

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-623

RICHARD M. COOPER,

**Prisoner #087442,
Florida State Prison
Starke, Florida**

Petitioner,

v.

MICHAEL W. MOORE,

**Secretary, Florida
Department of Corrections,**

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Citations shall be as follows: References to the Record on direct appeal of the judgments and sentences in this case will be denominated "(Dir. 123)." References to the Record in the post-conviction evidentiary hearing will be denominated "(ROA 123)." Items that were not included in the post conviction Record as originally prepared by the Pinellas County Clerk, but were listed in Mr. Cooper's three Motion to Supplement and Correct the Record denominated as "Supp." and will include the date filed, document title and internal page number, e.g. "(Supp. 11/18/83 Deposition of Skalnik, pg. 12)."

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

This is an original action under FLA. R. APP. P. 9.100(a). This Court has original jurisdiction pursuant to FLA. R. APP. P. 9.030(a) (3) and Article V, sec. 3(b) (9), FLA. CONST. Jurisdiction in this action lies in this Court. See, e.g., Smith v. State, 400 So.2d 956, 960 (Fla. 1981) since the fundamental constitutional errors challenged herein involved the appellate review process. See Johnson (Paul) v. Wainwright, 498 So.2d 938, 939 (Fla. 1986).

PROCEDURAL HISTORY

Petitioner Richard Cooper was convicted of three counts of first degree murder and sentenced to death by the Honorable William L. Walker of the Sixth Judicial Circuit Court, in and for Pinellas County in January 1984. Mr. Cooper's death sentence was affirmed on direct appeal by this Court, Cooper v State, 492 So. 2d 1059 (Fla. 1986). Certiorari was denied by the U.S. Supreme Court, Cooper v. Florida, 479 U.S. 1101 (1987). On or about May 18, 1989, Mr. Cooper filed a petition for habeas corpus and stay of execution with this Court simultaneously with his filing of his initial 3.850 motion in the trial court. That petition was denied without prejudice by this Court on September 7, 1999. See Case No. 74,171. This petition is, therefore, Mr. Cooper's first opportunity for habeas relief.

FACTS

In addition to the relevant facts set forth in Mr. Cooper's Rule 3.850 appellate brief filed contemporaneously with this petition, the following facts are of import.

In their 29-page initial brief, Mr. Cooper's appellate lawyers raised eight grounds for appeal. As to the three-day guilt/innocence phase of Mr. Cooper's trial, his appellate lawyers raised only one ground – that the trial court should have granted defense counsel's motion to suppress the ski mask used during the crime. As to the one-half day penalty phase, Mr. Cooper's appellate lawyers raised grounds that were, for the most part, simply reiterations of the argument and reasoning made by his trial counsel during the instruction conference held immediately prior to the closing arguments. Appellate counsel argued that certain aggravating instructions – kidnapping; avoidance of arrest; “heinous, atrocious and cruel;” and “cold calculating and premeditated” – were improperly given and one mitigating instruction – substantial impairment – should have been given. Mr. Cooper's appellate counsel also argued that certain anticipatory rebuttal evidence was improperly admitted over objection and that the trial court erred in finding that Mr. Cooper's youth as an eighteen-year-old at the time of the crime was not a mitigating factor. This Court agreed with Mr. Cooper that the capital felony was not committed in the course of a kidnapping but upheld the trial court's findings on

each of the other three aggravating circumstances.

NATURE OF HABEAS CORPUS RELIEF SOUGHT

Through this petition for a writ of habeas corpus, Richard M. Cooper asserts that his capital conviction and sentence of death were obtained and then affirmed during the Court's appellate review process in violation of his rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and the corresponding provisions of the Florida Constitution. For the reasons set forth below, pursuant to Subsections 3(b) (9) of Article V of the Florida Constitution and Florida Rule of Appellate Procedure 9.030 (a) (3), this Court should grant the petition of habeas corpus, vacate Mr. Cooper's death sentence and enter a life sentence or, in the alternative, require a new sentencing hearing. Mr. Cooper incorporates by reference the facts and legal argument set forth in his 3.850 appeal brief and urges the Court to contemporaneously consider both briefs in order to achieve a just result in this matter.¹

CLAIMS FOR HABEAS RELIEF

CLAIM 1: APPELLATE COUNSEL'S FAILURE TO RAISE ON APPEAL THE ISSUE OF THE TRIAL COURT'S DENIAL OF HIS MOTION FOR CONTINUANCE OF SENTENCING HEARING DENIED MR. COOPER EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

¹ In the event that the Court finds that any claim in the 3.850 appeal is barred because it should have been raised on appeal, Mr. Cooper requests that the Court consider that claim as an ineffective assistance of appellate counsel in this brief.

At Mr. Cooper's sentencing hearing, the prosecutor, for the first time, revealed that Jeff McCoy, a co-participant in the murders had tentatively agreed to enter a guilty plea in exchange for three concurrent life sentences and was, therefore, available for testimony in Mr. Cooper's sentencing hearing. (Dir. 391)² Recognizing the significance of McCoy's availability, Mr. Cooper's trial counsel immediately asked the court for a brief continuance of the sentencing proceedings so that trial counsel could interview McCoy to determine whether he possessed any information that would be mitigating to Mr. Cooper in the sentencing hearing.

MR. CRIDER: On behalf of Mr. Cooper, I think in light of this new development, we just received this information from Mr. Crow a very few minutes ago, we feel there may be some information that could come outside on the Cross-Examination of Mr. McCoy that may very well assist the [c]ourt in sentencing Mr. Cooper. We think the [c]ourt, if there is a possibility that there may be some assistance in terms of mitigating factors or some other information that might come out in that Cross-Examination, we feel [that in] a case of this magnitude the [c]ourt should be placed aware of those possibilities and for that reason we would request we would be allowed to continue the sentencing and give us an opportunity to talk to Mr. McCoy and to explore those possibilities.

(Dir. 393) The prosecutor objected to any continuance and asserted that McCoy's testimony would be in no way exculpatory to Mr. Cooper. Id.

MR. CROW: [W]e feel there is *absolutely nothing mitigating* [Mr.

² The prosecutor informed the trial court of McCoy's availability as a witness for the purpose of informing the court of the prosecutor's intent to use McCoy at the sentencing of J.D. Walton, Mr. Cooper's co-defendant who was scheduled for a sentencing hearing on the same day as Mr. Cooper. (Dir. 391)

McCoy] could say about Mr. Cooper.

* * *

As far as conducting discovery to see if there is anything mitigating, if they want to ask questions when he is on the stand and find out what he has to say, then we can do it right here and there is no reason to delay the proceedings. ***I don't think he has anything pertinent to Mr. Cooper that would be mitigating.***

Id. (emphasis added). Mr. Cooper's lawyers responded:

MR. KOCH: Number one, what's the hurry? We are here on a murder charge in which Mr. Cooper is facing a potential death sentence.

Number two, we have been advised there is a witness co-participants [sic] in the murders that is available for us to talk to and potentially provide some mitigating factors...

(Dir. 395) The prosecutor, intent on keeping McCoy away from Mr. Cooper's lawyers, held to his position that no continuance was warranted.

MR. CROW: If there are mitigating circumstances, call him to the stand and ask what they want to ask. But to delay the proceedings, we have family here, we have people here and really this witness was only a witness in the Walton case, and ***I feel very strongly that we should proceed in the case today and not continue it.***

Id. (emphasis added). Understandably, Mr. Cooper's trial counsel declined the invitation by the prosecutor to engage in the legal equivalent of Russian roulette by cross-examining a witness in court when there was no way of knowing the content of the witness' testimony.

MR. KOCH: The problem is that we have not yet had a chance to talk with Mr. McCoy. ... If we were to proceed today we have had no

opportunity to prepare properly for whatever it is Mr. McCoy had to say.

(Dir. 396) The prosecutor then responded by telling the judge that the State would not call McCoy and the judge summarily denied the motion for continuance. Id.

