IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,665

BERNARD BOLENDER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE ELEVENTH JUDICIAL
CIRCUIT COURT, IN AND FOR DADE
COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Bolender's motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The circuit court summarily denied Mr. Bolender's claims, without an evidentiary hearing. Mr. bolender also filed with this Court a petition for a writ of habeas corpus, which is currently pending.

Counsel note at the outset that in light of the untenable schedule with which the CCR office has had to deal, there has not been adequate time to properly edit this brief. Accordingly, counsel respectfully note their apologies at the outset for any resulting shortcomings.

Citations in this brief shall be as follows: The record on direct appeal shall be referred to as "R. ." The record on appeal from the denial of the instant Rule 3.850 motion shall be referred to as "PC-R. ___." Affidavits and documentary materials submitted at a February 12, 1990, hearing in the circuit court which were inadvertently not included in the record on appeal (and concerning which Appellant has separately requested supplementation of the record) are appended hereto and will be referred to as "App. ___." All other references will be self-explanatory or otherwise explained herein.

REQUEST FOR ORAL *ARGUMENT*

Oral argument has already been scheduled by this Court in this action. Mr. Bolender's counsel appreciate this scheduling, as oral argument would be useful to the parties and the Court in this case.

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PROCEDURAL HISTORY

This case arises out of a Dade County jury trial on four counts of murder and other charges. The State's key witness at trial was codefendant Joseph Macker, who made a deal with the State in exchange for which he testified, implicating Mr. Bolender (R. 789-933). Macker testified that for his cooperation, he was to receive twelve life sentences and did not know when, if ever, he would get out of prison (R. 865-66). However, Macker today is out of prison and residing in Dade County. The defense attempted to call codefendant Paul Thompson, who could have provided testimony exculpating Mr. Bolender, but was not permitted to present Thompson's testimony (R. 8, 247-49, 978-79). Thompson recently entered pleas for less than a life sentence in this case.

The jury unanimously recommended life imprisonment. The Circuit Court, overriding that recommendation, orally pronounced a sentence of death, and then entered Findings in Support of Death Sentence. Relief was denied on direct appeal. Bolender v. State, 422 So. 2d 833 (Fla. 1982).

A motion pursuant to Rule 3.850, Fla. R. Crim. P., was filed on August 1, 1983. After holding an evidentiary hearing, Judge Herbert M. Klein granted the Rule 3.850 motion and set aside Mr. Bolender's sentence of death. The State appealed Judge Klein's ruling, and this Court reversed and directed that Mr. Bolender be resentenced to death. State v. Bolender, 503 So. 2d 1247 (Fla. 1987); see also Claim XI, infra, discussing impropriety of the prior determination on appeal. Mr. Bolender was resentenced to death, and attempted to appeal that sentence. On January 31, 1989, this Court granted the State's Motion to Dismiss Appeal as Beyond the Scope of the Proceedings on Remand.

The instant Rule 3.850 motion, presenting inter alia claims predicated on Hitchcock v. Dugger, was filed on April 24, 1989. On January 31, 1990, although the State had yet to respond to the 3.850 motion, the Governor signed a death warrant. Argument on the 3.850 motion was held in the circuit court on February

12, 1990. At that hearing, defense counsel and the State's counsel explained, ~~inter alia~~, that Mr. Bolender had not been provided access under Chapter 119, Fla. Stat., to the State Attorney's files in his case because of the status of codefendant Thompson's case, and that access would not be provided until Thompson had provided the State Attorney with a sworn statement he had agreed to give as a condition of his plea agreement (PC-R. 2535-38). The circuit court summarily denied relief that same day, but agreed to set aside that ruling should examination of the State Attorney's files reveal additional bases for Rule 3.850 relief (PC-R. 2610-11).

On February 16, 1990, codefendant Thompson provided the statement he had agreed to give (see PC-R. 2502-24), and the State Attorney's office indicated that Mr. Bolender could then have access to the State Attorney's files. February 17 and 18, 1990, were a Saturday and Sunday, and the State Attorney's office was closed for a holiday on February 19, 1990. Thus, on February 20, 1990, an investigator from counsel's office began copying the State Attorney's files, which consisted of approximately 30 boxes of material (PC-R. 2589), and forwarding the copies to undersigned counsel. Copying continued every business day, as well as parts of weekends, while counsel attempted to review the materials.

Another hearing was held in the circuit court on March 6, 1990. At that time, counsel informed the court, inter alia, that the copying and reviewing of the State Attorney's files had not been completed and requested that the court vacate its earlier order denying Rule 3.850 relief. The court entered an order staying Mr. Bolender's execution until Friday, March 9, 1990, at 12:00 noon, and scheduling another hearing for 9:00 a.m. on March 9 (PC-R. 2499). At the March 9 hearing, counsel proffered Thompson's February 16, 1990, statement and several documents from the State Attorney's file in support of Mr. Bolender's Rule 3.850 motion (PC-R. 2616-17, 2621-22). The court reaffirmed its earlier summary

denial of relief (PC-R. 2624), and Mr. Bolender timely filed a notice of appeal (Id.).

This Honorable Court then stayed Mr. Bolender's execution, and set an expedited briefing schedule on the Rule 3.850 appeal. Mr. Bolender filed a habeas corpus petition, which is also now before the Court. This brief addresses the Rule 3.850 appeal.

ARGUMENT

CLAIM I

MR. BOLENDER'S SENTENCE OF DEATH STANDS IN VIOLATION OF HITCHCOCK V. DUGGER AND ITS PROGENY BECAUSE THE SENTENCING JUDGE DID NOT PROPERLY CONSIDER NONSTATUTORY MITIGATION AND DEFENSE COUNSEL'S PRESENTATION OF NONSTATUTORY MITIGATING EVIDENCE WAS INHIBITED BY THE LAW THEN IN EFFECT, CONTRARY TO THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

A sentencer in a capital case may not limit his or her consideration of mitigating circumstances. Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); Eddinas v. Oklahoma, 455 U.S. 104, 113-14 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). In Florida, a death-sentenced petitioner is entitled to relief if such a limitation occurs before a sentencing jury or a sentencing judge. McCrae v. State, 510 So. 2d 874, 880 (Fla. 1987). Even where, indeed especially where, as here, a trial judge overrides a jury's recommendation of life, and it is not certain that he considered nonstatutory mitigating evidence, resentencing is required. Zeigler v. Dugger, 524 So. 2d 419, 421 (Fla. 1988). If there is ambiguity as to whether the judge fully considered nonstatutory mitigating evidence, resentencing is required, particularly in a jury override case. This Court recently held as much in Thomas v. State, 546 So. 2d 716 (Fla. 1989). See also Woods v. Dugger, 711 F. Supp. 586 (M.D. Fla. Feb. 21, 1989)(even where proper instruction is given, if there is ambiguity concerning the extent to which nonstatutory mitigating evidence was considered by the judge arising from the face of the sentencing order, resentencing is required).

In Mr. Bolender's case, both the judge and jury were constrained in their

consideration of nonstatutory mitigation. The jury nevertheless returned a life recommendation. The judge, however, overrode that recommendation and imposed death, presumptively following his own Hitchcock-violative jury instructions, Zeigler, 524 So. 2d at 420, and without any reliable indication that he independently, meaningfully, and fully considered nonstatutory mitigation.

This case, however, like Hall v. State, 541 So. 2d 1125 (Fla. 1989), and Meeks v. Dugger, 548 So. 2d 184 (Fla. 1989), goes further. Here, the efforts of defense counsel were also adversely affected by the limiting statutory view then in effect. Defense counsel has explained as much under oath in his affidavit, an affidavit in conformity with what the record of this case reflects about the proceedings "actually conducted." Hitchcock, 107 S. Ct. at 1823-24. *An* evidentiary hearing should have been conducted on this aspect of Mr. Bolender's Hitchcock claim, but the circuit court refused to permit one. In this, the circuit court erred. Such a hearing is required, for the files and records in this case do not "conclusively" establish that Mr. Bolender is entitled to "no relief." See Lemon v. State, 498 So. 2d 923 (Fla. 1986).[1]

This brief shall initially discuss the eighth amendment errors resulting from the judge's limited consideration of nonstatutory mitigation. Thereafter, we discuss the eighth amendment errors arising from the constraints under which defense counsel operated, and the circuit court's error in declining to allow evidentiary resolution.

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[1]Counsel's affidavit clearly reflects that his preparations for the penalty phase were constrained by the capital sentencing statute. Alternatively, if counsel's efforts were not inhibited by the status of the law, counsel's affidavit reflects gross ineffectiveness. See Claim 11. *An* evidentiary hearing is necessary to determine whether counsel's efforts were constrained by the law and/or whether counsel rendered grossly ineffective assistance at the penalty phase of Mr. Bolender's trial, due in no small part to his failure to understand Florida sentencing law.

A. THE EIGHTH AMENDMENT VIOLATION BEFORE THE SENTENCING JUDGE

Post-Hitchcock, judicial preclusive consideration is "presumed" where, as here, the judge does not instruct the jury to consider nonstatutory mitigation, see Zeinler, 524 So. 2d at 420 ("[I]t may be presumed that the judge's perception of the law coincided with the manner in which the jury was instructed"), and/or from the fact; the sentencing order makes no reference/finding regarding nonstatutory mitigation. Woods v. Duaner, supra; Thomas, supra; Zeinler, supra. Post-Hitchcock, if the record reflects ambiguity as to the consideration the judge may or may not have given to nonstatutory mitigation, relief is proper: the very ambiguity renders the proceedings constitutionally unreliable, the sentence unindividualized, and the results tainted. Thomas; Woods.

If the record, particularly in an override situation, leaves any ambiguity about whether the sentencing judge considered factors which would support a lesser sentence, then resentencing is required. It is "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty," Lockett, 438 U.S. at 605, that "require[s] us to remove any legitimate basis for finding ambiguity concerning the factors actually considered." Eddings v. Oklahoma, 455 U.S. 104, 119 (1982)(O'Connor, J., concurring). Thus, for example, this Court has granted relief on the basis of a Hitchcock claim in a case also involving the override of a jury's life recommendation because "the record in this case leaves unresolved the question of whether the trial court considered nonstatutory mitigation evidence." Thomas, 546 So. 2d at 717. Reading the record of Mr. Bolender's case in proper context, it is obvious that the same reasons as those which formed the basis for relief in Thomas are present here.[2]

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[2]Hitchcock has worked a substantial change in the law, requiring relief in Mr. Bolender's case, Thus, for example, whereas under the prior standard, the (continued...)

Before trial, the defense filed a Motion to Declare Florida Statute Section 921.141 Unconstitutional. In this motion was a challenge to the constitutionality of Section 921.141 in light of Lockett (R. 98-100). Prior to jury selection, the defense asked for a ruling on several motions that had been filed pretrial. The discussion in the record was as follows:

> THE COURT: . . . Do you want to argue any of these, Counsel?
>
> MR. DELLA FERA: Your Honor, if the Court would like me to argue them --
>
> THE COURT: I do not need the argument. Your motions are very well written and are quite comprehensive. Is there anything other than what you have set down here?
>
> MR. DELLA FERA: No, Your Honor. I would let the Court rule on the motions as they stand.
>
> * * *
>
> THE COURT: . . . I also deny your motion as to your motion in limine to capital punishment. I decline again to declare 921.141 unconstitutional. It has been held on a number of occasions.

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[2](...continued)
opportunity to present evidence of nonstatutory mitigation defeated a constitutional challenge, Hitchcock rejected that standard, as this Court has explained. Downs v. Dugger, 514 So. 2d 1069, 1071 (Fla. 1987). Rather than focusing on whether evidence of nonstatutory mitigation was presented, the inquiry post-Hitchcock focuses on whether nonstatutory mitigation was given "serious", McCrae v. State, 510 So. 2d 874, 880 (Fla. 1987), and "full" and "meaningful" consideration. Penry v. Lynaugh, 109 S. Ct. 2934, 2951 (1989).

Additionally, whereas under the prior standard, the courts presumed that the trial judge considered all evidence of mitigation unless there was an affirmative indication that the judge refused to consider nonstatutory mitigating circumstances, see Sonaer v. Wainwriaht, 769 F.2d 1488 (11th Cir. 1985), under Hitchcock and its progeny, that presumption is reversed. Post-Hitchcock, the inquiry looks to the record of the proceedings -- including jury instructions and the sentencing order -- to determine whether the sentencer did not properly, "seriously", McCrae, supra, and "fully", Penry, supra, consider nonstatutory mitigation. Thus, for example, the courts post-Hitchcock "presume[] that the judge's perception of the law coincided with the manner in which the jury was instructed." Zeialer v. Dugger, 524 So. 2d 419, 420 (Fla. 1988). In Mr. Bolender's case, there was no jury instruction concerning nonstatutory mitigating evidence.

When Mr. Bolender's claim is analyzed according to post-Hitchcock standards, his entitlement to relief is clear. What cannot be doubted, on the basis of this record, is that "serious" consideration, McCrae, supra, was not afforded the nonstatutory mitigating factors in Mr. Bolender's case.

(R. 246-249).

The basis of the Motion to Declare Florida Statute Section 921.141 Unconstitutional was that the statute was "unconstitutional on its face in that it is violative of the mandate of the United States Supreme Court as expressed in Lockett v. Ohio, 98 S. Ct. 1664 (1978), which requires that the defendant be allowed to present all evidence relevant to the mitigation of sentence," because mitigation was limited to those circumstances set out in subsection (6) of section 921.141.

There is no real discussion on the record as to why the court denied this motion. The record does not reflect that the court did not take the motion very seriously, and that the court denied it.[3]

At the charge conference after the jury's verdict of guilt was returned, after ascertaining whether the parties would be presenting evidence at the penalty phase, the judge instructed the parties to provide him "with the standard instructions that would relate to the aggravating circumstances and the mitigating circumstances and the closing instructions to the jury" (R. 1371). After a recess, the parties again met, and the court informed them how it would proceed. The judge said that after both sides announced that they had no evidence to present, "I will then proceed, 'Ladies and gentlemen of the jury, it is now your duty,' which is the third paragraph on that page. I will go through them, the aggravating and mitigating circumstances which they may consider" (R. 1373). No further discussion was had about the instructions. The standard, Hitchcock-violative instructions were then given to the jury:

> The State and the defense may now present evidence relative to what sentence you should recommend to the Court.

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[3]It is not entirely clear from this record whether the trial judge even believed that nonstatutory mitigation could be presented. The nonstatutory mitigation in the record was admitted in the guilt phase. Counsel presented nothing in the penalty phase. This portion of the record does reflect, however, that the judge was employing the standard restrictive view of nonstatutory mitigation then in effect.

> You are instructed that this evidence when considered with the other evidence you have already heard is presented in order that you might determine first whether or not sufficient aggravating circumstances exist which would justify the imposition of the death penalty, and second, whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any.
>
> At the conclusion of the taking of the evidence and after arguments of counsel, you will be instructed on the factors in aggravation and mitigation that you may consider.

(R. 1374-75)(Preliminary instructions). This same instruction was given in Hitchcock itself.

The prosecutor, without comment or correction from the court, then argued that capital sentencers in Florida were restricted to the statutory factors:

> Realize that the law has set down certain words. It says in order for a person's life to be taken, you must meet certain requirements. These are known as aggravating circumstances.

(R. 1379-80). He then went through the aggravating circumstances (R. 1379-84). Then he went through each mitigating circumstance set out in the statute, one-by-one (R. 1384-87), because the "law says you just cannot go about doing these things unless you recognize [mitigating circumstances]" (R. 1384):

> I am talking about what guides your life or my life, the lives of everyone here, our system of justice, and our system of iustice says we have aggravating circumstances and mitigating circumstances.
>
> * * *
>
> We have four, if not five, of those aggravating circumstances as balanced against zero mitigating circumstances, and that is the law.

