

IN THE SUPREME COURT OF FLORIDA

NO. _____

THOMAS JAMES MOORE,

Petitioner,

v.

MICHAEL W. MOORE,

Secretary, Florida Department of Corrections,

Respondent.

AMENDED PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

This is Mr. Moore'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. Moore was deprived of the right to a fair, reliable, and individualized sentencing proceeding and that the proceedings resulting in his conviction and death sentence violated fundamental constitutional imperatives.

Citations shall be as follows:

"R. ___" -- volumes four (IV) through fifteen (XV) of the record on direct appeal to this Court; "Vol. ___, p. ___" -- citations to the first three volumes of the record on direct appeal to this Court; "PCR. ___" -- record on 3.850 appeal to this Court; and "Supp. ___" supplemental record on 3.850 appeal to this Court. All other references will be self-explanatory or otherwise explained herein.

INTRODUCTION

Significant errors which occurred at Mr. Moore's capital trial were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel. Appellate counsel failed to raise meritorious issues that were preserved for appeal.

In addition, counsel inadequately raised several issues so that this Court was not properly informed of the claims that entitle Mr. Moore to relief.

The issues which appellate counsel neglected demonstrate that counsel's performance was deficient and that the deficiencies prejudiced Mr. Moore. "[E]xtant legal principles . . . provided a clear basis for . . . compelling appellate argument[s]." Fitzpatrick v. Wainwright, 490 So.2d 938, 940 (Fla. 1986). Individually and "cumulatively," Barclay v. Wainwright, 444 So.2d 956, 959 (Fla. 1984), the claims omitted by appellate counsel establish that the "confidence in the correctness and fairness of the result has been undermined." Wilson, 474 So.2d 1162, 1165 (Fla. 1985)(emphasis in original). As this petition will demonstrate, Mr. Moore is entitled to habeas relief.

PROCEDURAL HISTORY

The Circuit Court of the Fourth Judicial Circuit, Duval County, Florida, entered the judgments and sentences. On February 18, 1993, a Grand Jury indicted Mr. Moore for first degree murder, attempted armed robbery, conspiracy to commit robbery, armed burglary, arson, and possession of a firearm by a convicted felon (Vol. I, p.3). Mr. Moore, "standing mute" to the allegations in the indictment, the trial court entered a plea of not guilty for him as to each of the six counts (R. 9).

On October 25, 1993, Mr. Moore's trial commenced before the Honorable John D. Southwood. On October 29, 1993, the jury found Mr. Moore guilty on all counts (R. 1381-82), except for possession of a firearm by a convicted felon which was severed prior to trial (Vol. II, p.327). On November 3, 1993, the jury recommended the death penalty by a vote of nine (9) to three (3) (R. 1553).

The trial court followed the recommendation of the jury and imposed the sentence of death upon Mr. Moore on December 2, 1993 (R. 1580-87). The trial court entered its sentencing order, titled "Findings Supporting Sentence," on the same day (Vol. III, p. 501).

On direct appeal, Mr. Moore's convictions and sentences were affirmed. Moore v. State, 701 So.2d 545 (Fla. 1997), cert. denied, 523 U.S. 1083 (1998).

On March 26, 1999, Mr. Moore filed his initial postconviction motion under Rule 3.850, Fla. R. Crim. P. (Supp. 202). Mr. Moore subsequently filed amended motions on June 22, 1999 (Supp. 300); September 20, 1999 (PCR. 1); and April 6, 2000 (PCR. 308). On April 20, 2000, the postconviction court struck Mr. Moore's entire April 6, 2000 amended Rule 3.850 motion and held a hearing, pursuant to Huff v. State, 622 So.2d 982 (Fla. 1993), on Mr. Moore's September 20, 1999 amended motion. The postconviction court summarily denied all claims (PCR. 529). The postconviction court denied Mr. Moore's motion for rehearing on September 8, 2000 (Supp. 541).

This petition seeking habeas corpus relief is being simultaneously filed with Mr. Moore's appeal from the summary denial of his Rule 3.850 motion. The two pleadings are interrelated and should be considered cumulatively.

**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. Moore's 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. Moore's direct appeal. See Wilson v. Wainwright, 474 So.2d 1162, 1163 (Fla. 1985); Baggett v. Wainwright, 229 So.2d 239, 243 (Fla. 1969). A petition for a writ of habeas corpus is the proper means for Mr. Moore to raise the claims presented herein. Groover v. Singletary, 656 So.2d 424 (Fla. 1995); Breedlove v. Singletary, 595 So.2d 8 (Fla. 1992); and Way v. Dugger, 568 So.2d 1263 (Fla. 1990).

This Court has 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. The petition pleads claims involving fundamental constitutional error. See Dallas v. Wainwright, 175 So.2d 785 (Fla. 1965); Palmer 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 plead in this petition, is warranted in this action. As the petition shows, habeas corpus relief would be more than proper on the basis of Mr. Moore's claims.

GROUND FOR HABEAS CORPUS RELIEF

Through this petition for a writ of habeas corpus, Mr. Moore 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 States Constitution and the corresponding provisions of the Florida Constitution.

CLAIM I

MR. MOORE WAS ABSENT FROM CRITICAL STAGES OF HIS TRIAL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AS WELL AS FLORIDA RULE OF CRIMINAL PROCEDURE 3.180. FURTHER, MR. MOORE WAS DENIED A PROPER APPEAL FROM HIS CONVICTION AND SENTENCE OF DEATH IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ART. 5, SEC. 3(b)(1) OF THE FLORIDA CONSTITUTION AND FLORIDA STATUTES ANNOTATED, SEC. 921.141(4), DUE TO OMISSIONS IN THE RECORD. APPELLATE COUNSEL WAS

**INEFFECTIVE FOR FAILING TO DISCOVER AND REMEDY
THIS OMISSION.**

Mr. Moore was involuntarily absent from critical stages of the proceedings which resulted in his conviction and sentence of death. A criminal defendant's Sixth and Fourteenth Amendment right to be present at all critical stages of the proceedings against him is a settled question. See, e.g., Francis v. State, 413 So.2d 493 (Fla. 1982); Illinois v. Allen, 397 U.S. 337, 338 (1970); Hopt v. Utah, 110 U.S. 574, 579 (1884); Diaz v. United States, 223 U.S. 442 (1912); Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982); see also Fla. R. Crim. P. 3.180. The standard announced in Hall v. Wainwright, 805 F.2d 945, 947 (11th Cir. 1986), is that "[w]here there is any reasonable possibility of prejudice from the defendant's absence at any stage of the proceedings, a conviction cannot stand. Estes v. United States, 335 F.2d 609, 618 (5th Cir. 1964), cert. denied, 379 U.S. 964 (1965); Proffitt, 685 F.2d at 1260." This is exactly what occurred in this case.

During a June 23, 1993, pretrial conference in this case (See Volume V, p.24, of the record on appeal), the trial court mentions "some discussions on the record yesterday with counsel" regarding an agreement to continue Mr. Moore's case:

THE COURT: Thomas Moore is Case-No.93-1659.
It's currently set for trial on July 12th. We
had some discussions on the record yesterday
with Counsel -- the defendant wasn't present.
-- about the inability because of discovery to

be ready for trial by July 12th. We seemingly,
I guess agreed to some type of continuance.