We now know why it was so critical to the prosecutor that McCoy not be made available to Mr. Cooper's attorneys: McCoy indeed had exculpatory testimony inconsistent with the State's theory that it was Mr. Cooper who returned to the house to fire the final *coup de grace* shot at Steven Fridella as well as evidence that Mr. Cooper was acting under the substantial domination of co-defendant J. D. Walton when he fired upon the victims. (ROA 340-41, 719-21 1427-29, Ex. 11) Having failed to grant the continuance, the judge never heard this exculpatory testimony that was inconsistent with the trial court's subsequent findings that (a) Mr. Cooper fired the *coup de grace* shot that ended Steven Fridella's life and (b) Mr. Cooper was not entitled to the substantial domination mitigating factor. (Dir. 397) While the propriety of ruling on a motion for continuance is generally within the sound discretion of the trial court, in this case the trial judge abused his discretion in failing to grant the requested continuance. See Wike v. State, 596 So. 2d 1020, 1025 (Fla. 1992) (holding that where the requested continuance is brief and for a specific purpose, and would provide admissible evidence relevant to sentencing, there was reversible error); See Kears

v. State, 770 So. 2d 1119, 1127 (Fla. 2000) (holding that it was the obligation of this Court "to review with caution the exercise of experienced discretion by a trial judge in matters such as a motion for continuance"); see also Scull v. State, 569 So. 2d 1251, 1252 (Fla. 1990) (holding that "haste has no place in a proceeding in which a person may be sentenced to death.").³ This Court's duty to correct the trial court's failure to grant a continuance is further compelled by (a) the statements of the prosecutor misleading the trial court and the defense counsel regarding the exculpatory nature of McCoy's testimony and (b) the actions of the prosecutor in making McCoy available as a witness and then withdrawing him from availability when it became clear that Mr. Cooper might benefit from his testimony. The court's denial of the motion for continuance was error which, considering the magnitude of the proceedings, cannot be deemed harmless. Because Mr. Cooper's appellate counsel never raised this claim in Mr. Cooper's direct appeal,⁴ Mr. Cooper was denied the assistance of effective appellate counsel at a critical stage of his proceedings. This fundamental error may well have been the difference between life and death. See Rutherford v. Moore, 774 So. 2d 637, 646 (Fla. 2000).

³ The trial court could have easily resolved the sole legitimate basis the prosecutor argued for proceeding without the continuance – the presence of family and witnesses – by proceeding with the witnesses available that day and thereafter continuing the hearing to give Mr. Cooper's lawyers a chance to talk to McCoy.

⁴ By appellate counsel's own admission, his failure to raise the trial court's refusal to grant the continuance was an oversight, not a strategic consideration. See Swisher Affidavit at 4.

Because reliability in the outcome has been undermined, Mr. Cooper's sentence should be commuted.

CLAIM 2: APPELLATE COUNSEL INEFFECTIVELY RAISED NO CLAIM REGARDING THE SENTENCING JURY'S AND JUDGE'S IMPROPER CONSIDERATION OF THE NON-STATUTORY AGGRAVATING FACTOR OF "LACK OF REMORSE."

For Florida's capital sentencing scheme to pass constitutional muster, courts must be ever-vigilant to assure that the aggravating circumstances specified by the statute are the exclusive aggravators considered by the judge and jury. See Miller v. State, 373 So. 2d 882, 884 (Fla. 1979). No other circumstances or factors may be used to aggravate a crime for the purpose of imposing a death sentence. Id. The Florida Supreme Court has stated that

We must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of the death penalty. Strict application of the sentencing statute is necessary because the sentencing authority's discretion must be "guided and channeled" by requiring an examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.

See Elledge v. State, 346 So. 2d 998, 1003 (Fla. 1977) (emphasis added).

This Court has repeatedly held that lack of remorse is not a statutory aggravating factor and cannot, therefore, be considered as such. See e.g., Shellito v. State, 701 So. 2d 837, 842 (Fla. 1997). This was the law at the time of Mr.

Cooper's penalty phase and continues to be the law today.

Despite this, during the instruction conference prior to the penalty phase, the trial court stated that lack of remorse:

can be offered to the jury and judge as a factor which goes into the equation whether or not the crime was especially cruel [and] here we are referring to an affirmative statement [by] the defendant indicating lack of remorse.

(Dir. 1385)

The State then elicited testimony from State informant Paul Skalnik, over the objection of defense counsel. (Dir. 1429)

MR. KOCH: One matter, housekeeping sort of matter. Before Mr. Skalnik takes the stand there are a couple of things I would like to address that were also in my motion in limine⁵ that we attempted to have heard prior to trial. We further object to any testimony by Mr. Skalnik that there was a lack of remorse in that Mr. Cooper bragged about that supposed event.

MR. YOUNG: ... Certainly the element of bragging goes to the element of coldness and cold and calculated.

THE COURT: We were just discussing that problem, cold and calculated, remorse. Now, lack of remorse goes to cold and calculated I suppose to heinous, atrocious and cruel, is that correct?

MR. YOUNG: Yes, sir.

(Dir. 1425-26) (emphasis added). There followed a colloquy in which the other prosecutor, Doug Crow, attempted to diminish Young's contention that the State was seeking to consider lack of remorse, but the court clearly still believed,

⁵ Koch moved to preclude Skalnik's testimony and made a cursory attempt to cross-examine him at trial, both of which were severely hindered by Koch's previous representation of Skalnik.

erroneously, that lack of remorse could be considered:

THE COURT: Any aspect of the defendant's character I think is admissible. Objection overruled.

(Dir. 1428) (emphasis added).

At the penalty phase closing argument, the State, despite having conceded earlier that lack of remorse should not be considered, argued that the defendant deserved the death penalty due to his bragging and lack of remorse:

We talked about Mr. Skalnik's testimony and about the things he said. He said this man bragged about the crime. ***This man thought it was no big deal, no big deal that he killed three people...***

Well, what do you know really about how he felt about things and how he felt about this crime? Well, you listen to that tape. I think Mr. Crider said, we will agree, the pictures in this case are so bad and evidence is so bad and the crime is so bad how could anybody but be repulsed by it? How could anybody not help but be affected by it? ***I'll tell you there was a guy sitting over there that wasn't.*** Jeff McCoy cried when he talked to the police. Terry Royal cried when he talked to the police. At least J.D. Walton was a little nervous. You heard him, we did this, we did this, and we came back and then I shot the guy. What did he tell Paul Skalnik? ***He was bragging.*** It was a bit – ***no big deal that people were dead, but it was quite a feat, I'm the guy that's involved in those Highpoint killings, a big shot.***

I don't mean to be sarcastic, but you have to give, to get a little jaded with these kind of people.

(Dir. 1588, 1584, 1585)

Despite the wealth of case law to the contrary, the court clung to its view that lack of remorse was relevant and could be considered in making the sentencing determination. (Dir. 243-48) The trial court's written Findings as to Aggravating and Mitigating Circumstances in Support of the Death Penalty – filed over 70 days after the judge's issuance of the sentence of death after plenty of time for consideration and revision – make clear that the trial court *actually found* lack of remorse as an aggravating factor supporting the death penalty.

[The defendant's expert's testimony] merely buttresses the State's contention that an aspect of the Defendant's character was that he was really without remorse.

(Dir. 243) Mr. Cooper was prejudiced by the prosecutor's introduction of Skalnik's testimony regarding Mr. Cooper's alleged lack of remorse. Mr. Cooper was prejudiced by the prosecutor's improper argument that Mr. Cooper lacked remorse. And Mr. Cooper was prejudiced by the court's actual reliance on lack of remorse as a non-statutory aggravating factor.⁶

The introduction and consideration of this non-statutory aggravator in the

⁶ Unlike the cases where this Court has found that consideration of the lack of remorse aggravator was harmless, Mr. Cooper's penalty phase included not only reference in closing argument, but also live testimony on this non-statutory aggravator. Contrast Shellito v. State, 701 So. 2d 837, 842 (Fla. 1997) (prosecutor's question to the jury during closing argument about whether defendant's was remorseful held harmless); Wournos v. State, 644 So. 2d 1000, 1010 (Fla. 1994) (brief reference to lack of remorse by prosecutor was harmless error).

sentencing determination violated the Eighth Amendment. See Barclay v. Florida, 463 U.S. 939, 955 (1983). Unfathomably, Mr. Cooper's appellate counsel failed to raise this issue on appeal, even though this Court had held two years earlier that lack of remorse could not be considered as an aggravating factor. See Pope v. State, 441 So. 2d 1073, 1078 (Fla. 1983). If raised on direct appeal, this would have necessitated vacating Mr. Cooper's death sentence. See Elledge, 346 So. 2d at 1002-03; Barclay v. Florida, 463 U.S. 939, 955 (1983). Appellate counsel's level of performance fell far below the level expected of advocates before this Court and Mr. Cooper's death penalty should be vacated accordingly.