(R. 1387)(emphasis added). There was no curative instruction by the court. This was because the prosecutor was arguing what the court believed -- that factors in mitigation were limited by and to the statute.

Examining the charge the court gave to the jury provides the clearest indication of the judge's own mindset. See Zeigler, supra. The judge had announced earlier that his own approach was to adhere to the standard instructions. That is exactly what he did:

> THE COURT: Sir and gentle ladies, it is your duty to advise the

Court as to what punishment should be imposed upon the defendant for his crime of first degree murder.

As you have been told, the final disposition and decision as to what punishment shall be imposed is the responsibility of this Trial Judge.

However, it is your duty to follow the law which will now be given to you by the Court and to render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

Your verdict should be based upon the evidence which you have heard during the trial of the guilt or innocence phase of the defendant and such other proceedings as we have presently gone through.

The aggravating circumstances which you may consider are limited to such of the following as may be established by the evidence: [Listing aggravating factors]

(R. 1390-91).

Should you find sufficient of these aggravating circumstances to, it will then be your duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist.

The mitigating circumstances which you may consider, if established by the evidence, are these. [Listing statutory mitigating factors only]

(R. 1393-94). This is the same instruction as given in Hitchcock, Zeigler, and Thomas.

Consistent with his earlier expressed understanding of the law, the judge instructed the jury to consider the evidence from both phases of the trial, but only to consider it in the context of the mitigating circumstances enumerated in the statute. As the judge's earlier statements and his instructions indicated, evidence could be considered only as to its application to the enumerated mitigating circumstances. See Zeigler, 524 So. 2d at 420.

The jury unanimously recommended a life sentence. The court announced that it would not be following that recommendation:

I have reviewed the aggravating circumstances in this case and find sufficient of them to warrant a consideration as to whether or

> not there are any mitigating circumstances, and I, for the life of me, cannot find a single mitigating circumstance on Mr. Bolender's behalf that would cause me to but otherwise overrule that decision, the recommendation made by the jury in this case.
>
> I do impose the sentence of death.

(R. 1406)(emphasis added).

It is clear from the foregoing that the court meant he could not "find a single [statutory] mitigating circumstance . . . ." Likewise, in his Findings in Support of Death Sentence, where the judge found no mitigation, it is clear that he did not believe he could consider nonstatutory mitigation. The portion of the order regarding mitigation refers to the "Mitigating Circumstances as specified by Section 921.141(6) Florida Statutes," and then discusses, seriatim, only the statutorily enumerated mitigating circumstances (R. 234-35). The order does not mention the nonstatutory mitigation that was clearly present in the record: the fact that Mr. Bolender had worked as a DEA agent, that he had a history of being a non-violent person, that he had no prior violent acts, questions concerning the respective roles of the participants, or that one of his co-defendants had worked out a deal whereby he believed he would serve only five years for his participation in the offense and that the other co-defendant would likely never even be tried for the offense.

The indicia now used in determining Hitchcock claims establish that an unlawfully limited sentencing proceeding occurred in Mr. Bolender's case. Where there is "any legitimate basis for finding ambiguity concerning factors actually considered by the trial court," resentencing is required. Eddinns, supra, 455 U.S. at 119 (O'Connor, J., concurring); Thomas, supra. A thorough review of this record in light of Hitchcock reveals a trial judge who limited himself to statutory mitigation in determining the propriety of overriding the jury's life recommendation. Considering nonstatutory mitigating evidence only to the extent

that it might relate to a specific statutory mitigating circumstance was precisely the error found in Hitchcock.[4]

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[4]The override order was approved in 1982 under pre-Hitchcock principles and assumptions ("mere presentation") then enshrined in Florida law. In 1982, "mere presentation" of nonstatutory mitigation, along with jury instructions then regarded as constitutional, were deemed sufficient. These rules have now been rejected. See, e.g., Downs v. Dueeer. 514 So. 2d 1069, 1071 (Fla. 1987). Accord. Thompson v. Duener, 515 So. 2d 173 (Fla. 1987); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); Foster v. State, 518 So. 2d 901 (Fla. 1987); McCrae v. State, 510 So. 2d 874, 880 (Fla. 1987); Waterhouse v. State, 522 So. 2d 341 (Fla. 1988); Magill v. Duener, 824 F.2d 879, 890-94 (11th Cir. 1987). These cases make it undeniable that the presentation of nonstatutory mitigating evidence is constitutionally meaningless if the jury or judge fail to consider it. As the Supreme Court noted in Eddinns v. Oklahoma, 455 U.S. 104, 114-115 (1982), "[t]he sentencer, and the court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration." Accordingly, in cases such as Morgan v. State, 515 So. 2d 975 (Fla. 1987) (emphasis added), this Court found an omission like the one in Mr. Bolender's case controlling for an evaluation of the petitioner's Hitchcock claim:

> Nowhere in [the judge's] order is there any reference to any non-statutory mitigating evidence proffered by the appellant. The state argues that there is no evidence that the trial court refused to consider such non-statutory mitigating circumstances. We disagree with this view of the record. Our reading of the record leads to one conclusion. That is, that non-statutorv mitieatine factors were not taken into account by the trial court, as required by Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed. 2d 973 (1978), and now Hitchcock.

See ~~also~~ McCrae v. State, 510 So. 2d 874 (Fla. 1987)(granting relief pursuant to Hitchcock because of judge's failure to give "serious" consideration to nonstatutory mitigation). Here, as in McCrae, the Court can "not [be] convinced . . . that [nonstatutory mitigation] was given serious consideration by the [trial] court." Id. at 880. In Booker v. Dugger, No. TCA 88-40228-MMP (N.D. Fla. Sept. 16, 1988)(emphasis added), the District Court explained that "[a]lthough the judge stated that he had considered all evidence presented at trial and the sentencing proceedings, including the defense memorandum addressing the then recent decision of Lockett . . ., it is clear from the record that the judge did not independently consider all of this evidence." These principles control Mr. Bolender's case. Another point of similarity between this case and the decision in Booker is worthy of note: as in Booker, here, defense counsel's effort to alert the judge to the Lockett decision is far from enough to cure the error which the record itself reflects: that the judge believed himself constrained to the statutorv list. The same thing occurred in Thompson, in which the judge had also been alerted to Lockett but there was no record indication that he would be considering nonstatutory mitigating factors, although he was allowing them to be presented. Relief was granted in Thompson. This Court concluded that the only question in Booker was whether the Hitchcock error was harmless. The Federal District Court also reached the same conclusion, found the Hitchcock error harmful, and ordered resentencing.

(continued...)

This life override case leaves no room for harmless error. As in Thomas and Zeigler, the trial court limited itself in its consideration of mitigation when it overrode the jury. And as in McCrae, "[t]his . . . is sufficient to require a new sentencing hearing." Id. at 880. The override itself shows the harm; the fact that "there was some nonstatutory mitigating evidence that the court could have considered" proves it. McCrae, 510 So. 2d 874, 880 (Fla. 1987); Foster v. State, 518 So. 2d 901 (Fla. 1987). See also Jones v. Dugger, 867 F.2d 1277 (11th Cir. 1989).

B. DEFENSE COUNSEL WAS CONSTRAINED

Defense counsel for Mr. Bolender was G. P. Della Fera. In an affidavit proffered to the circuit court, an affidavit consistent with what the original record reflects, Mr. Della Fera has explained that at the time of Mr. Bolender's capital proceedings, his efforts to develop and present mitigation on Mr. Bolender's behalf were constrained by the capital sentencing statute then in operation. As noted above, this statutory construction was challenged by defense counsel early on in the proceedings, but the challenge was denied by the trial judge. Thus, defense counsel's hands were tied: his development and presentation of mitigating evidence had to be relevant to the statutory mitigating factors in order for the evidence to be considered by the jury and judge. As a result of these constraints, powerful and compelling nonstatutory mitigating evidence was not presented to Mr. Bolender's jury and judge, even evidence in defense counsel's own file but which did not fit into the statute, and Mr. Bolender was sentenced to death in violation of the eighth and

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[4](...continued)
Resentencing is even more proper here, for the error even more egregiously violates the petitioner's right to a reliable capital sentencing determination: Mr. Bolender's jury recommended that he be sentenced to life, unanimously. A man should not be sent to his execution when there is uncertainty as to whether his sentence was reliably determined by the judge and whether it was individualized -- i.e., when we do not know whether the mitigating factors in his background were fully and fairly considered.

fourteenth amendments.

Mr. Della Fera's sworn affidavit explains his understanding of the capital sentencing statute at the time of Mr. Bolender's trial and how that statute affected his efforts:

> 1. My name is G. P. Della Fera. I am an attorney licensed to practice in the State of Florida. In 1980, I represented Bernard Bolender on charges of first degree murder in Dade County, Florida.
>
> 2. I knew that the State was going to seek the death penalty in Mr. Bolender's case. I also knew that the judge assigned to the case, The Honorable Richard S. Fuller, was predisposed to impose death and that there was not much that could be presented in the way of mitigation that would make any difference to Judge Fuller. After Mr. Bolender was convicted and the penalty phase was about to begin, I believed that the jury would return a life recommendation. However, as I said, I also believed Judge Fuller would override that recommendation. At the time, *my* understanding was that a judge could override a jury recommendation of life under any circumstances. Therefore, I did not think it mattered much what the jury recommended because the judge had the final say. As it turned out, the jury did recommend life, and Judge Fuller overrode that recommendation and imposed death.
>
> 3. When I was thinking about the penalty phase, I reviewed the capital sentencing statute and the jury instructions then in effect. Under the mitigating factors listed in the statute and the jury instructions, I could not think of anything to put on in mitigation. The mitigating factors seemed to be limited to the ones listed in the statute, and so it did not seem that there was much mitigating evidence available to me that was relevant. For example, I knew that Mr. Bolender had been shot in the head a few years before the capital offense, but I did not think that or its possible effects on his mental health would be a mitigating factor under the law then. I also was not aware that under the existing statute I could put on evidence about Mr. Bolender's mental health or that such evidence would be admitted as mitigating.
>
> *4.* As I understand capital sentencing law today, I realize that I did not consider, but should have considered, putting on mental health and other nonstatutory mitigating evidence and that I should have put on mitigating evidence to shed light on the judge's override of the jury's life recommendation. For example, I should have considered putting on evidence regarding Mr. Bolender having been shot in the head and testimony from Mr. Bolender's mother, sister, wife, and daughter. As I said, however, because I believed Judge Fuller was predisposed to impose death and because of *my* understanding of the capital sentencing statute, I did not present any of this evidence.

(App. 1).

Thus, defense counsel has explained that he believed that mitigation was

limited to the factors enumerated in the statute and, consequently, that the judge and jury would not consider evidence which was not relevant to the statutory factors. As his affidavit explains, that understanding controlled and guided his efforts at developing and presenting mitigation.

As defense counsel's affidavit also explains, he would have developed and presented extensive nonstatutory mitigation had the statute allowed for the consideration of such evidence. There was substantial evidence of nonstatutory mitigation available in this case. Absent a purely statutory focus, defense counsel could have developed and would have presented significant nonstatutory mitigating evidence.

Evidence was available from family members regarding Mr. Bolender's childhood and youth, which were marked by his father's abandonment of the family and Mr. Bolender's attempts to fill his father's shoes. Evidence was also available from Mr. Bolender's friends regarding the period prior to the offense when Mr. Bolender's drug use escalated to dramatic and self-destructive proportions. Other evidence was available regarding Mr. Bolender's valued assistance to the United States Attorney's Office in investigating corrupt prison officials in New York. Compelling evidence was also available regarding Mr. Bolender's positive adjustment to incarceration and excellent behavior in jail. Finally, expert mental health evidence was available regarding the psychological difficulties Mr. Bolender experienced as a result of his father's abandonment, the psychological deficits Mr. Bolender suffers as a result of a gunshot wound to the head and his severe polydrug abuse, and the seriously impaired status of Mr. Bolender's psychological and cognitive functioning at the time of the offense. All of this evidence would have established valid nonstatutory mitigating factors.

Bernard (Bo) Bolender is the second child of Beatrice and Bernard Bolendex (PC-R. 2111). He has one older sister, Pat, and a younger sister, Denise (PC-R.

2112). Bo's father had been an alcoholic from the time when Pat was born (PC-R. 2112), and finally abandoned the family when Bo was nine years old (PC-R. 2113). From that point on, Bo's father offered no support for the family, who did not even know where he was (Id.).

After the father's abandonment of the family, Beatrice Bolender lost the family house and was forced to move the family (PC-R. 2113). Bo Bolender was a good student at school, achieving great success in athletics (PC-R. 2114). Those who knew Bo during his high school years remember him for his athletic accomplishments, his compassion and concern for his family and friends, his respect for authority, his honesty, and his good character. In high school, he became New York State wrestling champion (id.), and was offered an athletic scholarship to Iowa State University (PC-R. 2114-15).

Bo was obsessed by his father's abandonment of the family and was determined to take care of his mother and sisters. He declined the scholarship in order to go to work and support the family (PC-R. 2115). He worked at various jobs, including driving a school bus, clamming, and pumping gas (Id.). Bo was a great help to the family and a good son (PC-R. 2115). When he married, Bo was a good father to his children (PC-R. 2117). Counsel had access to all of this information, but did not investigate, develop, or introduce it (or contact and call the witnesses) because of the preclusive view of mitigating evidence under which he operated.

Bo's sister, Denise, could have provided compelling testimony regarding Bo's childhood and youth, his obsession with his father's abandonment of the family, and his character:

> 1. My name is Denise Crane and I live in New York. Bernard (Bo) Bolender is my brother. I am about three years younger than Bo.
>
> 2. From the time when we were young our mother raised us without the assistance of our father. He was a severe alcoholic and abandoned our family. After my father left, the family business (a restaurant) went bankrupt and things got real tough. My mother took on two jobs and Bo immediately took over the responsibilities left

unattended to by our father. Bo realized that my mother was deeply hurt and from that point on he took it upon himself to see that our family was forever taken care of. This is a tremendous responsibility for a grown man let alone a young boy.

3. Our family has always been close. After our father abandoned us, we became even closer. Bo would talk to me and my sister (Pat) about our problems and was always around to take care of us. Again, my mother was working two jobs -- in an attempt to make ends meet -- and Bo made sure that Pat and I were safe and secure. Bo became obsessed with his struggle to see that the family was financially secure. He also wanted very badly to be the stable and wise father figure.

4. Meanwhile, Bo had become a great athlete and was offered scholarships for college. I am sure that Bo wanted to go on to college, be a star athlete, and build a career. However, his number one priority was his family. He quit school and went to work to relieve my mother of the burdens associated with being a single parent and sole financial provider. I mean from the time that Bo was a young boy he promised to himself that he would do all the things, for the family, that our father left undone. He wanted more than anything in the world to see his family taken care of.

5. After quitting school, Bo took on many odd jobs until he settled on the clamming business. Like always, Bo started at the bottom and worked his way up. He became very successful and had many opportunities to go off in the world and make a name for himself. However, Bo never lost sight of his family and the vow he made to himself long ago. Like he had done from the age of fourteen, Bo shared his success with the whole family.

6. Throughout his entire life, Bo has never displayed any signs of selfishness. I know that he does not have a selfish bone in his body. When I was in junior high and high school he would always look out for me. An example of this is how he would sit up and wait for me to come home after a date. Additionally, Bo would take the time to have talks with me and do all the little (but demanding) things a father does for his daughter. Bo has always been so very generous. Even today, although he is in prison, Bo still tries to look out for his family. If Bo's girlfriend sends him $20, Bo will send $10 of that to our mother.