Id. It is obvious, on the face of the record, that Mr. Moore was absent from this critical stage of the trial. Mr. Moore's absence during this critical stage violated his Fifth, Sixth, Eighth, and Fourteenth Amendment rights, as well as the requirements of Florida Rule of Criminal Procedure 3.180(a)(3).

Furthermore, had Mr. Moore been present and fully advised of the reasons his attorney wanted to continue his trial, he would have withdrawn his waiver of the right to a speedy trial. Mr. Moore had signed a form waiving his right to a speedy trial. However, he signed the form on May 11, 1993, based upon totally different reasons than the "discovery" problems alleged to the trial court on June 22nd by defense counsel. For unknown reasons, and without Mr. Moore's knowledge, defense counsel chose not to file the waiver until after the June 22nd unreported hearing.

Defense counsel should have objected to the proceeding in his client's absence but ineffectively failed to do so. Regardless, defense counsel failed to advise his client of the reasons he waived at the unreported hearing held on the 22nd, in violation of his duty to involve an accused in any decision to waive speedy trial rights. See, Gutierrez v. Baker, 276 So.2d 470 (Fla. 1973).

Worse still, defense counsel failed to advise Mr. Moore of the consequences of waiving his right to a speedy trial before filing it with the court. This was deficient performance that prejudiced Mr. Moore. This unnecessary delay put Mr. Moore's trial on hold for over four months. During this time, the state managed to "discover" several witnesses, or "discover" additional testimony from witnesses previously spoken to. The new testimony discovered by the state also included details of confessions Mr. Moore can establish were false. The prejudice to Mr. Moore is a conviction and sentence based upon unreliable and completely false testimony.

Mr. Moore's absence during these critical stages of his trial also violated his Fifth, Sixth, Eighth, and Fourteenth Amendment rights. Unfortunately, Mr. Moore is prevented from sufficiently pleading this claim because the relevant proceedings are omitted from the record. This omission is a direct result of the ineffectiveness of direct appeal counsel. Direct appeal counsel has a duty to investigate and plead all meritorious claims found in the record, thus it is unreasonable for counsel to file an appeal based on an incomplete record. Direct appeal counsel should have noticed the omission of the pretrial hearing and investigated its absence contemporaneously. Defendant has been seriously prejudiced by counsel's ineffectiveness, and the uncertainty as to what transpired

at that unrecorded hearing undermines confidence in defendant's conviction and sentence.

The circuit court is required to certify the record on appeal in capital cases, Fla. Stat. Ann. sec. 921.141(4), Fla. Const. art. 5, sec. 3(b)(1), and when errors or omissions appear, re-examination of the complete record in the lower tribunal is required. Delap v. State, 350 So. 2d 462 (Fla. 1977).

Transcripts of the June 22, 1993 "on the record" discussions mentioned by the Court during the June 23, 1993 proceeding are not contained in the record on appeal. This incomplete record prevented a proper direct appeal to the Florida Supreme Court, prevented Mr. Moore from properly pleading his postconviction claims and receiving a proper review of those claims, and is preventing Mr. Moore from fully presenting his habeas claims to this Court. Furthermore, the missing record prevents undersigned counsel from providing effective assistance in postconviction.

CLAIM II

MR. MOORE WAS DENIED THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WHERE COUNSEL FAILED TO BRIEF AND ARGUE THE CLAIM THAT MR. MOORE'S SENTENCE OF DEATH IS NOT PROPORTIONAL WITH THE PUNISHMENT RECEIVED BY OTHER DEFENDANTS WHO COMMITTED SIMILAR CRIMES AND PRESENTED LIKE AGGRAVATORS AND LIKE MITIGATORS AT TRIAL.

Proportionality review by this Court flows from the reality that "death is a unique punishment in its finality and in its total

rejection of the possibility of rehabilitation . . . it is proper, therefore . . . to reserve its application to only the most aggravated and unmitigated of most serious crimes." State v. Dixon, 283 So.2d 1, 10 (Fla. 1973). In ensuring that the death penalty is reserved "to only the most aggravated and unmitigated" of crimes, this Court has vowed:

No longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex. If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great. Thus the discretion charged in Furman v. Georgia, supra, can be controlled and channelled until the sentencing process becomes a matter of reasoned judgment rather than an exercise in discretion at all.

Id. at 7. In Livingston v. State, 565 So.2d 1288 (Fla. 1988), this Court reiterated its pledge that proportionality review be mandatory: "in reviewing a death sentence this Court **must** consider the circumstances revealed in the record in relation to other decisions and then decide if death is the appropriate penalty." At 1292.¹

¹In fact, the United States Supreme Court relied on this promised proportionality review in finding Florida's death penalty statute constitutional: "[I]t is apparent that the Florida court has undertaken responsibility to perform its function of death sentence review with a maximum of rationality and consistency. For example, it has several times compared the circumstances of a case under review with those of previous cases in which it has assessed the imposition of death sentences. By following this procedure, the Florida court has in effect adopted the type of proportionality review mandated by the Georgia statute." Proffitt v. Florida, 428 U.S. 242, 258-59 (1976).

With knowledge of this Court's mandatory duty to undertake proportionality review of sentences of death on direct appeal, it is ineffective, indeed, for appellate counsel not to brief and argue the issue of whether or not a sentence of death is proportional. The issue of whether or not a death sentence is proportional has become a "de facto" issue on every death penalty direct appeal. As the dissent in the direct appeal opinion in this case pointed out:

Because (proportionality of the death sentence is a fundamental issue) that (this Court) must confront, I would require the parties to brief these issues rather than considering them without briefing. Staff review of the record is no substitute for appellate advocacy, and appellant is obviously entitled to the benefit of competent counsel on appeal in addressing (this) fundamental (issue). (Citations omitted).

Moore at 552. This Court was never made aware and perhaps never considered cases in its proportionality review of this case which tend to show that Mr. Moore's sentence of death is, in fact, not proportional. Mr. Moore was denied the effective assistance of appellate counsel and the benefit of appellate advocacy on this fundamental issue.

In support of its sentence of death, the sentencing court found three statutory aggravating factors: (1) that Mr. Moore was previously convicted of a felony involving the use, or threat to use, violence to the person, section 921.141(5)(b), Florida Statutes; (2) the capital felony was committed for the purpose of avoiding or

preventing a lawful arrest, section 921.141(5)(e), Florida Statutes; and (3) the capital felony was committed for pecuniary gain, 921.141(5)(f), Florida Statutes. The court attached "great weight" to these aggravating factors. (Vol. III, p. 501-03).

In mitigation, the court attached "slight weight" to Mr. Moore's age at the time of the crime and attached "no significance or value" to testimony regarding Mr. Moore's character. (Vol. III, p. 503-04).

On direct appeal, this Court, without briefing from appellate counsel, "reviewed" Mr. Moore's death sentence and determined that Mr. Moore's sentence of death is proportionate. Moore at 551. In support of this finding, this Court cited cases in which the death penalty was imposed and subsequently upheld on direct appeal, where there were two aggravating factors, two statutory mitigating circumstances, and three non-statutory mitigating circumstance²; and where there were two aggravating factors and some non-statutory mitigating factors³. Moore at 551-52.

First, this Court's proportionality review of Mr. Moore's case is inadequate because it boiled the review down to a mere counting of numbers ("two aggravating factors . . . two statutory mitigating

²Pope v. State, 679 So.2d 710 (Fla. 1996).