CLAIM 3: APPELLATE COUNSEL INEFFECTIVELY FAILED TO ARGUE THAT THE PROSECUTOR'S IMPROPER ARGUMENT REGARDING MR. COOPER'S LACK OF MITIGATORS CONSTITUTED AN IMPERMISSIBLE NON-STATUTORY AGGRAVATING FACTOR.

Appellate counsel erred in failing to raise in the direct appeal the improper argument by the prosecutor in his closing statement regarding the lack of mitigating testimony about Mr. Cooper's prior criminal record of non-violent offenses or any other statutory mitigating factors. Specifically, the prosecutor in his closing argument stated:

... Don't assume because you haven't heard good or bad things that it is a mitigating circumstance to consider because it is not an issue.
They have not raised that as something they feel is mitigating.

When their big chance came to establish mitigating circumstances what did you hear? You heard one witness.

(Dir. 1544-55) (emphasis added).

The trial court committed reversible error in allowing this argument to be made because Mr. Cooper had the right not to rely on any mitigating factors. Because mitigating factors are for the defendant's benefit, the State is not allowed to present damaging evidence or arguments against the defendant to rebut a mitigating circumstance that the defendant has expressly conceded does not exist. Maggard v. State, 399 So.2d 973, 978 (Fla. 1981). Furthermore, the jury cannot be advised of the fact that the defendant could have presented evidence relating to a particular mitigating factor. Id. Any mitigating factor not invoked by Mr. Cooper must be excluded from the list of factors read to the jury and neither the State nor the prosecutor is allowed to argue to the jury the existence or the non-existence of the mitigating factor. Id.

The record shows that the State in its closing argument did just that. The State told the jury that Mr. Cooper could have introduced evidence relating to certain mitigating factors and inferred that Mr. Cooper chose not to introduce such evidence because it would not have helped his case.

The State cannot turn the defendant's decision not to offer mitigating

evidence into an aggravating circumstance. Even though Mr. Cooper's trial counsel failed to object to the improper argument at trial, appellate counsel was not excused from raising this meritorious claim on appeal. See Pait v. State, 112 So. 2d 380, 385 (Fla. 1959).

CLAIM 4: APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE SENTENCING COURT'S FAILURE TO CONSIDER AND WEIGH AGGRAVATING AND MITIGATING CIRCUMSTANCES AND THEN SET FORTH SUCH IN A TIMELY WRITTEN SENTENCE OF DEATH, IN DIRECT VIOLATION OF FLORIDA LAW AND MR. COOPER'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE 8TH AND 14TH AMENDMENTS.

The trial court failed to comply with Florida Statute § 921.141 (3) in three ways. First, the trial court failed to file contemporaneous written findings at the time of sentencing, despite making oral findings that were conclusory, inadequate, and did not effect a reasoned weighing at the time of the imposition of the death sentence. Second, the trial court's findings may have resulted from the court's wrongful delegation of its obligations to the State attorney. And third, the findings did not reflect an independent weighing of the aggravating and mitigating circumstances for each charge for which Mr. Cooper was to be sentenced.

Failure To Make Contemporaneous Written Findings

Florida Statute §921.141 (3) provides, in pertinent part: "In each case in which the court imposes the death sentence, the determination of the court

shall be supported by specific written findings of fact”

In Mr. Cooper's case, the sentence of death was pronounced on March 14, 1984. At that time, Judge Walker's only findings in support of the death penalty were conclusory, inadequate and did not reflect a careful and reasoned weighing process. In sum total, the court's oral findings at the time of sentencing were as follow:

The Court finds that each of the aggravating circumstances that were submitted to the jury were proven. The Court has considered the mitigating circumstances and the evidence here today and has weighed them against the other, and the Court finds that there really are no mitigating circumstances that outweigh the aggravating circumstances either individually, that is either separately or in toto.

It is the judgment and sentence of this Court that you, Richard Cooper, are of course adjudicated guilty of each of the crimes therefor herein and that you are sentenced to death in the manner and means appropriate at the time that the sentence will be carried out.

(Dir. 467-8). The court did not identify which aggravating or mitigating factors were found and did not refer to any evidence in support of them.

As Chief Justice Ehrlich concurred in an appeal from Mr. Cooper's co-defendant's death sentence:

The trial court's written findings with respect to aggravating and mitigating circumstances must at least be coincident with the imposition of the death penalty. It is unconceivable . . . that any meaningful weighing process can take place otherwise.

Van Royal v. State, 497 So. 2d 625 (Fla. 1986); See also Patterson v. State, 513

So. 2d 1257, 1261 (Fla. 1987). At the time sentence was imposed, Mr. Cooper was denied his due process rights under Fla. Stat. Sec. 921.141(3). Without those protections, there is no guarantee against "arbitrary and capricious sentencing like that found unconstitutional in Furman." Zant v. Stephens, 462 U. S. 862, 877 (1983). The Florida death penalty statute was unconstitutionally applied in Mr. Cooper's case.

The trial court attempted to "correct" his error by belatedly entering written findings some 70 days later on May 30, 1984 (Dir. 243-8), after the notice of appeal was filed (Dir. 252) and after the trial court surrendered jurisdiction to this Court. See Van Royal, 497 So. 2d at 628. However, the error could be cured only if, at the time of sentencing, the court's oral comments effected the requisite careful weighing. See Muehlman v. State, 503 So. 2d 310, 317 (Fla. 1987). That did not happen here as the court's meager two-paragraph statement made at sentencing demonstrates.

Improper Delegation of Duty of Drafting Written Findings to State

Attorney

Fla. Stat. sec. 921.141(3) requires that the "court... shall set forth in writing its findings." Mr. Cooper's appellate counsel has sworn in his affidavit that it was common knowledge and practice for the State Attorney's Office to draft the judge's findings under 921.141(3) and that the judge thereafter signs

them. See Swisher Affidavit at 2-3. In addition, a review of the sentencing findings in each of Cooper's co-defendants' respective cases reveals that the written findings are very similar.⁷ (ROA 721-28 and Van Royal Findings) This goes beyond coincidence and leads, rather, to the inexorable conclusion that Mr. Cooper's trial judge delegated his non-delegable duty of drafting the written findings required by § 921.141 to the state attorney's office.

In Patterson v. State, 513 So. 2d 1257, 1261 (Fla. 1987), this Court held that any delegation of this responsibility was improper where the court's statements at the sentencing hearing did not demonstrate that the judge, prior to imposing sentence and requesting the State attorney to draft the sentencing order, had fulfilled his duty to weigh the aggravating and mitigating circumstances.

Having the benefit of the Van Royal and Cooper findings, appellate counsel was ineffective for not raising this issue on appeal. At a minimum, appellate counsel should have filed a motion to relinquish jurisdiction to determine whether such an impermissible delegation had in fact occurred.

Failure to Independently Weigh Aggravating and Mitigating Circumstances for Each Charge

⁷ While the same judge authored the sentencing findings in Walton as did the findings in Cooper, a different judge wrote the Van Royal findings. The only common elements in all three trials were the prosecutors assigned to the cases.

Fla. Stat. sec. 921.141 provides that in "*each case* in which the court imposes the death penalty" (emphasis added), the court shall enter the requisite findings. To comply with the statute's commands, in a multiple count conviction –such as Mr. Cooper's – the trial court must make separate, independent findings as to the weighing of aggravating and mitigating circumstances relative to each count for which the death penalty will be imposed.

In Mr. Cooper's case, the trial court did not make separate findings for each victim. The failure to weigh each count separately means that as to some, or all, of the counts there is a risk of "arbitrary and capricious sentencing like that found unconstitutional in Furman." See Zant v. Stephens, 462 U. S. at 877.