7. After Bo quit school he married Margaret Bonavita and had a couple of children. This, of course, added to his responsibilities. He now had two families and households to look after. Bo and his wife had a few marital problems but he never abused her or anything like that. When they were separated, Bo continued to provide for Margaret and the children. He did not want to be like my father and leave his children high and dry. Bo was always great with his children and they loved one another very much.

8. In the early 1970's Bo used his profits from the clam business to invest in a nightclub. It went well for a while but things took a sudden turn for the worse. Bo lost a lot of money and his partner ended up buying him out. This left Bo depressed, for he

knew that he had to find a way to continue providing for his immediate family -- as well as our mother, grandmother, and me. He did not want to let everyone down and be associated in any way with our father's failure and abandonment.

(App. 3).

When Bo's business ventures in New York failed, he moved to Miami. There, he attempted other businesses and maintained his commitment to his family, but eventually became mired in drug abuse. Drugs ran Bo's life. The defendant's drug addiction was more overwhelming and controlled the defendant's life to a greater extent than any other case this Court has reviewed. Denise Crane discussed her interaction with Bo in Miami:

> In 1975, Bo moved down to Miami in hopes of improving the family's financial standing. I visited Bo every couple of months during his first year in Florida. He started his interior decorating business and was working with a partner (Santi Diaz) on opening a green house. Bo continued to be a hard worker and never failed to provide financial support to our mother and grandmother.
>
> In 1976, Bo moved into a place on Yacht Harbor and I moved to Miami. Bo continued to be successful with the interior decorating operation. However, Bo was always trying to increase his income so that our mother and family could have the life that our father took away from her. Bo and a friend, Robert Burke, were always trying their hand at something.
>
> After moving to Florida, Bo's use of cocaine started to pick up. As far as I know, he was at first only using "socially" and was snorting. Outside of the immediate high, Bo seemed to be doing OK and I didn't really think about him becoming addicted. But he just began using more and more cocaine. I remember seeing him bring out plates of cocaine and just sitting there snorting huge quantities of it. Other times, Bo would go in his office and stay there all night doing cocaine. His cocaine use grew progressively worse up until the time he was arrested.
>
> Throughout all of his time in Miami Bo never lost sight of his childhood commitment to be the man of the family. Our grandmother and mother lived in Miami for a while and it made Bo extremely happy that he was able to follow through.
>
> Sometime around 1977 our father showed up in Miami. Needless to say it was a surprise to hear from him. Bo took him in and tried to straighten him out. That was typical of Bo. His heart was so big that he was willing to assist the person who caused our mother and family so much pain. If it hadn't been for Bo, the damage my father caused would have been worse.
>
> I was hoping that my father would get his act together. I would

have liked to have seen our parents get back together. Bo had been under so much stress to be a son, brother, and father. However, our father was a total mess and he left. He returned to Miami when Bo was shot in the head. It appeared that maybe he really cared for us. Again Bo was willing to offer him help. However, he ripped off Bo's money and van and left town never to be heard from again -- until his death.

Most people would have thrown our father out. However, Bo was always very forgiving and kept telling me that our father had a sickness, being an alcoholic, and couldn't help himself.

Bo's commitment to our family was unbelievable. My mother got laid off from her job in 1977 and moved down to Miami. This was the same time that I was in the process of divorcing *my* then-husband. To sum it up, Bo was caring for my grandmother, mother, and me -- his sister who was 6 months pregnant.

When Bo went to federal prison, everyone moved back to New York. After his release he stayed in New York for a short while and returned to Miami. This time he was alone.

Although I was not in Miami at the time when Bo was arrested I am aware of changes in his personality. He suddenly stopped calling the family. Additionally, he stopped openly communicating with me. Bo and I have been very tight all of our lives. I mean, Bo is like a father to me, in addition to being my only brother.

Bo and I never kept any secrets and suddenly he was avoiding me and his conversations were shallow. Something was terribly wrong with Bo and he wouldn't talk about it. He became a totally different person.

Bo has never been violent or greedy. I was totally shocked when Bo was charged with murder. That was totally out of character for him.

After his conviction, Bo told me over and over how much he had been free-basing cocaine before his arrest. He said that free-basing was his downfall, and told me never to try free-base.

(App. 3).

A friend and business partner of Bo's in Miami also described the pressure Bo put on himself to succeed, and how that pressure and Bo's increasing drug abuse led to his downfall:

1. My name is Robert M. Burke, III and I live in the Miami area. I am a graduate of Michigan State University where I attained All-American Honors in the sport of swimming. I am an honorably discharged United States Marine Corps Veteran. Currently, I am Publisher and President of Ad One, Inc. I specialize in Travel Marketing.

2. I first met Bernard (Bo) Bolender in about 1975. We are both from New York and our friendship quickly grew.

3. He told me the story behind his father, his alcoholism, and his eventual abandonment of Bo's family. This left an ever-lasting impression on Bo. He constantly talked about how it was his responsibility to provide for his mother, grandmother, and sister. Bo was married and had two children. Of course, their well being was also in the forefront of Bo's mind.

4. Bo was obsessed with the notion of being a successful businessman. He was determined to be able to provide for his family. Bo never wanted to fail them like his father did.

5. Bo and I were both young men and tested the business waters. Among other areas, we pursued the import/export industry in Central and Latin America. We went on several trips and met with government officials in these countries and discussed the possibilities of becoming involved with coffee, fruit, and rubber plantations. Throughout all of our business ventures, Bo kept a tremendous amount of pressure on himself to provide for his family. Everything he did was somehow related to his goal -- being a strong, stable, and reliable provider for his family.

6. My father Robert M. Burke was Executive Vice President of Chemical Bank in New York. Bo and *my* father were frequently on the phone discussing possible investment plans. Bo was always looking for a way to wisely improve his family's financial situation. My father talks of Bo often and how shocked he was (and remains) when he heard about Bo's predicament.

7. Bo was the most generous person I have ever met. He was not only eager to pamper his family but went out of his way to assist any and all of his friends. Actually, many people took advantage of Bo. He would contribute to their business ventures and never receive any return on his investments. *An* example of this would be Bo's involvement in the green house business. He saved a friend from bankruptcy and provided periodical investments to keep the business above ground. It was typical of Bo to become financially involved in something, never receive returns or benefits, and somehow feel obligated to continue providing the capital. This was definitely related to Bo and his father. Bo could not cope with the idea of backing out of any type of financial obligation. Like I said, Bo was the most generous person!

8. Bo gave everything he had to his family. He would always be concerned about them and wanted to be able to cover all bases. Bo didn't want his family to work or be in need of anything. It was like Bo was living a fantasy life. He had this idealistic movie image of himself where he cared for all of those under him. Bo definitely believed in the idea of a family being a patriarchal structure. This notion originated from Bo's childhood and the fact that his father abandoned the family. After his father disappeared, Bo immediately took charge and was determined to forever pursue the responsibilities involved with being the male head of his family. Bo would specifically talk about his mother's need to work two jobs after his

father left the family, and how he would never let that happen again.

9. The overwhelming burden Bo placed on himself, coupled with his extraordinary generosity, led to his demise. It got to the point that Bo would have to borrow from Peter to pay Paul. I mean so many people took advantage of Bo's generous heart that he lost control and ended up scrambling.

10. A big part of Bo's demise was cocaine use. He just got so caught up in that scene and eventually lost his grip on the legitimate business pursuits we had originally initiated. I can remember going to parties and there would be Bo, sitting behind piles of cocaine, snorting for hours and hours. He had become a regular user and it began to take its toll. When he was high, he wasn't himself, and he was high more and more of the time.

11. I have never witnessed any type of violence or aggressive behavior from Bo. He basically appeared to be a level headed person who placed an incredible amount of pressure on himself. This pressure, coupled with the unwise investments his friends convinced him to make, eventually weighed him down. I guess you could say Bo was self-sacrificing. I mean altruistic is not a strong enough term to describe Bo.

12. I cannot even come close to imagining Bo being involved in the crime for which he is presently imprisoned. Violence is totally out of Bo's character. Bo is a good hearted Catholic who openly displayed his faith in God.

13. I was never contacted by any attorneys and asked of my knowledge about Bo. I have been in Miami for quite a while and would have told Bo's attorney everything I know about him.

(App. 4).

Before the time of the offense, Bo met Joe Macker and his drug use became completely out of control. Macker and drugs dominated Bo's life. Bo's drug use increased dramatically: he began to smoke cocaine every day and stopped caring about himself. The night of the offense Bo was consuming huge quantities of drugs, was very high and incoherent, and was in a dream state (**See** PC-R. 123-30). Even more nonstatutory mitigation was available; indeed, it was contained in defense counsel's own file, but defense counsel never used it because of the preclusive view under which he operated.

In 1978, for example, while incarcerated in New York state, Mr. Bolender provided valuable assistance to the United States Attorney's Office:

This letter is respectfully submitted to assist the Court in

imposing sentence upon Bernard Bolander. Mr. Bolander cooperated with this office in connection with a significant and ongoing investigation of corrupt prison officials in the Metropolitan Correction Center (hereinafter the "MCC") in New York.

While housed at the MCC, Bolander agreed to cooperate in an undercover capacity and subsequently to testify fully and truthfully as required before the Grand Jury and at trial.

Specifically what he did was give us intelligence, engage a corrupt prison official who, for a bribe, agreed to smuggle contraband (narcotics) into the prison and then actually received the narcotics from the prison official. He then surrendered the narcotics to a Drug Enforcement Administration Agent. He agree to wear a body recorder, obviously at substantial personal risk in a prison system where informants are killed for the very fact that they are discovered to be informants,

Finally, only because of Mr. Bolander were we able to lure the official to a meeting with an agent outside the prison, where we videotaped the actual payoff.

Mr. Bolander provided us with other leads but we transferred him out of the institution lest he be further endangered by directly negotiating any other deals.

An indictment will be filed upon the successful conclusion of these other pending investigations founded in large part upon his leads.

No doubt the Court can appreciate the many strategic problems such cooperation helped us to overcome. The significance of successful efforts such as these is obvious; bribed officials undermine the integrity of the institution in the abstract and compromise the safety of every guard and indeed every non-offending inmate in the institution.

The only personal information I am aware of is that, since he was shot in the head by other narcotic traffickers, he has cooperated with the Government and reestablished strong ties with his wife and children,

(Letter of John P. Flannery, II, Assistant U.S. Attorney)(App. 5).

We are writing to advise you of cooperation and assistance Mr. Bolender rendered this office during our investigation of corruption among federal Bureau of Prisons officials at the Metropolitan Correctional Center, (M.C.C.) in New York City.

While a prisoner at M.C.C. in 1978, Mr. Bolender advised our office that Debra Green, an M.C.C. employee, had offered to smuggle cocaine to him in return for a cash bribe. Mr. Bolender agreed to wear a tape recorder concealed on his person in the prison to record his conversations with Ms. Green and thus gain the necessary evidence of her criminal activity. By making these tape recordings inside the M.C.C. Mr. Bolender undertook substantial personal risk.

Through Mr. Bolender's efforts Ms. Green was introduced to an undercover agent of the Drug Enforcement Administration. Ms. Green brought cocaine to Mr. Bolender in the M.C.C. and received a cash bribe from the undercover agent in return. Ms. Green was arrested on November 29, 1978. Mr. Bolender testified as the principal government witness at her trial in the U.S. District Court, Southern District of New York on January 18 and 19, 1979. Ms. Green was convicted of smuggling cocaine to Bolender and sentenced to one year in prison.

Without Mr. Bolender's cooperation no prosecution of Ms. Green could have been brought. His assistance was significant to our effort to combat corrupt prison officials whose activities undermine the integrity of the prison system and compromise the safety of other prison employees and inmates.

(Letter of Patricia M. Hynes, Chief, Official Corruption and Special Prosecutions, Office of the United States Attorney)(App. 6).

Extensive evidence was also available that Mr. Bolender was a model prisoner while incarcerated in the Dade County Jail: he abided by the rules of the institution, created no disturbances, was not a security risk, and, overall, was an excellent prisoner. Such evidence is undeniably mitigating. See Skipper v. South Carolina, 106 S. Ct. 1669 (1986); Valle v. State, 502 So. 2d 1225 (Fla. 1987).

Had counsel's efforts not been constrained, he not only could have presented the information outlined above to Mr. Bolender's jury and judge as independently mitigating, but he also could have provided that information to a mental health expert as the basis for a mental health evaluation. That information has now been provided to Dr. Pat Fleming, Ph.D., a qualified clinical psychologist, who conducted a thorough evaluation of Mr. Bolender. Her report demonstrates that substantial nonstatutory mental health mitigation was readily available:

SIGNIFICANT BACKGROUND INFORMATION

Bernard (Bo) Bolender is the middle child and only son of Bea and Bernard Bolender. The mother is a significant factor in Bo's life according to both records and interview information. She divorced the father when Bo was nine years old due to alcoholism and frequent absences from the home. The final incident, prior to the divorce, was a fire started by the father's cigarette when drinking and falling

asleep and Bo saved the family. The divorce changed the family's financial stability and resources dramatically. The mother and three children moved to a small apartment and the mother worked *two* jobs to support the family. The father had no contact, nor provided financial support to the mother or three children. He moved to Atlanta, remarried, and recouped some of his lost fortunes. The father was a flamboyant wheeler dealer who later contacted his then adult son and a limited father/son reunification occurred. According to Bo, the father gave his son a Jaguar and later visited him in Florida with some thought of sharing business dealings. The Jaguar gift may be a fantasy of a relationship Bo would like, but did not have. The father is described as a "hippy" type most of his life who valued money, and business success. The father died one and one half years ago and left none of his reported half million dollar estate to his children.

The role vacated by the father was quickly filled by the son who was "man of the house." Neither the older sister, Denise, nor the younger sister, Patricia, felt the responsibility for the family as did Bo, who assumed the role of the perfect child in an alcoholic family. To this day, he worries about the well-being of his mother and his need to care for her. During the years that he was successful financially, Bo provided for his family of origin, including his grandmother. The conflictual need to be a clone of his father in terms of financial success and yet be unlike him in personality continues to be a problem area. A conflict also remains with the relationship with the mother for whom he felt responsible and yet burdened by her high expectations.

School was fulfilling to Bo in terms of success in wrestling and approval by friends. He states that the academics did not interest him and he put forth minimal effort. Records indicate positive statements of a well adjusted student by teachers and administrators who tried to deter him from dropping out of school in his senior year. Mr. Bolender believes at the time he saw limited value to school as a means to attain his ultimate goal of financial success. He wanted his mother to have the pride, comfort, and lifestyle she previously enjoyed. Bo did earn his GED at a later date.

Bo became an independent and successful owner of a clam business which netted him $100-150,000 a year by the time he was 19 years old. He was then able to provide for his mother and "spoil" his sisters with extravagant gifts. Bo left the clam business, opened a bar and disco, which failed -- a significant turning point in his life. It was during the disco period when he first became involved in cocaine use. He moved to Florida and made contact with friends who were involved in drug use and deals.

Bo married Margaret Bonavita, his high school sweetheart, when he was approximately 17 years old. The couple have two children, Erica 17 years and Bernard John (Bo) Bolender, 15 years. Mr. Bolender's relationship with his ex-wife and children bears a striking similarity to that of his own father, Bo has not had contact with his children, but did support them financially. The couple separated in 1977 and at Bo's urging were divorced in 1980 following the present charges. Margaret was married to Steve May and the children now bear his name. Mr. Bolender had a recent picture of his daughter and reported that

the children had never been told of his life but would be.

