

IN THE SUPREME COURT OF FLORIDA

NO. _____

OLEN CLAY GORBY,

Petitioner,

v.

MICHAEL W. MOORE,
Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

This is Mr. Gorby's first habeas corpus petition in this Court. Art. 1, Sec. 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, claims demonstrating that Mr. Gorby was deprived of the right to a fair, reliable, and individualized sentencing proceeding and that the proceedings resulting in his conviction and death sentences violated fundamental constitutional imperatives.

Citations shall be as follows: The record on appeal concerning the original jury trial proceedings shall be referred to as "R." followed by the appropriate page number(s). The Supplemental Transcript of Record will be referred to as "Supp. R." followed by the appropriate page number(s). The postconviction record on appeal will be referred to as "PC-R." followed by the appropriate page number(s).

All other references will be self-explanatory or otherwise explained herein.

INTRODUCTION

Significant errors which occurred at Mr. Gorby's capital trial and sentencing were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel. Further, trial counsel preserved numerous issues by objection and motion for mistrial which were not raised on appeal. In addition, appellate counsel failed to challenge numerous constitutionally flawed and vague penalty phase jury instructions, despite objections by trial counsel.

The issues which appellate counsel neglected demonstrate that counsel's performance was deficient and that the deficiencies prejudiced Mr. Gorby. "[E]xtant legal principles...provided a

clear basis for ... compelling appellate arguments[s]." Fitzpatrick, 490 So. 2d at 940. Neglecting to raise fundamental issues such as those discussed herein "is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome." Wilson v. Wainwright, 474 So. 2d 1162, 1164 (Fla. 1985). Individually and "cumulatively," Barclay v. Wainwright, 444 So. 2d 956, 959 (Fla. 1984), the claims omitted by appellate counsel establish that "**confidence** in the correctness and fairness of the result has been undermined." Wilson, 474 So. 2d at 1165 (emphasis in original).

Additionally, this petition presents questions that were ruled on, on direct appeal, but that should now be revisited in light of subsequent caselaw or in order to correct error in the appeal process that denied fundamental constitutional rights. As this petition will demonstrate, Mr. Gorby is entitled to habeas relief.

PROCEDURAL HISTORY

The Circuit Court for the Fourteenth Judicial Circuit, in and for Bay County, Florida, entered the judgment of convictions and death sentence at issue.

Mr. Gorby was indicted by the grand jury in Bay County, Florida, on June 27, 1990 (R. 1849-50). He was charged with first degree murder, robbery with a deadly weapon, grand theft and burglary of a dwelling.

Jury trial commenced June 24, 1991. The jury found Mr. Gorby guilty of all the crimes as charged except that it found him guilty of the lesser offense of robbery (R. 2495-96). The penalty phase took place on July 5, 1991. The jury rendered a sentencing verdict of death by a vote of nine to three (R. 2546).

On August 30, 1991, the Court sentenced Mr. Gorby to death as to the first degree murder conviction (R. 2627). As to the other convictions the Court sentenced Mr Gorby to 15 years for robbery, five years for grand theft, and life for burglary, all sentences to run consecutively with the murder sentence but concurrently with each other (R. 2628). The trial court entered written findings (R. 2621-29).

A timely direct appeal was filed in the Supreme Court of Florida. The Supreme Court of Florida affirmed Mr. Gorby's convictions and sentences. Gorby v. State, 630 So. 2d 544 (Fla. 1993). Mr. Gorby filed a petition for writ of certiorari in the United States Supreme Court, which was denied on October 3, 1994. Gorby v. Florida, 115 S. Ct. 99 (1994).

Because Mr. Gorby's conviction and sentence became final after January 1, 1994, Mr. Gorby was required to file his motion for postconviction relief within one (1) year pursuant to the newly-enacted Rule 3.851. Mr. Gorby timely filed his original Rule 3.850 Motion on October 3, 1995. However, because access to the files and records pertaining to Mr. Gorby's case in the possession of certain state agencies were not available to Mr. Gorby, the original motion did not represent a complete pleading, and Mr. Gorby requested leave to amend. Mr. Gorby filed his amended Rule 3.850 Motion on May 30, 1997. (PC-R. 309-525.)

On June 16, 1998, the lower court issued an order summarily denying some claims and ordering an evidentiary hearing on other claims. (PC-R. 594-95.) An evidentiary hearing was conducted on July 13-15 and October 9, 1998. Following the evidentiary hearing, the court denied all claims for relief on November 25, 1998. (PC-R. 675-77.) The court also denied Mr. Gorby's motion for rehearing. (PC-R. 814.) The instant petition seeking habeas corpus relief is being filed simultaneously with Mr. Gorby's appeal from the denial of his Rule 3.850 motion.

**JURISDICTION TO ENTERTAIN PETITION
AND GRANT HABEAS CORPUS RELIEF**

This is an original action under Fla. R. App. P. 9.100(a). See Art. 1, Sec. 13, Fla. Const. 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. Gorby's convictions and sentence of death.

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 arise in the context of a capital case in which this Court heard and denied Mr. Gorby's direct appeal. See Wilson, 474 So. 2d at 1163; Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); cf. Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Gorby to raise the claims presented herein. See, e.g., Way v. Dugger, 568 So. 2d 1263 (Fla. 1990); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); Wilson, 474 So. 2d at 1162.

This Court has the inherent power to do justice. 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. This 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 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 proper on the basis of Mr. Gorby's claims.

GROUND FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Gorby asserts that his capital conviction and sentence of death were obtained and then affirmed during this Court's appellate review process in violation of his rights as guaranteed by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United State Constitution and the corresponding provisions of the Florida Constitution.

CLAIM I

MR. GORBY WAS DENIED THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WHERE COUNSEL FAILED TO ASSERT THAT THE GENERAL JURY QUALIFICATION PROCEDURE EMPLOYED BY THE BAY COUNTY CIRCUIT COURT DEPRIVED MR. GORBY OF HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF FLORIDA LAW.

The Bay County Circuit Court's general jury qualification procedure is unconstitutional: it is held outside the presence of both the defendant and his attorney; the State is allowed to participate in the proceeding; and the proceeding is unrecorded. While it is true that this Court has held that general jury qualification is not a critical stage of the proceedings requiring presence of the defendant,¹ that holding is not dispositive here due to the unique circumstances of Mr. Gorby's case. Three facts distinguish Mr. Gorby's case from each of the cases holding that the defendant's presence is not required at general jury qualification: (1) Neither Mr. Gorby **nor his attorney** was present during the proceeding; (2) An assistant state attorney **was** present, objecting to the release of various venirepersons and not objecting to others; and (3) **No**

¹Wright v. State, 688 So. 2d 298 (Fla. 1996); Bates v. State, 24 Fla. L. Weekly S471 (Fla. 1999).

transcript exists from which it can be ascertained whether the State's participation in the proceeding prejudiced Mr. Gorby.²

In every case in which this Court has held that the defendant's presence is not required during general jury qualification, the defendant's attorney was present to safeguard his client's rights and/or a transcript was made. In the most recent case on point, this Court found it noteworthy that the defendant's attorney was present during the proceeding and made no objection. Bates v. State, 24 Fla. L. Weekly S471 (1999). In Wright v. State, 688 So. 2d 298, 300 (Fla. 1996), again this Court noted that defense counsel was present. This Court's opinion in Robinson v. State, 520 So. 2d 1, 3 (Fla. 1988), quotes from the transcript of the general jury qualification proceeding and notes that defense counsel was present. And in Remeta v. State, 522 So. 2d 825, 827 (Fla. 1988), defense counsel was present and there was a transcript indicating counsel had obtained a waiver of his client's presence.