The trial court's written findings specify which aggravators were found, *but do not specify which aggravators apply to which victim*. (Dir. 243-48) The court's oral findings above did nothing to clarify this point. (Dir. 467-68) In fact, the oral findings at sentencing were so inadequate that the State attorney requested the to court clarify that it was rendering a death sentence on all three counts. (Dir. 469)

The court's written findings provide no clarification. In finding that the "heinous, atrocious and cruel" and "cold, calculated and premeditated aggravating" circumstances were applicable, the court relied at least in part, on the fact that Mr. Cooper returned to deliver the *coup de grace* to Mr. Fridella. (Dir.

246) This evidence can only be relevant to the one count in the indictment, that of the murder of Steven Fridella.

Appellate counsel failed to raise on direct appeal any of these three issues arising out of the defective written findings. This performance is substantially below the level of performance expected from advocates appearing before this Court in capital cases. Undoubtedly, the most telling evidence of appellate counsel's substandard performance is the appeal to this Court in Van Royal. See 497 So. 2d at 628. Appellate counsel for Mr. Cooper's co-defendant Van Royal did raise the issue that the trial court's findings did not effect a reasoned weighing at the time of the imposition of the death sentence. Van Royal ultimately prevailed before this Court on that issue and his death sentence was vacated. See id.

If the trial court's errors had been raised on direct appeal, this Court would have vacated Mr. Cooper's death sentence as well. See id.; Patterson, 513 So. 2d 1257. But for appellate counsel's failure to raise these issues on direct appeal, Mr. Cooper would have life sentences today.

CLAIM 5: MR. COOPER'S JURY WEIGHED INVALID AND CONSTITUTIONALLY VAGUE AGGRAVATING CIRCUMSTANCES IN VIOLATION OF HIS RIGHT TO AN INDIVIDUALIZED AND RELIABLE SENTENCING PROCEEDING AS GUARANTEED BY THE 8TH AND 14TH AMENDMENTS TO THE U. S. CONSTITUTION. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE.

Aggravating circumstance must be described in terms that are commonly understood, interpreted and applied. They must provide guidance and direction to the sentencer as to any particular aspect of a killing that justifies the death penalty. The Supreme Court has ruled that an aggravating circumstance cannot stand when it is so vague that it fails to adequately channel the sentencing decision and thus allows for "a pattern of arbitrary and capricious sentencing like that found unconstitutional in Furman." See Zant v. Stephens, 462 U. S. at 877.

Improper Use of Heinous, Atrocious and Cruel Aggravator

With respect to the "especially heinous, atrocious and cruel" aggravating circumstance, this Court has also recognized that the circumstance must be applied to narrow the class of defendants eligible for the death penalty. This Court has noted that although:

all killings are atrocious,... [s]till, we believe that the Legislature intended something "especially" heinous, atrocious or cruel when it authorized the death penalty for first degree murder.

See Tedder v. State , 322 So. 2d 908, 910 (Fla. 1975). Accordingly, this Court has limited the use of this circumstance to "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973). Indeed, in Maynard v. Cartwright, 486 U.S. 356, 364 (1988), the U. S. Supreme Court struck down Oklahoma's application of the "heinous, atrocious and cruel"

aggravating factor⁸ because the Oklahoma courts did not sufficiently guide the jury's sentencing discretion.

Over Mr. Cooper's trial counsel's objection (Dir. 71, 97-98, 1361, 1523-28), the trial judge gave the following confusing and unconstitutionally vague instruction on the "especially heinous, atrocious and cruel" aggravating circumstance: "The crime for which the defendant is to [be] sentenced was especially wicked, evil, atrocious or cruel." (Dir. 1606) The court did not attempt to instruct the jury that this circumstance only applied to "the conscienceless or pitiless crime which is unnecessarily torturous to the victim," Dixon, 283 So. 2d at 9, even though Mr. Cooper's counsel had specifically referred the judge to that case (Dir. 1528). The court did not explain to the jury that "heinous means extremely wicked or shockingly evil" or that "cruel means designed to inflict a high degree of pain..." Id. The instruction is patently erroneous since it could be easily interpreted by the jury *as requiring* a finding that the crime was HAC.

Proper jury instructions in an execution style case like Mr. Cooper's are particularly critical. This Court has held that HAC is not appropriate in execution style murders "unless the State has presented other evidence to show

⁸ Oklahoma's "heinous, atrocious and cruel" aggravating factor is virtually identical to its counterpart in Fla. Stat. 921.141(5) (h). See generally Maynard v. Cartwright, 822 F.2d 1477 (10th Cir. 1987).

some physical or mental torture of the victim." See Hartley v. State, 686 So. 2d 1316, 1323 (Fla. 1996); see also Donaldson v. State, 722 So. 2d 177, 186 (Fla. 1998) (illustrating that an instantaneous gunshot killing does not alone satisfy the requirements for the HAC aggravating factor).

It is readily apparent that the instructions given to the jury of the "especially heinous, atrocious and cruel" aggravating circumstance did not adequately guide the jury in rendering its sentences as required by Stephens. Failure to raise this issue on direct appeal⁹ renders appellate counsel's performance below the level of competence required in capital cases before this Court.

Improper Cold, Calculating and Premeditated Aggravator Instruction

With respect to the "cold, calculated and premeditated" aggravating circumstance, Fla. Stat. 921.141 (5) (i), this Court requires "heightened" premeditation evidenced by a "careful plan or prearranged design to kill" to support a finding of this aggravating circumstance:

While there is ample evidence to support simple premeditation, we must conclude that there is insufficient evidence to support the heightened premeditation described in the statute...

⁹ The appeal did raise the issue of whether the evidence at trial was sufficient to support the finding of "heinous, atrocious and cruel." See Appellant's Initial Brief, pp. 18-19. Having focused his attention on the aggravating circumstance, the failure of counsel to raise the issue of the adequacy of the instruction is even more egregious.

Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987) (emphasis supplied).

At Mr. Cooper's penalty phase proceeding, over counsel's objection (Dir. 71, 97-98, 1529-32), the trial court gave the following vague instruction on the "cold, calculated and premeditated" aggravating circumstance: "[T]he crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without... any pretense of moral or legal justification." (Dir. 1606). The court made no attempt to instruct the jury on the requirement of a careful plan or prearranged design to kill to establish heightened premeditation, nor did the court define the CCP aggravator to the jury. See Rogers v. State, 511 So. 2d at 526; Banks v. State, 700 So. 2d 363, 366 (1997). Indeed, the instruction is so vague that it could have been interpreted by the jury as instructing them that the murders *were* in fact "cold calculated and premeditated" as a matter of law.

As given to the jury, the CCP aggravating circumstance arguably misguided the jury's sentencing decision. Appellate counsels' failure to raise this issue on direct appeal¹⁰ renders their performance below the level of competence required in

¹⁰ The appeal did raise the issue of whether the evidence at trial was sufficient to support the finding of "cold, calculated and premeditated." See Appellant's Initial Brief, pp. 20-21. Having focused his attention on the aggravating circumstance, the failure of counsel to raise the issue of the adequacy of the instruction is even more egregious.

capital cases before this Court.

Improper Finding and Instruction of the Aggravating Circumstance of "Prior Capital Felony."

The trial court improperly stacked the same underlying facts – that three people were killed – to serve as the basis for instructing the Jury on the aggravating circumstance of both (1) that the defendant had been convicted of a prior capital felony and (2) that the killings were heinous, atrocious and cruel. (Dir. 1604, 235, 386-87). Trial counsel repeatedly objected to this instruction and moved for a new penalty phase on the grounds of impermissible stacking (Dir. 1352-5, 1498-1504, 230-31). During argument on the motion for new trial, Mr. Cooper's trial counsel explained how the court had improperly "stacked" the aggravating circumstances:

One of the things that you talked about or that Mr. Crow argued in arguing this was an extremely heinous, atrocious or cruel crime, was the fact that three people were killed, and one of them necessarily was killed first, and the other one that was killed second had to have been aware that the first one was shot, and the third had to have been aware that the first two were shot. And that was one of the arguments he made. Well, if you use that as a justification of extremely heinous, atrocious and cruel, and then you turned around and use those very same factors as justification for prior convictions, then what you are doing is you are stacking aggravating circumstances.

(Dir. 386-7). The trial court denied the motion (Dir. 387, 235).