Bo maintains that he did not use drugs until age 21 and in the bar business. He reports that alcohol has never been a problem since he recognized the trauma caused by the father's alcoholism and as a child vowed he would never repeat his father's lifestyle. He began using cocaine "socially," but does not view his use as addictive as heroin. He smoked marijuana and did heroin for two weeks. The cocaine use increased to approximately around five grams a day of uncut cocaine, which he reports would be around five times as strong as street purchases. The two months prior to the 1980 charges, he was free basing, which he believes had the most negative affect.

He was only 25 years old when he left the disco for Florida, was depressed and a failure. His dream of being successful and filling Dad's shoes had failed. The move to Miami began a new life phase. He was snorting coke regularly and now dealing. His income dramatically increased and he was living the high life, traveling and associating with mob people. One of these acquaintances was Pete Salenro who taught Bo "tricks of the trade" of burglarizing. The burglary provided additional income for Bo and later caused his arrest for possession of burglary tools and loitering and prowling.

During all his life and the time he spent in Florida, Bo had a number of friends live with him or drop in's. One friend was Ronny Keenan, an ex-cop with whom Bo had business dealings. It was Keenan who shot Bo in the right temple and in turn was killed by a Columbian who was living in the house at the time. The information regarding the effect of the gunshot wound were vague. According to Bo, he was taken to Mercy Hospital in Coconut Grove under the alias of Alexander Bo Solo. Mr. Bolender stated that these records have never been found and is suspicious of the reason. He reports limited information regarding the effects of the wound other than to say the physicians told him that the bullet had been deflected by a bone, was removed, and that he had missed death by a fraction of an inch. While in the hospital, Bo was arrested for a previous charge of stealing a Western Union money order and was transferred to the Jackson Memorial Hospital. The reference to Jackson Memorial Hospital was found in the records since Mr. Bolender was vague regarding this incident. It appears that these money order charges were suspended as a result of his cooperation with the investigators for the DEA. He then returned to Miami and picked up his old lifestyle of doing Coke and burglary. Court records indicate some of these happenings, but Mr. Bolender is vague regarding dates and specifics. The dialogue does fit generally with the known records.

The important factors, psychologically, is that Mr. Bolender at the time of the 1980 offenses was daily using a high quantity of cocaine, which he then was snorting and free basing. He was living a lifestyle which was "dreamlike," vague and disconnected. He continued to be obsessed with the idea of money and possessions and the view of himself as a responsible person. Needless to say, the discrepancy between his lifestyle, which resulted in loss of money, arrests, shootings, did not fit with a responsible father and provider, but he appeared to be unaware of this at the time. He now recognizes his need to possess the qualities his father lacked ultimately resulted in

a lifestyle that was similar.

Mr. Bolender lived under consistent paranoia. The paranoia was part of the drug culture in which he lived, the constant fear of being set up by those he thought were his friends, fear of being picked up by the police, harm from other drug dealers, and lack of trust of any kind of situation that he perceived as dangerous. These were in fact true. In addition, his use of cocaine added to this paranoia and so his lifestyle was one of constant vigilance against danger from all sources.

The final outcome of the lifestyle is well known, and well documented. Bernard Bolender was convicted of first-degree murder and the multiple death sentences were imposed, although the jury had recommended life imprisonment. He has been on death row in the Florida State Prison since his arrest. During the interview, Mr. Bolender reported that a supply of cocaine was readily available during the time of the crime. Mr. Bolender continues to find it unusual that he would have committed these crimes for one kilo of cocaine as charged. He denies previous violence. His account of his lifestyle at the time was one of confusion due to the high drug use, a heightened paranoia, fear of being harmed as previously, and discovery and arrest by the police. The victims violated a rule of this particular culture by entering a home where other members of the family were present. The account of the crime indicated that one of the men was hiding in the bushes, another driving a car circling the house. It was late at night and all of these factors would significantly heighten the aura of paranoia and fear. The drug use would have only further distorted the perceptions of the effect of the crime. The information indicates that other people were in the house at the time of the crime and they had knowledge of fighting and unusual circumstances. The setting, and reaction of any of those present did not indicate the responsible action that one would assume would be taken by the average person. There is an element of unreality regarding the entire crime scene.

PRESENT EVALUATION

Interview behavior: Mr. Bolender is a muscular, 36 year old man who was cooperative and provided necessary information willingly. He was well-oriented as to the time and place and answered questions in a cooperative manner. He concentrated on some minutiae and had difficulty focusing on a main theme.

Mr. Bolender was a cooperative informant who responded quickly. He tended to describe events in great deal and get involved in extraneous material. He discussed both positive and negative aspects of his background without entering into self-pity nor becoming defensive. There was no evidence of bizarre or peculiar thought patterns at this time. He was predominately serious, somber, and candid in addressing the seriousness of the crime. Although Mr. Bolender did not describe himself as depressed, he did express sadness at his failure to live up to his capabilities and acknowledged the pain that he had caused his family.

Speech was without articulation errors and grammar was good. He had difficulty remembering dates and did poorly on sequencing events. He did not give indications of hyperactivity nor unusual motor deficits.

Given the extensive history of drug abuse and the right temporal bullet entry, Mr. Bolender was screened for possible impairments stemming from this injury. He did not evidence any construactional dypsraxia (copying casings). His visual fields were full to gross confrontation and there was no evidence on simple screening or finger dysgnosia, graphesthesia, or tendencies to suppress tactile, visual or auditory stimuli to either side of this body.

Mr. Bolender reported some difficulties in memory. The Wechsler Memory Scale was administered with no evidence of significant deficits in short term memory. He made errors while counting by 4's. He had some problem in reciting the key points in two paragraphs, retaining only seven and five memories of 22 in the two paragraphs. His memory for digits both forward and reversed was excellent (eight forward and seven backwards). His drawing of figures from memory was low average. His ability to recall matched words was excellent. These results indicate that Mr. Bolender has average short term memory skills but difficulty in organizing information.

Mr. Bolender's medical problems were discussed and he reported two problems. He noted that he had frequent headaches that occur approximately every other day and last four to five hours. Medical records indicate past referrals for headache treatment. He does not report vision problems. He notes a continual dizziness and vertigo. He has no hearing in his right ear, but denies problems in sound localization. He denies seizures.

Mr. Bolender's medical condition is complicated by his extended polydrug use and the injury of the bullet entering his right temporal lobe. All records and Mr. Bolender's self report support that this defendant had a better than average early adjustment. He was described as a hard worker, popular with his peers and adults. The turn appeared when the drug use began at approximately 22 years. According to Tartar and Edwards (1987), research indicates that up to 50% of polydrug abusers exhibit neuropsychological impairment, even after a period of absence. The deficits do not appear to be related in a simple ratio to cause and effect of consumption, but reflect demographics, lifestyle, medical, and developmental variables. When combined, this result is impairment in cognitive capacity for some individuals. The cognitive impairments and associated psychiatric and social impairments generally are manifest after prolonged or habitual use. This appears to be the case with Mr. Bolender. The combination of three significant factors appear to have combined with the polydrug use, early obsession of making money and taking care of the family, effects of head injury, and a drug culture that accentuated paranoia and anxiety. The combination is more significant than any one factor alone.

Information regarding the right temporal lobe injury is limited. He reported amnesia for five days following the surgery. He experience the symptoms of depression following the bullet wound inflicted by his friend. He was not told the extent of the injuries by the physician

and he does not dwell on any injuries that may have been unsued from the wound. His inability to track events, poor ability skill at sequencing events may be the result of his wound. His impulsivity is typical of individuals with known brain injury. . . .

The typical anti-social personality disorder is typified by a pattern of anti-social behavior that begins before the age of 15. Good job performance is generally not sustained. Early childhood signs include lying, stealing, fighting, truancy, and resisting authority. In adolescence, excessive drinking and use of illicit drugs are frequent. None of these signs were noted during Mr. Bolender's early childhood and early and late adolescence.

SUMMARY AND CONCLUSIONS

Bernard John Bolender had a history of psychological problems stemming from the initial abandonment by his father and the need to assume the responsibilities that were too demanding for a nine year old child. This obsession was the basis for his later lifestyle which focused on the need for money and security. In 1976, a bullet entered his right temporal lobe and medical information is lacking regarding the severity of the injury. The extended polydrug use, mainly cocaine is known to cause psychological problems including psychosis, anxiety, hallucinations, and distorted judgment, with limited ability to predict the consequences, a marked change from his early year. He has now been drug free since the conviction and his psychological state has changed, although he continues to demonstrate confusion in some of this cognitive processing.

A review of the trial testimony indicates that if Mr. Bolender had been evaluated by a mental health profession additional information would have been available to aid in the trial. Unfortunately, the validity of the testimony of both the participants and witnesses is questionable. One provided State's evidence and the other was declared mentally incompetent to stand trial.

Mr. Bolender describes his "dream" state. The others in the house were also drug users and their behavior that evening indicates their judgment was also impaired. It is hard to understand the others in the house did not intercede, call the police, or at least escape themselves. Due to the combination of the alerted state due to the drug abuse, the paranoia and anxiety, the defendant's ability to appreciate the consequences of his actions, and the capacity to conform his conduct to the requirements of law was substantially impaired. Mr. Bolender did not have the faculties to differentiate right from wrong; his abilities to understand the nature and consequences of his conduct, differentiate fact from fantasy, to premeditate, and to form specific intent were substantially impaired. Additionally, due to the factors discussed herein, it is clear that Mr. Bolender suffered from an emotional disturbance at the time of the offense. Grant, Mohns, Miller, and Reitan 1976 concluded that the neuropsychological defects in polydrug users were more pronounced than those found in psychiatric patients and were quite similar to those presented by schizophrenics. The events of the evening supported this finding.

> Taking all of this into account Mr. Bolender did not have the intent to be torturous to the victims, which is one of the elements of the heinous, atrocious, and cruel aggravating circumstances and could not formulate the mental state necessary for an offense to be deemed cold, calculated and premeditated.
>
> Mr. Bolender could not formulate the intent knowingly to create the great risk of danger to many people. He did not have the capacity to appreciate the criminality of the act as required by the law. Myriad mitigating factors not listed in the statute are present in this case as well, as discussed herein.
>
> On first glance, the impact of a father's abandonment and the mother's subsequent dependence would appear minimal. It is apparent that these factors had significant impact in the development of this defendant's psychological makeup. Bo had a continuing fantasy, of not only equalling, but surpassing his father's contribution. The primary loss from his father was material, not emotional since the father had long before absented himself. He continued to grieve that his mother was over-burdened and had lost her place in the community, in addition to the financial support. This obsession allowed him to disregard the consequences of his actions. In his fantasy, if he provided for his mother and sisters, would justify his behavior. While this is not rational to the average man, Mr. Bolender continues to feel the need to provide for his mother. He has maintained a $150,000 life insurance policy with his mother as the beneficiary.
>
> This particular case is particularly tragic in that prior to Mr. Bolender's involvement in drugs was the typical "all American good boy." The defendant, victims and the other individuals in the house during the crime were all involved in a lifestyle typified by danger, paranoia and violence. The psychological impairment of drugs is clear. The consequences of this particular incident were traumatic and yet understandable given all of the antecedents. It is interesting to note that the jury recommended life imprisonment, suggesting that they had some grasp of the bizarre quality of the sequence of events. It is not in a sense of excusing, but rather in understanding that one can appreciate the mitigating circumstances."

(PC-R. 123-30).

The evidence discussed above establishes numerous and significant nonstatutory mitigating factors.[5] Because of the constraints imposed by the

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[5]Had the defense been permitted to call codefendant Thompson as a witness, evidence was also available from Thompson demonstrating that Mr. Bolender's level of culpability for the offense was not as great as that testified to by codefendant Macker. Defense counsel, possibly because of the constraints, did not even attempt to call Thompson at the penalty phase after the court denied the opportunity to call Thompson at guilt-innocence. According to Macker's testimony, Mr. Bolender was the ringleader and was the person who inflicted the wounds on the victims. Macker testified that he was told by Mr. Bolender to get a knife, which he did, and which was used during the incident (R. 820).

(continued...)

statute, defense counsel did not develop and present any of this evidence, as his affidavit attests. Had he not been constrained by the statute, defense counsel would have developed and presented this evidence, as his affidavit also attests.

In light of defense counsel's affidavit and the nonstatutory mitigating evidence discussed above, an evidentiary hearing was necessary in order to properly resolve this claim. Mr. Bolender proffered sufficient evidence in support of his claim to warrant a hearing, including former counsel's sworn affidavit and a panoply of documentary evidence. Indeed, in the circuit court, the State contested Mr. Bolender's factual allegations, arguing, for example, that defense counsel's memory, as reflected in his sworn affidavit, was faulty (PC-R. 2574), that the fact that the letters from the United States attorneys cited above were in defense counsel's files "could only" mean defense counsel considered using evidence of nonstatutory mitigation (PC-R. 2575), although a

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[5](...continued)
However, according to Thompson, Thompson himself was the one who obtained the knife and he did not know who used it (PC-R. 2509, 2513). Macker had testified that Mr. Bolender shot one of the victims (R. 829), but Thompson never saw Mr. Bolender shoot anyone (PC-R. 2519-20). Macker testified that Mr. Bolender stabbed two of the victims (R. 827-28, 831), but Thompson did not see Mr. Bolender stab anyone (PC-R. 2519, 2520). Macker testified that three people (himself, Thompson, and Mr. Bolender) were involved in the offense, but Thompson remembered four people being involved, himself and three others (PC-R. 2517). Macker testified about securing a baseball bat for Mr. Bolender (R. 821), but Thompson had no recollection of anything concerning a baseball bat (PC-R. 2512). Macker testified that Mr. Bolender and Thompson left in two cars (R. 846), but Thompson remembers three cars being involved (PC-R. 2516). Macker testified that Thompson and Mr. Bolender threw the guns into a canal (R. 853), but Thompson remembers that when he threw the guns away he was with a small, dark man (PC-R. 2509), not Mr. Bolender who is approximately six feet tall and muscularly built.

Clearly, Thompson's version of the offense is significantly different from Macker's version, and substantially reduces Mr. Bolender's relative degree of culpability. Such evidence is undeniably mitigating. (Thompson's account is based on a sworn statement he recently provided to the State Attorney's office in the course of plea negotiations resulting in agreed-upon sentences of less than life. The transcript of the statement was made part of the record of the instant Rule 3.850 proceedings, as were the other documents and affidavits discussed herein.)

fair reading of the record reflects just the opposite (that defense counsel believed the evidence would not be considered because it did not fall into the statute's rubric), and that defense counsel somehow made a tactical decision not to present evidence of nonstatutory mitigation (PC-R. 2576-78).[6] The State has contested Mr. Bolender's factual allegations and attempted to refute them. But the State's own position below makes the need for an evidentiary hearing in this case manifest: because the facts were in dispute is precisely why an evidentiary hearing was required. The circuit court, however, summarily denied relief without allowing an evidentiary hearing, a decision contrary to settled precedent. See Lemon v. State, 498 So. 2d 923 (Fla. 1986); see also Cooper v. Wainwright, 807 F.2d 881, 889 (11th Cir. 1989).