In Mr. Gorby's case, his attorney was not present during the proceeding, nor was the proceeding transcribed. At the beginning of the week in which Mr. Gorby's trial occurred, a venire comprising prospective jurors for three trials was assembled in a courtroom. They were then voir dired by a Bay County judge **outside the presence of Mr. Gorby and his counsel**. At this point certain prospective jurors were excused, and the remainder were dispatched to the three courtrooms in which jury trials were scheduled to commence. The presiding judge therefore had

²Because no record was made and all documentation relating to the jury pool was destroyed before Mr. Gorby's conviction became final, precise details of the general jury qualification proceeding cannot be known until an evidentiary hearing is conducted. However, in Bates v. State, supra, the State Attorney for the Fourteenth Judicial Circuit admitted that the Circuit Court in Bay County has long engaged in the practice of allowing a state attorney to participate in general jury qualification without defense counsel present.

unbridled latitude as to whom to excuse altogether, and as to which panel members were to be sent to which trial.

Most troubling is the fact that **an assistant state attorney was present**. Neither counsel for Mr. Gorby nor Mr. Gorby was present. This proceeding was ostensibly for "jury qualification" purposes. Prospective jurors were asked by the court if they had a "hardship" that would interfere with their ability to serve. Based on the individual response, the assistant state attorney would object to disqualification for some venirepersons and not object to the release of others. The court would then decide if the venireperson should be disqualified after considering that individual's response and the State's position.

This ex parte system of juror qualification is a practical invitation for abuse by the State. Hypothetically, the State might object only to the release of venirepersons perceived as friendly to the prosecution, while not objecting to the release of venirepersons likely to be sympathetic to the defense. Specifically, the State might object only to the release of white venirepersons, while acquiescing in the release of minorities. Or perhaps the state attorney objects only to the release of individuals he suspects are conservative Republicans, while not objecting to the release of persons known to be liberal community activists. The result of this practice is that **the panel from which jurors are subsequently drawn is ideologically slanted in favor of the prosecution, before voir dire even begins.**

Unlike the situation in Bates, counsel for Mr. Gorby was not present to ensure that the jury venire was drawn from a fair cross-section of the community. Counsel was not there to guard against any prejudice to Mr. Gorby resulting from the State's participation in this ex parte proceeding.

Equally problematic is the fact that **no transcript or questionnaires exist to record the reason for disqualifying. No record exists to show the race, ethnicity, social class, income level, religion or gender of the veniremen released or retained.** Thus, the state attorney acts with impunity in advising the court which venirepersons ought to be released and which ought to be retained. Defense counsel is not present to challenge the State's action, nor is a transcript available which might serve as a post hoc check on the fairness of the proceeding. The case with facts nearest those of the instant case is Mackey v. State, 548 So. 2d 904 (Fla. 1st DCA 1989). The question presented in that case was whether a state attorney's speech to prospective jurors regarding their duties was sufficiently prejudicial to warrant a mistrial. Like Mr. Gorby's case, Mackey originated in the Circuit Court for Bay County. And in both the instant case and Mackey, a state attorney was present during the general jury qualification held outside the presence of both the defendant and his attorney. However, in Mackey procedural safeguards existed to ensure that the jury qualification proceeding was conducted without prejudice to the defendant: A pre-trial hearing was held at which the state attorney was examined by defense counsel to determine what had transpired at the general jury qualification. 543 So. 2d at 904-905. Moreover, the trial court offered defense counsel the opportunity to further question the prospective jurors regarding any prejudice that may have arisen. 543 So. 2d at 905.

Although the First District Court of Appeal found that Mackey's appeal failed to demonstrate reversible error, the court was disturbed by the potential for prejudice inherent in the Bay County Circuit Court's general jury qualification system:

[W]e write further to express to the bench and bar our concern with the practice of assigning or permitting the state attorney to advise prospective veniremen as to the legal requirements relating to jury

service and the statutory entitlements to request exemption or excuse from such duty . . . **We cannot say that, in the future, questions of substance will not arise concerning state attorney qualification of jurors which may dictate a result different than that reached here.**

548 So. 2d at 905-906 (emphasis added). Mr. Gorby's case presents the very "questions of substance" regarded by the First District as warranting relief. While Mackey involved a state attorney merely giving a speech to prospective jurors, the instant case involves an ex parte method of jury selection whereby a prosecutor advises the court on which venirepersons to release and which to retain, without benefit of defense counsel or a court reporter. This state of affairs is analogous to a situation where, during voir dire, a prospective juror who announces to the judge that she has a hardship is summoned to the bench where the judge and state attorney discuss the validity of her proffered excuse outside the presence of the defense attorney and court reporter. Such a scenario would be patently unconstitutional during voir dire; the effect is no different if it occurs during general jury qualification.

In contrast to Bates, Mr. Gorby and his attorney were **both absent** from the general jury qualification; a state attorney was present and participating in the proceeding; and no record exists to verify that the proceeding was conducted without prejudice to Mr. Gorby. Moreover, unlike the situation in Mackey, no hearing was ever held in Mr. Gorby's case to determine the nature of the proceeding; nor was defense counsel given the opportunity to question prospective jurors about the proceeding. Defense counsel was effectively denied the opportunity to challenge the panel under Rule 3.290 of the Florida Rules of Criminal Procedure.

Not only was no record made of this critical stage of jury selection; Mr. Gorby labors under the additional burden that all records relating to the jury pool were destroyed before his

conviction became final, thus rendering such records unavailable to collateral counsel. The lack of any documentation of this proceeding is an omission in the record which denied Mr. Gorby the right to a proper appeal. Under similar circumstances, this Court has in the past required that the cause be remanded for a new trial. Delap v. State, 350 So. 2d 462 (Fla. 1977); see also, Blalock v. Rice, 707 So. 2d 738 (Fla. 2d DCA 1997) (lack of record of contempt hearing required vacating plea and conviction). This Court should grant Mr. Gorby relief in the form of a new trial. At a minimum, this Court should remand this case to the trial court for an evidentiary hearing on this issue.

This issue was pled in Mr. Gorby's Amended Motion to Vacate as Claim XXIX. (PC-R. 465-68.) Although Mr. Gorby alleged that trial counsel was ineffective for failing to discover and litigate this issue, the lower court ruled that the Claim was procedurally barred. (PC-R. 594-95.) The lower court's ruling was erroneous; however, to the extent that appellate counsel should have raised the issue on direct appeal, counsel was ineffective for failing to do so.