³Melton v. State, 638 So.2d 927 (Fla. 1994) and Consalvo v. State, 21 Fla. L. Weekly S423 (Fla. Oct. 3, 1996).

circumstances . . . and three nonstatutory mitigating circumstances." Moore at 551-552). This Court has consistently held that proportionality review be more than a mere counting of numbers. See Sager v. State, 699 So.2d 619, 623 ("Our proportionality review is not a comparison between the numbers of aggravating and mitigating circumstances . . . (r)ather, it requires this Court to consider the totality of the circumstances in a case and to compare the case with other capital cases.") If this Court's proportionality analysis is to have any meaning at all, then it must take into consideration "the totality of the circumstances present" and not merely count the number of aggravating and mitigating circumstances.

Defendant's Age: Youth is a statutory mitigating circumstance in this state. Section 921.141(6)(g). The death penalty violates this state's constitution if imposed on one who was under sixteen when the capital crime is committed. See Allen v. State, 636 So.2d 494 (Fla. 1994). However, because it is the lack of maturity and responsible judgment that underlies the mitigation of youth, the closer a defendant is to the age where the death penalty is constitutionally barred, the weightier this statutory mitigation becomes.

"[I]f a defendant's age is to be accorded any significant weight as a mitigating factor, 'it must be linked with some other characteristic of the defendant or the crime such as immaturity.'" Mahn v. State, 714 So.2d 391, 400 (Fla. 1998). The sentencing court

in this case failed to take into account the "other characteristics of the defendant or the crime." In this case, Mr. Moore was nineteen when the crime for which he received the death penalty was committed. The sentencing court gave this mitigating circumstance only "slight weight" because "[t]he Defendant has exhibited a criminal maturity beyond his age." (Vol. III, p. 503). Whatever the term "criminal maturity" may mean, its use in dismissing this statutory mitigator must be tempered by the fact that this concept does not take into account "lack of maturity" and "responsible judgment."

During the penalty phase, the court was made aware that Thomas Moore was raised by a single parent (R. 1472); that his father was shot and killed when he was seven (R. 1476); that he was given adult responsibilities at a young age; that he suffered constantly from migraine headaches (R. 1479); and that Thomas was treated as an adult in the criminal justice system when he was 15 (R. 1489). In addition, evidence adduced at trial revealed that Thomas and the victim had begun to share in the victim's moonshine when Thomas was at a young age (R. 1090). This drinking continued up to the time of the crime. This evidence tends to show that Thomas grew up without a father figure and that he was forced to become an "adult" at a much greater pace and in a much abbreviated time period than would be required in ordinary and typical childhood. Without more, it cannot definitively be said that Thomas did not suffer from "lack of

maturity" or suffer from lack of "responsible judgment." In fact, his past criminal history suggests the opposite.

This Court has reduced death sentences to life sentences on proportionality review involving young defendants. See Johnson v. State, 720 So2d 232 (Fla. 1998) (twenty-one year old defendant); Hawk v. State, 718 So.2d 159 (Fla. 1998) (nineteen year old defendant); Puccio v. State, 701 So.2d 858 (Fla. 1997) (twenty year old defendant); Hazen v. State, 700 So.2d 1207 (Fla. 1997) (twenty-one year old defenant); Sager v. State, 699 So.2d 619 (Fla. 1997) (twenty-one year old defendant); Terry v. State, 668 So.2d 954 (Fla. 1996) (twenty-one year old defendant); and Jones v. State, 705 So.2d 363 (Fla. 1997) (nineteen year old defendant.)

Defendant's Intoxication or Addiction: This Court has consistently recognized drug addiction, alcoholism, and other substances which diminish a defendant's ability to make rational decisions as powerful mitigation. Addictions rob defendants of "substantial control over [their] behavior." See Nibert v. State, 574 So.2d 1059 (Fla. 1991). In this case, Thomas Moore drank moonshine regularly with the victim (R. 1089-90) and was invited to drink and did drink moonshine with the victim on the day of this homicide. (R. 1101). Mr. Moore also smoked marijuana on the day of the crime. (R. 1108). The sentencing court did not take these facts into account in sentencing Thomas Moore to death.

This Court has reduced death sentences to life sentences on proportionality review involving defendants who were intoxicated at the time of the crime or who have a history of substance abuse and addictions. See Sager (where two men were invited to the home of a third to drink heavily, a dispute occurred and the host was tied up, beaten, and stabbed to death); Morgan v. State, 639 So.2d 6 (Fla. 1994) (death found to be disproportionate, even with a finding of heinous, atrocious or cruel, when perpetrator had been drinking and huffing gasoline); Knowles v. State, 632 So.2d 62 (Fla. 1993) (with two murder victims but only one death sentence by a defendant with a long history of substance abuse and "huffing"); Kramer v. State, 619 So.2d 274 (Fla. 1993) (where two drunks got into a fight on a highway and the victim was beaten to death with a rock, but the death sentence was reduced to life, despite a finding of heinous, atrocious, or cruel, and a prior violent felony that resulted in the death of an earlier victim); White v. State, 616 So.2d 21 (Fla. 1993) (where death was found to be disproportionate for a drug addicted defendant who murdered his former girlfriend and where there was a valid finding of a prior violent felony, a burglary and assault directed at the victim); Clark v. State, 609 So.2d 513 (Fla. 1992) (a shotgun murder after a day of drinking); Penn v. State, 574 So.2d 1079 (Fla. 1991) (reduced to life where defendant got drunk, killed his mother, with whom he was living, by beating her to death with a

claw hammer, resulting in a finding of heinous atrocious, or cruel); Nibert (death reduced to life where an intoxicated alcoholic man stabbed the victim seventeen times in the course of a robbery with a valid finding of heinous, atrocious, or cruel); Proffitt v. State, 510 So.2d 896 (Fla. 1987) (a stabbing murder during the course of a burglary where defendant had been drinking); Ross v. State, 474 So.2d 1170 (Fla. 1985) (an alcoholic who beat his wife to death with a blunt instrument under circumstances that gave rise to a finding of heinous, atrocious, or cruel); and Rembert v. State, 445 So.2d 337 (Fla. 1984) (death reduced to life where the victim was clubbed to death by an apparently intoxicated defendant during the robbery of a bait and tackle shop.)

Co-Defendant Sentencing: This Court has held that equally culpable codefendants should receive equal punishment and that when a more culpable codefendant receives a lesser sentence, a sentence of death should not be imposed on the less culpable defendant. See Jennings v. State, 718 So.2d 144 (Fla. 1988); Scott v. Dugger, 604 So.2d 465 (Fla. 1992).

In this case, the jury was instructed that it could find Mr. Moore guilty of either first degree premeditated murder or first degree felony murder. (R. 1346-48). However, the verdict form relating to first degree murder wholly omits of which type of first degree murder Mr. Moore was found guilty. Knowing which type of

first degree murder is important for this habeas petition because if the jury found Mr. Moore guilty of first degree murder under a felony murder theory, then Mr. Moore and his co-defendant are equally culpable in the sense that it cannot be said the jury found, beyond a reasonable doubt, that Mr. Moore pulled the trigger of the gun that killed the victim. It is equally plausible that Mr. Moore's co-defendant pulled the trigger. If this is the case, then Mr. Moore and his co-defendant are equally culpable under the theory of felony murder. It is disproportionate, indeed, for Mr. Moore to be on death row while his co-defendant walks the streets.

