

IN THE SUPREME COURT OF FLORIDA

NO. _____

ELMER LEON CARROLL,

Petitioner,

v.

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

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

GREGORY C. SMITH
Florida Bar No. 279080
Capital Collateral Counsel -
Northern Region

ANDREW THOMAS
Florida Bar No. 0317942
Chief Assistant CCC-NR
CAPITAL COLLATERAL COUNSEL -
NORTHERN REGION
Post Office Drawer 5498
Tallahassee, FL 32314-5498
(850) 488-7200

COUNSEL FOR PETITIONER

PRELIMINARY STATEMENT

This is Mr. Carroll'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. Carroll 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, containing the transcript of Mr. Carroll's November 15, 1991, competency hearing, 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. Carroll's capital trial and sentencing were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel. For example, appellate counsel failed to raise the fundamental and primary issue of Mr. Carroll's mental incompetence during the direct appeal process. This is so despite extensive evidence of mental incompetency from the time of trial and Department of Corrections' records generated during the appeal process demonstrating Mr. Carroll's continued mental illness and incompetency.

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. Carroll. "[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. Carroll is entitled to habeas relief.

PROCEDURAL HISTORY

The Circuit Court of the Ninth Judicial Circuit, Orange County, Florida, entered the judgments and sentences. On November 26, 1990, a Grand Jury indicted Mr. Carroll for one count of first degree murder and one count of sexual battery on a child under the age of 12 years. (R. 996-997.) Mr. Carroll pleaded not guilty and on March 17, 1992, filed an Amended Notice of Intent to Rely on Defense of Insanity. (R. 1110-1111.)

Mr. Carroll's trial was conducted March 16-21, 1992, before the Honorable Belvin Perry. On March 21, 1992, the jury found Mr. Carroll guilty of first degree felony murder and sexual battery as charged (R. 879), and on April 13, 1992, the jury recommended the death penalty be imposed. (R. 1281.) Mr. Carroll's attorney presented no witnesses during penalty phase.

The trial court entered its original Sentencing Order on April 16, 1992, (R. 1284-1298), finding three aggravating circumstances and, although rejecting all statutory mitigating factors, concluded Mr. Carroll's "possible mental abnormalities" established "one statutory mitigating circumstance". (R. 1296.) Mr. Carroll was sentenced to death. (R. 1297.) At the request of the State, an Amended Sentencing Order was entered on April 20, 1992. (R. 1304-1315.)

On direct appeal, Mr. Carroll's convictions and sentences were affirmed. Carroll v. State, 636 So. 2d 1316 (Fla.), cert. denied, 513 U.S. 973 (1994).

On February 1, 1996, Mr. Carroll filed his motion under Rule 3.850, Fla. R. Crim. P. (PC-R. 450-571.) On January 31, 1997, Mr. Carroll filed an amended motion. (PC-R. 696-791.) On April 30, 1997, the lower court issued an order summarily denying some claims and ordering an evidentiary hearing on other claims. (PC-R. 979-981.) An evidentiary hearing was conducted on August 4-5, 1997. Following the evidentiary hearing, the court denied all claims for relief on October 20, 1998. (PC-R. 1157-1185.) The court also denied Mr. Carroll's motion for rehearing. (PC-R. 1189.) The instant petition seeking habeas corpus relief is being filed simultaneously with Mr. Carroll's appeal from the denial of his Rule 3.850 motion. The two pleadings are interrelated and should be considered cumulatively, particularly since Mr. Carroll's mental incompetency pervades, infects, and renders null and void his jury trial, the judgments and sentences, his direct appeal, and his postconviction proceedings.

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. Carroll'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. Carroll'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. Carroll 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. For the State of Florida to try, convict, and sentence to death a mentally incompetent individual violates fundamental principles of Due Process and the Florida and United States Constitutions. See, Jones v. State, 740 So. 2d 520 (Fla. 1999). 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. Carroll's claims.

GROUND FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Carroll 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, primarily due to the inescapable fact that Mr. Carroll is psychotic, has been incompetent throughout his legal proceedings, and his proved mental illness has never been accorded the mitigating weight and significance required under Florida's capital sentencing laws and constitutional law of this State and the United States.

CLAIM I

MR. CARROLL WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL WHEN COUNSEL FAILED TO ASSERT HIS CLIENT'S CONTINUED INCOMPETENCY AND ASSERTED APPELLATE ISSUES WITHOUT BENEFIT OF RATIONAL COMMUNICATION WITH MR. CARROLL.

Mr. Carroll was mentally incompetent to proceed during his direct appeal to this Court. Mr. Carroll's right to the effective assistance of counsel on appeal is a guaranteed by the Constitution. Evitts v. Lucey, 469 U.S. 387 (1985). Mr. Carroll's appellate counsel did not serve as his trial counsel and, thus, the need for open and rational communication was heightened during the appeals process. An individual convicted of a criminal offense - particularly a capital

offense with a sentence of death - must be able to "rationally" communicate with appellate counsel. Laferty v. Cook, 949 F.2d 1546 (10th Cir. 1991), cert. denied, 112 S.Ct. 1942 (1992).

The Rules Regulating the Florida Bar support Mr. Carroll's constitutional claim that he must be mentally competent while pursuing appellate remedies. Rule 4-1.2.(a) requires a lawyer "to abide by a client's decisions regarding the objectives of representation" and to "consult with the client as to the means by which they are to be pursued". Rule 4-1.4.(a) requires a lawyer to "keep a client reasonably informed about the status of a matter". Rule 4-1.4.(b) requires the lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation".

Additionally, representing a client under "mental disability" involves delicate and additional duties on the part of a lawyer; including the potential need for requesting appointment of a guardian. Rule 4-4.14.(a)(b).

It is inconceivable that Elmer Carroll had any meaningful communication with his attorney, let alone "rational" communication, during the direct appeal process. The trial record reviewed by appellate counsel contains numerous psychiatric reports, a competency hearing, and numerous assertions by trial counsel of Mr. Carroll's then-present inability to testify or communicate rationally, which put counsel on notice of Mr. Carroll's mental incompetence. The fact that the trial court ultimately found Mr. Carroll competent to proceed - which is submitted to be error in itself - does not diminish appellate counsel's obligation to insure rational and meaningful communications with his capital client. The trial record is replete with indications that Mr. Carroll's trial attorney considered his client incompetent. Specifically, when the trial court inquired of trial counsel regarding his decision to waive presentation of mitigation evidence during

penalty phase, trial counsel asserted Mr. Carroll was not capable of testifying, was making irrational statements during trial, and expressing paranoid ideation. (R. 912.) As "good cause why sentence should not be imposed", trial counsel asserted Mr. Carroll's sanity was in doubt and further evaluation was necessary. (R. 966-967.)