CLAIM II

THE STATE'S CONTENTION THAT THE MURDER WAS HEINOUS, ATROCIOUS, OR CRUEL WAS IMPROPER IN THAT THE PROSECUTOR'S ARGUMENT WAS BASED ON FACTS NOT IN EVIDENCE AND WAS OTHERWISE CONTRARY TO EVIDENCE PRESENTED AT TRIAL. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE OF FUNDAMENTAL ERROR ON APPEAL.

The prosecutor made the following argument during final summation:

[The victim] was tied up after he was beaten. Now, was he trying to strangle him? We know the cause of death was not strangulation. **Look at the photographs that shows (sic) how tight that was around Mr. Raborn's neck.** By the time he got to

the autopsy and cords had been cut and all Dr. Sybers was able to put his finger underneath it, but at the photograph taken at the scene. **Look how tight that is around the victim's neck and his skin pinched. Beneath that cord.**

(R. 1551-52.)(emphasis added).

And at penalty phase:

And then as [the victim] lay there dying, at some point, these cords were wrapped around his neck and tied and you saw the photograph of **how tight they were**. You saw the skin pinched underneath those cords.

Now, he didn't die of strangulation, but **it doesn't take a great leap of imagination to know that his air flow was restricted.**

(R. 1796.)(emphasis added).

The State's argument was wholly unsupported by the evidence. In fact, the only evidence presented on this point contradicted the State's argument: the medical examiner testified that the victim did not die of strangulation, (R. 1377, 1396), and that **none of the cords around the victim's neck were tight**. (R. 1396.) Dr. Sybers stated unequivocally that the ligatures were loose. He gave the following testimony regarding his findings at the autopsy:

[I]ndeed that cord was loose. I could get my finger under there and lift it, so it did not cause strangulation . . . [I]f there were strangulation there would be a line which is actual hemorrhage in the skin where that cord was around the neck and there's no line here.

(R. 1378-79.)

While the prosecutor implied that the cords had simply been loosened by the time the autopsy was conducted, (R. 1551), a review of the record belies this assertion. The medical examiner, referring to photographs **taken at the crime scene**, testified as follows:

The next is Number 60. This photograph was taken from the hall into the bathroom . . . and it shows this red extension cord was looped to a handle, a door handle in the bathroom. **The cord you can see here is loose, it's not tight. There's no real knot in that cord.**

...

Number 48, again, shows this rather **loose twisting pattern of the cord, it's not really a knot.**

And 49 is a picture of the drawer itself with the extension cord looped to the handle. And again, **it's a loose cord.** Obviously if there were tension it would have pulled that down again. **So it was not tight.**

(R. 1386-89.)(emphasis added).

The prosecutor's argument respecting the tightness of the ligatures was not the only instance where the State argued facts not supported by the evidence. During the guilt phase closing argument, the prosecutor told the jury, "[The victim] was tied up after he was beaten. Now, was [Mr. Gorby] trying to strangle him?" (R. 1551.) But contrary to the prosecutor's assertion that the victim was "tied up after he was beaten," Dr. Sybers testified that he was **unable to determine when the ligatures were placed on the victim's neck.** (R. 1397, 1400.) Furthermore, Dr. Sybers stated that **any one of the blows to the victim's head could have caused death,** (R. 1395), and that **the victim lost consciousness after the first or second blow.** (R. 1388.). Therefore, even if the ligatures had been placed on the victim's neck after he was beaten, they would not have contributed to his death or even caused any suffering.

This Court's recent opinion in Ruiz v. State, 743 So. 2d 1 (Fla. 1999), makes clear that closing argument must be confined to the evidence presented at trial. This principle is integral to a fair legal system and has long been the law in Florida: "It is well settled that a prosecutor must

confine closing arguments to evidence in the record, and must refrain from comments that could not be reasonably inferred from the evidence." Jones v. Florida, 730 So. 2d 346, 347 (Fla. 4th DCA 1999) (citing Ford v. State, 702 So. 2d 279, 280 (Fla. 4th DCA 1997)); see also, Huff v. State, 437 So. 2d 1087 (Fla. 1983); Thompson v. State, 318 So. 2d 549 (Fla. 4th DCA 1975). The State's argument--both at guilt phase and penalty phase--plainly violated this principle.

Mr. Gorby was prejudiced by the State's improper argument. The State based its contention that the "heinous, atrocious, or cruel" aggravating circumstance applied partly on the supposition that the victim suffered as cords were tightened around his neck, constricting his breathing.³ But as the testimony cited above illustrates, this supposition is not only unfounded; it is inconsistent with the evidence presented at trial. As a consequence, the proceedings resulting in Mr. Gorby's sentence of death are fundamentally unreliable.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness and reliability of Mr. Gorby's death sentence. Appellate counsel was ineffective for failing to raise this issue. Habeas relief is warranted.

CLAIM III

MR. GORBY WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL WHERE COUNSEL FAILED TO ASSERT THE FUNDAMENTAL ERROR OF IMPROPER STATE CONDUCT AND ARGUMENT AND THE PROSECUTOR'S INTRODUCTION OF NON-STATUTORY AGGRAVATING FACTORS, BOTH OF WHICH RENDERED MR. GORBY'S DEATH SENTENCE FUNDAMENTALLY UNFAIR AND UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH AND

³The trial court considered this circumstance in finding that the murder was heinous, atrocious, or cruel, and sentencing Mr. Gorby to death. (R. 2623-24.)

**FOURTEENTH AMENDMENTS TO THE UNITED STATES
CONSTITUTION.**

A. IMPROPER PENALTY PHASE CLOSING ARGUMENT

At the conclusion of Mr. Gorby's penalty phase, the assistant state attorney made the following argument to the jury regarding aggravating and mitigating factors:

But we know that [Mr. Gorby] had been out of prison less than a month when he came down here and killed Jay Raborn.

Thirty points.

Now, his mother loves him. Well, most mothers love their son (sic). How much weight do you want to give that? **Say ten points.**

He has children. Well, that's not anything extremely significant . . . **Five.**

He comes from a broken home. His mother and father were divorced. Well, again that happens a lot. Let me put that down here. **Give him twenty.**

Intoxication. This alcohol thing. Well, we know if he did have anything to drink nobody was pouring it down his throat. He chose on his own free will to drink it.

And brain damage. He's putting wood blocks in that pasteboard hole when the CAT scan he received showed absolutely no evidence at all of any brain damage. But if you want to believe Dr. Goff, how much weight would you give him? **Let's say twenty.**

Let's go back up here. Previously convicted of a violent felony offense. A violent felony offender here. How much weight? **I submit to you history is worth fifty points.**

...

And finally, Ladies and Gentlemen, one of those weight factors in this particular case, and that's the manner in which he chose to kill Jay Raborn.

...

Now, you see, that's the way you evaluate them. It's not a number counting procedure. It's the weight you attach to them. **Two hundred and eighty points? Less than a hundred?** Any way you count it.

...

There really is only one sentence in this case.