The State also argued below that Mr. Bolender's claim should be rejected because his previous penalty phase ineffective assistance of counsel claim was rejected. As this Court well knows, the two issues are distinct. Mr. Bolender has consistently argued that the proceedings resulting in his death sentences were unconstitutional because they did not provide for the full consideration of mitigation. Hitchcock provided the mechanism for presenting this issue, as this Court recognized in Hallv. State, 541 So. 2d 1125 (Fla. 1989), and Meeks v. Dugger, 548 So. 2d 184 (Fla. 1989). Only after Hitchcock did the law recognize that which capital defense practitioners knew all along: that the status of the law (and jury instructions) at the time of Mr. Bolender's capital sentencing constrained counsel's efforts to develop, present, and argue nonstatutory mitigation. As defense counsel's affidavit attests, the law in effect at the

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[6]Moreover, the State's arguments regarding defense counsel's purported "strategy" fail to consider that trial counsel's strategy, of course, had to be developed with a view toward what the jury instructions and statutory view of the judge would allow the jury and judge to consider. The State has said nothing regarding the evidence and argument which defense counsel himself states, under oath, that he would have presented on Mr. Bolender's behalf had he not been constrained by the statutory focus then in effect.

time of Mr. Bolender's capital proceedings constrained his efforts to develop, present, and argue nonstatutory mitigation. As that affidavit also attests, defense counsel would have presented substantial evidence and arguments on Mr. Bolender's behalf had he not been inhibited by the statute. Hitchcock error occurred, and it was by no means harmless beyond a reasonable doubt, particularly in a jury override case. *An* evidentiary hearing and Rule 3.850 relief are proper.

CLAIM II

MR. BOLENDER WAS DENIED A RELIABLE, MEANINGFUL, AND INDIVIDUALIZED CAPITAL SENTENCING DETERMINATION BECAUSE OF COUNSEL'S UNREASONABLE FAILURES TO CONDUCT INDEPENDENT INVESTIGATION INTO AND PRESENT COMPELLING AND AVAILABLE MITIGATING EVIDENCE AT MR. BOLENDER'S CAPITAL SENTENCING PROCEEDING, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

An effective defense attorney's objective at a Florida capital sentencing proceeding is to obtain a life sentence from the judge. In order to do that, at a minimum, defense counsel is responsible for providing "a reasonable basis in the record" for a life recommendation from the jury. See Hansbrough v. State, 509 So. 2d 1081, 1086 (Fla. 1987)(a jury recommendation of life may not be overridden if there exists "a reasonable basis for the jury to recommend life"); ~~see also~~ Tedder v. State, 322 So. 2d 908 (Fla. 1975). In Mr. Bolender's case, ample mitigation existed which would have provided much more than a "reasonable basis" for a jury recommendation of life. Trial defense counsel, however, conducted absolutely no penalty phase investigation and had no strategy or tactic for this failure. Indeed, as the record reflects, counsel did absolutely nothing with regard to the penalty phase and was ignorant of Florida capital sentencing law. Where, as here, a reasonable basis for life exists and defense counsel without tactic or strategy fails to present it, ineffective assistance is shown, as this Court recently made clear in Stevens v. State, 552 So. 2d 1082 (Fla. 1989). In such circumstances, "confidence in the trial judge's decision

to reject the jury's recommendation is undermined," and relief is appropriate. Stevens, 552 So. 2d at 1087, citing Porter v. Wainwright, 805 F.2d 930, 936 (11th Cir. 1986).

A. COUNSEL'S ASSISTANCE WAS PREJUDICIALLY DEFICIENT

Counsel did no preparation for Mr. Bolender's capital sentencing proceedings, and presented nothing at sentencing. That counsel's failures were entirely unreasonable, and that he was ignorant of the significance of a jury recommendation of life in Florida's capital sentencing scheme, are evident from counsel's sworn affidavit:

> I knew that the State was going to seek the death penalty in Mr. Bolender's case. I also knew that the judge assigned to the case, The Honorable Richard S. Fuller, was predisposed to impose death and that there was not much that could be presented in the way of mitigation that would make any difference to Judge Fuller. After Mr. Bolender was convicted and the penalty Phase was about to begin, I believed that the jury would return a life recommendation. However, as I said, I also believed Judne Fuller would override that recommendation. At the time, my understandinn was that a judge could override a jury recommendation of life under anv circumstances. Therefore, I did not think it mattered much what the iurv recommended because the judge had the final say. As it turned out, the jury did recommend life, and Judge Fuller overrode that recommendation and imposed death.
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> As I understand capital sentencing law today, I realize that I did not consider, but should have considered, putting on mental health and other nonstatutory mitigating evidence and that I should have put on mitigating evidence to shed light on the judge's override of the jury's life recommendation. For example, I should have considered putting on evidence regarding Mr. Bolender having been shot in the head and testimony from Mr. Bolender's mother, sister, wife, and daughter. As I said, however, because I believed Judge Fuller was predisposed to impose death and because of *my* understanding of the capital sentencing statute, I did not present any of this evidence.

(App. 1)(emphasis added).

Recently, in Stevens v. State, 552 So. 2d 1082 (Fla. 1989), this Court explained the analysis appropriate to a penalty phase ineffective assistance of counsel claim involving the override of a jury's life recommendation. First, the court summarized Florida's legal principles regarding jury overrides.

Stevens, 552 So. 2d at 1085 (If there is a reasonable basis in the record to support the jury's recommendation, an override is improper. Ferry v. State, 507 So. 2d 1373, 1376 (Fla.1987).) The Court found that Stevens' counsel had failed to investigate and thus failed to present available mitigating evidence to the jury and/or judge, id. at 1085-86, because "he did not believe he could persuade the trial judge to impose a life sentence, and, at any rate, believed a life recommendation from the jury was a guarantee that this Court would overturn a death sentence if it was imposed." Id. at 1085. Thus, in Stevens, as in Mr. Bolender's case, defense counsel believed the trial judge could not be persuaded to impose life, proceeded on the basis of a misunderstanding of Florida override law, and therefore failed to investigate and present available mitigation. In Stevens, the Court explained why this view, a view shared by defense counsel in Mr. Bolender's case, constituted ineffective assistance in the jury override context:

> When trial counsel fails to develop a case in mitigation, the trial court is prevented from considering whether the jury could have based its recommendation upon this aspect of the case. Although a trial judge may not believe the evidence presented in mitigation or find it persuasive, others may. Robinson v. State, 487 So.2d 1040, 1043 (Fla.1986). It takes more than a difference of opinion for a trial judge to override a jury's life recommendation. Holsworth v. State, 522 So.2d at 354. The presentation of this mitigating evidence may have persuaded the trial judge that an override was unreasonable under the circumstances. . . .
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> Thus, when counsel fails to develop a case in mitigation, the weighing process is necessarily skewed in favor of the aggravating factors argued by the state. Francis v. State, 529 So.2d at 677 (Barkett, J. dissenting); Amazon v. State, 487 So.2d 8, 13 (Fla.), cert. denied, 479 U.S. 914, 107 S.Ct. 314, 93 L.Ed.2d 288 (1986). Moreover, if the trial judge views the case as one without any mitigating circumstances when in fact those circumstances exist, then confidence in the trial judge's decision to reject the jury's recommendation is undermined. Porter v. Wainwright, 805 F.2d 930, 936 (11th Cir.1986), cert. denied, 482 U.S. 918, 107 S.Ct. 3195, 96 L.Ed.2d 682 (1987). At that point it cannot be said that no reasonable person could differ as to the appropriate penalty. Id.
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> According to the principles established in Strickland v. Washington, "counsel has a duty to make reasonable investigations or

> to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691, 104 S. Ct. at 2066. Trial counsel claims that it was a matter of strategy not to develop a case in mitigation. "A strategic decision, however, implies a knowledgeable choice." Eutzy v. State, 536 So. 2d 1014, 1017 (Fla. 1988)(Barkett, J., dissenting). It is apparent here that trial counsel's failure to investigate and present mitigating evidence was not the result of an informed decision because trial counsel was unaware the evidence existed. In this case, it is clear that the failure to investigate Stevens' background, the failure to present mitigating evidence during the penalty phase, the failure to argue on Stevens' behalf, and the failure to correct the errors and misstatements made by the state was not the result of a reasoned professional judgment. Trial counsel essentially abandoned the representation of his client during sentencing. "It should be beyond cavil that an attorney who fails altogether to make any preparations for the penalty phase of a capital murder trial deprives his client of reasonably effective assistance of counsel by any objective standard of reasonableness." Blake v. Kemp, 758 F.2d 523, 533 (11th Cir.), cert. denied, 474 U.S. 998, 106 S. Ct. 374, 88 L.Ed.2d 367 (1985). At the very least, any evidence presented and any plausible arguments made to the trial court could have provided the trial court with a basis to follow the jury's recommendation of a life sentence. We find that trial counsel's inaction in the penalty phase of the trial amounted to a substantial and serious deficiency measurably below the standard for competent counsel. Under the circumstances presented in this case, we believe Stevens has demonstrated a reasonable probability that trial counsel's inaction may have affected the sentence imposed by the trial judge.

Stevens, 552 So. 2d at 1086-88 (footnote omitted)(emphasis added).

In Mr. Bolender's case, as in Stevens, trial counsel "abandoned the representation of his client during sentencing." Counsel believed the judge was predisposed to impose death and so did not even attempt to persuade the judge otherwise. Counsel had absolutely no understanding of the jury's critical function in sentencing and so did nothing to provide a reasonable basis for the life recommendation. Counsel failed to investigate and prepare and so was unaware of the value of the wealth of mitigating evidence available in this case or of the relevance of that evidence to the capital sentencing decision. Here, as in Stevens, "trial counsel's inaction in the penalty phase of the trial amounted to a substantial and serious deficiency measurably below the standard for competent counsel." 552 So. 2d at 1087. Here, as in Stevens, Mr. Bolender "has demonstrated a reasonable probability that trial counsel's inaction may

have affected the sentence imposed." 552 So. 2d at 1088. Here, as in Stevens, relief is required.[7]

Prejudice is also apparent: a wealth of mitigating evidence was available at the time of trial and would have established much more than a reasonable basis for the jury's life recommendation. Counsel failed to present this evidence through no strategy or tactic but rather because he failed to investigate and prepare. See Porter, supra, 805 F.2d at 935-36 ("In light of the very strict standard that applies in jury override cases, and in light of the fact that the sentencing judge viewed this case as one without any mitigating circumstances when in fact . . . there were mitigating circumstances

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[7]As this Court has made clear in Stevens, and as the Eleventh Circuit has made clear in Doualas v. Wainwright, 714 F.2d 1532, 1553-58 (11th Cir. 1983), adhered to on remand, 739 F.2d 531 (11th Cir. 1984), and Porter v. Wainwrinht, 805 F.2d 930, 932-36 (11th Cir. 1986), an attorney's ineffectiveness in allowing a jury's life recommendation to be overturned demonstrates ineffective assistance to an even greater degree than cases wherein the jury recommends death. This is so because in cases where the jury recommends life all an effective attorney needs to do is place in the record a "reasonable basis" for that life recommendation. See Stevens, supra; see also Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975); Ferry v. State, 507 So. 2d 1373, 1376-77 (Fla. 1987); Wasko v. State, 505 So. 2d 1314, 1318 (Fla. 1987). An attorney who fails to meet that simple requirement of Florida law cannot but be deemed ineffective. This is especially so in a case such as Mr. Bolender's, a case involving a wealth of mitigation which was available for presentation at the time of trial and which was never investigated or developed by defense counsel. There was no tactic here. There was no strategy here. This is plainly a case of ineffective assistance. Here, "counsel's failure to present or investigate mitigation evidence resulted not from an informed judgment, but from neglect." Harris v. Dunner, 874 F.2d 756, 763 (11th Cir. 1989).

"It should be beyond cavil that an attorney who fails altogether to make any preparations for the penalty phase of a capital murder trial deprives his client of reasonably effective assistance of counsel by any objective standard of reasonableness." Blake v. Kemp, 758 F.2d 523, 533 (11th Cir. 1985). Here, counsel made no preparation for the penalty phase, had no reason for failing to prepare, and had no strategy at all. Counsel violated his primary duty -- the duty to investigate and prepare. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Harris, supra; Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988). Here, as in Jones v. Thigpen, 788 F.2d 1101 (5th Cir. 1986), "[d]efense counsel either neglected or ignored critical matters in mitigation at the point where the jury was to decide whether to sentence [Bernard Bolender] to death." Id. at 1103. As a result, the judge deemed an override appropriate and reversed the jury's life recommendation; this is a clear example of ineffectiveness. See Stevens; Porter; Douglas.

which cannot be characterized as insubstantial, our confidence in the outcome -- the outcome being the trial judge's decision to reject the jury's recommendation -- is undermined."); Harris, supra. Under Stevens, Mr. Bolender's entitlement to relief is more than apparent.

Whether because of his stark ignorance of the jury's recommendation of life in Florida's capital sentencing scheme, or (and) because of the pre-Hitchcock statutory focus then in effect and under which counsel operated (see Claim I), the fact remains that Bernard Bolender was denied an individualized and meaningful capital sentencing determination in a case in which a great deal of evidence establishing a "reasonable basis" for the jury's recommendation of life existed. There was no tactic or strategy here. The jury and judge were deprived of substantial mitigation, while there was absolutely no reason for this deprivation,

A defense attorney's objective at a Florida capital sentencing proceeding is to obtain a life sentence from the judge. An integral part of that process is obtaining a life recommendation from the "sentencing" jury. Tedder v. State, 322 So. 2d 908 (Fla. 1975). Since under Florida law a jury recommendation of life can be overridden, a defense attorney has the duty to persuade the judge to accept the jury's life recommendation and thus to provide a reasonable basis for a jury's life recommendation. Only by reasonably fulfilling these responsibilities does a defense attorney provide effective assistance. If counsel fails, through no tactic or strategy, to present a reasonable basis for a jury recommendation when such a basis is available for presentation, that is unreasonable attorney conduct, which, within the context of the Florida death penalty scheme, is plainly prejudicial. Where, as here, there is no preparation, no strategy can be ascribed to counsel's failure: this is deficient performance. Where, as here, what counsel ignored (i.e., failed to investigate, develop, or present) through his deficient performance is enough to

provide a "reasonable basis" for a jury's recommendation of life, confidence in the outcome is undermined and ineffective assistance of counsel is shown. Stevens, supra; Porter, supra.

As discussed, counsel here did no preparation for Mr. Bolender's capital sentencing proceedings, and presented nothing at sentencing. Counsel's affidavit, quoted above, demonstrates that his failures were entirely unreasonable (see App.1). As counsel's affidavit clearly reflects, defense counsel proceeded from ignorance, not from reasonable investigation or preparation. Counsel obviously did not know or understand Florida capital sentencing law regarding the jury's role in sentencing. Thus, in no small part because he believed the judge was predisposed to impose death and would not consider mitigating evidence, counsel simply gave up and abandoned his duties to his client. A note in defense counsel's file succinctly summarizes counsel's attitude regarding the jury's function: "921.141--Recommendation *my* ass!" (App. 2)(emphasis in original). Defense counsel was ignorant regarding the jury's central role in Florida's capital sentencing scheme and thus did nothing to establish a reasonable basis for the jury's life recommendation.

Counsel's affidavit also reflects that because of his failure to investigate and prepare, counsel was unaware of what kind of evidence was relevant and admissible at a capital penalty phase. Thus, although important mental health mitigation was available in this case, counsel did not investigate such evidence because he believed it was not admissible (App. 1). Even given counsel's belief that mitigation was limited to the factors listed in the capital sentencing statute (see Claim I), counsel's failures were nevertheless plainly ineffective.