Mr. Moore's co-defendant, Carlos Clemons, initially plead guilty to second degree murder and attempted armed robbery with the understanding that he would receive juvenile sanctions contingent upon testifying truthfully at Mr. Moore's trial. However, this plea deal was illegal because under Section 39.022(5)(c)(1) a juvenile charged with violation of a law punishable by life is not eligible to receive juvenile sanctions. This plea offer was subsequently withdrawn and Mr. Clemons testified at Mr. Moore's trial. Following Mr. Moore's trial, Mr. Clemons plead guilty again, this time to third degree murder and armed robbery, allowing him to receive juvenile sanctions. Specifically, Mr. Clemons received commitment to the custody of the Department of Health and Rehabilitative Services for

an indeterminate term not to exceed Mr. Clemons' nineteenth birthday with community control after his release.

In Ray v. State, 755 So.2d 604, 611 (Fla. 2000), this Court reversed a defendant's death sentence, in part, on the mere "**possibility** that (the co-defendant) was the shooter." In Mr. Moore's case, this same "**possibility**" exists. There is no definitive finding that Mr. Moore, in fact, pulled the trigger. Because this fact is essential in justifying the disparate sentences received by Mr. Moore and his co-defendant, this Court should now take into consideration the co-defendant's sentence in determining whether Mr. Moore's sentence of death is proportional.

This Court has reduced death sentences to life sentences on proportionality review where there was no substantial evidence suggesting one defendant more culpable than the other. See Puccio v. State, 701 So.2d 858 (Fla. 1997) (death sentence reversed where trial court's determination that defendant was more culpable than his co-defendant was not supported by competent substantial evidence in the record); Hazen v. State, 700 So.2d 1207 (Fla. 1997) (non-triggerman could not receive death while more culpable non-triggerman accomplice testifying for the state received life imprisonment); Curtis v. State, 685 So.2d 1234 (Fla. 1996) (death reduced to life, in part, based on finding that defendant's partner in robbery was actual killer); Terry v. State, 668 So.2d 954, 965

(Fla. 1996) (where death sentence reversed because "the circumstances surrounding the actual shooting are unclear"; Scott v. Dugger, 604 So.2d 465, 468-69 (Fla. 1992) (death sentence reversed where co-perpetrators "were equally culpable participants in the crime.")

Multiple Murder Victims: This Court has reversed death sentences on proportionality review in cases involving multiple murder victims. See Besaraba v. State, 656 So.2d 441 (Fla. 1995) (two victims and a third victim injured); Knowles v. State, 632 So.2d 62 (Fla. 1993) (two victims); Garron v. State, 528 So.2d 353 (Fla. 1988) (wife and fourteen year-old stepdaughter were victims); Wilson v. State, 493 So.2d 1019 (Fla. 1986) (two killed in a family fight). The circumstances surrounding Mr. Moore's case involve a single victim.

CLAIM III

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE CLAIM THAT MR. MOORE'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED WHEN THE STATE UNCONSTITUTIONALLY USED ITS PEREMPTORY CHALLENGES TO STRIKE JURORS BECAUSE OF RACE WHILE CLAIMING RACE-NEUTRAL REASONS.

The State used its peremptory challenges in such a way as to deny Mr. Moore his rights under the Sixth and Fourteenth Amendment of the United States Constitution and his rights under Article I, Section 16 of the Florida Constitution, to a trial by an impartial jury drawn from a representative cross section of the community.

The State may challenge for cause a juror whose attitudes against the death penalty would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Wainwright v. Witt, 105 S.Ct. 844 (1985); Witherspoon v. Illinois, 88 S.Ct. 1770 (1968); Lambrix v. State, 494 So.2d 1143 (Fla. 1986). These decisions, however, do not allow the State to challenge for cause those jurors who merely have misgivings about the death penalty.

In Mr. Moore's case, the State used its peremptory challenges to exclude jurors who merely had misgivings about the death penalty, jurors that could not be excluded for cause. The State thereby accomplished what it could not do under Witherspoon, Witt, and Lambrix. The State excluded an identifiable segment of the population who have unfavorable (to the prosecutor) attitudes about the death penalty and thereby denied Mr. Moore his rights to a trial by an impartial jury drawn from a representative cross section of the community. In doing so, the State unconstitutionally, and with discriminatory intent, excluded members of the African-American community from serving on Mr. Moore's jury.

During selection of the jury, Mr. Moore's counsel objected to several of the State's peremptory challenges because they were not motivated by racially-neutral reasons. The Court, despite evidence

to the contrary, found the State's reasons to be racially-neutral. (R. 354-62). These findings constituted fundamental error.

Venireman Dunbar: The State exercised a peremptory strike on venireman Dunbar, a black male. (R. 348). During a Neil⁴ inquiry, the State gave, as its "race neutral" reason for striking venireman Dunbar, the fact that Mr. Dunbar is the brother-in-law of a criminal defense attorney who State's co-counsel had cases against. (R. 356). The Court ruled that this reason was "racially neutral". (R. 358). The Court's ruling ignores several facts about this venireman that contradicts the State's "race neutral" reason.

First, venireman Dunbar, when asked whether he had discussed cases with his brother-in-law, answered that he did not and had never discussed "any general philosophy about the criminal justice system". (R. 185). In fact, venireman Dunbar stated that the death penalty was warranted in some cases (R. 284) and that there was nothing in his feelings about the death penalty that would impair his ability to vote for death if it was deemed appropriate. (R. 210). As Mr. Moore's trial counsel correctly pointed out, "there was no inquiry by the State at any time as to whether or not Mr. Dunbar's relationship as an in-law would have raised any specter of impartiality or partiality toward Defendant . . . [i]n fact, the State didn't even make an inquiry of their own." (R. 356). This supports the

⁴State v. Neil, 457 So.2d 481 (Fla. 1984).

conclusion that the true reason the State struck Mr. Dunbar was because of his race and any reason to the contrary is disingenuous.

Second, the Court's Neil inquiry ruling on venireman Dunbar ignores the fact that another juror (venirewoman Fross), who was white and who the State did not object to (R. 345), knew "real well" (R. 181) a former Public Defender who "handles capital cases." (R. 358). Like venireman Dunbar, venirewoman Fross, did not discuss the work of her former Public Defender friend. (R. 182).

Except for the fact that venireman Dunbar is black and venirewoman Fross is white, there is nothing to distinguish the two who are otherwise similarly situated with respect to their respective relationships with criminal defense attorneys. There is simply no race-neutral reason for striking Mr. Dunbar and accepting Mrs. Fross as a juror. The reason set forth by the State in striking venireman Dunbar is quite simply, a sham. The Court's ruling that "[r]ace had nothing to do with it," (R. 358) ignores the record.

Venirewoman Pitts: The State exercised a peremptory challenge on venirewoman Pitts, a black female. (R. 350) The State gave as its "race neutral" reason for striking venirewoman Pitts that it perceived her to be "very reluctant," could not give her feelings on the death penalty when asked, that she stated she felt it was the Judge's role to do the sentencing and "that she did not want to be involved in giving an advisory sentence." (R. 359).

In fact, when the State asked venirewoman Pitts about the death penalty and giving a recommendation as to the appropriate sentence, she agreed that she would have no problem with the death penalty as long as "the merits of the case hold in value," (R. 210) and that she would follow the Court's instructions. (R. 211). Venirewoman Pitts stated that she agreed with the statement that the death penalty is appropriate in some cases. (R. 211). Additionally, when asked by the Court if she could make a recommendation to the Court of death or life without the possibility of parole for twenty-five years, venirewoman Pitts stated that she could. (R. 291). Based on the record, Mr. Moore argues that the State's given "race-neutral" reason is meritless.