The period of appellate representation was between April, 1992, and at least April 14, 1994, when this Court affirmed Mr. Carroll's convictions and death sentence. Records from the Department of Corrections during 1993 clearly indicate Mr. Carroll remained mentally ill and incompetent during this time period. A representative sample are contained in the Appendix to this Petition. During the time his appeal was being prepared, filed, and argued, Mr. Carroll was diagnosed as suffering from a Psychotic Disorder, not otherwise specified, was prescribed Navane and Cogentin, required psychiatric counselling and inpatient admission, and suffered from suicidal gestures and ideation, delusions, and hallucinations.

Appellate counsel was ineffective for failing to notify this Court of Mr. Carroll's incompetence and for failing to seek a stay of appellate proceedings pending restoration to competency. It is impossible for this Court or present counsel to fully gauge the prejudicial impact of Mr. Carroll's incompetency during the appeal process. However, if the right to effective appellate representation is to have meaning, one's client must, at a minimum, be competent to discuss the trial proceedings with appellate counsel. Claims relying upon a client's report of factual events, such as shackling, juror separation, and absence from critical stages of the trial proceedings, cannot be gleaned from a cold record and cannot be detected or asserted in the absence of a mentally competent client. Prior postconviction counsel was likely ineffective for failing to assert Mr. Carroll's incompetency during preparation and hearing of his Rule 3.850

motion. See, Carter v. State, 706 So. 2d 873 (Fla. 1997)(it must be noted that Carter was not decided until approximately 3 months after Mr. Carroll's evidentiary hearing).

The right to effective representation by counsel in postconviction proceedings is evolving, see, Peede v. State,

24 FLW S391 (Fla. Aug. 19, 1999)("...we urge the trial court, upon remand, to be certain that Peede receives effective representation"), while the right to effective representation on direct appeal is well established. See, Anders v. California, 386 U.S. 738 (1967). Surely if Mr. Carroll is entitled to be competent in postconviction proceedings where factual matters are at issue, Carter, supra, then he had the absolute, fundamental right to be competent and able to "rationally" communicate with his attorney on direct appeal.

In the interests of justice this Court should grant Mr. Carroll a new appeal. This matter should be remanded to the lower court for a competency determination and the belated appeal should only be filed once Mr. Carroll is restored to competency, if restoration is possible.

CLAIM II

APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE ON DIRECT APPEAL THE PREJUDICIAL ERROR CAUSED BY THE ADMISSION OF INFLAMMATORY AND GRUESOME PHOTOGRAPHS THAT VIOLATED MR. CARROLL'S FIFTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

During the guilt/innocence phase of Mr. Carroll's trial the State introduced numerous autopsy slides (photographs) over strenuous defense objection. (R. 380-398.) The introduction and use of these photographic slides was designed solely to inflame the jurors' emotions. The court failed to conduct a proper weighing of probative value versus prejudicial impact to Mr.

Carroll, instead deferring to the Medical Examiner's obviously biased assertions that each slide was helpful in explaining his testimony and opinions. (R. 390-397.) These slides included multiple images of markings and abrasions to the child victim's inner lip, (R. 380), various abrasions and contusions to the child's neck and ear, (R. 381-382), blood on the child's thighs and just outside her vaginal area, (R. 384), tearing of the child's hymen, (R. 385, 386), the deeper portions of the child's vagina, (R. 387), and the child's panties on the body (front and back sides). (R. 388.)

Appellate counsel failed to raise this issue on direct appeal.

There was no necessity or legitimate relevancy argument supporting admission of these slides and the jury was subjected to prolonged exposure during the Medical Examiner's testimony. As the prosecutor noted during jury selection, Mr. Carroll's jury panel was disproportionately configured of individuals with many children.¹ The trial court failed to consider the prejudicial

¹ During jury selection, the following occurred:

Mr. Ashton [prosecutor]: Okay. Ms. McMillan?

Ms. McMillan [prospective juror]: Yes, sir.

Mr. Ashton: You win. You have more children than anyone in this jury room.

Ms. McMillan: I believe that's probably true.

Mr. Ashton: You have nine children?

Ms. McMillan: Yes, I do.

The Prospective Juror: Bless your heart.

Mr. Ashton: Bless your heart is right. That (sic) absolutely amazing. How many grandchildren do you have?

(continued...)

impact of these inflammatory and gruesome photographic slides in light of the number of jurors with "a lot of children". (R. 172.) Photographs should be excluded when the risk of prejudice outweighs relevancy. Alford v. State, 307 So. 2d 433, 441-42 (Fla. 1975), cert. denied, 428 U.S. 912 (1976). Photographs should also be excluded when they are repetitious or "duplicates". Id., see also Adams v. State, 412 So. 2d 850 (Fla. 1982)(excluding two photographs based on trial court's determination that photos were "duplicates").

Florida law is clear that "[p]hotographs should be received in evidence with great caution." Thomas v. State, 59 So. 2d 517 (1952). Although relevancy is a key to admissibility of such photographs under Adams, limits must be placed on "admission of photographs which prove, or show, nothing more, than a gory scene." Thomas, 59 So. 2d at 517. The photographs admitted during Mr. Carroll's trial did nothing more than inflame the passions of the jury by exposing them to a "gory scene" for an extended period of time. One can reasonably conclude the trial was over and verdicts of guilt and death a foregone conclusion once these photographic slides were displayed for the jury of parents.

In Mr. Carroll's case, the numerous, repetitious photographs admitted at trial were in of minimal relevance. Neither the location nor appearance of injuries on a body are relevant to proof

¹(...continued)

Ms. McMillan: Fourteen.

Mr. Ashton: Nine children, fourteen grandchildren. I salute you. Actually I was going through noticing we have a lot of people in this jury room with a lot of children. Nothing close to Ms. McMillan, of course, but an unusual number with more than one, with a lot of children.

(R. 171-172)(emphasis supplied).

of guilt or establishment of any statutory aggravating circumstance. The photographs were irrelevant and highly prejudicial.