(R. 1799-1801.)(emphasis added) By thus characterizing the jury's role as that of "scorekeeper," the prosecutor accomplished the very result that Florida's capital sentencing scheme seeks to avoid: he reduced a serious, reasoned weighing process into a mechanical tabulation of numbers. In so doing, he ignored this Court's exhortation in State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973) that "the procedure to be followed by trial judges and juries is not a mere counting process."⁴

The prosecutor's callous suggestion that such a weighty decision boils down to merely totaling the points on either side constitutes the same misinterpretation of the law which troubled this Court in Floyd v. State, 569 So. 2d 1225 (Fla. 1990). In that case, the trial court--after finding two aggravating circumstances and no mitigating circumstances--stated, "I cannot ignore that score." This Court observed that:

The trial court's statement, taken on its own, seems to ignore principles that we have repeated since State v. Dixon. That is, the sentencing scheme requires more than a mere counting of aggravating and mitigating circumstances. It requires the trial court to make "a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment **in light of the totality of the circumstances present.**"

⁴Though the prosecutor gave lip service to this principle--mentioning in closing that consideration of aggravating and mitigating circumstance is not a counting process--it is evident that the thrust of the State's argument was to the contrary.

Id. at 1233 (quoting State v. Dixon, 283 So. 2d 1 (Fla. 1973))(citations omitted)(emphasis added).

The State's argument trivialized the manner in which it is decided whether a capital defendant shall live or die, creating the danger that the jury would underestimate the importance of its role. Such a risk runs contrary to underlying principles of death penalty jurisprudence. As stated by the U.S. Supreme Court, "[T]his Court's Eighth Amendment jurisprudence has taken as a given that capital sentencers would view their task as the serious one of determining whether a specific human being should die at the hands of the State." Caldwell v. Mississippi, 472 U.S. 320, 329 (1985). By referring to aggravating and mitigating circumstances with a frivolity more appropriate to a T.V. game show than a capital trial, the prosecutor encouraged the jury to view its role with a diminished sense of responsibility. This misperception cannot be allowed in any criminal trial, much less in a case where the State seeks to impose the ultimate punishment.

B. PRESENTATION OF SURPRISE WITNESSES

On June 26, 1991--two days into Mr. Gorby's trial--counsel for Mr. Gorby was notified by the prosecutor that the State intended to call Gwen Beck as a guilt phase witness. When the State called Ms. Beck to the stand on the following day, counsel promptly objected and a bench conference was held, at which the State announced that it would also present the testimony of Dale Skipper. (R. 892-97.) Mr. Gorby's attorney also moved for a continuance, but the trial court denied this motion. Appellate counsel was ineffective for failing to raise this issue on appeal.

Fla. R. Crim. P. 3.220 (b)(1)(A) provides that within 15 days after service of the Notice of Discovery by the defendant, the prosecutor shall serve a written Discovery Exhibit which shall

disclose to the defendant, inter alia, "a list of the names and addresses of all persons known to the prosecutor to have information that may be relevant to any offense charged or any defense thereto." The prosecutor's duty to disclose is a continuing duty. Fla. R. Crim. P. 3.220 (j). The State's surprise disclosure of these two witnesses constituted a discovery violation which, at the least, entitled Mr. Gorby to a continuance so that his attorney could adequately prepare for their testimony. See, e.g., Richardson v. State, 604 So. 2d 1107 (Fla. 1992)(trial court erred in allowing capital defendant only one week to study and refute firearms expert's report); Smith v. State, 578 So. 2d 366 (Fla. 3rd DCA 1991)(trial court's refusal to grant continuance following State's announcement that codefendant would testify as a prosecution witness as part of his plea bargain constituted reversible error); Hill v. State, 535 So. 2d 354 (Fla. 5th DCA 1988)(defendant had due process right to have witnesses disclosed and made available to him in sufficient time to permit reasonable investigation regarding proposed testimony).

With respect to Dale Skipper, the prosecutor actually conceded that the State had known for some time that Mr. Skipper was a potential witness. (R. 897.) Mr. Skipper himself stated that the police had interviewed him back on May 7, 1990, more than a year prior to Mr. Gorby's trial. (R. 924.) Despite this fact, the State argued that the information Mr. Skipper would testify to was previously unavailable because the State's investigators had simply neglected to ask him about it until the week of trial! (R. 897.) The trial court agreed and allowed Mr. Skipper to testify.

Mr. Skipper's testimony was especially prejudicial to Mr. Gorby. Mr. Skipper claimed to recognize the murder weapon as a hammer which the victim stored in a backyard shed (as opposed to one of numerous hammers which the victim kept in a kitchen drawer). (R. 952.) During final argument, the prosecutor used this testimony to bolster the State's theory that the

murder was premeditated, based on the notion that going out to the storage shed to retrieve a hammer showed a degree of forethought. (R. 1552.)

C. IMPUGNING INTEGRITY OF DEFENSE COUNSEL

The prosecutor sought to bring into question the integrity of defense counsel by suggesting that counsel was not being truthful and was deliberately misleading the jury. During the redirect examination of Allen Brown, the prosecutor asked the witness if he was confused by the way the defense attorney "suggests an answer within the context of his question." (R. 849.) Counsel objected, and the court instructed the jury to disregard the prosecutor's question. But the prosecutor persisted, insinuating that defense counsel was trying to trick the witness. The prosecutor returned to this theme during his closing argument, when he told the jury that defense counsel "was able to confuse" Allen Brown. (R. 1559.) Also during closing argument, the prosecutor derided the defense for presenting the "nonsensical" testimony of Dr. Goff, (R. 1569), and for presenting alternative theories of the crime ("You can't have it both ways," he argued). (R. 1578.)

The prosecutor's conduct exceeded the bounds of proper argument. It is clear that a prosecutor may not ridicule a defendant or his theory of defense. Riley v. State, 560 So. 2d 279, 280 (Fla. 3d DCA 1990). Moreover, "[v]erbal attacks on the personal integrity of opposing counsel, rather than appropriate comments on the credibility of witnesses and inferences to be drawn from the evidence before the jury, are wholly inconsistent with the prosecutor's role." Briggs v. State, 455 So. 2d 519, 521 (Fla. 1st DCA 1984); see also, Rosso v. State, 505 So. 2d 611 (Fla. 3d DCA 1987) (improper prosecutorial misconduct warrants new trial where prosecutor indulges in personal attacks upon accused, his defense, or his counsel); Ryan v. State, 457 So. 2d

1084 (Fla 4th DCA 1984), pet. for rev. denied, 462 So. 2d 1108 (Fla. 1985) (resort to personal attacks on defense counsel is an improper tactic which can poison the minds of the jury).

To the extent that appellate counsel failed to raise this issue on appeal, Mr. Gorby was denied the effective assistance of counsel.

D. IMPROPER BOLSTERING OF WITNESSES

During the redirect examination of Michael Bennett, the prosecutor stated, "I told you I had a golden rule for my witnesses and I told you always to tell the truth, didn't I." (R. 702.) While questioning Allen Brown, the prosecutor asked, "Did I tell you I had a rule for all my witnesses?" and "Have you been told to always tell the truth?" (R. 831.) The court sustained counsel's objection, but the witness answered; no curative instruction was given. (R. 831.)