Though venirewoman Pitts expressed reservations about the death penalty (as most jurors do), she merely expressed that, depending on the facts of a particular case, she would or would not vote to impose the death penalty. The majority of the jurors on the venire expressed this same judgement about imposing the death penalty. That is, the death penalty would not be automatically imposed, but rather, consideration would be given to the particular facts of the case (i.e., the aggravating and mitigating circumstances.) Certainly, this cannot be a "race-neutral reason" as this reason is merely what qualifies one to be a juror.

Venirewoman Washington: The State exercised a peremptory challenge on venirewoman Washington, a black female. (R. 354). The State gave as its "race neutral" reason for striking venirewoman Washington that "she did have a problem with the death penalty." (R. 361). The Court found this to be a race-neutral reason even though, as the Court stated, "she could follow the law." (R. 362).

Like venirewoman Pitts, venirewoman Washington's honest expression of reservations about the death penalty comported with the feelings of most of the venire members. Further, her need to weigh specific circumstances of aggravation and mitigation merely demonstrated her qualifications as a juror. Venirewoman Washington stated twice on the record that there are cases where she could conceive of recommending the death penalty once she found a person guilty of first degree murder. (R. 213, 298-99). There is nothing about venirewoman Washington's answers that disqualified her from serving on Mr. Moore's jury. The State's only reason for striking her was her race.

Venirewoman Carter: The State exercised a peremptory challenge on venirewoman Carter, a black female. (R. 365). The State gave as its "race neutral" reason for striking venirewoman Carter that "she had problems with . . . the death penalty," although she stated that she felt like she could follow the law. (R. 365). The State's reason in

striking venirewoman Carter is the same reason used to justify striking venirewoman Washington.

Mr. Moore's arguments regarding why his constitutional rights were violated in the State's striking of venirewoman Pitts and venirewoman Washington are equally applicable here. Venirewoman Carter was well-qualified to be a juror. The State's attempt to use her candor as a "race-neutral reason" for striking her is transparent at best.

Based on the record before this Court, it is obvious that the State used its peremptory challenges in a racially discriminatory manner. None of the reasons stated by the Prosecution during the Court's Neil inquiry are sufficient to rebut Mr. Moore's allegations that the peremptory challenges were used in a racially discriminatory manner.

Appellate counsel was ineffective for failing to raise this claim on direct appeal. These improper uses of peremptory challenges violated Due Process and the Eighth Amendment, rendering Mr. Moore's death sentence fundamentally unfair and unreliable. In the interests of justice, this Court must grant habeas relief.

CLAIM IV

MR. MOORE WAS DENIED THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WHERE COUNSEL FAILED TO ASSERT FUNDAMENTAL ERROR WHERE THE JURY WAS ALLOWED TO HEAR INFLAMMATORY, EMOTIONAL AND PREJUDICIAL ARGUMENT AT MR. MOORE'S TRIAL AND SENTENCING PROCEEDING. THIS ERROR RENDERED MR. MOORE'S TRIAL AND SENTENCING FUNDAMENTALLY UNFAIR AND UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Appellate counsel's failure to assert fundamental error of the State's inflammatory, emotional and prejudicial argument violated Mr. Moore's Sixth, Eighth and Fourteenth Amendment rights and his corresponding rights under the Florida Constitution.

Closing argument "must not be used to inflame the minds and passions of the jurors so that [the] verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law." Bertolotti v. State, 476 So.2d 130 (Fla. 1985). The entirety of the State's rebuttal argument during the guilt/innocence phase, was laced with an impermissible theme about Mr. Moore, his crime, and the neighborhood in which it occurred. The State's arguments tainted the jury's deliberations and rendered the judgment and sentence fundamentally unfair and unreliable.

The State began its rebuttal argument with the following:

Crime conceived in hell will not have any angels as witnesses. And, ladies and gentlemen, as true as that statement is, Grand Park is hell. And that man right there (referring to Mr. Moore) is **the devil**. Because that actually was a crime conceived in hell . . .
(R. 1262).

The State continued:

Ladies and gentlemen, deals. Yes, ma'am, yes, ma'am, yes, sir, to all of you. I have dealt with (co-defendant 1) and I have dealt with (co-defendant 2). I did that as an Assistant State Attorney. I did that the best I knew how. But, ladies and gentlemen, sometimes you have to deal with sinners to get the devil (referring to Mr. Moore). And I would submit to you what the State did was we dealt with this sinner and we dealt with this sinner to get **this devil** (referring to Mr. Moore).
(R. 1277).

Not only did the prosecution continue its effort to inflame the passions of the jury by referring to Mr. Moore as "the devil" and his co-defendants as "sinners", but it also "obscure[d] the jury's view with personal opinion . . . and nonrecord evidence." Ruiz v. State, 743 So.2d 1, 2 (Fla. 1999). In the above excerpt, the prosecution vouched for her own credibility by suggesting to the jury that it had done its job by giving the co-defendants what they deserved without revealing what exactly the "deals" were and how it compared to what the prosecution was seeking for Mr. Moore.⁵

⁵Co-defendant Carlos Clemons plead guilty to third degree murder and attempted armed robbery and received juvenile sanctions. Co-defendant Vincent Gaines plead guilty to accessory after the fact and attempted armed robbery and received 3 1/2 years with time served.

In sum, the State equated Mr. Moore's neighborhood as "hell"; referred to everyone who lived in that neighborhood as "sinners"; and symbolized Mr. Moore as "the Devil". These references were not fair comment on the facts shown by the record and were more emotional than is normal in a criminal trial. The State's blatantly improper penalty phase argument sought to pander to the jury's fears and to paint an inflammatory picture of Mr. Moore, as well as infusing the prosecutor's personal opinion and emotion into the guilt and penalty determination. The argument was an invitation to the jury to disregard the law, and it worked. The jury found Mr. Moore guilty and recommended death.

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. Moore's case. By referring to Mr. Moore as "the devil" and intimating at Mr. Moore's personal knowledge of "hell", the prosecutor willed guilt and death by appealing to the jury's passion and emotion.

The instant claim is similar to that considered by this Court in Urbin v. State, 714 So.2d 411 (Fla. 1988) (reversing on

proportionality grounds, but discussing the impropriety of the penalty phase closing arguments). 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). Thomas Moore was both dehumanized and demonized.

The prosecutor's comments and over-arching theme 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 in a capital case. 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").

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 errors. See, Kilgore v. State, 688 So.2d 895, 898 (Fla. 1996). Appellate counsel was ineffective for failing to raise this claim on direct appeal. Mr. Moore's trial attorney's failure to properly object at trial does not preclude raising this claim on direct appeal. See Urbin. These improper arguments violated Due Process and the Eighth Amendment, rendering Mr. Moore's death sentence fundamentally unfair and unreliable. In the interests of justice, this Court must grant habeas relief.