While relevancy is the key to admissibility of photographs, this Court has indicated that courts must also consider the shocking nature of the photos, whether jurors are thereby distracted from fair factfinding, and whether admission of the photos is simply to inflame the jury. Ruiz v. State, 743 So. 2d 1 (Fla. 1999); Czubak v. State, 570 So. 2d 925, 928 (1990).

The state's use of the photographs distorted the actual evidence against Mr. Carroll at the guilt phase and unfairly skewed the weight of aggravating circumstances against him at the penalty phase. Appellate counsel failed to raise this issue despite there being proper objections - at least in part - by trial counsel. The trial court abandoned it's role in deferring to the State witness. The trial court abused it's discretion in admitting the photographic slides and, therefore, habeas relief is proper.

CLAIM III

MR. CARROLL WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL WHERE COUNSEL FAILED TO ASSERT THE FUNDAMENTAL ERROR OF THE PROSECUTOR'S INFLAMMATORY AND IMPROPER COMMENTS AND ARGUMENT AND THE PROSECUTOR'S INTRODUCTION OF NON-STATUTORY AGGRAVATING FACTORS, BOTH OF WHICH RENDERED MR. CARROLL'S DEATH SENTENCE FUNDAMENTALLY UNFAIR AND UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

As this Court recently noted:

A criminal trial is a neutral arena wherein both sides place evidence for the jury's consideration; the role of counsel in closing argument

is to assist the jury in analyzing the evidence, not to obscure the jury's view with personal opinion, emotion, and nonrecord evidence.

Ruiz v. State, 743 So. 2d 1, 2 (Fla. 1999).

In reversing Walter Ruiz's conviction and sentence of death due to prosecutorial misconduct during arguments to the jury, this Court, in part, found fault with the prosecutor for implying that the State of Florida only prosecutes the guilty. In Mr. Carroll's case, the prosecutor implied to the jury that the State of Florida only sought the death penalty in cases where "what he did was so horrible and heinous that death is the only just sentence". (R. 946.) Further, the prosecutor essentially asked the jury to ignore its obligation to weigh aggravation and mitigation by suggesting **no amount of mitigation** could outweigh the aggravation: "...even if you believed every single piece of mitigating evidence ...there is **nothing on this earth that can outweigh what he did to Christine McGowan**". (R. 946.)(emphasis supplied) This was blatantly improper argument calculated to infuse the prosecutor's personal opinion and emotion into the penalty determination and an invitation to the jury to disregard the law. It worked; the jury unanimously recommended death despite overwhelming evidence of mental mitigation at the time of the offenses.

In Ruiz this Court found prejudicial error because the prosecutor invited the jury to convict Ruiz because he was a liar. In Mr. Carroll's case, the prosecutor went further and invited the jury to recommend a death sentence because Elmer Carroll did not "deserve to live", there was "nothing good" in him, and "there [was] nothing but evil in [him] and [he] must die". (R. 946.) Further, as in Ruiz, the prosecutor here blatantly appealed to the jurors' emotions:

A small child will sometimes cry out in the night frightened by a shadow or a piece of wallpaper that looks like a monster and its parents will come in and say it's okay, you don't have to be afraid. There's no monsters under the bed. There is no Boogie Man. There is no creature which stalks the night searching out children. It doesn't exist. **Well, ladies and gentlemen, those parents lie because, ladies and gentlemen, that is the Boogie Man right there. That is the creature that stalked the night and murdered a ten year old girl and he must die.**

(R. 946-947.)(emphasis supplied)

As noted in Claim II above, the jury was comprised of a disproportionately large number of parents with a disproportionately large number of children. They had been exposed to a series of gruesome and inflammatory photographs during guilt phase and then the prosecutor, as father and protector of all frightened children in the night, preys upon the fears of the jury of parents and declares Elmer Carroll the "Boogie Man" who must die; thus implying that the death of Elmer Carroll will safeguard the jurors' own children and there will no longer be a "Boogie Man" stalking the night. This was improper, prejudicial, constitutes introduction of extreme non-statutory aggravation, and requires a new sentencing proceeding free of such improper comment and argument. Despite this Court's repeated admonitions to prosecutors of capital cases, Ruiz, supra, at footnote 8, the prosecutors in Mr. Carroll's case lacked propriety and restraint in the instant prosecution. This claim was raised by Mr. Carroll in postconviction, but procedurally barred as a direct appeal issue by the court below. (PC-R. 1179.)

In King v. State, 623 So. 2d 486 (Fla. 1993), this Court cautioned prosecutors against injecting "elements of emotion and fear into the jury's deliberations". Therein, King's death sentence was vacated and a new sentencing required because "the prosecutor gave a dissertation on evil" and inflamed the minds and passions of the jurors, thus precipitating an emotional

response to the crime or the accused. Id., at 488-489. The same occurred in Mr. Carroll's case, although the image of a "Boogie Man" stalking the night and invading the jurors' homes to rape and murder their children is unquestionably more egregious than the arguments made in King.

The instant claim is similar to that considered by this Court in Urbin v. State, 714 So. 2d 411 (Fla. 1998)(reversing on proportionality grounds, but discussing the impropriety of the penalty phase closing argument). Therein, this Court condemned the prosecutor's closing arguments, which were infected with 'emotional fear' and "efforts to dehumanize and demonize the defendant". Id., at 420 n. 9. See also, Bonifay v. State, 680 So. 2d 413, 418 n. 10 (Fla. 1996). Elmer Carroll was dehumanized and demonized beyond all human recognition. It became easy for a jury of parents to convict and sentence to death such a sub-human, evil mass of flesh for killing a child - regardless of mitigation or law.

The prosecutor's comments violated the Eighth and Fourteenth Amendments. See, e.g., Wilson v. Kemp, 777 F.2d 621 (11th Cir. 1985); Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985)(en banc); Newlon v. Armontrout, 885 F.2d 1328, 1338 (8th Cir. 1989), quoting Coleman v. Brown, 802 F.2d 1227, 1239 (10th Cir. 1986) ("[a] decision on the propriety of a closing argument must look to the Eighth Amendment's command that a death sentence be based on a complete assessment of the individual's circumstances...and the Fourteenth Amendment's guarantee that no one be deprived of life without due process of law")(citations omitted).