Not only must counsel investigate in order to make decisions regarding a penalty phase defense, but also counsel must make reasonable decisions. Here, counsel was guided by his lack of investigation and by his belief that it was

futile to attempt to convince the judge to impose life. Given the status of Florida law (i.e., that an override of a jury's life recommendation is improper if that recommendation is supported by a "reasonable basis"), defense counsel's penalty phase (in)action was entirely unreasonable. Stevens. By not investigating, preparing, or understanding Florida capital sentencing law, defense counsel failed to provide a reasonable basis for the jury's life recommendation and thus failed to provide the trial judge with a basis for following that recommendation or to provide a reasonable basis for this Court to reverse the override. Stevens. In Mr. Bolender's case, as in Stevens, defense counsel's actions were unreasonable.[8]

B. COUNSEL FAILED TO PROVIDE A REASONABLE BASIS FOR A LIFE SENTENCE, WHEN SUCH A BASIS WAS AVAILABLE, AND PREJUDICE IS SHOWN

Several types of evidence in mitigation were readily available had defense counsel fulfilled his duties. Evidence was available from family members regarding Mr. Bolender's childhood and youth, which were marked by his father's abandonment of the family and Mr. Bolender's attempts to fill his father's shoes. Evidence was also available from Mr. Bolender's friends regarding the period prior to the offense when Mr. Bolender's drug use escalated to dramatic and self-destructive proportions. Other evidence was available (in fact, was in defense counsel's files) regarding Mr. Bolender's valued assistance in the past to the United States Attorney's Office. Compelling evidence was also available regarding Mr. Bolender's positive adjustment to incarceration and excellent behavior in jail. Finally, expert mental health evidence was available regarding the psychological difficulties Mr. Bolender experienced as a result of

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[8]In addition to his total ignorance regarding capital sentencing law and his total failure to investigate, defense counsel's deficient performance also resulted from personal problems involving drugs. Evidence has been recently uncovered reflecting that during Mr. Bolender's trial, defense counsel was smoking marijuana almost every morning of trial and was also using cocaine in the evening. Obviously, counsel's functioning was impaired, as is evident from his complete failure to investigate, develop, and present a penalty phase case.

his father's abandonment, the psychological deficits Mr. Bolender suffers as a result of a gunshot wound to the head and his severe polydrug abuse, and the seriously impaired status of Mr. Bolender's psychological and cognitive functioning at the time of the offense. Any or all of this evidence would have provided a reasonable basis for a life sentence. Nothing, however, was investigated or presented.

The evidence counsel could have presented had he fulfilled his duty to investigate and prepare is detailed above (see Claim I, Section C), and will not be repeated herein. This evidence obviously establishes numerous reasonable bases for the jury's life recommendation, and would have precluded an override or resulted in this Court reversing an override. Counsel unreasonably and without any tactic or strategy failed to investigate, develop, or present any of this evidence. Mr. Bolender's override sentence of death is the prejudice. An evidentiary hearing in order for these issues (see also Claim I) to be properly resolved and Rule 3.850 relief are appropriate.

CLAIM III

BERNARD BOLENDER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT-INNOCENCE PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

In Strickland v. Washington, *466* U.S. *668* (1984), the Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *466* U.S. at *688* (citation omitted). Strickland v. Washington requires a defendant to demonstrate: 1) unreasonable attorney performance, and 2) prejudice. In th Rule 3.850 motion, Mr. Bolender pled each. Given a full and fair evidentiary hearing, he can prove each. He is entitled, at a minimum, to an adequate evidentiary hearing on these claims.

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Each of the errors committed by Mr. Bolender's counsel is sufficient, standing alone, to warrant relief. Each undermines confidence in the fundamental fairness of the guilt-innocence determination. The allegations are more than sufficient to warrant an evidentiary hearing. See Aaan v. Duaaer, 835 F.2d 1337 (11th Cir. 1987); Code v. Montgomery, 725 F.2d 1316 (11th Cir. 1983).

The State's key witness at trial was Joseph Macker, a cooperating co-defendant. He testified basically that Mr. Bolender was the instigator and main participant in the homicides. The other eye-witness and co-defendant, Paul Thompson, did not testify. Mr. Thompson had previously been found incompetent in another case, and had entered a not guilty by reason of mental illness plea in this case.

On direct appeal, this Court held that the trial court properly refused defense counsel's attempts during trial to call Thompson as a witness because defense counsel was on notice that the service of the subpoena on Thompson was defective and defense counsel failed to properly subpoena Thompson. Bolender, 422 So. 2d at 836. To the extent that the Court refused to allow Mr. Bolender to call Mr. Thompson as a witness because of the inadequacy of defense counsel's subpoena, defense counsel was woefully ineffective.

Mr. Della Fera had reason to believe that Mr. Thompson could provide exculpatory testimony for Mr. Bolender. The recent under oath statement provided to the State by Thompson demonstrates that counsel's initial view was correct: there was quite a great deal of helpful testimony that Thompson could have provided, testimony that would have undermined Macker's account. At trial, defense counsel repeatedly, albeit ineffectively, attempted to secure Thompson's testimony. Questions had arisen regarding Thompson's competency, so on April 9, 1980, defense counsel moved for a continuance until Thompson's competency could be determined (ROA, Pleadings Volume, p. 49). Defense counsel alleged that the State was preventing Thompson from testifying by delaying the determination of

Thompson's competence and that Thompson had exculpatory information, but would not testify until his competence was determined (Id.) Defense counsel and Mr. Bolender had spoken to Thompson at the jail, and Thompson had indicated that he could provide exculpatory information (Id.). The trial court denied the motion (R. 8), relying on a United States District Court's determination two years earlier (see Thompson v. Crawford, 479 So. 2d 169, 170 n.2 (Fla. 3rd DCA 1985)). that Thompson was incompetent. The trial court refused to await the outcome of state court determinations regarding Thompson's competence (Id.). Eventually, a judicial determination was made that Thompson feigned incompetence.

Immediately prior to trial, on April 21, 1980, defense counsel again requested a continuance in order to secure Thompson's testimony, arguing that the State had had over 90 days to determine Thompson's competence and was delaying in order to prevent Mr. Bolender from calling Thompson as a witness (R. 247). Defense counsel also argued that even if Thompson was incompetent to stand trial, he was still qualified to be a witness (R. 248). The court denied the motion (R. 249). Defense counsel had not attempted to properly serve a subpoena to obtain Thompson's testimony, nor did he request a hearing to ascertain whether Thompson would indeed invoke his fifth amendment privilege.

During Mr. Bolender's trial, defense counsel again attempted to secure Thompson's testimony, this time requesting that the court issue a writ of habeas corpus ad testificandum (R. 978). The court refused to issue the writ, stating that Thompson's attorney had said Thompson would refuse to testify based on the fifth amendment and that the federal district court order finding Thompson incompetent still stood (R. 979). Again, defense counsel argued that Thompson was qualified as a witness even if he was incompetent to stand trial and that he could provide exculpatory information (R. 979). On direct appeal, this Court held that since defense counsel was on notice that the original attempt to subpoena Thompson was defective and defense counsel failed to correct the

improper service or request the writ of habeas corpus ad testificandum before trial, the trial court properly denied the defense request for the writ. Bolender, 422 So. 2d at 836.[9]

In December, 1980, eight months after Mr. Bolender's trial, Thompson was adjudged incompetent and found not guilty of this offense by reason of insanity. Thompson v. Crawford, 479 So. 2d at 172. However, after the state mental hospital to which Thompson had been committed reported that Thompson was not mentally ill, further evaluations were conducted revealing that Thompson had been malingering and feigning mental illness. Thompson, 479 So. 2d at 173-75. As a result, the trial court determined that Thompson had secured his acquittal by fraud, and that he was in fact competent. Id. at 176. Thompson's acquittal was set aside. Id.

After Thompson's appeals were rejected, on January 25, 1990, Thompson pled guilty to four counts of second degree murder and eight other charges arising from the offense for which Mr. Bolender was convicted. As part of his plea agreement, on February 16, 1990, Thompson gave a sworn statement to the State Attorney's office describing his version of the offense (PC-R. 2501-24).

Thompson's recent statement demonstrates that defense counsel's failure to secure Thompson's testimony at Mr. Bolender's trial deprived Mr. Bolender of

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[9]Unbeknownst to the trial court or defense counsel, the State had received information on March 7. 1980, that Thompson was feigning insanity, Thompson v. Crawford, 479 So. 2d at 171, and had obtained an affidavit from an inmate who was in prison with Thompson which explained Thompson's efforts to learn how to feign mental illness (See PC-R. 2525-29). Despite this knowledge, the State had opposed defense counsel's motions and had opposed the defense attempts to secure Thompson as a witness. The State also precluded Mr. Bolender from testifying as to statements made by Thompson to Mr. Bolender (R. 1053-55). The State's position raises serious concerns under Brady v. Maryland, 373 U.S. 83 (1963), and on this basis as well an evidentiary hearing is warranted. This evidence was recently obtained from the Dade County State Attorney's office's files, as that office finally agreed to provide disclosure pursuant to Fla. Stat. section 119. Had defense counsel acted properly (by getting a valid subpoena out on time), or properly investigated, or had the trial court not precluded evidence concerning what Thompson could testify to, this evidence would have been heard by the jury, a jury that (without it) was forced to rely on Macker's account.

significantly exculpatory testimony and of testimony undermining the credibility of Macker's version of the offense.[10] This is precisely the type of evidence that the jury should have been allowed to hear.

Defense counsel was aware that Thompson could provide exculpatory information and, as this Court held, knew that the original attempt to subpoena Thompson was defective. Despite this knowledge, however, defense counsel did not attempt to subpoena Thompson properly. This is deficient performance. Prejudice is obvious from the discussion above: Thompson's version of the offense contradicted Macker's and undermined the State's case against Mr. Bolender. Counsel's errors deprived Mr. Bolender of his right to present a defense. As a result, the State's case against Mr. Bolender went unchallenged, and evidence rebutting aggravation and establishing mitigation was never heard by Mr. Bolender's jury and judge. Relief is proper, for the proceedings

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[10] According to Macker's testimony, Mr. Bolender was the ringleader and was the person who inflicted the wounds on the victims. For example, Macker testified that at one point when the victims were in the bedroom of his house, Mr. Bolender told Macker to get a knife which he then used against the victims (R. 820). However, according to Thompson, Thompson himself was the one who obtained the knife, but he did not see it used on the victims (PC-R. 2509, 2513). Macker had testified that Mr. Bolender shot one of the victims (R. 829), but Thompson never saw Mr. Bolender shoot anyone (PC-R. 2519, 2520). Macker testified that Mr. Bolender stabbed two of the victims (R. 827-28, 831), but Thompson did not see Mr. Bolender stab anyone (PC-R. 2519, 2520). Macker testified that three people (himself, Thompson, and Mr. Bolender) were involved in the offense, but Thompson remembered four people being involved, himself and three others (PC-R. 2517). Macker testified about securing a baseball bat for Mr. Bolender (R. 821), but Thompson had no recollection of seeing a baseball bat anywhere (PC-R. 2512). Macker testified that Mr. Bolender and Thompson left in two cars (R. 846), but Thompson remembers three cars being involved (PC-R. 2516). Macker testified that Thompson and Mr. Bolender threw the guns into a canal (R. 853), but Thompson remembers that when he threw the guns away he was with a small, dark man (PC-R. 2509). Mr. Bolender is approximately six feet tall and muscularly built.

Clearly, Thompson's version of the offense is significantly different from Macker's version, and raises substantial questions regarding the credibility of Macker's testimony. Defense counsel's failure to secure Thompson's testimony violated Mr. Bolender's rights to fundamental fairness and due process. Due process and the right to present a defense require that testimony directly affecting the determination of guilt or penalty be admitted. The failure to secure Thompson's testimony violated the sixth, eighth, and fourteenth amendments.

violated the sixth, eighth, and fourteenth amendments.

Counsel was also deficient in other respects. He failed to object to a number of clearly objectionable and prejudicial statements made by the prosecutor in closing argument in the guilt phase. The prosecutor injected his own personal beliefs into his argument to the jury:

> "This guy did it. I am not afraid to look at him, point at him, and show you and say he did it." (R. 1231)

The prosecutor called the defendant a liar:

> "I submit to you, ladies and gentlemen of the jury, there is not anything Bernard Bolender could have said, from that witness stand, that would make him sound like anything but a liar and murderer he is." (R. 1301).

> "This story is an absolute incredible lie. It is a story that was fashioned during the trial, that he made up during the trial, because he felt it was the best defense, just like he said on the witness stand." (R. 1317).

The prosecutor also argued that his witnesses were being truthful.

> "Joe Macker is telling you the truth. Joe Macker is a man who already has been sentenced in this case." (R. 1317)

Defense counsel, ineffectively, did not object to any of these blatantly improper arguments.

The United States Supreme Court has held that due process and the right to a fair trial may be breached when a prosecutor engages in improper argument such as the one involved in Mr. Bolender's case. United States v. Young, 470 U.S. 1, 7-8 (1985).

> '[I]t is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.' ABA Standards for Criminal Justice 3-5.8(b)(2nd Ed. 1980)(footnotes omitted).

In Young, 470 U.S. at 18-19, the Court also noted that the prosecutor may breach the constitutional guarantee when he implies he had more information than had been presented to the jury.

> The prosecutor's vouching for the credibility of witnesses and expressing his personal opinion concerning the guilty of the accused pose two dangers: such comments convey the impression that evidence

not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis or the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the government's judgment rather than its own view of the evidence. See Berger v. United States, 295 U.S. at 88-89.

Defense counsel never objected to any of these comments by the prosecutor.

Defense counsel also failed to object to the blatant misrepresentation to the jury concerning Joe Macker's sentence. In opening argument, the State presented Mr. Macker to the jury:

> You are going to hear the testimony of Joseph Macker, one of the individuals charges in this crime.
>
> If you recall, I think it was Mr. Wood or one of the other jurors that said he felt some sort of compulsion about the necessity of in some cases negotiating a deal or plea bargaining.
>
> You are going to hear the testimony of Mr. Macker that the nature of his plea bargaining, the nature of his agreement with the State was that he plead guilty and was sentenced to twelve life sentences, along with some additional time on some other charges.
>
> It is not as though the evidence is going to be presented to you he is somebody that got off scot free.
>
> It is evidence that is going to be presented to you through somebody who admitted his guilt and his participation in this series of acts and did so knowing it will result in his being sentenced to twelve sentences of life in prison plus additional sentences in order to have him testify in this case.

(R. 293-94)(emphasis added). When Macker testified, he also said to the jury that he would be serving "life" sentences:

> Q. So you received twelve sentences of life in prison on these twelve counts?
>
> A. Yes.
>
> Q. With reference to a thirteen count indictment, possession of cocaine, did you plead guilty to that, also?
>
> A. Yes. I did.
>
> Q. Did you receive a sentence of fifteen years on that charge?
>
> A. Yes. I did.
>
> Q. Did you understand, or do you understand now, that the date

in which you are paroled, if ever, is up to the Parole Commission and you don't have any idea when you will ever get out of prison?

A. Yes. That's right. I know that.

(R. 865-66).

On cross-examination, defense counsel did absolutely nothing to inform the jury that a life sentence on a second degree murder conviction did not mean that Macker would be in prison for any set period of time, and that he would be actually receiving a great deal less, although he knew this. (Macker is out on the streets today.) He also never brought to the jury's attention that the State, in its agreement with Macker, promised to "make the Parole Commission aware of the full tenor of the instant agreement and of the full extent of the defendant's cooperation in the prosecution of the co-defendant's in the instant case, Bernard Bolender and Paul Thompson." (State v. Macker, No. 80-640, 11th Judicial Circuit, Plea Agreement)(PC-R. 110-12).

Finally, in closing argument, the State did its best to convince the jury that Macker had nothing to gain by testifying, and that he would serve the remainder of his life in prison.

> He is paying and he will pay for the remainder of his life for the crimes he committed that night. He will probably spend the rest of his life in prison, or if he is paroled, it certainly is not going to be any time soon.
>
> He is not a young man. He is in his middle forties. He maybe sixty. He may never be paroled. He may never live through prison life, but he knows that he told the truth that night, and I think that you know that.

(R. 1310).

> Joe Macker is telling you the truth. Joe Macker is a man who already has been sentenced in this case. He knows what his punishment is going to be.