The prosecutor's manner of questioning these witnesses constituted an impermissible attempt to vouch for the witnesses' credibility and to bolster their testimony. This type of vouching is improper. See, e.g., Lewis v. State, 711 So. 2d 205, 207 (Fla. 3d DCA 1998); Cisneros v. State, 678 So. 2d 888, 890 (Fla. 4th DCA 1996). Appellate counsel was ineffective for failing to raise this issue on appeal.

E. INTRODUCTION OF NON-STATUTORY AGGRAVATING FACTORS

During the State's opening statement, the prosecutor remarked, "I anticipate the evidence is going to show that as [Mr. Gorby] sits here today in front of you he does not have one grain of remorse for bludgeoning Jay Raborn with that claw hammer no less than seven times." (R. 526.) The court sustained defense counsel's objection but did not give a curative instruction, and the issue was not raised on appeal. Appellate counsel was ineffective in this regard.

The prosecutor's remark cast a taint on Mr. Gorby's trial from the very beginning by predisposing the jury to view Mr. Gorby as a conscienceless killer. This constituted a non-statutory aggravating factor in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Florida law. Maynard v. Cartwright, 486 U.S. 356 (1988); Miller v. State, 373 So. 2d 882 (Fla. 1979). The prejudice to Mr. Gorby was compounded when the prosecutor repeated this remark during guilt phase closing arguments.⁵ (R. 1582.)

The prosecutor also indulged in personal attacks against Mr. Gorby. During his opening statement he told the jury that various witnesses "are not members of the First United Methodist Church," and attributed this to the fact that Mr. Gorby would never confide in churchgoing people but only in those "of the same breed." (R. 528.) Continuing his assault on Mr. Gorby's character, the prosecutor asked the first witness if Mr. Gorby was "the type of individual you want riding around with you."⁶ (R. 540.) The prosecutor's remarks were improper. Under Florida law, evidence of a person's bad character is generally inadmissible to prove action in conformity with it on a particular occasion. F.S.A. s. 90.404; Marchina v. State, 702 So. 2d 1369 (Fla. 1st DCA 1997).

The foregoing comments were irrelevant and prejudicial. Only a few hours after the trial had begun, the State's message to the jury was clear: Mr. Gorby was an unsavory, un-Christian individual who deserved to be convicted and sentenced to death on the basis of his bad character. Such argument is unacceptable in a capital trial. Habeas relief is proper.

⁵This issue was raised on direct appeal.

⁶The trial court sustained defense counsel's objection to this improper question, but did not give a curative instruction.

CLAIM IV

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE ON APPEAL THE TRIAL COURT'S REFUSAL TO PERMIT INDIVIDUAL AND SEQUESTERED VOIR DIRE REGARDING EACH VENIREPERSON'S VIEWS ON THE DEATH PENALTY AND ATTITUDE TOWARD THE CASE.

Mr. Gorby was prejudiced by the trial court's refusal to allow sequestered voir dire regarding the views of the panel about the death penalty (R. 9). Furthermore, he was prejudiced by the failure to conduct sequestered voir dire regarding potential jurors' individual attitudes towards the case, before the individual voir dire regarding pretrial publicity was commenced. The prosecutor repeatedly referred to Juror Grammer by her given name, and announced in open court that she was married to an assistant state attorney. Ms. Grammer said in front of the other jury panel members that she knew one of the law enforcement officers who would be called to testify (R. 75). The other panel members were left with the impression that Ms. Grammer knew facts about the case that were favorable to the prosecution, and cannot but have been influenced.

Juror White made a similarly prejudicial comment in front of the other panel members. Juror White announced that he would rather not sit on the jury because he was a lawyer. (R. 179). The jury was left with the impression that as a lawyer, Mr. White had an insight into the case that made it especially distasteful for him to sit through the trial. Again, the jury could not help but be influenced by such nuance.

Though this issue was preserved at trial, appellate counsel failed to raise this issue on appeal. Appellate counsel was ineffective in this regard.

CLAIM V

MR. GORBY'S JURY WEIGHED INVALID AND UNCONSTITUTIONALLY VAGUE AGGRAVATING CIRCUMSTANCES, IN VIOLATION OF HIS RIGHT TO AN INDIVIDUALIZED AND RELIABLE SENTENCING PROCEEDING, AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE.

In Claims XIX, XX, XXI and XXII of Mr. Gorby's Amended Motion to Vacate, he alleged that his death sentence was tainted and unconstitutional because of erroneous jury instructions regarding the aggravating factors of pecuniary gain, prior violent felony, under sentence of imprisonment, and heinous, atrocious or cruel. (PC-R 412-22.) In Claim XXIII of Mr. Gorby's Amended Motion to Vacate, he alleged that Florida's statute setting forth aggravating circumstances was facially overbroad and vague. He further asserted the trial court failed to give adequate narrowing instructions to cure the facial invalidity of the statute. (PC-R. 422-25.) The trial court denied Claims XIX-XXIII, finding all Claims procedurally barred because they should have been raised on appeal. (PC-R. 594-95.) Appellate counsel was ineffective in failing to raise these claims on direct appeal.

During Mr. Gorby's penalty proceedings, the trial court instructed the jury on four aggravating circumstances as follows:

The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence. First, the crime for which Olen Clay Gorby is to be sentenced was committed while he was under sentence of imprisonment; the defendant has been previously convicted of a felony involving the use or threat of violence to some person. The crime of robbery is a felony the use or threat of violence to another person. The crime for which the defendant is to be sentenced was committed for financial gain. The crime for which the defendant is to be sentenced was especially wicked, evil, atrocious, or cruel.

"Atrocious" means outrageously wicked and vile.
"Cruel" means designed to inflict a high degree of pain; utter indifference to, or enjoyment of, the suffering of others; pitiless.

(R. 1824-25.)

No further explanation of the aggravating circumstances was provided to the jury.

Mr. Gorby's jury received no instructions or definitions regarding the elements of the aggravating circumstances, despite it being the State's burden to prove aggravating factors and their elements as defined through limiting instructions beyond a reasonable doubt. Hamilton v. State, 547 So. 2d 528 (Fla. 1989); Banda v. State, 536 So. 2d 221 (Fla. 1988). Under Florida law, a sentencing jury has the right to reject or assign little weight to any particular aggravating circumstance and the discretion to recommend life based upon its conclusions regarding the asserted aggravating circumstances. In the absence of effective limiting and guiding instructions, the jury was left with unbridled discretion which violated the Eighth Amendment.

A. UNDER SENTENCE OF IMPRISONMENT

Mr. Gorby's jury was instructed that it could consider that "the crime for which Olen Clay Gorby is to be sentenced was committed while he was under sentence of imprisonment" (R. 1824). The jury was not told that the weight of this aggravator was less if the defendant had not committed the homicide after escaping from confinement. In Songer v. State, 544 So. 2d 1010 (Fla. 1989), this Court indicated the gravity of this aggravator is diminished since the defendant "did not break out of prison but merely walked away from a work-release job." Songer, 544 So. 2d at 1011.