Despite trial counsel's repeated objections (Dir. 1352-5, 1498-504) and their motion for a new penalty phase (Dir. 230-31), appellate counsel never raised the

issue on direct appeal. See Cooper v. State, 492 So.2d 1059 (1986).¹¹

The failure to raise this issue, which had been properly objected to and preserved both at trial and in the motion for a new penalty phase, is inexplicable. Appellate counsel's performance fell substantially below the level expected of counsel.

Prejudice Arising from Improper HAC, CCP and/or Prior Capital Felony Instructions

The jury's recommended sentences were far from unanimous. Given that the votes were 9 to 3, 7 to 5 and 7 to 5, it is likely that, had the jurors been properly instructed on any one of the instructions addressed in this claim, the recommendations would have been for a life sentence. This difficulty in predicting the effect of prejudicial errors has resulted in error that affects the impartiality of the jury – as these improper instructions most certainly did require a new trial – or, in Mr. Cooper's case, a new penalty phase. See Rose v. Clark, 478 U. S. 570, 578 (1986).

CLAIM 6: MR. COOPER'S APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO ARGUE THAT MR. COOPER WAS DENIED CONSIDERATION OF ALL MITIGATING FACTORS IN VIOLATION OF THE 8TH AND 14TH AMENDMENTS TO THE U. S. CONSTITUTION AND THAT THE PROSECUTOR'S IMPROPER COMMENTS

¹¹ Even the trial judge was initially concerned as to the propriety of instructing the jury as to this aggravating circumstance (Dir. 1352-3).

**CURRYING SYMPATHY SO INFLAMED THE JURY AS TO
RISE TO THE LEVEL OF PROSECUTORIAL
MISCONDUCT IN VIOLATION OF MR. COOPER'S 5TH
AND 14TH AMENDMENT DUE PROCESS RIGHTS.**

To be constitutional, a capital sentencing proceeding must permit the sentencer to consider "any aspect of a defendant's character or record that the defendant proffers as a basis for a sentence less than death." See Lockett v. Ohio, 438 U.S. 586, 604 (1978). To satisfy the heightened "need for reliability in the determination that death is the appropriate punishment in a specific case," there must be a "particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." See Woodson v. North Carolina, 428 U.S. 280, 303-04 (1976). Thus, before deciding whether death is the appropriate punishment, the jury must evaluate not only the circumstances of the crime, but also the character of the accused. See Eddings v. Oklahoma, 455 U.S. 104, 111 & n.7 (1982). Remarks that direct a jury to disregard the consideration of sympathy, without defining or distinguishing such evidence from viable mitigating evidence, improperly suggest to "the jury that it must ignore the mitigating evidence about the [defendant's] background and character," since much of that evidence, as discounted by the State in the instant case, may suggest sympathy for the defendant. See California v. Brown, 479 U.S. 538, 545-46 (1987) (O'Connor, J., concurring). Mercy towards the defendant

faced with the possibility of death is an allowable consideration. See Caldwell, 472 U.S. at 331; Pait, 112 So. 2d at 385.

Failure to Consider Sympathy for Mr. Cooper as a Mitigating Factor

Beginning with the *voir dire* phase of the trial, the prosecutor conditioned the jurors against affording any sympathy for Mr. Cooper or his childhood predicament. (Dir. 613-14). See Brooks v. State, 762 So. 2d 879, 900 (Fla. 2000); Urbain v. State, 714 So. 2d 411, 420 n.9 (Fla. 1998). This theme was reiterated throughout the State's closing argument in the penalty phase of the trial, while at the same time, the State discounted the mitigating factors that the court allowed the jury to consider. (Dir. 1542-91) By joining the concepts of the prohibition against sympathy for Mr. Cooper, denigrating his mitigation evidence, and inciting the jury toward sympathy for the victims, the jurors were clearly confused, as evidenced by their split votes for death, as to just what they could consider as mitigation. See Brown, 479 U.S. at 545-46 ("In combination with the instructions, the prosecutor's comments suggesting that jury must ignore mitigating evidence about Defendant's background and character may create a 'legitimate basis for finding ambiguity concerning the factors actually considered by the' jury.").

The State admonished against considering sympathy for Mr. Cooper:

You heard from the defendant's mother, and it's easy to feel sympathy for her. . . . But I want you to understand that ***sympathy is not a mitigating circumstance*** and I don't have the ability—I'm not

allowed to bring in the mothers of the victims, to bring in their families and have them talk about how he was, they were, when they were five years old or six years old, what it was like when they went through high school and what their experiences were and their personals were. ***That's not a relevant factor.***

For the same reason I ask you to disregard what I feel was more an attempt to curry favor and create sympathy and not to establish any relevant or appropriate mitigating circumstance.

(Dir. 1546) (emphasis added)

Mr. Cooper's mother testified about Mr. Cooper's difficult childhood and the difficult relationship he had with his father. (Dir. 1469-72) All of this evidence is admissible in the penalty phase of the proceedings.

Prosecutor's Misconduct in Currying Juror Sympathy

For the State to tell the jury that it could not consider this evidence because *he felt* it was "an attempt to curry favor and create sympathy and not to establish any relevant or appropriate mitigating circumstances," was a misstatement of the proffer and created an impermissible impression that the jury should discount Mr. Cooper's mother's testimony. These improper comments were made in conjunction with multiple inappropriate remarks seeking to inflame the jury by "currying" sympathy for the victims and their families. These comments are so pervasive that only the most egregious are excerpted as illustration:

Can there really be any serious—you heard the tape of what Chris went through. I don't think him taking the stand would have expressed what he felt, what he thought and the terror he expressed any better

than that pathetic call for help that he made to the sheriff's office. . . .
(Dir. 1563)

Well, you look at it from the victims' perspective, the suffering, the pain, the agony that the victims endured throughout the process of forfeiting their lives to his man's hand. . . . You recall we read you all the witnesses names. . . . [A]nd one thing that everybody almost forgets, and I was as much at fault as anybody else, we didn't read you the names of the victims. It was like they hadn't existed. I would like you to think about that as you consider each case, extremely wicked or evil. . . . These people's rights were violated. They were in their homes sleeping in their bed. . . . Now, you can imagine the experience of being awakened and having four guys and four guns staring you in the face, the feeling of terror, the feeling of helplessness that must accompany that and a sense of outrage. . . . I have never had the experience of being wounded by a shotgun, . . . but I'm sure that it must be extremely painful. You cannot quantify the suffering that someone endures for seconds or minutes that's that excruciating and that severe. . . . The first person shot, he has survived minutes. How long he was conscious, how long he suffered I don't know. We can hope that it wasn't too long. (Dir. 1569-70)

I can't express how that must have felt, but I can get a feeling by listening to Chris Fridella's terror and that tape affects me every time I hear it. I'm sure it must have affected you in some way. It's not a feigned affectation, something that's difficult to express just to listen to. But you think and you hear the terror and the desperation in Chris Fridella's voice and you can get a sense for what his father must have felt as he lay on the floor helpless. And it's that man who is responsible. . . . (Dir. 1571)

What the prosecutor thought or felt is irrelevant. What he said to the jury and the way in which he misstated the evidence that could be considered by the jury as appropriate mitigating evidence and his plea for sympathy for the victims and their families was not only irrelevant, it was contrary to law.

This court does not tolerate improper comments of prosecutors made to

inflare and bias a jury. See Thomas v. State, 748 So. 2d 970, 985 (Fla. 1999).

The argument held violative in Garron v. State, 528 So. 2d 353 (Fla. 1988), echoes inappropriate comments made by the State in Mr. Cooper's trial, such as:

[Y]ou can just imagine the pain this young girl was going through as she was laying there on the ground dying. . . . Imagine the anguish and the pain that [the victim] felt as she was shot in the chest and drug [sic] herself from the bathroom into the bedroom where she expired.

See Urbin, 714 So. 2d at 419 (quoting Garron, 528 So. 2d at 358). Comments during the Cooper argument were no less violative:

Well, you look at it from the victims' perspective, the suffering, the pain, the agony that the victims endured throughout the process of forfeiting their lives to his man's hand. . . . Now, you can imagine the experience of being awakened and having four guys and four guns staring you in the face, the feeling of terror, the feeling of helplessness that must accompany that and a sense of outrage. . . .