The improprieties at issue here are particularly significant because they occurred at a capital sentencing proceeding. The improper arguments "serve[d] no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime

and the defendant." Booth v. Maryland, 482 U.S. 496, 508 (1987). Since a decision to impose the death penalty must "be, and appear to be, based on reason rather than caprice or emotion," Gardner v. Florida, 430 U.S. 349, 358 (1977)(opinion of Stevens, J.), such efforts to fan the flames are "inconsistent with the reasoned decision making" required in a capital case. Booth, 482 U.S. at 509. See also, Penry v. Lynaugh, 492 U.S. 302, 328 (1989)(death sentence cannot be premised on "an unguided emotional response").

As in Urbin, trial counsel did not object to these blatantly improper comments. However, this Court should grant relief on one of two valid bases: (a) The lack of objections, combined with the absence of any penalty phase presentation on Mr. Carroll's behalf other than a brief, ineffectual argument, constitutes persuasive evidence of ineffective assistance of trial counsel. See, Urbin, supra, at 418 n. 8. Thus, as argued in Mr. Carroll's companion Initial Brief appealing denial of his Rule 3.850 motion, the trial court erred in denying him penalty phase relief due to ineffective assistance of counsel. (b) The comments of the prosecutor constituted fundamental error, which combined with ineffective assistance of counsel and other errors, "reaches down into the validity of the trial itself" to the extent that the death sentence would not have been obtained without the assistance of the errors. See, Kilgore v. State, 688 So. 2d 895, 898 (Fla. 1996). In either event, appellate counsel was ineffective for not raising this issue on direct appeal, as was done in Urbin, despite the lack of objection. These improper arguments violated Due Process and the Eighth Amendment, rendering Mr. Carroll's death sentence fundamentally unfair and unreliable. In the interests of justice, this Court must grant habeas relief.

CLAIM IV

MR. CARROLL WAS DENIED EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WHERE COUNSEL FAILED TO RAISE THE FUNDAMENTAL ERROR OF MR. CARROLL'S UNCONSTITUTIONAL "WAIVER" OF THE RIGHT TO TESTIFY AND PRESENT EVIDENCE OF MITIGATION IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

The United States Constitution requires that sentencers in capital cases be made aware of the "[c]ompassionate and mitigating factors stemming from the frailties of humankind" so as to avoid treating capital defendants as a "faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." Lockett v. Ohio, 438 U.S. 586 (1978); Woodson v. North Carolina, 428 U.S. 280, 304 (1976). In order for a capital defendant to receive adequate Sixth and Eighth Amendment protections in a capital sentencing, the result must be reliable and a proper adversarial process must be assured. Strickland v. Washington, 466 U.S. 668, 686 (1984). In every capital case, the result of the proceeding must not be unreliable because of a breakdown in the adversarial process which is counted upon to produce just results. Id. at 696.

Part of the process which assures reliability in judicial proceedings is the right to due process; to meet the opposition's case and to present evidence on your own behalf. In a capital sentencing proceeding, the right to present evidence in mitigation is a matter of life and death. Any waiver of the right to present evidence in mitigation must be knowing and voluntary. See, Deaton v. Dugger, 635 So. 2d 4 (Fla. 1993).

In Mr. Carroll's capital sentencing, **his attorney waived the presentation of testimony and other evidence while Mr. Carroll was incompetent** and patently unable to waive fundamental constitutional rights in a knowing, intelligent, and voluntary manner. See, Mincey v.

Arizona, 437 U.S. 385 (1978); Miranda v. Arizona, 384 U.S. 436 (1966). As argued in Mr. Carroll's companion Initial Brief appealing denial of his ineffective assistance of penalty phase counsel and incompetency claims, Mr. Carroll should have been granted relief pursuant to Deaton v. Dugger, *supra*, in that there is no evidence demonstrating "by a preponderance of the evidence that the defendant knowingly, freely, and voluntarily waived his right to testify or to call witnesses at the penalty phase" of his trial. *Id.* at 8. In fact, the evidence is that Mr. Carroll **could not testify relevantly due to incompetence and Mr. Carroll never waived a penalty phase because he was unaware of what he would be waiving.** The evidence of this fundamental violation of Mr. Carroll's constitutional rights appears on the face of the record on appeal. Appellate counsel's failure to assert this claim on direct appeal denied Mr. Carroll effective assistance of appellate counsel.

A motion for competency hearing was filed. (R. 1038-1039.) Numerous experts examined Mr. Carroll. Although eventually deemed minimally competent to proceed, trial counsel never doubted his client's incompetency and so asserted on the face of the record:

The Court: Defense ready to proceed?

Mr. Taylor: We're ready.

The Court: **You don't intend to put on anything?**

Mr. Taylor: **No, Your Honor.**

The Court: Approach the bench.

(Following discussion was held at the bench)

Bench Conference

The Court: Mr. Taylor.

Mr. Taylor: **I discussed this with Mr. Carroll. I don't think he's in my opinion capable of testifying. I have no idea what he's going to say. He could say one thing. He could say the other; too dangerous. In his own interest, best interest at heart, I don't think it would be in his best interest to testify.**

(R. 912-913.)

The Court: Okay, Mr. Carroll feels comfortable with that?

Mr. Taylor: **He said, your the lawyer, judge. He doesn't think Don Williams is the same guy. He doesn't. He's over there pulling my coat saying, who is this person? That's not Don Williams. He wants to know, he thinks Robin is telling people to tell lies, okay.**

The Court: Okay.

(R. 913.)

The Court: Let the record reflect that the defendant is present, along with counsel for the defendant, assistant state attorneys.

Mr. Taylor, do you know of any legal cause why we should not proceed to sentencing...?

Mr. Taylor: **As to the legal reason...at this time I would suggest to the Court that there is a question as to whether or not the defendant is sane or insane at the present time so as to preclude the possibility of going forward with the sentencing.**

The Court: Do you have any additional evidence to offer at this point dealing with the issue of insanity?

Mr. Taylor: **The only additional evidence that I would have, Your Honor, would be, I suppose statements that he has made to me during the course of this proceeding that may or may not have some bearing on it; but I think it would take the examination**

and then testimony of a qualified witness, a physician or a psychiatrist, in order to reach that conclusion or opinion, as opposed to me.

(R. 967.)