(R. 1317)(emphasis added). There was no objection to any of this, although counsel knew it to be inaccurate. This was ineffective assistance.

Macker did know what his sentence was; but his idea and the one presented to the jury could not have been farther apart. As indicated by a Memorandum of Law in Support of Motion for Post-Conviction Relief, filed pro se by Joe Macker, in the Circuit Court of the Eleventh Judicial District in and for Dade County, Florida, in Case No. 80-640-B (Feb. 25, 1985):

> 1) Movant was convinced by his own counsel and, other counsel and investigators from the State, that he would be eligible for parole after three (3) years and released on paroled within five (5) to seven (7) years.

(PC-R. 116).

At this date Macker is out of prison. Mr. Bolender's defense counsel did nothing to inform the jury that Macker had quite a lot to gain by testifying -- his freedom, after only a few years of imprisonment.

Defense counsel also failed to bring to the attention of the jury and the judge that an immunity agreement had been entered into by the State and Macker's wife, Diane (PC-R. 121). In fact, neither defense counsel nor the State mentioned the agreement to the judge when he mentioned, outside the presence of the jury, that the State should bring an appropriate action to revoke Diane's probation which she was serving at the time of the offense, and of which it appeared that she was in violation (R. 1205). When defense counsel was cross-examining Diane Macker, he was unable to even question her adequately about her past criminal record (R. 1173; 1176), although the jury was eventually told that she was on probation for breaking and entering (R. 1191).

Defense counsel's deficiencies do not end there. Because of his failure, a directed verdict was essentially entered against Mr. Bolender. The judge instructed the jury, without objection, that there was no argument that a homicide had occurred. Virtually the first words out of the judge's mouth after closing arguments were as follows:

> These crimes are alleged to have occurred here in Dade County, Florida, between the 7th and 10th of January 1980.

There is no argument in this case but that a homicide did take place on that date or those dates and that it occurred in Dade County.

Obviously the balance of the issues are for your determination.

(R. 1234)(emphasis added). There was no objection to this.

There was also no objection to the failure of the trial court to instruct the jury on the definition of "reasonable doubt" (R. 1206).

Finally, numerous bloody and gory photographs, in excess of 50, were entered into evidence by the State. Defense counsel objected to almost none of these.

Mr. Bolender was prejudiced by these unjustifiable omissions of counsel and denied his rights under the sixth, eighth, and fourteenth amendments. Counsel's omissions resulted in a failure to subject the prosecution's case to the "crucible of meaningful adversarial testing." United States v. Cronic, 466 U.S. 648 (1984). A full and fair evidentiary hearing and Rule 3.850 relief are proper.

CLAIM IV

RECENT DECISIONS FROM THIS COURT MAKE MANIFEST THAT THE JURY OVERRIDE IN MR. BOLENDER'S CASE RESULTED IN AN ARBITRARILY, CAPRICIOUSLY, AND UNRELIABLY IMPOSED SENTENCE OF DEATH, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The jury override procedure in Florida is constitutionally valid only to the extent that it is utilized within specific, reliable procedural parameters, and so long as it does not lead to freakish and arbitrary capital sentencing. Spaziano v. Florida, 468 U.S. 447, 465 (1984). The override in this case would not be allowed to stand today, thus demonstrating the unreliability and arbitrariness of Mr. Bolender's sentence of death.

If the jury override here, and the method by which it was sustained, is acceptable under the Florida statute, then "the application of the jury override procedure has resulted in arbitrary or discriminatory application of the death penalty . . . in general . . . [and] in this particular case." Spaziano, supra.

Where a particular override results in an arbitrary imposition of the death penalty, the eighth and fourteenth amendments are violated.[11]

Mr. Bolender's jury recommended that he be sentenced to life. However, although mitigation was present in the record, and although there was a reasonable basis for the jury's recommendation, the trial judge ignored the law and imposed death. This Court then did not apply its override standards in affirming that sentence. See Bolender V. State, 422 So. 2d 833 (Fla. 1982). The record here demonstrates many reasonable bases for life. The jury's unanimous verdict of life should not have been disturbed.

Under the law as it now exists, if a Florida jury recommends life, death may not be imposed if there is any "reasonable basis in the record" for the recommendation. Mann v. Duener, 844 F.2d 1446, 1450-54 (11th Cir. 1988)(in banc); Ferry v. State, 507 So. 2d 1373, 1376 (Fla. 1987); see also Hansbrough v. State, 509 So. 2d 1081, 1086 (Fla. 1987)("a reasonable basis for the jury to recommend life" cannot be overridden); Wasko v. State, 505 So. 2d 1314, 1318 (Fla. 1987)(no override "unless no reasonable basis exists for the opinion").

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[11]The nature of Florida's capital sentencing process ascribes a role to the sentencing jury that is central and "fundamental", Riley v. Wainwright, 517 So. 2d 656, 657-58 (Fla. 1988); Mann v. Dugger, 844 F.2d 1446, 1452-1454 (11th Cir. 1988)(in banc), representing the judgment of the community. Id. A Florida sentencing jury's recommendation of life is entitled to "great weight," and can only be overturned by a sentencing judge if "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975)(emphasis supplied). See ~~also~~ ~~Mann~~, 844 F.2d at 1450-51 (and cases cited therein). The standard established under Florida law is thus that if a jury recommendation of life can be supported by a reasonable basis in the record, that jury recommendation cannot be overridden. See Mann. supra, 844 F.2d at 1450-54 (and cases cited therein); see also, Ferry v. State, 507 So. 2d 1373, 1376-77 (Fla. 1987); Wasko v. State, 505 So. 2d 1314, 1318 (Fla. 1987); Brookings v. State, 495 So. 2d 135, 142-43 (Fla. 1986); Tedder, supra, 322 So. 2d at 910. Cf. Hallv. State, 541 So. 2d 1125 (Fla. 1989). This is "the nature of the sentencing process," Mann, supra, 844 F.2d at 1455 n.lO, under Florida law. This standard has in fact been recognized by the United States Supreme Court as a "significant safeguard" provided to a Florida capital defendant. Spaziano, supra, 468 U.S. at 465.

Here, "reasonable people could differ as to the propriety of the death penalty in this case, [and thus] the jury's recommendation of life must stand." Brookinns v. State, 495 So. 2d 135, 143 (Fla. 1986). There were numerous valid and eminently reasonable bases supporting the jury's verdict of life in this case. Moreover, the jury could quite reasonably have reached different conclusions than the judge regarding the aggravation, particularly in light of the numerous improprieties in the trial court's findings regarding aggravation. Whatever balance the trial judge may have struck, the jury's balancing and resulting life recommendation, were undeniably reasonable under Florida law. See Mann, supra, 844 F.2d at 1450-55; Ferry, supra; Wasko, supra. The trial judge, however, did not provide Mr. Bolender with the right which the law clearly afforded him: the right not to have a reasonable jury verdict overturned.

In fact, the trial judge failed to even explain why the jury had no rational basis for its recommendation, as Tedder requires. A jury life recommendation magnifies the sentencing judge's duty to actually consider statutory and nonstatutory mitigating factors, because the usual presumption in Florida that death is the proper sentence upon proof of one or more aggravating factors does not apply (and indeed is reversed) when a jury recommendation for a life sentence has been made. Williams v. State, 386 So. 2d 538. 543 (Fla. 1980).[12]

The court's sentencing order mentioned that the case was before the court after a) the conviction of the defendant and b) the jury's recommendation of life imprisonment, and the Order then continues with a listing of the statutory

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[12]The judge considering an override must weigh aggravating circumstances "against the recommendation of the jury.'' Lewis v. State, 398 So. 2d 432, 439 (Fla. 1981). The overriding judge must make findings that explain why the jury was unreasonable, why no reasonable person could differ, and why death is proper. Tedder, supra. Neither this procedure, nor the substantive "no reasonable juror" determination, occurred in this case.

aggravating and mitigating circumstances. The Tedder standard was not mentioned, and the jury was mentioned only in passing. The judge found eight statutory aggravating circumstances, of which two were struck by this Court on direct appeal, and of which the remaining six involved numerous errors (doubling) in their application. The judge then considered only statutory mitigation, weighed statutory aggravation and mitigation, and imposed death. The judge made no findings regarding the unreasonableness of the jury, and did not explain why the jury's recommendation was not entitled to great weight. The judge did not consider the mitigation in the record, nonstatutory mitigation which formed an eminently reasonable basis for the jury's recommendation of life.

The override was thus predicated upon what the judge felt, and not upon any analysis of why there was no reasonable basis for the jury. That is not the law:

> The state, however, suggests that the override was proper here because the trial court judge is the ultimate sentencer and his sentencing order represents a reasonable weighing of the relevant aggravating and mitigating circumstances. According to the state's theory, this Court should view a trial court's sentencing order with a presumption of correctness and when the order is reasonable, this Court should uphold the trial court's sentence of death. We reject the state's suggestion. Under the state's theory there would be little or no need for a jury's advisory recommendation since this Court would need to focus only on whether the sentence imposed by the trial court was reasonable. This is not the law. Sub judice, the jury's recommendation of life was reasonably based on valid mitigating factors. The fact that reasonable people could differ on what penalty should be imposed in this case renders the override improper.

Ferry, 507 So. 2d at 1376-77 (emphasis added). Despite the presence of mitigation, this Court sustained the override. Bolender v. State, supra. This case thus involves a fundamental error of law, an error which deprived Mr. Bolender of his eighth amendment rights.

Under this Court's recent interpretations of the Tedder standard, a trial judge may not override a jury's verdict of life when there is a "reasonable

basis" for that verdict. Mr. Bolender's jury had an eminently reasonable basis for its life recommendation, e.g., the victim's actions (they had planned to rob and kill Mr. Bolender, and were lurking armed before the incident), cf. Francis v. State, 473 So. 2d 672, 678 (Fla. 1985)(McDonald, J., dissenting); the nature of the offense (the victims had been planning a "rip off" during a drug transaction); the disparate treatment afforded to the codefendants (neither Macker nor Thompson will ever be an death row, and Macker is on the streets today, having been released). If the trial judge's override of this unanimous jury recommendation for life passes muster under the eighth amendment, the United States Supreme Court can no longer be confident that the Florida Supreme Court still "takes that [Tedder] standard seriously." Spaziano, 104 S. Ct. at 3165.[13]

This Court discussed this issue Cochran v. State, 547 So. 2d 928 (Fla. 1989). In Cochran both the majority and the dissent agreed that the Tedder standard has been inconsistently applied. Dissenting from the reversal of the override in Cochran, Chief Justice Ehrlich cited three cases in which overrides were affirmed despite the presence of information which could have influenced the jury to recommend life, and argued that a "mechanistic application" of the Tedder standard "would have resulted in reversals of the death sentences in these cases." Cochran, supra. Though Chief Justice Ehrlich argued that the Tedder standard as construed today and as applied by the majority in Cochran is

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[13]The override scheme and the application of the Tedder standard were upheld in Spaziano on the basis of the "significant safeguard" provided by the Tedder standard, the Court's satisfaction that the Florida Supreme Court took that standard seriously, and the lack of evidence that the Florida Supreme Court had failed in its responsibility to perform meaningful appellate review. Spaziano, supra, 468 U.S. at 465-66. Mr. Bolender's claim is that in his case the assurances upon which the Court relied in Spaziano have not been fulfilled. On the contrary, although a "reasonable basis" for the jury's life recommendation was present, the trial judge overrode that recommendation, the trial court failed to provide Mr. Bolender the "significant safeguard" of the Tedder standard, and failed to take that standard seriously.

wrong and that the court should return to the standard employed in the earlier cases which he cited, he correctly noted that the shift in the standard has resulted in an eighth amendment violation under Furman v. Georgia, 408 U.S. 238 (1972). Cochran, supra. In response to Chief Justice Ehrlich's dissent, the majority wrote:

> Finally, we agree with the dissent that "legal precedent consists more in what courts do than in what they say." However, in expounding upon this point to prove that Tedder has not been applied with the force suggested by its language, the dissent draws entirely from cases occurring in 1984 or earlier. This is not indicative of what the present court does, as Justice Shaw noted in his special concurrence to Grossman v. State, 525 So.2d 833, 851 (Fla. 1988)(Shaw, J., specially concurring):
>
> > During 1984-85, we affirmed on direct appeal trial judge overrides in eleven of fifteen cases, seventy-three percent. By contrast, during 1986 and 1987, we have affirmed overrides in only two of eleven cases, less than twenty percent. This current reversal rate of over eighty percent is a strong indicator to judges that they should place less reliance on their independent weighing of aggravation and mitigation . . . .
>
> Clearly, since 1985 the Court has determined that Tedder means precisely what it says, that the judge must concur with the jury's life recommendation unless "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." Tedder, 322 So.2d at 910.

Today, "Tedder means precisely what it says." At the time of Mr. Bolender's direct appeal, Tedder did not mean what it said, although the United States Supreme Court relied upon Tedder and the Florida Supreme Court's assurances that it would give the Tedder standard effect in upholding the validity of Florida's jury override scheme. Today, Mr. Bolender's death sentence would not be affirmed. This is arbitrary. This is capricious. This is not a reliable result. This death sentence violates the eighth and fourteenth amendments.

The trial court's override is constitutionally improper for the foregoing reasons, and also because it found in aggravation one aggravating circumstance which was not even argued to the jury: hindering enforcement of law. See

Bullinnton v. Missouri, 451 U.S. 430 (1981). On direct appeal, two aggravators, great risk of death to many persons and under sentence of imprisonment, were struck. Mr. Bolender's case at that point should have been reversed for resentencing. Stevens v. State, 552 So. 2d 1082 (Fla. 1989). The override is also improper because of the trial judge's failure to employ the Tedder standard (or even to make any reference of it), and for the sentencing judge's failure to recognize the nonstatutory mitigation appearing plainly on the record. Hitchcock v. Dunner, 481U.S. 393 (1987); Lockett v. Ohio, 438 U.S. 586 (1978). The trial court's override is thus based on improper aggravation, the failure to recognize mitigation,[14] and the refusal to abide by proper override principles. The resulting death sentence is arbitrary. Habeas corpus or Rule 3.850 relief are proper.

CLAIM V

THE COLD, CALCULATED, *AND* PREMEDITATED AGGRAVATING CIRCUMSTANCE WAS APPLIED TO MR. BOLENDER'S CASE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Aggravating circumstance (5)(i) of Section 921.141, Florida Statutes, is unconstitutionally vague, overbroad, arbitrary, and capricious on its face, and as applied in this case, and is in violation of the sixth, eighth, and fourteenth amendments to the United States Constitution and Article I, sections 2, 9 and 16 of the Florida Constitution. This circumstance is to be applied when:

> The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

921.141(5)(i), Florida Statutes.

The United States Supreme Court has stated that:

> *An* aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty.

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[14]Mr. Bolender's case involves a substantial claim for relief pursuant to Hitchcock v. Dunner. See Claim I.

Zant v. Stephens, 462 U.S. 862, 877 (1983). Thus, aggravating circumstances that are defined and imposed too broadly fail to satisfy eighth and fourteenth amendment requirements. However, section 921.141(5)(i), even on its face, fails in a number of respects to "genuinely narrow the class of persons eligible for the death penalty." Zant v. Stephens, supra. This circumstance has been applied to virtually every type of first degree murder and has become a global or "catch-all" aggravating circumstance. Even where this Court has developed principles for applying the circumstance, those principles have not been applied with any consistency whatsoever.[15]

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[15]In Jent v. State, 408 So. 2d 1024 (Fla. 1982), this Court stated:

> the level of premeditation needed to convict in the penalty phase of a first degree murder trial does not necessarily rise to the level of premeditation in subsection (5)(i). Thus, in the sentencing hearing the state will have to prove beyond a reasonable doubt the elements of the premeditation aggravating factor -- "cold, calculated...and without any pretense of moral or legal justification".