These comments, that place the jury in the position of the victims, "and having them imagine their pain are *clearly prohibited*" as violations of the "Golden Rule." Id. (emphasis added) (quoting Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985)). In conjunction with the other comments set forth above, they "demonstrate the classic case of an attorney who has overstepped the bounds of zealous advocacy and entered into the forbidden zone of prosecutorial misconduct." Urbin 714 So. 2d at 420 (quoting Garron, supra.)¹²

¹² The court cited similar cases and examples that were no more inflammatory than those uttered in Mr. Cooper's trial. See id. at 421-22; see also Muhammad v. State, 782 So. 2d 343, 360 (Fla. 2001); Brooks v. State, 762 So. 2d 879, 898 (Fla. 2000)

Moreover, comments that invite the jury to administer the same mercy for the defendant as the defendant showed for the victims are intolerable, and may constitute fundamental error even in the absence of a contemporaneous objection. See Thomas, 748 So. 2d at 985 n.10 (" . . . asking a jury to show as much mercy to a defendant as he showed the victim is a clear example of improper prosecutorial misconduct, which constitutes error and will not be tolerated"). The comment in Thomas, asking the jury "to show him the same mercy that he showed to Imara Skinner on that day," was far less inflammatory than that made by the prosecutor in Mr. Cooper's trial:

[Cooper] has already put three people to death, three innocent people and he has sentenced Chris Fridella to a life of emptiness and a life full of loss and a lot of sorrow. There was nobody there . . . to argue for those victims, and there wasn't anyone there to protect Chris. . . . There was no one there to speak eloquently, argue, refer to God, talk about the electric chair or the effects of a shotgun wound, no one there. This man sentenced them to die.

(Dir. 1588-89)

This Court's intolerance of these types of improper remarks is well established, and should have been cognizable to Mr. Cooper's trial counsel. See,

("After carefully reviewing the prosecutor's penalty phase closing argument in this case, and considering the jury's close seven-to-five recommendation that Brooks be sentenced to death, we determine that the objected-to comments, when viewed in conjunction with the unobjected-to comments, deprived Brooks of a fair penalty phase hearing."). Brooks also contains numerous examples of prosecutorial comments found to be distasteful, inflammatory, and, more significantly, determined to constitute harmful error. See Brooks, 762 So. 2d at 900.

e.g., Stewart v. State, 51 So. 2d 494, 494 (Fla. 1951) ("This Court has so many times condemned pronouncements of this character that the law against it would seem to be so commonplace that any layman would be familiar with and observe it."). Thus, even though Mr. Cooper's trial counsel failed to object, appellate counsel should have recognized that a fundamental error had been committed that denied Mr. Cooper a fair trial at a crucial stage and raised it on appeal. His failure to do so subjected Mr. Cooper to ineffective assistance of appellate counsel, for which he should receive redress.

CLAIM 7: MR. COOPER WAS DEPRIVED OF HIS RIGHTS TO AN INDIVIDUALIZED AND RELIABLE CAPITAL SENTENCING DETERMINATION AS A RESULT OF THE PRESENTATION OF CONSTITUTIONALLY IMPERMISSIBLE VICTIM IMPACT INFORMATION, IN VIOLATION OF THE 8TH AND 14TH AMENDMENTS.

Appellate counsel provided ineffective assistance to Mr. Cooper because he failed to raise on appeal the trial court's fundamental error in admitting extremely prejudicial victim impact evidence. At the time of Mr. Cooper's trial and sentencing, Florida law did not permit the use of victim impact evidence at the guilt phase of a criminal proceeding in which the defendant was pleading – as Mr. Cooper plead – not guilty to the crimes charged. See, § 921.143(1), Fla. Stat. Ann. (1983); see also Gardner v. Florida, 430 U.S. 349, 358 (1977).

Mr. Cooper's appellate counsel should have been aware that Florida's victim

impact statute did not permit *any* testimony from a victim, or someone impacted by the crime against the victim, in the guilt phase of Mr. Cooper's trial. In particular, the introduction of this improper evidence at the commencement of the guilt phase of the trial was so prejudicial that it permeated the entire proceedings and brings into doubt the validity and reliability of the jury's already tight verdicts in favor of death. Immediately upon calling its first witness, the State played an audiotape of the 911 call placed by eight-year-old Christopher Fridella on the night in question. Its paralyzing effect set the ominous tone of the trial and effectively caused Mr. Cooper to be condemned in the eyes of the jury before the first witness had been called by the prosecutors. This evidence was so inherently prejudicial that there is a presumption that prejudice rising to the level of fundamental error occurred.

CLAIM 8: THE FLORIDA DEATH SENTENCING STATUTE AS APPLIED IS UNCONSTITUTIONAL UNDER THE 5TH, 6TH, 8TH, AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION BECAUSE MR. COOPER WAS DENIED HIS DUE PROCESS RIGHT TO TRIAL BY A JURY OF HIS PEERS IN VIOLATION OF APPRENDI AND ITS PROGENY.

In Jones v. United States, the United States Supreme Court held, “under the Due Process Clause of the Fifth Amendment and the notice and jury guarantees of the Sixth Amendment, any fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.” 526 U.S. 227, 243 n.6 (1999).

Subsequently, in Apprendi v. New Jersey, the Court held that the Fourteenth Amendment affords citizens the same protections under state law. 530 U.S. 466, 476 (2000).

Apprendi holds that any finding that subjects the defendant to a sentencing enhancement, that increases the punishment beyond the statutory maximum, operates as an element of the offense and requires a jury determination beyond a reasonable doubt. See Apprendi, 530 U.S. at 495.

At the time of Mr. Cooper's penalty phase, the relevant Florida statute provided:

A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than 25 years before becoming eligible for parole unless the proceeding held to determine sentence according to the procedure set forth in § 921.141 results in findings by the court that such person shall be punished by death, and in the latter event such person shall be punished by death.

§ 775.082, Fla. Stat. Ann. (1983) (emphasis added). Applying the Apprendi test, it is clear that aggravators under the Florida death penalty sentencing scheme are elements of the offense which must be charged in an indictment, submitted to a jury during the guilt phase, and proven beyond a reasonable doubt by a unanimous verdict. Under this statute, the State must prove at least one aggravating factor in the separate penalty phase proceeding *before* a person convicted of first-degree murder is eligible for the death penalty. See State v. Dixon, 283 So.2d 1, 9 (Fla.

1973); § 775.082, Fla. Stat. Ann. (1983); § 921.141, Fla. Stat. Ann. (1983). Thus, Florida capital defendants are not eligible for the death penalty simply upon conviction of first-degree murder. If a court sentenced a defendant immediately after conviction, the court could only impose a life sentence. § 775.082, Fla. Stat. Ann. (1983). Therefore, under Florida law, the death sentence is not within the statutory maximum sentence because it increases the penalty for first degree murder beyond the life sentence a defendant is eligible for based solely upon the jury's guilty verdict.

In Apprendi, the Court concluded that because the statute at issue increased the penalty beyond the statutory maximum, it was an element of the underlying crime that required Sixth Amendment protection. See 530 U.S. at 495. The Florida death penalty procedure is similarly flawed. Mr. Cooper's indictment violated the Sixth Amendment because it did not allege the aggravators that the State sought to prove to make Mr. Cooper eligible for a penalty greater than the statutory maximum available after a jury found him guilty of first degree murder.

To meet the standard set forth in Apprendi, Mr. Cooper should have been given notice of what aggravators the State would rely upon in the indictment and the State should have been required to prove each of the aggravators (or elements of the offense) to the jury beyond a reasonable doubt. While the jury was involved in the decision to sentence Mr. Cooper to death through the sentencing hearing, the

jury's involvement did not meet the Apprendi standard. As discussed *infra*, the jury's role was constantly diminished. The prosecutor and the judge told the jury that the judge had the responsibility for sentencing Mr. Cooper and that it was not the jury's decision. Additionally, the jury's decisions regarding the sentence was not unanimous as is required by the Sixth Amendment but rather, were only by slim majorities. Finally, the jury did not even hear all of the mitigating evidence because there was a Spencer type hearing before the judge six weeks after the jury had been dismissed, during which time additional testimony was presented for consideration by the Court.