Clearly, Mr. Taylor believed his client was incompetent prior to trial, asserted he was insane both at the time of the offenses and at the time of his sentencing, stated as an officer of the court that Mr. Carroll was talking nonsense during the trial, stated he did not think he could testify relevantly, **and yet, the lawyer waived Mr. Carroll's fundamental rights to testify and present evidence in mitigation and the trial court made no inquiry of Mr. Carroll or ordered additional competency inquiries sua sponte based on what the lawyer was saying.** This was error of fundamental dimension and should have been asserted on direct appeal.

In Deaton v. Dugger this Court held that "[t]he rights to testify and call witnesses are fundamental rights under our state and federal constitutions" and "clearly, the record must support a finding that such a waiver was knowingly, voluntarily, and intelligently made". Id. at 8 (citing to Henry v. State, 613 So. 2d 429 (Fla. 1992)). The record in Mr. Carroll's case contains no clear evidence of a constitutionally sufficient waiver of rights. Habeas relief is proper.

CLAIM V

MR. CARROLL'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 Claim V of Mr. Carroll'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 prior violent felony, engaged in the commission of a sexual battery, avoid arrest, and heinous, atrocious or cruel. (PC-R. 736-759.) In Claim VIII of Mr. Carroll'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. 780-787.) The trial court denied Claim V, finding all sub-claims procedurally barred because they should have been raised on appeal. (PC-R. 1167-1170.) The trial court also denied Claim VIII, concluding the claims should have been raised on direct appeal and were procedurally barred. (PC-R. 1174-1175.) Appellate counsel was ineffective in failing to raise these claims on direct appeal.

During Mr. Carroll'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. One, the defendant has been previously convicted of a felony involving the use or threat of violence to some person. The crimes of aggravated assault and aggravated battery are felonies involving the use or threat of violence to another person.

Two, the crime for which the defendant is to be sentenced was committed while he was engaged in the commission of a sexual battery. Three, the crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing lawful arrest. Four, the crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel.

Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked or vile. Cruel means designed to inflict

a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.

The kind of crime intended to be included [sic] heinous, atrocious or cruel is one applied by additional acts that show that the crime which is [sic] conscienceless or pitiless or was unnecessarily torturous to the victim.

(R. 953-954.)

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

Mr. Carroll'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. PRIOR CONVICTION OF A VIOLENT FELONY

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. Carroll's prior convictions. The

instruction regarding this circumstance "fail[ed] adequately to inform [Mr. Carroll's] jur[y] what it must find to impose the death penalty." Maynard v. Cartwright, 486 U.S. 356, 361-362 (1988).

Trial counsel was ineffective for not disputing the applicability of and condoning the instruction regarding this factor (R. 918-919.) Appellate counsel was ineffective for failing to raise this issue as one of fundamental error on appeal.

B. ENGAGED IN THE COMMISSION OF A SEXUAL BATTERY

"[I]f a State uses aggravating factors in deciding who shall be eligible for the death penalty or who shall receive the death penalty, it cannot use factors which as a practical matter fail to guide the sentencer's discretion." Stringer v. Black, 503 U.S. 222, 235 (1992). The United States Supreme Court requires "close appellate scrutiny of the import and effect of invalid aggravating factors to implement the well-established Eighth Amendment requirement of individualized sentencing determinations in death penalty cases." Stringer, 503 U.S. at 230 (extensive cites omitted).

If a sentencer could fairly conclude that an aggravating circumstance applies to every defendant eligible for a sentence of death, then the circumstance is constitutionally infirm. Arave v. Creech, 507 U.S. 463 (1993); Zant v. Stephens, 462 U.S. 862 (1983).

Stringer and Arave validate Mr. Carroll's claim that the felony murder aggravating factor is an unconstitutional automatic aggravator in Florida's sentencing scheme and it fails to provide for Eighth Amendment narrowing of the class of person eligible for the death sentence. Mr. Carroll was convicted of one count of felony first degree murder, with sexual battery being the underlying felony upon which the conviction was based. The State did not seek to prove murder by premeditation and thus, without the sexual battery offense, Mr. Carroll could not have been

convicted of first degree murder and become death-eligible. Thus, the sexual battery was essentially "doubled" in Mr. Carroll's case: it was both a necessary element to be proved beyond a reasonable doubt in order for conviction to be had and it was then automatically applied as an aggravating circumstance, creating a presumption of death being an appropriate sentence.

A state cannot use aggravating factors which fail to guide the sentencer's discretion. Every felony murder involves, by necessity, the finding of a statutory aggravating circumstance which, under the particulars of Florida's statute, violates the Eighth Amendment. Arave v. Creech, supra. There is no narrowing of the class of death-eligible persons where an automatic aggravator flows from a first degree felony murder prosecution and conviction. Zant v. Stephens, 462 U.S. at 876. This renders the sentencing process unconstitutionally unreliable. "Limiting the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." Maynard v. Cartwright, 486 U.S. at 362. The aggravating factor of in the course of a sexual battery, as an element of the first degree murder conviction and then automatically an aggravating circumstance for purposes of sentencing, was an "illusory circumstance" which "infected" the weighing process; it did not narrow and channel the jury's discretion. Stringer v. Black, 503 U.S. at 235-236. An aggravating circumstance which merely repeats the elements of the capital offense does not narrow the class. Porter v. State, 564 So. 2d 1060, 1063-1064 (Fla. 1990). Further, this factor alone would not support a death sentence. Rembert v. State, 445 So. 2d 337 (Fla. 1984). However, the trial court never informed Mr. Carroll's jury that use of this aggravator was in any manner limited or diluted by its status as an automatic factor; nor was the jury told this factor alone would not support a sentence of death.

This Court must adopt the position taken by the Wyoming Supreme Court in Engberg v. Meyer, 820 P.2d 70 (Wyo. 1991), in order to insure Florida's capital sentencing scheme comports with the dictates of the Eighth Amendment. An automatic aggravating factor serves the same diabolical purpose as a vague aggravating factor: it "creates the possibility not only of randomness but also of bias in favor of the death penalty." Stringer v. Black, 503 U.S. at 236. In Engberg, the court concluded that the use of an underlying felony both as an element of first degree murder and as an aggravating circumstance violates the Eighth Amendment. See, State v. Middlebrooks, 840 S.W. 2d 317 (Tenn. 1992)(following Engberg and remanding the torture murder of a child for a new sentencing).