Mr. Gorby's jury was not advised that the weight of this aggravator was lessened because Mr. Gorby obtained his release from prison by legal and non-violent means. In considering this aggravator, the jury needed to be fully instructed. In Mr. Gorby's case, the jury did not receive an instruction regarding this limitation on the consideration of aggravating circumstances. As a result, the penalty phase instructions on aggravating circumstances "fail[ed] adequately to inform [Mr. Gorby's] jur[y] what [it] must find to impose the death penalty." Maynard v. Cartwright, 486 U.S. 356, 361-62 (1988). Such instruction violates Espinosa v. Florida, 112 S. Ct. 2926 (1992); Stringer v. Black, 112 S. Ct. 1130 (1992); Sochor v. Florida, 112 S. Ct. 2114 (1992); Maynard v. Cartwright, and the Eighth and Fourteenth Amendments to the United States Constitution.

In Espinosa, the United States Supreme Court stated that juries in Florida must be adequately instructed on aggravating circumstances. Accordingly, Mr. Gorby was prejudiced by the unbridled discretion and the extra heavy thumb on the death side of the scale by his sentencing jury.

B. PRIOR CONVICTION OF A VIOLENT FELONY

To support the aggravating circumstance of "prior conviction of a violent felony," the State relied on a guilty plea entered by Mr. Gorby to the charge of "robbery threats." (R. 1731-32, 2315-16.) Counsel for Mr. Gorby objected, noting that this offense occurred in Texas and that the State should therefore be required to establish each element of the offense as it related to Florida law. (R. 1731.) The trial court overruled counsel's objection, and the issue was never raised on direct appeal. In this regard, appellate counsel was ineffective.

In effect, the trial court's instruction was a command to the jury to find this aggravating circumstance without any burden of proof being imposed upon the State, thus amounting to a directed verdict of guilt regarding the aggravating circumstance. See, United State v. Ragsdale, 438 F.2d 21 (5th Cir. 1971). Pleas are entered as a matter of convenience on a routine basis in the criminal justice system. The State should have been held to its proof of this circumstance and the jury should have been informed and instructed as to an actual definition of "violence" and "threat of violence" and compared those definitions with Mr. Gorby's prior convictions. The instruction regarding this circumstance "fail[ed] adequately to inform [Mr. Gorby's] jur[y] what it must find to impose the death penalty." Maynard v. Cartwright, 486 U.S. 356, 361-362 (1988).

C. CRIME COMMITTED FOR PECUNIARY GAIN

The jury in Mr. Gorby's case was instructed that they could find as an aggravating factor that the murder was committed for the purpose of financial gain (R. 1825). This Court has repeatedly held that in order for this aggravator to be applicable, it must be shown to exist beyond a reasonable doubt. Scull v. State, 533 So. 2d 1137, 1142 (Fla. 1988); Peek v. State, 395 So. 2d 492, 499 (Fla. 1980); Rogers v. State, 511 So. 2d 526, 534 (Fla. 1987). This aggravating factor is not supported by the evidence. See Rogers; Simmons v. State, 419 So. 2d 316 (Fla. 1982).

This Court has also held that the "pecuniary gain" aggravating factor applies only where pecuniary gain is shown to be the primary motive for the murder. Peek v. State, 395 So. 2d 492, 499 (Fla. 1981); Small v. State, 533 So. 2d 1137, 1142 (Fla. 1988). Without this limitation, the statute setting forth the "pecuniary gain" aggravating factor is facially vague and overbroad because it fails to adequately inform the sentencer what must be found for the aggravator to be present. In order to be constitutionally adequate, the sentencing court must instruct the jury that

it can find pecuniary gain established only if the State has proven beyond a reasonable doubt that the **primary motive** for the murder was financial gain. That showing was not made here. Further, counsel failed to object to the vague and overbroad instruction, and failed to proffer a constitutionally adequate limiting instruction.

Such instruction violates Espinosa v. Florida, 112 S. Ct. 2926 (1992); Stringer v. Black, 112 S. Ct. 1130 (1992); Sochor v. Florida, 112 S. Ct. 2114 (1992); Maynard v. Cartwright, 486 U.S. 356 (1988), and the Eighth and Fourteenth Amendments to the United States Constitution.

Not only is the "pecuniary gain" aggravating instruction vague under the Eighth and Fourteenth Amendments to the United States Constitution; the State did not prove that pecuniary gain was the primary motive for the crime of which Mr. Gorby was accused. The jury must be given adequate and constitutional instructions since it is part of any sentencing calculus. Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993). This Court requires that the finding of "pecuniary gain" as an aggravating circumstance must be limited to those crimes where it was the primary motive. The instructions given to the jury did not include this language. (R. 1825).

The jury relied upon an improper aggravating factor in arriving at its recommendation of death. The trial court also found the existence of this aggravating factor which was not supported by the facts.

D. HEINOUS, ATROCIOUS OR CRUEL

Trial counsel objected to the giving of the heinous, atrocious or cruel instruction (R. 1739.) The issue was raised on direct appeal, but was done so ineffectively and superficially (Initial Brief, Issues XI-XII). This Court rejected this issue on appeal, but merely found sufficient evidence to support the aggravating factor without any discussion of the constitutional infirmity of

the instruction given at Mr. Gorby's trial. Gorby v. State, 630 So. 2d 544, 547 (Fla. 1993). The interest of justice requires this Court revisit this issue.

While it is true the trial court gave an expanded instruction regarding this factor, (R. 1824-25), the jury was never explicitly instructed that Mr. Gorby must have "intended" to inflict unnecessary torture upon the victim. Stein v. State, 632 So. 2d 1361 (Fla. 1994); Santos v. State, 591 So. 2d 160, 163 (Fla. 1991). This Court's opinion in Stein required that Mr. Gorby's jury be informed that Mr. Gorby intended "to inflict a high degree of pain or to otherwise torture" the victim before this factor could be proved beyond a reasonable doubt. Stein v. State, 632 So. 2d at 1362-1363.

This narrowing instruction is found in numerous opinions of this Court. See, Bonifay v. State, 626 So. 2d 1310, 1313 (Fla. 1993); Omelus v. State, 584 So. 2d 563, 566 (Fla. 1991); Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990); Rhodes v. State, 547 So. 2d 1201, 1208 (Fla. 1989); Amoros v. State, 531 So. 2d 1256, 1260 (Fla. 1988); Lewis v. State, 377 So. 2d 640, 646 (Fla. 1979). These cases were decided well before Mr. Gorby's trial. Accordingly, Mr. Gorby was entitled to their narrowing interpretations of this emotionally-charged aggravating factor in order to direct the jury's consideration of his fate.

Further, Shell v. Mississippi, 498 U.S. 1 (1990), was decided well before Mr. Gorby's trial and this Court's opinion in 1993. Mr. Gorby's appellate counsel didn't even cite the case on appeal. In Shell, the trial court instructed as follows:

[T]he word heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with indifference to, or even enjoyment of the suffering of others.

Id. at 2.

The above instruction is similar to the one given by the trial court in Mr. Gorby's case, but the Supreme Court found this instruction constitutionally insufficient:

Obviously, a limiting instruction can be used to give content to a statutory factor that "is itself too vague to provide any guidance to the sentencer" only if the limiting instruction's own "definitions are constitutionally sufficient," that is, only if the limiting instruction itself "provide[s] **some** guidance to the sentencer." Walton v. Arizona [cite deleted].