CLAIM V

MR. MOORE WAS DENIED THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WHERE COUNSEL FAILED TO ASSERT FUNDAMENTAL ERROR WHERE THE COURT ALLOWED THE SENTENCING JURY TO HEAR SUBSTANTIVELY IRRELEVANT, BUT EXTREMELY PREJUDICIAL, DETAILS OF A "PRIOR VIOLENT FELONY" AGGRAVATING CIRCUMSTANCE, VIOLATING THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

During Mr. Moore's penalty phase proceedings, and in support of the aggravating circumstance that Mr. Moore had previously been convicted of a felony involving the use or threat of violence, the State introduced two judgments and sentences of Mr. Moore's prior felony convictions, of which the Court took judicial notice and moved into evidence (R. 1458-59). Thereafter, the State called Detective L.H. Goff to testify to the details of Mr. Moore's prior felony convictions:

Q (by the State) Let me direct your attention, Detective Goff, to December 10th, 1983; Did you work with the Sheriff's Office at that time?

A Yes, ma'am, I was.

Q Where were you assigned then?

A At that time I was assigned to the robbery division as a detective.

Q Detective, were you assigned on that date to investigate a robbery, armed robbery, in Case No. 89-9116 involving the defendant Thomas Moore?

A Yes, I was.

Q Could you please tell the jurors anything about the victim in that case?

(R. 1461). At this point, defense counsel objected on hearsay grounds. The court did not rule on the objection and allowed the State to continue:

Q (by the State) Could you please tell the jurors about the victim?

A Yes, ma'am. This was a white female, 23 years old, named Cynthia Hyman that was robbed on that date.

Q Did you arrest the defendant Thomas Moore in connection with that armed robbery?

A Mr. Moore was arrested and charged with that robbery, yes, ma'am.

Q Did anyone identify the defendant Thomas Moore in connection with that armed robbery?

A Yes, Cynthia Hyman identified Thomas Moore as being the suspect with the pistol.

Q **Suspect with what?**

A **The pistol.**

(R. 1462). Allowing the State to introduce and the jury to hear this evidence was error. This evidence was irrelevant to the aggravating circumstance to which it was purportedly connected and was highly prejudicial. This error rose to the level of fundamental error.

The aggravating factor to which Detective Goff's testimony purports to relate reads:

The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(Fla. Stat. 921.141(5)(b). Detective Goff's testimony was not relevant to whether Mr. Moore was convicted of anything. At most, this is evidence of a prior bad act:

[U]nder (Florida's) capital felony sentencing law and principles of due process, the arguments to the jury in a sentencing proceeding, like the evidence presented, must be relevant to the issues involved in the sentencing decision and must not be unduly inflammatory or emotional or improperly prejudicial to the capital offender.

Craig v. State, 510 So.2d 857, 860 (Fla. 1987). This testimony only showed that Mr. Moore was arrested for allegedly robbing a white woman with a firearm, which is prejudicial and denied Mr. Moore his right to a fair sentencing. The fact of a prior felony conviction involving the use or threat of violence to another person had already been proved beyond a reasonable doubt upon judicial notice of Mr. Moore's prior conviction and sentence. There was no need, other than to inflame the minds and passions of the jurors, to reveal that Mr. Moore had been arrested for allegedly robbing a white woman with a firearm. In addition, trial counsel already noticed the court that the statutory mitigating circumstance of "no significant history of prior criminal history" had been waived. (Vol. III, p. 487).

This testimony constitutes nonstatutory aggravation of the worst kind because it involved the element of race and gender (i.e.

"a white woman.") As this Court stated in *Elledge v. State*, 346 So.2d 998, 1003 (Fla. 1977): "We must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death." Evidence of a "prior bad act" is certainly not enumerated in the list of aggravating factors which a jury and court may consider in imposing a sentence of death.

Additionally, the fact that the victim's name (Cynthia Hyman) was mentioned during Detective Goff's testimony regarding Mr. Moore's prior bad act is also cause for concern about the fairness of Mr. Moore's sentencing proceeding. The mention of the victim's name opens up the possibility that the victim was known by one the jurors. The jurors were not voir dired about this point.

Under the Supreme Court's decision in *Proffitt v. Florida*, 428 U.S. 242 (1976), discretion in capital sentencing must be "guided and channeled" to eliminate the arbitrary and capricious imposition of the death penalty. Based on that requirement, this Court has consistently held that only statutory aggravating factors may be considered in the sentencing decision. *Grossman v. State*, 525 So.2d 833 (Fla. 1988); *Floyd v. State*, 497 So.2d 1211 (Fla. 1986); *Drake v. State*, 441 So.2d 1079 (Fla. 1983); *Purdy v. State*, 343 So.2d 4, 6 (Fla. 1977) ("[u]nder the provisions of Section 921.141, Florida Statutes, aggravating circumstances enumerated in the statute must be found to exist before a death sentence may be imposed . . . [t]he

specified statutory circumstances are exclusive; no others may be used for that purpose.")

CLAIM VI

MR. MOORE WAS DENIED THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WHERE COUNSEL FAILED TO RAISE THE CLAIM THAT MR. MOORE WAS DENIED A FAIR SENTENCING WHERE THE COURT ALLOWED PREJUDICIAL VICTIM IMPACT TESTIMONY DURING PENALTY PHASE. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE CLAIM THAT FLORIDA'S LAW ON VICTIM IMPACT EVIDENCE IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

During the penalty phase, the victim's daughter was allowed to testify:

Q (by State Attorney). Do you know (the victim)?

A. Yes.

Q. How do you know him?

A. *He's my father. He was my father.*

Q. Ms. (victim's daughter), could you please tell these jurors what was unique about (the victim), what was unique about him in his community?

A. *My dad was a good man. He never bothered nobody. And he was very free-hearted, you know. He loved everybody.*
(R. 1466).

This testimony was not relevant to any issue in the penalty phase of Mr. Moore's trial. It was both inflammatory and prejudicial, and even assuming that the testimony was relevant, its

prejudice outweighs any possible probative value. Section 90.403, Fla. Stat. The admission of this testimony violated Mr. Moore's fundamental rights pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

The testimony of the victim's daughter also served as a non-statutory aggravator. In Grossman v. State, 525 So.2d 833 (Fla. 1988), this Court held:

Florida's death penalty statute . . . limits the aggravating circumstances on which a sentence of death may be imposed to the circumstances listed in the statute. The impact of the murderer on family members and friends is not one of these aggravating circumstances. Thus, victim impact is a non-statutory aggravating circumstance which would not be an appropriate circumstance on which to base a death sentence (citations omitted, at 842).

See Windhom v. State, 656 So.2d 432 (Fla. 1995) (reiterating the scope of victim impact evidence, stating, "victim impact evidence **must** be limited to that which is relevant as specified (in the statute).") This testimony should not have been admitted because it fails to fall within any of the statutory aggravating circumstance and, conversely, none of the aggravating circumstances relate to the character or personal characteristics of the victim. The testimony of the victim's daughter during the penalty phase was not relevant to or probative of whether, based on the statutorily enumerated

aggravating circumstances, Mr. Moore should live or die. The sole purpose of this testimony and the fact of the victim's daughter's presence was designed to invoke sympathy for the victim and to introduce a non-statutory aggravating circumstance. See Hudson v. State, 522 So.2d 802 (Fla. 1988) (holding that such arguments are improper "because it urged consideration of factors outside the scope of the jury's deliberation," at 809).

Section 921.141(7), Fla. Stat., allows the introduction of victim impact evidence during penalty phase. It reads:

(7) VICTIM IMPACT EVIDENCE.-Once the prosecution has provided evidence of the existence of one or more aggravating circumstances . . . the prosecution may introduce, and subsequently argue, victim impact evidence. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterization and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as part of victim impact evidence.