This claim is particularly germane in Mr. Carroll's case. As previously asserted, Mr. Carroll's jury was tainted by both its' composition of a disproportionately large number of parents with many children, but also by the introduction and extended display of horrific photographic slides graphically and vividly displaying the blood-smeared thighs and damaged genitalia of a child. The State made the sexual battery the feature of the trial and relied upon it in three ways: (a) to convict Mr. Carroll and make him death-eligible; (b) as an automatic aggravator; and (c) as the core feature of it's heinous, atrocious or cruel assertion. Thus, the sexual battery was in reality "tripled". The State placed two "extra thumb[s]" on the death side of the scales being used to decide whether Mr. Carroll should live or die. This cannot be harmless and it polluted the sentencing process by rendering it unreliable and unindividualized contrary to the Sixth, Eighth, and Fourteenth Amendments.

Trail counsel was ineffective in failing to challenge this instruction at trial, (R. 919), (particularly since he made an argument regarding avoid arrest that would be applicable here--R. 920), and appellate counsel was ineffective in failing to assert fundamental error on direct appeal.

C. AVOIDING LAWFUL ARREST

The instruction given the jury did not contain this Court's limiting construction of when this aggravating factor may legitimately be found to apply. While the trial court rejected this factor in its sentencing order (R. 1286; avoid arrest not proved as "dominant motive" for homicide), the jury was instructed on the factor and the State strenuously asserted the factor applied in closing argument:

The third aggravating circumstance is that the crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest. Now, think about it. How was Christine McGowan killed? According to the Medical Examiner's Office, she was killed because someone placed a hand over her mouth and suffocated her.

Now, ask yourselves, in the context of this case, why did Elmer Carroll put his hand over Christine McGowan's mouth? Remember, this is in the middle of the night. This is in Christine McGowan's own home. This is with her father asleep thirty feet away. So why did he put his hand over her mouth? The conclusion is obvious. To keep her quiet.

Based on the injuries that we have seen, you can have no doubt that Christine McGowan was not going to silently take what he did to her. And the only reason for him to cover her mouth in the way that he did was to keep her quiet and that's what killed her. Therefore, there can be no doubt that the crime for which the defendant is to be sentenced; that is, felony murder, was committed for the purpose of avoiding or preventing lawful arrest. He didn't want Robert Rank to catch him and have him be arrested. He made her quiet and he killed her.

(R. 934-935.)

Trial counsel objected to the giving of this instruction and preserved his objection after the jury was instructed, but before they retired to deliberate. (R. 957.) Appellate counsel was ineffective for failing to raise this issue on appeal.

As demonstrated by the State's argument above, the failure of the trial court to narrow and limit the applicability of the avoid arrest factor unleashed a wholly specious, prejudicial, and legally insupportable argument upon the sentencing jury. Instead of limiting the State to proving - as they surely could not do - that the dominant or only motive for the homicide was to avoid arrest, see, Clark v. State, 443 So. 2d 973, 977 (Fla. 1983), the instruction as given gave the State a license to argue that the victim knew the defendant and the above nonsense. The mere fact that a victim knows and can identify her assailant is insufficient to prove intent to kill in order to avoid arrest. Perry v. State, 522 So. 2d 817, 820 (Fla. 1988).

Failure to limit the applicability of this proposed aggravating circumstance violated the Eighth Amendment and cannot be deemed harmless, since it is impossible to gauge the impact of the State's argument on the jury's death recommendation. Stringer v. Black, supra; Espinosa v. Florida, 112 S.Ct. 2926 (1992); Sochor v. Florida, 112 S.Ct. 2114; Maynard v. Cartwright, supra.

D. HEINOUS, ATROCIOUS OR CRUEL

Trial counsel objected to the giving of the heinous, atrocious or cruel instruction (R. 921, 957-958.) The issue was raised on direct appeal, but was done so ineffectively and superficially (Initial Brief, Point V). 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. Carroll's trial. 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. 953-954), the jury was never explicitly instructed that despite his obviously abnormal mental state at the time of the offenses, Mr. Carroll 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. Carroll's jury be informed that Mr. Carroll 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. Carroll's trial and was entitled to their narrowing interpretations of this emotionally-charged aggravating factor in order to direct the jury's consideration of his fate. As mentioned previously, it was especially vital in Mr. Carroll's case where jury composition, gruesome photographs, and improper State argument all blended with the actual fact of a child killing to deprive him of a constitutionally reliable and fair sentencing determination.

Further, Shell v. Mississippi, 498 U.S. 1 (1990), was decided well before Mr. Carroll's trial and this Court's opinion in 1994. Mr. Carroll'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 remarkably similar to the one given by the trial court in Mr. Carroll'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. Carroll'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. Carroll 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. Carroll'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. Carroll'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. Carroll's jury on the "heinous, atrocious or cruel" instruction. Mr. Carroll's jury was presented with aggravating factors that were invalid under Espinosa. The State argued with equal furor 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. Carroll, 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. CARROLL'S SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS SHIFTED THE BURDEN TO MR. CARROLL TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE SENTENCING JUDGE HIMSELF EMPLOYED IMPROPER STANDARDS IN SENTENCING MR. CARROLL TO DEATH.

Mr. Carroll raised this claim as Claim XIII of his postconviction relief motion. (PC-R. 809-810.) The trial court summarily rejected this claim. (PC-R. 1178.) Appellate counsel was ineffective in failing to raise this claim on direct appeal.

Prosecutorial argument and judicial instructions at Mr. Carroll's capital penalty phase required that the jury impose death unless mitigation was not only produced by Mr. Carroll, but also unless **Mr. Carroll proved** that the mitigation he provided outweighed and overcame the prosecution's aggravation. The trial court then employed the same standard in sentencing Mr. Carroll to death. This standard obviously shifted the burden to Mr. Carroll to establish that life was the appropriate sentence and limited consideration of mitigating evidence to only those factors proven sufficient to outweigh the evidence in aggravation. According to this standard, the jury could not "full[y] consider[]" and "give effect to" mitigating evidence. Penry, 109 S. Ct. at

2951. This burden-shifting standard thus "interfered with the consideration of mitigating evidence." Boyde v. California, 110 S. Ct. 1190, 1196 (1990). Since "[s]tates cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the [death] penalty," McCleskey v. Kemp, 481 U.S. 279, 306 (1987), the argument and instructions provided to Mr. Carroll's sentencing jury, as well as the standard employed by the trial court, violated the Eighth Amendment's "requirement of individualized sentencing in capital cases [which] is satisfied by allowing the jury to consider all relevant mitigating evidence." Blystone v. Pennsylvania, 110 S. Ct. 1078, 1083 (1990). See also Lockett v. Ohio, 438 U.S. 586 (1978); Hitchcock v. Dugger, 481 U.S. 393 (1987).