Id. at 3.

The Supreme Court found the limiting instructions to suffer from the same infirmities as the primary instructions and concluded they could be utilized by "[a] person of ordinary sensibility [to] fairly characterize almost **every** murder." Maynard v. Cartwright, 486 U.S. at 363.

This Court must, in the interest of justice and in consideration of the cumulative errors infecting Mr. Gorby's capital sentencing demonstrated both in this petition and in his Initial Brief appealing denial of Rule 3.850 relief (filed simultaneously), apply Shell to Mr. Gorby and order a new sentencing.

The Supreme Court has said that "there is no serious argument that [the language "especially heinous, cruel or depraved"] is not facially vague." Richmond v. Lewis, 113 S.Ct. 528, 534 (1992). Florida's similar statutory language is facially vague and overbroad in violation of the Eighth and Fourteenth Amendments, subject to constitutional salvation only by narrowing instructions capable of being applied by the sentencer in a fashion which cures the "facial" defect. Id. at 535. Espinosa v. Florida, 112 S.Ct. 2226 (1992). As in Shell, the narrowing instructions given in Mr. Gorby's case did not "cure" the facial defect; rather, they perpetuated and aggravated

the defects by adding additional, emotionally-charged, but meaningless words into the instruction. Habeas relief is proper and required.

E. THE EIGHTH AMENDMENT ERROR WHICH INFECTED THE JURY'S WEIGHING PROCESS IS NOT HARMLESS BEYOND A REASONABLE DOUBT.

The effect of jury weighing of an invalid aggravating factor on the resulting death sentence has been discussed by the United States Supreme Court in a number of cases, notably Espinosa and Stringer v. Black, supra. In Stringer, the Court held that relying on such an aggravating factor, particularly in a weighing state, **invalidates** the death sentence;

Although our precedents do not require the use of aggravating factors, they have not permitted a state in which aggravating factors are decisive to use factors of vague or imprecise content. A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion. A vague aggravating factor used in the weighing process is in a sense worse, **for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be** by relying on the existence of an illusory circumstance. Because the use of a vague aggravating factor in the weighing process creates the possibility not only of randomness but also of **bias in favor of the death penalty**, we cautioned in Zant that there might be a requirement that **when the weighing process has been infected with a vague factor the death sentence must be invalidated.**

503 U.S. at 235-236 (emphasis added).

Consideration of an invalid aggravating factor distorts the entire weighing process, adding improper weight to death's side of the scales and depriving the defendant of the right to an individualized sentence:

[W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no

difference if the thumb had been removed from death's side of the scale.

Id. at 232. The jury's "weighing process" in Mr. Gorby's case was "skewed" in the same way that the process was skewed by the invalid aggravator in Espinosa.

This Court did not conduct any review of the effect of the error in the instructions to Mr. Gorby's jury on the "heinous, atrocious or cruel" instruction. Mr. Gorby's jury was presented with aggravating factors that were invalid under Espinosa. The State argued with equal fervor that these aggravating factors were applicable and justified a sentence of death. Any one of the errors standing alone requires a resentencing in this case before a new jury.

The instructional errors in this case were similar, but even more prejudicial to Mr. Gorby, than the error that this Court held required reversal in James v. State, 453 So. 2d 786, 792 (Fla. 1984), cert. denied, 469 U.S. 1098 (1984). This Court initially determined that the trial court's error in finding the aggravating factor was harmless. James, 453 So. 2d at 792. However, on postconviction appeal, when the Court considered the effect of the Espinosa error in instructing James' jury on the invalid aggravating factor, it could not say that the error was harmless:

In closing argument the state attorney argued forcefully that the murder was heinous, atrocious or cruel. On appeal, on the other hand, we held that the facts did not support finding that aggravator. James, 453 So. 2d at 792. Striking that aggravator left four valid ones to be weighed against no mitigators, and we believe that the trial court's consideration of the invalid aggravator was harmless error. **We cannot say beyond a reasonable doubt, however, that the invalid instruction or that its recommendation would have been the same if the requested expanded instruction had been given.**

James, 615 So. 2d at 669 (emphasis added).

This Court cannot find "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Chapman v. California, 386 U.S. 18, 24 (1967).

CLAIM VI

MR. GORBY WAS DENIED THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WHERE COUNSEL FAILED TO ASSERT THAT MR. GORBY'S EIGHTH AMENDMENT RIGHTS WERE VIOLATED BY THE SENTENCING COURT'S REFUSAL TO FIND AND WEIGH THE MITIGATING CIRCUMSTANCES SET OUT IN THE RECORD.

The proceedings resulting in Mr. Gorby's sentence of death violated the constitutional mandate of Eddings v. Oklahoma, 455 U.S. 104 (1982). Sentencing judges are required to specifically address nonstatutory mitigation presented and/or argued by the defense. Campbell v. State, 571 So. 2d 415 (Fla. 1990). The failure to give meaningful consideration and effect to the evidence in mitigation requires reversal of a death sentence. Penry v. Lynaugh, 109 S. Ct. 2934 (1989).

At trial, evidence was presented showing Mr. Gorby's abusive upbringing, his poverty as a child, his history of alcoholism and his brain damage.

"When a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved." Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990). See Maxwell v. State, 603 So.2d 490 (Fla. 1992).

This Court has recognized that trial courts "continue to experience difficulty in uniformly addressing mitigating circumstances." Campbell, 571 So. 2d 415, 419 (Fla. 1990). Moreover, the failure to set forth specific findings concerning all aggravating and mitigating circumstances could

prevent the appellate court from adequately carrying out its responsibility of providing the constitutionally required meaningful appellate review, including proportionality review. Campbell, 571 So. 2d 419-20; State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973). Indeed, lack of uniformity in the application of aggravating and mitigating circumstances invariably results in the arbitrary and capricious imposition of the death penalty. Furman v. Georgia, 408 U.S. 238 (1972); see Grossman v. State, 525 So. 2d 833, 850 (Fla. 1988) (Shaw, J., concurring).

In Campbell, the requirements on sentencing courts with respect to findings regarding mitigating circumstances was set forth:

When addressing mitigating circumstances, the sentencing court must **expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature.** . . . The court must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence The court next must weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, must **expressly consider** in its written order each established mitigating circumstance. Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight. To be sustained, the trial court's final decision in the weighing process must be supported by "sufficient competent evidence in the record." Brown v. Wainwright, 392 So. 2d 1327, 1331 (Fla. 1981).

Campbell, 571 So. 2d at 419-20 (footnotes and citations omitted)(emphasis added); see also Ferrell v. State, 653 So. 2d 367 (Fla. 1995), Larkins v. State, 655 So. 2d 95 (Fla. 1995).