This provision is far broader and vaguer than section 921.143, Fla. Stat., which this Court has held does not apply to capital sentencing. Grossman. 921.143 limits the testimony to the victim's family. By its terms, 921.141(7) places no limits as to who can testify or what they can testify to. The phrase "loss to the community" contains no definition of community or limits on its membership. This could lead anyone to testifying or even to death by

petition or public opinion poll. The phrase "uniqueness as a human being" places absolutely no limits on the evidence. This statute clearly does not meet the higher standard of due process in capital cases required by Art. I, Sections 9 and 17.

A penal statute must be definite and valid. Locklin v. Pridgeon, 30 So.2d 102 (Fla. 1947). An attack on a statute's constitutionality must "necessarily succeed" if its language is indefinite. D'Alemberte v. Anderson, 349 So.2d 164 (Fla. 1977). Thus, definiteness is essential to the constitutionality of a statute.

921.141(7) fails under any standard of definiteness under the United States and Florida Constitutions. The term "community" contains a wide variety of meanings. It can mean a geographic community or it can mean people with perceived common interests. Even within the concept of geographic community, it can mean anything from neighborhood up to the "community of nations." The term "community" when applied to community of interest can mean virtually anything (common hobbies, jobs, political beliefs, religion, race, ethnicity). The terms of 921.141(7) are vague and overbroad and are capable of a wide variety of clearly impermissible uses. This statute gives a defendant virtually no notice of the type of evidence which he is to defend against.

The admission of this type of evidence without any guidance as to how to use it is unconstitutional pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

The failure to sufficiently guide discretion, with the possibility of arbitrary and discriminatory results, was a theme running throughout the opinion in Furman v. Georgia, 92 S.Ct. 2726 (1972). The guiding of the judge's and jury's discretion was a critical factor to both this Court and the United State's Supreme Court in upholding the facial constitutionality of the Florida death penalty statute. Proffitt v. Florida, 96 S.Ct. 2960, 2969 (1976). The United States Supreme Court has reversed several cases for jury instructions which fail to sufficiently define an aggravating circumstance. Espinosa v. Florida, 112 S.Ct. 2926 (1992); Shell v. Mississippi, 111 S.Ct. 313 (1990); Maynard v. Cartwright, 108 S.Ct. 1853 (1988). The jury is given absolutely no guidance how to handle this highly explosive and emotional evidence. This is far worse than merely being given inadequate guidance as to an aggravator as in Espinosa, Shell, and Maynard. This is unconstitutional under the Florida and United States Constitutions.

CLAIM VII

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE CLAIM THAT MR. MOORE WAS DENIED HIS RIGHT TO A FAIR SENTENCING BECAUSE THE JURY INSTRUCTIONS IMPROPERLY SHIFTED THE BURDEN TO

**MR. MOORE TO PROVE THE APPROPRIATENESS OF A
LIFE SENTENCE.**

The jury instructions at Mr. Moore's capital penalty phase required that the jury impose death unless mitigation was not only produced by Mr. Moore, but also unless Mr. Moore proved that the mitigation outweighed and overcame the State's aggravation. The effect of this error was repeated when the trial court employed an erroneous standard in sentencing Mr. Moore to death. This standard improperly shifted the burden to Mr. Moore to establish that life was the appropriate sentence and limited consideration of mitigating evidence to only those factors proven sufficient to outweigh evidence in aggravation. Mr. Moore's Eighth Amendment rights were violated because the instructions precluded the jury from fully considering and giving effect to the mitigation evidence. Under the Eighth Amendment, "[s]tate's 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. Moore'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. See Lockett v. Ohio, 438 U.S. 586 (1978); Hitchcock v. Dugger, 481 U.S. 393 (1987).

The jury instructions in this case constitute a distinctly egregious abrogation of Eighth Amendment principles. In this case,

Mr. Moore was required to 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. Mr. Moore's jury was instructed to sentence him to death unless he proved: "mitigating circumstances sufficient to outweigh the aggravating circumstances" (R. 1458); "sufficient mitigating circumstances exist to outweigh any aggravating circumstance found to exist" (R. 1543); and "mitigating circumstances . . . that outweigh the aggravating circumstances." (R. 1544). 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). Mr. Moore's attorney requested the proper standard in a proposed jury instruction (Vol. III, p. 441). The motion was denied (R. 1446).

The instructions, and the standard upon which the court based its own determination, violated the Eighth and Fourteenth Amendments in three ways. First, the instructions shifted the burden of proof to Mr. Moore on the central sentencing issue of whether he should live or die. Under Mullaney, this unconstitutional burden-shifting violated Mr. Moore'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).

Second, 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, 486 U.S. 367 (1988); Hitchcock v. Dugger, 481 U.S. 393 (1987). Thus, the jury was precluded from considering mitigating evidence and from evaluating the "totality of the circumstances" in considering the appropriate penalty. State v. 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. This Court must presume that the jury was misled by this instruction, resulting in a death recommendation despite factors calling for life. See Espinosa v. Florida, 505 U.S. 2926 (1992). This Court 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).

Third, 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.

Dixon, at 10. The constitutionality of the statute depends in part upon the faithful application of this standard. Proffitt v. Florida. The trial judge did not apply this standard, and Mr. Moore's death sentence must be reversed.

The constitutional infirmity of these instructions and arguments is not simply that they placed the burden of proof on Mr. Moore -- 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.

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. 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. This is precisely the effect resulting from the burden-shifting instructions given here.

In Arango v. State, 411 So.2d 172 (Fla. 1982), this Court noted that such a "burden-shifting" instruction might violate due process of law as construed in Mullaney and Dixon. At 174. However, the Court went on to hold that the instructions as a whole did not violate due process since the jury was eventually instructed that a death sentence "could only be given if the state showed the aggravating circumstances outweighed the mitigating circumstances." Id. at 174. Unlike Arango, the jury instructions given in Mr. Moore's penalty phase was never "cured" as in Arango. The jury was never instructed that they could find death only if the aggravating circumstances outweighed the mitigating circumstances. In fact, Mr. Moore requested that the penalty phase instructions be cured. (Vol. III, p. 447-469). There is no way that this Court can say that the penalty phase instructions in Mr. Moore's case "taken as a whole show that no reversible error was committed." Id. at 174.

CLAIM VIII

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE CLAIM THAT MR. MOORE WAS DENIED HIS RIGHT TO A FAIR SENTENCING WHEN THE TRIAL COURT DENIED HIS REQUEST FOR AN INSTRUCTION THAT THE JURY MAY CONSIDER MERCY IN ITS SENTENCING DECISION.

Defense counsel requested the following instruction:

Mere sympathy which is purely an emotional response to what you have heard should not influence your decision in any way. However, if sympathy arises as part of a reasoned moral response to mitigation placed before you, you may consider that in your decision about the appropriate penalty.

(Vol. III, p. 452). This instruction was denied by the trial court. (R. 1435).

This Court recognized the importance of mercy in capital sentencing in Thomas v. State, 403 So.2d 371 (Fla. 1981), when it reversed the defendant's conviction because the trial court refused to excuse for cause a juror "who had admitted in voir dire that he could not 'recommend any mercy' in any required sentencing phase." At 375. This Court explained that an inability to recommend mercy is equivalent to a juror admitting that he would not consider mitigating circumstances. Id. at 376 (referring to "[t]he admitted refusal of juror Roberts to weigh mitigating circumstances").