As explained below, the standard which the prosecutor argued, upon which the judge instructed Mr. Carroll's jury, and upon which the judge relied is a distinctly egregious abrogation of Eighth Amendment principles, qualitatively different from the recently-established standards in Blystone and Boyde. In this case, Mr. Carroll, the capital defendant, was required to establish (prove) that life was the appropriate sentence, and the jury's and judge's consideration of mitigating evidence was limited to mitigation "sufficient to outweigh" aggravation.

At the penalty phase of trial, prosecutorial argument and judicial instructions informed Mr. Carroll's jury that death was the appropriate sentence unless "mitigating circumstances exist sufficient to outweigh the aggravating circumstances" (R. 954.) Such instructions, which shift to the defendant the burden of proving that life is the appropriate sentence, violate the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975).

At the outset of the penalty phase, the jury was instructed as follows:

The State and **the defense may now present evidence** relative to the nature of the crime and the character of the defendant. You are instructed that this evidence when considered with the evidence that you have already heard is presented so that you can determine, first, if sufficient aggravating circumstances exist that justify the position [sic] of the death penalty and, second, **whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances**, if any.

(R. 886.)(emphasis added)

The prosecutor emphasized this burden-shifting instruction in his closing argument:

You determine whether those mitigating circumstances that you find have been proven reasonably convince you to where they **outweigh the aggravating circumstances. In other words, the bad with the good outweighs the bad. If the good outweighs the bad, then you vote to impose a life sentence. If, however, you find that one or more aggravating circumstances are proven beyond a reasonable doubt, that the aggravating circumstances proven justify the death penalty and that those aggravating circumstances are not outweighed by mitigating circumstances, then your recommendation is death.**

(R. 932-933.)(emphasis added)

Finally, in his instructions before the jury retired to deliberate, the judge again explained that once aggravating circumstances were found the jury was to recommend death unless the mitigating circumstances outweighed the aggravating circumstances ("whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist" - R. 953.)

This is an aggravated case because the trial court had set the stage for the jury to be misled into a death recommendation as early as jury selection:

The burden rests solely upon the State to prove beyond and to the exclusion of every reasonable doubt the existence of those

**aggravating circumstances upon which it will -- upon which
you will base your recommendation of death.**

(R. 88.)(emphasis added).

The instructions violated the Eighth and Fourteenth Amendments in three ways. Firstly, the instructions shifted the burden of proof to Mr. Carroll on the central sentencing issue of whether he should live or die. Under Mullaney, this unconstitutional burden-shifting violated Mr. Carroll's due process and Eighth Amendment rights. See also Sandstrom v. Montana, 442 U.S. 510 (1979); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988).² Moreover, the application of this unconstitutional standard at the sentencing phase violated Mr. Carroll's right to a fundamentally fair and reliable capital sentencing determination, i.e., one which is not infected by arbitrary, misleading and/or capricious factors. Jackson. It is particularly unreliable considering the jury panel was told in voir dire that it **would** return a recommendation of death. (R. 88.)

Secondly, in being instructed that mitigating circumstances must outweigh aggravating circumstances before the jury could recommend life, **the jury was effectively told that once aggravating circumstances were established, it need not consider mitigating circumstances unless those mitigating circumstances were sufficient to outweigh the aggravating circumstances.** Cf. Mills v. Maryland, 108 S. Ct. 1860 (1988); Hitchcock v. Dugger, 107 S. Ct. 1821 (1987). Thus, the jury was precluded from considering mitigating evidence, Hitchcock, and from evaluating the "totality of the circumstances" in considering the appropriate penalty. State v.

² The jury instruction had the same **effect** as an instruction which told the jury to "presume" death appropriate once any aggravating factors were established. The prosecutor argued for a presumption. For a presumption to arise the word "presumed" need not be used. When the jury is told that once certain predicate facts have been established, i.e., aggravating circumstances, it must reach a particular result, i.e., death is the appropriate sentence, a mandatory presumption has been employed. That is what occurred here.

Dixon, 283 So. 2d 1, 10 (Fla. 1973). According to the instructions, jurors would reasonably have understood that only mitigating evidence which rose to the level of "outweighing" aggravation need be considered. We must presume that the jury was misled by this instruction, resulting in a death recommendation despite factors calling for life. See Espinosa v. Florida, 112 S. Ct. 2926 (1992). We must also presume that the trial court gave great weight to the jury's recommendation. Espinosa; Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975).

Thirdly, the process is qualitative, not quantitative. A death sentence cannot be imposed merely because the total number of aggravating circumstances exceeds the total number of mitigating ones. As this Court has stated:

It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather 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.

State v. Dixon, 283 So. 2d 1, 10.

In Arango v. State, 411 So. 2d 172, 174 (1982), this 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 **if the state showed the aggravating circumstances outweighed the mitigating circumstances.**

Accord State v. Dixon, 283 So. 2d 1 (Fla. 1973)(emphasis added). This Court has, in fact, 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 Dixon. Arango. Thus, Mr. Carroll was sentenced to death in violation of Florida law in effect at the time of his trial and direct appeal.

The constitutional infirmity of these instructions and arguments is not simply that they placed the burden of proof on Mr. Carroll -- which they did -- but also that they precluded the jury from considering mitigating evidence unless that evidence was "sufficient to outweigh" aggravation. Thus, although the jury was instructed to consider statutory and nonstatutory mitigation, the burden-shifting instruction essentially negated those instructions by telling the jury that only mitigation "sufficient to outweigh" aggravation need be considered. The jurors' understanding of the instructions would have resulted in their failure to fully and fairly assess and consider mitigating factors calling for a life sentence.

Lockett instructs that a capital defendant must be allowed to present any evidence regarding his character and background and the circumstances of the offense which calls for a sentence less than death, and Penry mandates that a capital sentencer must be able to "full[y] consider[]" and "give effect to" that evidence. See also Eddings v. Oklahoma, 455 U.S. 104 (1982). When a capital sentencer's view of the procedure to be followed in determining sentence does not provide for "full consideration" or for "giv[ing] effect to" mitigating evidence, the sentencing process does not conform to the Eighth amendment. Penry; Lockett; Hitchcock; Eddings.