Accordingly, because of the U.S. Supreme Court's holdings in Jones and Apprendi that sentencing aggravators that have the effect of increasing the maximum sentence are subject to Sixth Amendment requirements and protections, Mr. Cooper's death sentence must be vacated.¹³

¹³ Although the majority of the Court stated in dicta that Apprendi did not overrule Walton v. Arizona, 497 U.S. 639 (1990), the Apprendi Court was not addressing a death case in which constitutional protections are more rigorously applied, and Apprendi did not specifically address the Florida sentencing scheme. See Apprendi, 530 U.S. at 496-97. Moreover, the majority dicta did not carry the force of an opinion of the full court. See id. at 523 (Thomas, J., concurring) ("Whether this distinction between capital crimes and all others, or some other distinction, is sufficient to put the former outside the rule that I have stated is a question for another day."); Id. at 538 (O'Connor, J., dissenting) ("If the Court does not intend to overrule Walton, one would be hard pressed to tell from the opinion it issues today.") Finally, the U.S. Supreme Court has granted certiorari to Ring v. Arizona, which considers Arizona's death penalty statute, a statute similar to Florida's in light of Apprendi.

CLAIM 9: APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE THE ERRONEOUS DIMINISHMENT OF THE ROLE OF THE JURY IN VIOLATION OF CALDWELL.

From the commencement of *voir dire*, the State interrogated the venire about their feelings concerning the death penalty. The responses elicited reveal that several individuals ultimately selected to serve as jurors were apprehensive about imposing such a severe and final penalty absent appropriate circumstances. Thus, it was crucial to impart upon the jury the seriousness of their deliberations consequent to the penalty phase of the trial. However, the prosecution and the trial court repeatedly diminished the jury's responsibility in deciding between a sentence of life or death. On numerous occasions, the jurors were told their decision was merely "an advisory sentence as to what punishment should be imposed . . . upon [Mr. Cooper]." (Dir. 1429) In closing, the State further alleviated any lingering concerns the jurors might have had by consoling that "again, all you do is recommend. If Judge Walker doesn't think it is the appropriate penalty, he wouldn't impose it." (Dir. 1589) At no time did the prosecutor or the judge clarify the "great weight" the judge must afford the jury's recommendation. See Espinosa, 505 U.S. at 1082.

Even more significantly, although Mr. Cooper's trial counsel should have objected to this misstatement of the law, when he attempted to correct the erroneous impression conveyed to the jury, the prosecutor objected in open court,

and asked that the jury be instructed to disregard the true nature of its role, stressing: “It’s your Honor’s decision as to whether to impose it and not the jury’s.” (Dir. 1592) The judge ratified this impression by sustaining the objection: “The jury will be so instructed. Their recommendation, their verdict in this instance is a recommendation only and the instructions carefully carry that; you are so advised.” (Dir. 1592-93) The instructions were equally deficient in delineating the jury’s critical role in imposing a fatal penalty, especially in light of the recurring misrepresentations.

This Court has recognized the need to “stress to the jury the seriousness which it should attach to its recommendation and, when the recommendation is received, to give it weight.” See Garcia v. State, 492 So. 2d 360, 367 (Fla. 1986). Anything less “would be contrary to Caldwell v. Mississippi.” Id. (citing Caldwell v. Mississippi, 472 U.S. 320 (1985)).

Mr. Cooper’s jury should not have been given the false understanding that its verdict was not the only determination whether the death penalty would be imposed in violation of Caldwell. The jurors in this case had no comparable constructive or legal knowledge that would prevent them from being swayed by the repeated comments that they would not be responsible for making the final determination.

It is well established that trial counsel’s failure to object, however, did not excuse Mr. Cooper’s appellate counsel from arguing this meritorious issue on

appeal. See Pait v. State, 112 So. 2d 380, 385 (Fla. 1959) (“when an improper remark to the jury can be said to be so prejudicial to the rights of an accused that neither rebuke nor retraction could eradicate its evil influence, then it may be considered as ground for reversal despite the absence of an objection below, or even in the presence of a rebuke by the trial judge”). These comments that diminished the jury’s sentencing recommendation undermined the jury’s sense of responsibility and cast so much doubt on the reliability of the deliberation process that Mr. Cooper’s death sentence must be vacated.

CLAIM 10: APPELLATE COUNSEL'S FAILURE TO RAISE A CLAIM REGARDING THE ERRONEOUS MAJORITY VOTE JURY INSTRUCTION VIOLATED MR. COOPER'S 5TH, 6TH AND 14TH AMENDMENT RIGHTS IN VIOLATION OF CALDWELL.

Mr. Cooper’s jurors were misinformed as to the required vote for a recommendation of life imprisonment. Although they were correctly instructed that a majority of their number was required to recommend a sentence of death, this same majority instruction was erroneously applied to a life recommendation as well. As instructed, Mr. Cooper’s jury could well have believed that they *could not* return a recommendation of life imprisonment unless a majority of them so voted. See Rose v. State, 425 So. 2d 521, 525 (Fla. 1982); Harich v. State, 437 So. 2d 1082 (Fla. 1983). A six-six vote is sufficient for a recommendation of life; a

majority vote is not necessary. Rose, 425 So. 2d at 525.

At the penalty phase, the trial court informed the jury that:

The fact that the determination of whether a *majority* of you recommend a sentence of death *or sentence of life imprisonment* in this case can be reached by a single ballot ... should not influence you to act hastily.

(Dir. 1608) The court concluded the penalty phase instructions by telling the jury:

You will now retire to consider your recommendation. When *seven or more are in agreement as to what sentence should be recommended* to the court that form of recommendation should be signed by your foreman and returned to the court, and that applies to each count.

(Dir. 1610) (emphasis added). The trial court then immediately allowed the jury to retire for its sentencing deliberations.

Although trial counsel did not object to these instructions, appellate counsel should have nonetheless recognized the significance of such comments – especially in light of the slim margins by which the jury recommended the death sentences. Such inaccurate and misleading statements of the law regarding a capital jury’s actions, function and responsibility irrevocably reduce the reliability of the sentencing determination. See Caldwell v. Mississippi, 472 U.S. 320 (1985). As in Caldwell, the instructions here fundamentally undermined the reliability of the sentencing determination since they created the risk that the death sentence was imposed in spite of factors calling for a less severe punishment.

CLAIM 11: THE INSTRUCTIONS GIVEN TO MR. COOPER'S JURY

SHIFTED TO BURDEN OF PROOF IN THE PENALTY PHASE TO THE DEFENDANT, IN VIOLATION OF HIS DUE PROCESS AND 8TH AMENDMENT RIGHTS.

In Mr. Cooper's penalty phase, the burden was shifted to him to establish that the mitigating circumstances outweighed the aggravating circumstances before a life sentence would be imposed. This improper burden shift violated both due process and the Eighth Amendment.

Mr. Cooper's sentencing jury was specifically instructed that Mr. Cooper bore the burden of proof on the issue of whether he should live or die. According to the instructions given, the State needed only to show that aggravating circumstances existed. Once those were established, Mr. Cooper had to prove not only that mitigation existed, but that it outweighed the aggravator's proven by the State. Despite trial counsel's objections, the jury was never corrected that, before a death sentence could be imposed, the State had to prove that the aggravators outweighed the mitigating circumstances.

The penalty phase instructions relevant to this issue were as follows:

[Evidence at the penalty phase] is presented in order that you might determine, first, whether sufficient aggravating circumstances exist that would justify the imposition of the death penalty and, second, *whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances*, if any.

* * *

[I]t is your duty to follow the law that will now be given to you by the Court and render to the Court an advisory sentence based upon your

determination as to *whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.*

* * *

Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine *whether mitigating circumstances exist that outweigh the aggravating circumstances.*

(Dir. 1430, 1604, 1606-7) (emphasis added).

These instructions violated the Eighth Amendment and Mullaney v. Wilbur, 421 U.S. 684, 703-04 (1975), which render as unconstitutional placing the burden of proof on the defendant to prove an element of an offense, to wit: capital murder. This burden shifting violated Mr. Cooper's due process rights because the application of this unconstitutional standard at the sentencing phase violated Mr. Cooper's rights "to have the sentencing authority's discretion . . . be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." See Jackson, 837 F. 2d at 1474; Arango v. State, 411 So. 2d 172,174 (Fla. 1982).

