indicating that both of these defendants were capable of rehabilitation. This court also considered this factor in the defendants favor, but again does not believe it should rise to the level of a mitigating factor.
>
> . . . .
>
> Therefore, after carefully weighing the aggravating circumstances discussed above, and after considering the jury recommendation, and after comparing the circumstance of this case with the circumstances existing for other capital cases reviewed by the Florida Supreme Court and other appellate courts which are listed in the appendix, and after carefully considering the Constitutional standards espoused in Furman v. Georgia, supra, and Proffitt v. Florida, supra, it is the judgment of this court that Mr. Glock and Mr. Puiatti be put to death in the manner provided by Florida law for the first degree murder of Mrs. Sharilyn Richie.

(Findings in Support of Sentences, App. 13)

The trial court's sentencing order clearly reflects that the court did not provide Mr. Glock the individualized sentencing determination to which he was entitled. The court referred to the defendants and the evidence jointly and sentenced the defendants jointly.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Glock's

trial and death sentence. This Court has not hesitated in the part to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings. See Wilson v. Wainwright, supra, and it should now correct this error.

The procedures resulting in his death sentence violated Mr. Glock's fundamental eighth amendment rights. Post-conviction relief is proper.

CLAIM X

THE TRIAL COURT'S REFUSAL TO PROVIDE REQUESTED INSTRUCTIONS REGARDING SUBSTANTIVE FACTORS WHICH COULD BE CONSIDERED IN MITIGATION AT THE PENALTY PHASE DEPRIVED MR. GLOCK OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

A capital sentencer may not be "precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978). In Mr. Glock's case, the jury was precluded in its consideration by the trial court's refusal to provide several requested instructions regarding mitigating factors.

At the penalty phase charge conference, defense counsel requested that the jury be instructed that the following factors could be considered as mitigation:

> The remorse felt by the defendant for his crime.
>
> The defendant had no history of violent behavior.
>
> The prospects for the defendant's rehabilitation are good.
>
> Age means not only chronological age, but includes maturity and psychological functioning.

(R. 2368-2370; see also App. 19). The court denied the requests (R. 2368-70).

The court's refusal to provide these instructions limited the jury's consideration of mitigation by emphasizing the factors specifically listed in the statute and by not informing the jury of the additional factors it could consider. Mr. Glock was deprived of his right to an individualized capital sentencing determination.

CONCLUSION AND RELIEF REQUESTED

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

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. MAIL/HAND DELIVERY to Robert J. Landry, Assistant Attorney General, Department of Legal Affairs, Park Trammell Building, 1313 Tampa Street, Tampa, FL 33602, this 28th day of November, 1988.

K. Leslie Delk
Attorney
by Julie D. Naylor