The Supreme Court's discussion in California v. Brown, 479 U.S. 538 (1987), regarding a mercy instruction further supports Mr. Moore's argument that the court erred in this case. In Brown, the

defendant objected to an instruction telling the jury not to be swayed by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling." Id. at 542. The defendant argued that the instruction prevented the jury from properly evaluating the mitigating evidence. The Court disagreed because a "reasonable juror would . . . understand the instruction not to rely on 'mere sympathy' as a directive to ignore only the sort of sympathy that would be totally divorced from the evidence adduced during the penalty phase." Id. at 543. In other words, the word "mere" saved the instruction from the defendant's constitutional challenge. The Court found that a reasonable juror would interpret the instruction as a prohibition against considering sympathy unrelated to mitigation; an instruction prohibiting consideration of sympathy based on the defendant's mitigation would be unconstitutional. Eddings v. Oklahoma, 455 U.S. 104 (1982) (holding that a sentencing body must be able to consider any relevant mitigating evidence regarding the defendant's background and character and circumstances of the offense).

The Court's refusal to specifically instruct the jury on the role of mercy in capital sentencing prevented the jury from "considering as a mitigating factor, any aspect of a defendant's character and record . . . that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586 (1978).

The purpose of mitigation is to humanize the defendant in the eyes of the jurors to be open to feeling an emotional response based on the evidence. Woodson v. North Carolina, 428 U.S. 280 (1976) (recognizing that mitigation is intended to induce consideration of "compassionate or mitigating factors stemming from the diverse frailties of humankind"). Not making the jurors aware that such a response can be weighed in mitigation was a violation of Mr. Moore's Eighth Amendment rights. See Eddings; Lockett.

CLAIM IX

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO THOROUGHLY BRIEF AND ARGUE THE CLAIM THAT MR. MOORE'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED DUE TO THE STATE'S IMPERMISSIBLE USE OF THE PENALTY PHASE WHEN VIEWED AS A WHOLE.

Florida's death penalty statute was upheld by the Supreme Court, in part, because the "procedures . . . seek to assure that the death penalty will not be imposed in an arbitrary and capricious manner." Proffitt v. Florida, 96 S.Ct. 2960, 2967 (1976). In enacting a new death penalty statute, this Court noted that separate proceedings on the issue of penalty, the limitation of aggravating factors, and the objective weighing of aggravating factors with mitigating factors would ensure that Florida's capital sentencing scheme would be "reasonable and controlled, rather than capricious and discriminatory." State v. Dixon, 283 So.2d 1, 7 (Fla. 1973). The penalty phase in Mr. Moore's case was conducted in such a manner

as to render a nullity the procedural safeguards designed to avoid "capricious and discriminatory" imposition of the death penalty. Mr. Moore's Eighth and Fourteenth Amendment rights to a fair sentencing were violated during the penalty phase and this violation cannot be said to be harmless beyond a reasonable doubt.

A. THE STATE'S USE OF NON-STATUTORY AGGRAVATING FACTORS

During the penalty phase, the State argued:

What is the quality of the aggravation and the quality of the mitigation? I would submit to you that the Defense put on a lot of mitigation. They brought in, as I told you, all of the wonderful people who had known this defendant his entire life, who nurtured him, who loved him, who spent holidays with him, who said that he was treated just like their son, their brother, their cousin. That he did well in school. That he played football. That he had a normal life. And, ladies and gentlemen, it may sound like mitigation, but to me it's the most -- well, I would submit to you that its the **most aggravating factor of all . . .**

* * *

Ladies and gentlemen, look at these photographs that the Defense put in. They show a young man who was loved, they show a young man who gave love and got love. It could be mitigation that he was that type of person, but I would submit to you that is all the more reason that he should not have committed any of these crimes; because he did grow up in a decent, loving environment . . .

(R. 1526-28). Mr. Moore's trial counsel objected to these comments

(R. 1527, 1528-29, 1549) and was overruled (R. 1550). Mr. Moore's

appellate counsel briefed and argued this issue but was denied relief. Moore v. State, 701 So.2d (Fla. 1997).

The State's argument constituted impermissible use of non-statutory aggravating factors. Grossman v. State, 525 So.2d 833 (Fla. 1988) ("Florida's death penalty statute . . . limits the aggravating circumstances on which a sentence of death may be imposed to the circumstances listed in the statute."); Floyd v. State, 497 So.2d 1211 (Fla. 1986); Drake v. State, 441 So.2d 1079 (Fla. 1983). Such argument renders a nullity the constitutional directive in Furman v. Georgia, 92 S.Ct. 2726 (1972), and its progeny that jury discretion in capital sentencing be sufficiently guided so as to avoid the arbitrary and selective imposition of the death penalty.

The State's argument also violated Mr. Moore's Eighth Amendment right to have the jury consider "any relevant mitigating factor." Eddings v. Oklahoma, 455 U.S. 104, 112 (1982). In Lockett v. Ohio, 438 U.S. 586 (1978), the Supreme Court defined a mitigating circumstance as "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." At 604. Thus, any evidence which "might" serve to reduce the urge to punish harshly must be deemed mitigating. All the mitigation presented by Mr. Moore was voided by the State's argument that all the mitigation presented be viewed as aggravating.

In short, the State's argument violated Mr. Moore's Eighth Amendment Rights in two ways. First, it violated the principles enunciated in *Furman*, that jury discretion in capital sentencing be guided to avoid the arbitrary and selective imposition of the death penalty. There is no guidance when the jury is allowed to hear, from the State, that it use non-statutory aggravating factors in deciding a punishment. Second, it violates the principles enunciated in *Lockett* that the jury may consider "any relevant mitigating factor." The State prevented the jury from considering the entirety of Mr. Moore's mitigation evidence when the State argued that all of the mitigation presented be deemed aggravating circumstances.

B. IRRELEVANT DETAILS OF PRIOR BAD ACT

Mr. Moore fully incorporates Claim IV, wherein the State introduced irrelevant details of a "prior bad act" for the sole purpose of inflaming the minds and passions of the jury.

C. PREJUDICIAL VICTIM IMPACT TESTIMONY DURING PENALTY PHASE

Mr. Moore fully incorporates Claim VI, wherein the inflammatory and prejudicial victim impact evidence introduced was not relevant to any issue in the penalty phase of Mr. Moore's trial. The admission of this testimony violated Mr. Moore's fundamental rights pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida

Constitution. Additionally, Florida's law on victim impact evidence is unconstitutionally vague and overbroad.

D. IMPROPER BURDEN-SHIFTING TO PROVE MITIGATING CIRCUMSTANCES

Mr. Moore fully incorporates Claim VII wherein the jury instructions at Mr. Moore's capital penalty phase improperly required Mr. Moore to show that the mitigation outweighed and overcame the State's aggravation, and that life was the appropriate sentence. This standard further limits consideration of mitigating evidence to only those factors proven sufficient to outweigh evidence in aggravation in violation of the Eighth Amendment requirement of individualized sentencing in capital cases.

CONCLUSION

For all the reasons discussed herein, Mr. Moore respectfully urges this Court to grant habeas corpus relief.

I HEREBY CERTIFY that a true copy of the foregoing Petition has been furnished by United States Mail, first class postage prepaid, to all counsel of record on April 2, 2001.

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