The trial court's instructions allowed the jury to sentence Mr. Cooper to death without ever requiring the State to prove that death was appropriate. Reasonable jurors could interpret the instructions given as creating a presumption in favor of death unless the defendant not only proved mitigating circumstances existed, but that they also outweighed the aggravating circumstances. This prevented an individualized sentencing determination which is mandated by the

Eighth Amendment. See also Mills v. Maryland, 486 U.S. 367, 375 (1988).

Effectively, these instructions established that once the State proved an aggravating circumstance, death was then presumed. The defense would then need to prove that mitigation existed and that it outweighed the aggravating circumstances shown by the State. This Court has repeatedly held that a jury does not have to recommend death, even when it feels that the aggravating circumstances outweigh the mitigating. See, e.g., Brooks, 762 So. 2d at 902; Henyard v. State, 689 So. 2d 239, 249-50 (Fla. 1996); Garron, 528 So. 2d at 359, n.7 (Fla. 1988). The jury's role is not a "mere tabulation" of aggravation verses mitigation. See Porter, 564 So. 2d at 1064. Mr. Cooper's sentence therefore violated the Eighth and Fourteenth Amendments and must be vacated. The improper jury instructions regarding the burden of proof would have been sufficient to require this Court to vacate Mr. Cooper's death sentence and remand for a new sentencing proceeding, if it had been raised on direct appeal. And, given the split among the jury on the recommendation, there is a reasonable probability that the outcome would have been different had this issue had been raised.

CLAIM 12: PETITIONER’S DEATH SENTENCE AS IMPOSED IS VIOLATIVE OF THE 8TH AND 14TH AMENDMENTS OF THE CONSTITUTION, THE DOUBLE JEOPARDY AND EX POST FACTO CLAUSES OF THE CONSTITUTION, THE CONVENTION ON CIVIL AND POLITICAL RIGHTS (“CCRP”) AND THE CONVENTION AGAINST TORTURE (“CAT”).

The imposition of the death sentence is not always unconstitutional. See Gregg v. Georgia, 428 U.S. 153, 178 (1976). Yet, Gregg also held that the punishment of death is not always constitutional, regardless of the manner in which it is imposed, administered or inflicted. The punishment must “comport with the basic concept of human dignity” and “cannot be so totally without penological justification that it results in the gratuitous infliction of suffering.” Id. at 182-83. Florida’s process of reviewing death sentences coupled with the treatment of those prisoners during the review process does not meet the Gregg standard and constitutes cruel, unusual, inhumane and degrading punishment violative of: (1) the 8th and 14th Amendments of the Constitution; (2) the Ex Post Facto and Double Jeopardy Clauses of the U.S. Constitution; (3) the CCRP; and (4) the CAT.

Florida’s criminal justice system in cases involving the death penalty is no longer a dispenser of justice but rather is a manufacturer of death. Florida sends more persons to death row than its prisons or its judicial system can cope with. At the same time, Florida has failed to provide its death row inmates with humane confinement pending adjudication of the validity of their sentences. The long delays in the sentence’s implementation have resulted in inmates being sentenced to a long prison sentence under inhumane and often tortuous conditions followed by death.

In addition, the death sentence is imposed in an arbitrary and capricious

manner. The great majority of the death sentences imposed by Florida courts will eventually be reversed. Fifty percent of all death sentences imposed are reversed on direct appeal and an astounding sixty-eight percent are reversed prior to implementation.

Florida's policies and practices have caused Mr. Cooper more pain and suffering than is normally associated with being condemned to death. Mr. Cooper's appeals process has been unreasonably delayed by the State's refusal to comply with its mandatory disclosure obligations. It took the Circuit Court over ten years to finally hold an evidentiary hearing on Mr. Cooper's 3.850 motion and Mr. Cooper is still waiting on death row *eighteen years* after he was sentenced to death. During this lengthy delay caused entirely by the State, Mr. Cooper has lived in inhumane and needlessly harsh conditions. Mr. Cooper is locked up almost 24 hours a day in a 10' x 12' cell that is not air-conditioned in a facility that is too small for the number of inmates it is holding. Even though Mr. Cooper has only been the subject of disciplinary action once in the 18-plus years he has spent on death row, he is required to live in solitary confinement similar to the prison's punitive segregation unit. Unlike prisoners who are not on death row he is not permitted to work, has a limited opportunity for exercise and is severely restricted on the personal property he is allowed.

This treatment is violative of the 8th Amendment which forbids cruelty

beyond that which is “inherent in the method of punishment” by death. See Louisiana v. Resweber, 329 U.S. 459, 464 (1947) (plurality opinion). Similarly, the CAT defines torture as severe, intentionally inflicted physical or mental pain or suffering other than “pain or suffering arising only from, inherent in or incidental to lawful sanctions. See CAT art. 1. The 8th Amendment has been violated when the State through its policies and procedures inflicts “something more than the mere extinguishment of life.” See Weems v. United States, 217 U.S. 349, 370 (1910), quoting In re Kemmler, 136 U.S. 436, 447 (1890). Punishments are cruel when they entail exposure to a risk that “serves no legitimate penological objective,” See Farmer v. Brennan, 511 U.S. 825, 833 (1994), and that is simply not “part of the penalty that criminals pay for their offenses against society.” See Farmer, 511 U.S. at 834, quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981).

Mr. Cooper also asserts that his death sentence was essentially changed to a sentence of an indefinite long-term jail term coupled with incidents of torture, terror and degradation, followed by death. This change constitutes (1) the infliction of multiple punishments for the same crime violative of the Double Jeopardy Clause of the Constitution and (2) an unforeseeable expansion of the imposed penalty violative of the Ex Post Facto and Due Process Clauses of the Constitution.

On the date Mr. Cooper was convicted, the penalty for first degree murder with special circumstances was life in prison *or* death by execution. Mr. Cooper

was sentenced to death, but in fact is serving a sentence of life of punitive imprisonment followed by death. “The [Double Jeopardy] Clause serves the function of preventing successive punishments. . . .” See United States v. Dixon, 509 U.S. 688, 696 (1993) (citing North Carolina v. Pearce, 395 U.S. 711 (1969)). “The protection against multiple punishments prohibits the Government from punishing twice, or attempting a second time to punish criminally for the same offense.” See Witte v. United States, 515 U.S. 389, 396 (1995) (emphasis deleted).

Due process provides that a court may not judicially expand the narrow and precise statutory language in such a way that increases the penalty for a violation of a criminal statute. See Bouie v. Columbia, 378 U.S. 347, 352 (1964). Similarly, article 15, section 1 of the CCPR prohibits imposition of a “heavier penalty . . . than the one that was applicable at the time the criminal offense was committed.”

The adjudication of the validity of the sentence in Mr. Cooper’s case has taken almost twenty years. This lengthy delay, attributed solely to the State, has increased the punishment provided by statute at the time of Mr. Cooper’s offense and has punished him twice for the same crime.

Finally, there is no question that the eighteen years it took to clear Mr. Cooper’s claims through the adjudication process was sufficiently long to constitute a denial of due process. See Phillips v. Vasquez, 56 F.3d 1030, 1035-36

(9th Cir. 1995) (finding due process violation from delay of fifteen years from conviction and three years and counting from imposition of death sentence); Coe v. Thurman, 922 F.2d 528, 531-32 (9th Cir. 1990) (three year delay in processing appeal violated due process).

Accordingly, Mr. Cooper's death sentence should be set aside.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed in this petition, Mr. Cooper respectfully urges this Honorable Court to grant habeas relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this the 20th day of March, 2002, a true and correct copy of the foregoing was furnished by U.S. Mail to **C. MARIE KING**, **BOB LEWIS**, and **JIM HELICKSON**, Assistant State Attorneys, Office of the State Attorney, 14250 49th Street North, Clearwater, Florida 33762-2800; **CAROL M. DITTMAR**, Assistant Attorney General, Office of the Attorney General, Suite 700, Westwood Building, 2002 North Lois Avenue, Tampa, Florida 33607-2366.

CERTIFICATE OF FONT

I HEREBY CERTIFY that this brief was prepared using Times New Roman 14 point type, a font that is proportionately spaced.

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