This is precisely the effect resulting from the burden-shifting instructions given here. The procedure the jury followed did not allow for a "reasoned moral response" to the issues at Mr. Carroll's sentencing or permit full consideration of mitigation.

In this case, because of the burden-shifting instruction, it is presumed that the jury understood that it was precluded from considering life unless it found the defense presented mitigating circumstances that outweighed the aggravating circumstances. Espinosa. This prevented Mr. Carroll's jury from providing Mr. Carroll the "particularized consideration" the Eighth Amendment requires. It is particularly egregious in a case where trial counsel was blatantly ineffective during penalty phase (see Initial Brief filed simultaneously) and presented **no mitigation** for the jury to **erroneously weigh** (thus, the jury had to find mitigation from the guilt phase to **outweigh** the aggravation, which included automatic aggravation and vague and overbroad instructions on aggravating factors). The Eighth Amendment requires that capital sentencers be able to "fully consider" and "give effect to" evidence of mitigation. Penry, 109 S. Ct. at 2951. This is necessary in order for a capital sentencer to provide a "reasoned **moral** response to the defendant's background, character, and crime." Id. (emphasis in original). Undeniably, the presentation of evidence in mitigation of punishment involves the jury's humane, merciful reaction to the defendant. Peek v. Kemp, 784 F.2d 1479, 1490 and n.12 (11th Cir. 1986)(en banc)(the role of mitigation is to present "factors which point in the direction of mercy for the defendant"); see also Tucker v. Zant, 724 F.2d 882, 891 (11th Cir.), vacated for reh'g in banc, 724 F.2d 898 (11th Cir. 1984), reinstated in relevant part sub nom. Tucker v. Kemp, 762 F.2d 1480, 1482 (11th Cir. 1985)(in banc).

Not permitting the jury to make a "reasoned judgment" or to know it has discretion to recommend life forecloses the very reaction that evidence is intended to evoke, and therefore precludes the sentencer from fully considering relevant, admissible mitigating evidence, in

violation of Lockett, Eddings, Arango and Hitchcock. See also Skipper v. South Carolina, 476 U.S. 1 (1986).

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

CLAIM VII

THE JUDGE AND PROSECUTOR IMPERMISSIBLY SUGGESTED TO MR. CARROLL'S JURY THAT THE LAW REQUIRED A RECOMMENDATION OF DEATH, THUS DENYING MR. CARROLL HIS RIGHTS UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ERROR ON DIRECT APPEAL.

During jury selection, the court, prosecutor and defense repeatedly asked prospective jurors if they could vote for a sentence of death, follow the law, and base their decisions on the facts (R. 116-116, 118-120, 125-130, 132-134, 137-138, 140, 143, 146-148, 150, 152-153). While the jurors were properly instructed that neither mercy nor sympathy should affect their guilt-innocence determination, they were never properly instructed that mercy and sympathy are proper considerations for penalty phase. Thus, Mr. Carroll's jury was not instructed on one of the proper considerations upon which a life recommendation could be legally based.

Further, the trial court confused the jury by stating they **would** recommend a death sentence during preliminary instructions.

(R. 88.)(explaining State had burden to prove aggravating circumstances "**upon which you will base your recommendation of death**")(emphasis supplied).

Contrary to the impression given the jury, the law never requires that a death sentence be imposed. The law requires the jury to consider the evidence introduced throughout the trial and recommend an appropriate sentence. This Court has addressed the role of mercy in a capital sentencing:

Certain factual situations may warrant the infliction of capital punishment, but, nevertheless, would not prevent either the trial jury, the trial judge, or this Court from exercising reasoned judgment in reducing the sentence to life imprisonment. Such an exercise of mercy on behalf of the defendant in one case does not prevent imposition of death by capital punishment in the other case.

Alvord v. State, 322 So. 2d 533, 540 (Fla. 1975). In other words, mercy, for whatever reason a jury chooses to factor it into their decision, may play a part in arriving at an appropriate sentence. See, Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985).

The cumulative effect of the improper preliminary instruction advising the jury to return a recommendation of death even before guilt was determined, combined with voir dire questions, all other jury instructions and the omission to instruct on mercy during penalty phase, was to direct the jury to ignore valid mitigating circumstances and return a verdict of death. The jury was impelled to follow the law as given; the law as given was constitutionally infirm and required a death sentence by fair, common sense interpretation. This issue should have been raised on direct appeal as one of fundamental error; habeas relief is proper.

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. Carroll 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.

Mr. Carroll's case is a study in the deficiencies inherent in the Florida capital punishment scheme: failure to protect the incompetent and insane from prosecution; "waiver" of rights belonging to the defendant by incompetent counsel and an uncaring trial court; improper, vague, misleading, and downright erroneous jury instructions; and a sentence of death flowing from a non-penalty phase while the client was incompetent. The only remaining unconstitutional indignity is for the State of Florida to execute Mr. Carroll as he resides in his fog of incompetency and mental illness.

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 fact that an incompetent such as Mr. Carroll could be required to "elect" electrocution or lethal injection within the next month or so violates due process and the Eighth Amendment. An incompetent electing an unconstitutional form of execution violates the constitutions of Florida and the United States.

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 - such as Mr. Carroll's case, where the underlying sexual battery was actually **tripled** - 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. Elmer Carroll is a poster child for this arbitrariness. See, Furman v. Georgia, 408 U.S. 238 (1972); Jackson v. Dugegr, 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. Carroll habeas relief on this claim.

CONCLUSION AND RELIEF SOUGHT

Based upon the discussion and citation to authority contained herein, Mr. Carroll 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 January 10, 2000.

GREGORY C. SMITH
Florida Bar No. 279080
Capital Collateral Counsel -
Northern Region

ANDREW THOMAS
Florida Bar No. 0317942
Chief Assistant CCC-NR
CAPITAL COLLATERAL COUNSEL -
NORTHERN REGION
Post Office Drawer 5498
Tallahassee, FL 32314-5498
(850) 487-4376

COUNSEL FOR PETITIONER

Copies furnished to:

Richard Martell
Chief, Capital Appeals
Department of Legal Affairs
The Capitol - PL01
Tallahassee, Florida 32399-1050