In Eddings, Justice O'Connor wrote separately explaining why she concurred in the reversal:

In the present case, of course, the relevant Oklahoma statute permits the defendant to present evidence of any mitigating circumstance. See Okla. State., Tit. 21, Section 701.10 (1980). Nonetheless, in sentencing the petitioner (which occurred about one month before Lockett was decided), the judge remarked that he could not "in following the law. . . consider the fact of this young man's violent background." App. 189. Although one can reasonably argue that these extemporaneous remarks are of no legal significance, I believe that the reasoning of the plurality opinion in Lockett compels a remand so that we do not "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." 438 U.S., at 605, 98 S. Ct., at 2965.

Eddings, 455 U.S. at 119-20. Justice O'Connor's opinion makes clear that the sentencer is entitled to determine the weight due a particular mitigating circumstance; however, the sentencer may not refuse to consider that circumstance as a mitigating factor. See Parker v. Dugger, 489 U.S. 308 (1991). Here the trial court improperly rejected nonstatutory mitigation. This was Eighth Amendment error.

The lower court ruled that this issue was procedurally barred as it should have been raised on direct appeal. (PC-R. 594-95.) To the extent that appellate counsel failed to raise this issue, Mr. Gorby was denied effective assistance of counsel.

CLAIM VII

MR. GORBY'S SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS SHIFTED THE BURDEN TO MR. GORBY TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE SENTENCING JUDGE HIMSELF EMPLOYED IMPROPER STANDARDS IN SENTENCING MR. GORBY TO DEATH.

Mr. Gorby raised this claim as Claim XXVI of his postconviction relief motion. (PC-R. 434-37.) The trial court summarily rejected this claim. (PC-R. 594-95.) Appellate counsel was ineffective in failing to raise this claim on direct appeal.

It is well-established that:

the State must establish the existence of one or more aggravating circumstances before the death penalty [can] be imposed . . .

[S]uch a sentence could be given **if the State showed the aggravating circumstances outweighed the mitigating circumstances.**

State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974) (emphasis added).

This standard was not applied at the penalty phase of Mr. Gorby's trial. Instead, the Court and prosecutor shifted to Mr. Gorby the burden of proving whether he should live or die.

It is improper to shift the burden to the defendant to establish that mitigating circumstances outweigh aggravating circumstances. Mullaney v. Wilbur, 421 U.S. 684 (1975).

Thus, the Court injected misleading and irrelevant factors into the sentencing determination.

Caldwell v. Mississippi, 472 U.S. 320 (1985); Hitchcock v. Dugger, 481 U.S. 393 (1987);

Maynard v. Cartwright, 486 U.S. 356 (1988).

Prosecutorial argument at Mr. Gorby's penalty phase required imposition of the death sentence unless Mr. Gorby not only produced mitigation, but also established that the mitigation outweighed the aggravating circumstances. The trial court then employed the same standard in sentencing Mr. Gorby to death. See Zeigler v. Dugger, 524 So. 2d 419 (Fla. 1988), cert. denied, 112 S. Ct. 390 (1991)(trial court is presumed to apply the law in accord with manner in which jury was instructed). It is clear the burden was on Mr. Gorby to show that life imprisonment was the appropriate sentence because consideration of mitigating evidence was limited to only those factors proven sufficient to outweigh the aggravation.

The standard the prosecutor argued, and upon which the Court relied, is a violation of Florida law and the Eighth Amendment to the United States Constitution. See McKoy v. North Carolina, 494 U.S. 433, 454 (1990)(Kennedy, J., concurring)(a death sentence arising from erroneous instructions "represents imposition of capital punishment through a system that can be described as arbitrary or capricious").

The defendant in a capital case is afforded the opportunity to make the final argument to the jury in the penalty phase. This practice is contrary to the typical procedure in a criminal case where the party that carries the burden of proof, the State, speaks last to the jury. It is precisely because the State carries the burden in a criminal prosecution that the State is afforded the "last word" to the jury. See Preston v. State, 260 So. 2d 501, 504 (Fla. 1972); Smith v. State, 19 So. 2d 698, 698 (Fla. 1944). The practice in Florida of allowing the defendant to have the "last word" in the penalty phase recognizes that the defendant has the burden of proof to establish that life is the proper penalty. Shifting the burden to the defendant in this way violates due process.

The Court believed Mr. Gorby carried the burden of proving whether he should live or die. The Court unreasonably believed that only mitigating evidence that rose to the level of "outweighing" aggravation need be considered. Therefore, Mr. Gorby is entitled to relief in the form of a new sentencing hearing. To the extent that defense counsel failed to effectively litigate and preserve this issue, counsel's performance was ineffective.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness and reliability of Mr. Gorby's death sentence. Appellate counsel was ineffective for failing to raise this issue. Habeas relief is warranted.

CLAIM VIII

FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED IN THIS CASE BECAUSE IT FAILS TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY AND IT VIOLATES THE CONSTITUTIONAL GUARANTEES OF DUE PROCESS AND THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

Florida's capital sentencing scheme denies Mr. Gorby his right to due process of law and constitutes cruel and unusual punishment on its face and as applied in this case. Florida's death penalty statute is constitutional only to the extent that it prevents the arbitrary imposition of the death penalty and narrows application of the penalty to the worst offenders. See, Proffitt v. Florida, 428 U.S. 242 (1976). The Florida death penalty statute fails to meet these constitutional guarantees in violation of the Eighth Amendment.

Further, execution by electrocution or lethal injection carries with it the unconstitutional risk of physical and psychological torture without justification and violates the Eighth Amendment.

The capital sentencing statute in Florida fails to provide any standard of proof for determining that aggravating circumstances "outweigh" the mitigating factors, Mullaney v. Wilbur, 421 U.S. 684 (1975), and does not define "sufficient aggravating circumstances." Further, the statute does not sufficiently define the aggravating circumstances to be considered by the co-sentencing jury and judge. See, Godfrey v. Georgia, 446 U.S. 420 (1980). These deficiencies lead to the arbitrary and capricious imposition of the death penalty and violate the Eighth Amendment to the United States Constitution.

Further, Florida's scheme does not have the independent reweighing of aggravating and mitigating circumstances required by Proffitt v. Florida, 428 U.S. 242 (1976). Additionally, the aggravating circumstances have been applied in a vague and inconsistent manner, and juries receive unconstitutionally vague instructions in applying the aggravating circumstances. See, Godfrey, supra; Espinosa v. Florida, 112 S.Ct. 2926 (1992).

Florida law creates a presumption of death as the appropriate sentence if a single aggravating factor is found, creating a presumption of death in every first degree felony murder case and in most premeditated murder cases. Florida requires mitigation to outweigh aggravation once any aggravation is found to exist. This systematic presumption of death does not satisfy the Eighth Amendment's requirement that the death penalty be applied to only the most aggravated and unmitigated of offenses. See, Furman v. Georgia, 408 U.S. 238 (1972); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988); Richmond v. Lewis, 113 S.Ct. 528 (1992).

In the interest of justice, this Court should grant Mr. Gorby habeas relief on this claim.

CONCLUSION AND RELIEF SOUGHT

Based upon the discussion and citation to authority contained herein, Mr. Gorby respectfully urges this Court to grant habeas corpus relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing **PETITION FOR WRIT OF HABEAS CORPUS** has been furnished by United States Mail, first-class postage prepaid, to all counsel of record on February 28, 2000.

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