408 So. 2d at 1032. The Court in McCray v. State, 416 So. 2d 804 (Fla. 1982), stated:

> That aggravating circumstance [(5)(i)] ordinarily applies in those murders which are characterized as executions or contract murders, although that description is not intended to be all-inclusive.

416 So. 2d at 807. See also Combs v. State, 403 So. 2d 418 (Fla. 1981).

In part because of the concerns discussed above, this Court has further defined "cold, calculated, and premeditated":

> We also find that the murder was not cold, calculated and premeditated, because the state has failed to prove beyond a reasonable doubt that Rogers' actions were accomplished in a "calculated" manner. In reaching this conclusion, we note that our obligation in interpreting statutory language such as that used in the capital sentencing statute, is to give ordinary words their plain and ordinary meaning. See Tatzel v. State, 356 So.2d 787, 789 (Fla.1978). Webster's Third International Dictionary at 315 (1981) defines the word "calculate" as "[t]o plan the nature of beforehand: think out ... to design, prepare or adapt by forethought or careful plan." There is an utter absence of any evidence that Rogers in this case had a careful plan or prearranged design to kill anyone during the robbery. 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, which

(continued...)

Because Mr. Bolender's trial judge did not have the benefit of the narrowing definition set forth in Roners, his sentence violates the eighth and fourteenth amendments. The judge did not apply any "heightened" premeditation as required by McCray, supra; in fact the judge applied no standard at all to this aggravator, but "doubled" it up with the heinous, atrocious or cruel aggravating factor.

What occurred here is precisely what the eighth amendment was found to prohibit in Maynard v. Cartwrifit, 108 S. Ct. 1853 (1988). It is respectfully urged that this Honorable Court should now correct Mr. Bolender's death sentence, a sentence which violates the eighth amendment principles of Cartwright. The error denied Mr. Bolender an individualized and reliable capital sentencing determination, particularly since the trial court overrode the jury's life recommendation. This Court reviewed this aggravator on direct appeal, but failed to apply the construction required by Rogers. McCray, and Cartwrifit. This Court should remedy this fundamental error at this juncture. Rule 3.850 and/or habeas corpus relief is warranted.

CLAIM VI

THE "HEINOUS, ATROCIOUS AND CRUEL" AGGRAVATING CIRCUMSTANCE WAS APPLIED TO MR. BOLENDER'S CASE WITHOUT ARTICULATION OR APPLICATION OF A NARROWING PRINCIPLE, IN VIOLATION OF MAYNARD V. CARTWRIGHT AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Bolender was sentenced to death based on a finding that the murder was "especially heinous, atrocious, and cruel." Such a vaguely worded aggravating

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[15](...continued)
must bear the indicia of "calculation."

Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987). This Court's subsequent decisions have plainly recognized that cold, calculated and premeditated requires proof beyond a reasonable doubt of a "careful plan or prearranged design." See Mitchell v. State, 527 So. 2d 179, 182 (Fla. 1988)("the cold, calculated and premeditated factor [] requir[es] a careful plan or prearranged design."); Jackson v. State, 530 So. 2d 269, 273 (Fla. 1988) (application of aggravating circumstance "error under the principles we recently enunciated in Rogers,").

circumstance is impermissible under the eighth and fourteenth amendments unless the sentencer is provided with and the courts articulate and apply a "narrowing principle" which goes beyond merely reciting the specific facts that may support the finding of such an aggravating circumstance in the particular case. Mavnard v. Cartwright, 108 S. Ct. 1853 (1988). No court in this case articulated and applied a "narrowing principle" to the "heinous, atrocious, and cruel" aggravating circumstance. No limiting construction was provided to the jury, and thus it can be presumed that the sentencing judge applied none himself. Zeigler v. Dugger, 524 So. 2d 419, 420 (Fla. 1988). Accordingly, appellant's death sentence violates the eighth and fourteenth amendments.

In Proffitt v. Florida, 428 U.S. 242, 255-56 (1976), the United States Supreme Court construed Florida's use of an "especially heinous, atrocious, or cruel" aggravating circumstance to be "directed only at 'the conscienceless or pitiless crime which is unnecessarily torturous to the victim.' State v. Dixon, 283 So. 2d [1,] 9 [(1973)]." This narrowing construction was not applied in Mr. Bolender's case.

In Mavnard v. Cartwright, 108 S. Ct. at 1859, the Court further held that the narrowing construction could not be fulfilled by a mere recitation of the evidence which supported the finding of that aggravating circumstance, and that the use of the word "especially" did not cure the overbreadth of the aggravating factor. Id. There, as here, the sentencer's unchanneled discretion was not cured by any limiting construction thereafter applied by a reviewing court.[16]

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[16]Specifically, the Court held that the Oklahoma courts' "conclusions that on these facts the jury's verdict that the murder was especially heinous, atrocious, or cruel was supportable did not cure the constitutional infirmity of the aggravating circumstance." Id. In short, the Court held that mere recitation of the facts of the particular case is not enough; a "narrowing principle to apply to those facts" must be articulated and actually applied. Mr. Bolender's case is identical to Cartwright.

In this case, the courts failed to articulate and apply any "narrowing principle" to cure the unconstitutional overbreadth of the "especially heinous, atrocious and cruel" aggravator. First, the trial court gave no indication in his jury instructions that a narrowing principle would be employed. Second, in his sentencing order (R. 1255), the trial court merely articulated facts in support of this aggravator, without articulating and applying any "narrowing principle." Here, as in Adamson v. Ricketts, 865 F.2d 1011, 1036 (9th Cir. 1988), the trial court's recitation of facts supporting a finding of the "heinous, cruel and depraved" circumstance was insufficient to cure the constitutional infirmity: the trial court failed to apply a narrowing principle to those facts.

Finally, on direct appeal, this Court affirmed the application of this aggravator without discussion. Bolender v. State, 422 So. 2d 833 (Fla. 1982).[17] Mr. Bolender was thus sentenced to death on the basis of an aggravating circumstance which was unconstitutionally applied under the eighth and fourteenth amendments. The constitutional infirmity of the "heinous, atrocious and cruel" aggravator requires resentencing.

CLAIM VII

THE SENTENCING PROCEDURE EMPLOYED BY THE TRIAL COURT SHIFTED THE BURDEN TO MR. BOLENDER TO ESTABLISH THAT LIFE WAS THE APPROPRIATE SENTENCE AND RESTRICTED FULL CONSIDERATION OF MITIGATING CIRCUMSTANCES TO THOSE WHICH OUTWEIGHED AGGRAVATING CIRCUMSTANCES, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

In sentencing Mr. Bolender to death, the trial court shifted the burden to Mr. Bolender to establish that death was not appropriate and limited consideration of mitigating factors to those which outweighed the aggravating

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[17] Of course, the articulation and application of a narrowing principle by this Court alone would not be sufficient to cure the unconstitutional overbreadth of the "heinous, atrocious and cruel" aggravator. See Adamson v. Ricketts, 865 F.2d at 1036 ("a reviewing court has no way to determine how a particular sentencing body would have exercised its discretion had it considered and applied appropriately limited statutory terms").

factors. The court's sentencing order stated:

> [T]he inescapable conclusion of the Court is that sufficient Aggravating Circumstances exist and that no Mitinatinn Circumstances exist which could possibly outweigh the Aggravating Circumstances.

(R. 235). The order thus reflects that the court required Mr. Bolender to establish mitigation that outweighed the aggravation (i.e., to prove that life was appropriate) and that the court failed to consider mitigation which did not outweigh aggravation.

The procedure reflected in the sentencing order is consistent with the manner in which the judge instructed the jury. At the penalty phase, the jury was instructed that in deciding what sentence to recommend the jury was to determine "whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist" (R. 1391). Although instructed with this burden-shifting standard, the jury recommended life. However, the instructions demonstrate the procedure employed by the judge in imposing death. See Zeinler v. Dunner, 524 So. 2d 419, 420 (Fla. 1988)("it is presumed that the judge's perception of the law coincided with the manner in which the jury was instructed").

The standard employed by the trial court required that the judge impose death unless mitigation was not only produced by Mr. Bolender, but also unless Mr. Bolender proved that the mitigation he provided outweighed and overcame the prosecution's aggravation. This standard obviously shifted the burden to Mr. Bolender to establish that life was the appropriate sentence and limited consideration of mitigating evidence to only those factors proven sufficient to outweigh the evidence in aggravation. According to this standard, the judge could not "full[y] consider[]" and "give effect to," Penry v. Lynaugh, 109 S. Ct. 2934, 2951 (1989), mitigating evidence unless that evidence established mitigation "sufficient to outweigh" aggravation. The standard thus "interfered

with the consideration of mitigating evidence." Bovde v. California, 58 U.S.L.W. 4301, 4303 (1990). Since "States 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 standard employed by Mr. Bolender's sentencing judge violated the eighth amendment's "requirement of individualized sentencing in capital cases [which] is satisfied by allowing the [sentencer] to consider all relevant mitigating evidence." Blystone v. Pennsylvania, 58 U.S.L.W. 4274, 4276 (1990). See also Lockett v. Ohio, 438 U.S. 586 (1978); Hitchcock v. Dugger, 481 U.S. 393 (1987).[18]

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[18] "Sentencing procedures such as that employed by the trial judge here, which shift to the defendant the burden of proving that life is the appropriate sentence, violate the principles of Mullaney v. Wilbur, 421U.S. 684 (1975), as the Court of Appeals for the Ninth Circuit held in Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(in banc). In Adamson, the Ninth Circuit held that because the Arizona death penalty statute "imposes a presumption of death on the defendant," the statute deprives a capital defendant of his eighth amendment rights to an individualized and reliable sentencing determination. Adamson. supra, 865 F.2d at 1041-44.

What occurred in Adamson is precisely what occurred in Mr. Bolender's case. The trial judge's sentencing procedure violated the eighth and fourteenth amendments, Mullaney v. Wilbur, 421U.S. 684 (1975), Lockett v. Ohio, 438 U.S. 586 (1978), and Mills v. Maryland, 108 S. Ct. 1860 (1988). The burden of proof was shifted to Mr. Bolender on the central sentencing issue of whether he should live or die. This unconstitutional burden-shifting violated Mr. Bolender's due process and eighth amendment rights. See Mullaney, supra. See also Sandstrom v. Montana, 442 U.S. 510 (1979); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988).

Moreover, the application of that unconstitutional standard at the sentencing phase violated Mr. Bolender's rights to a fundamentally fair and reliable capital sentencing determination, i.e., one which is not infected by arbitrary, misleading and/or capricious factors. See Adamson, supra; Jackson, supra. The trial court's sentencing procedure presumed death was the appropriate sentence and plainly shifted to Mr. Bolender the burden to prove that he should receive a life sentence. But "presumptive" death sentences have long been condemned. See Woodson v. North Carolina, 428 U.S. 280 (1976); Sumner v. Shuman, 107 S. Ct. 2716 (1987). The burden-shifting also unconstitutionally restricted the judge's ability to "fully consider" and "give effect to" the statutory and nonstatutory mitigating factors before him. Penry v. Lynaugh, 109 S. Ct. 2934, 2951 (1989). It thus violated the eighth amendment's mandate that any capital sentencing decision be individualized and reliable.

Under the presumption employed here, once one of the statutory aggravating circumstances is found, by definition sufficient aggravation exists to impose death. Here, the procedure employed by the trial court made it clear that the defendant had the burden of production and the burden of persuasion of the existence of mitigation, and then the burden of persuasion as to whether the mitigation outweighs the aggravation. The standard used here simply does not allow for a reliable and individualized capital sentencing determination.

Under Penry, 109 S. Ct. at 2951, it is not sufficient that a capital defendant be allowed to introduce evidence in support of mitigating circumstances: "[t]he sentencer must also be able to consider and give effect to that evidence in imposing sentence." Id. The judge here, however, believed death was presumptively the proper penalty unless the mitigation outweighed the aggravation. Under Florida law, however, a life sentence is appropriate whenever the mitigation provides a "reasonable basis" for determining that a sentence of less than death is warranted. Hallv. State, 541 So. 2d 1125 (Fla. 1989). Thus, the judge here could have imposed life, but could not but have thought himself precluded from doing so by the presumption placed upon Mr. Bolender.

The application of a presumption of death violates eighth amendment principles. Jackson v. Duaaer. 837 F.2d 1469. 1474 (11th Cir. 1988), cert. denied, 108 S. Ct. 2005 (1988). The error was particularly egregious in Mr. Bolender's case, a case in which mitigating evidence was present. This burden shifting denied Mr. Bolender the individualized consideration of mitigating factors which Lockett, Eddings, and Penry v. Lynaugh require. The judge did not "fully" and independently "give effect" to the mitigating factors which were reflected in the record and which may have established a reasonable basis for a life sentence.

These errors undermined the reliability of the judge's sentencing

determination and prevented the judge from assessing the mitigation present in the record. No contemporaneous objecton rule bars consideration of this sentencing-order-based claim. Mr. Bolender's death sentence is unreliable, particularly in light of the jury's unanimous verdict of life. Relief is proper.

CLAIM VIII

MR. BOLENDER'S DEATH SENTENCE RESTS UPON AN UNCONSTITUTIONAL AUTOMATIC AGGRAVATING CIRCUMSTANCE, IN CONTRAVENTION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

In Florida, the "usual form" of indictment for first-degree murder under sec. 783.04, Fla. Stat. (1987), is to "charg[e] murder . . . committed with a premeditated design to effect the death of the victim." Barton v. State, 193 So. 2d 618, 624 (Fla. 2d DCA 1968). Mr. Bolender was charged with first-degree murder in the "usual form": murder "from a premeditated design" in violation of Florida Statute 782.04 (R. 3-4). However, it is impossible to determine whether the guilty verdict in this case rested on premeditated or felony murder grounds. The jury received instructions on both theories, the prosecutor argued both, and a general verdict was returned.

If felony murder was the basis of Mr. Bolender's conviction, then the subsequent death sentence is unlawful. Cf. Stromberg v. California, 283 U.S. 359 (1931). This is so because the death penalty in this case was predicated upon an unreliable automatic finding of a statutory aggravating circumstance -- the very felony murder finding that formed the basis for conviction. Automatic death penalties upon conviction of first-degree murder violate the eighth and fourteenth amendments. Sumner v. Shuman, 107 S. Ct. 2716 (1987). In this case, felony murder was found as a statutory aggravating circumstance. ("The capital felony was committed during the perpetration of a robbery and kidnapping" (R. 230)). The sentencer was thus entitled automatically to return a death sentence upon a finding of guilt of first degree (felony) murder. Every felony-murder

would involve, by necessity, the finding of a statutory aggravating circumstance, a fact which, under the particulars of Florida's statute, violates the eighth amendment: an automatic aggravating circumstance is created which does not narrow. See Zant v. Stephens, 462 U.S. 862, 876 (1983)("[A]n aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty"). In short, if Mr. Bolender was convicted for felony murder, he then faced statutory aggravation for felony murder. This is too circular a system to meaningfully differentiate between who should live and who should die, and it violates the eighth and fourteenth amendments.

The Supreme Court addressed a similar question in Lowenfield v. Phelps, 108 S. Ct. 546 (1988), and Lowenfield illustrates the constitutional shortcomings in Mr. Bolender's capital sentencing proceeding. Here, the jury did not specifically find premeditation (R. 208-11). "To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined by the trial court." Cole v. Arkansas, 333 U.S. 196, 202 (1948). The principle that an appellate court cannot utilize a basis for review of a conviction different from that which was litigated and determined by the trial court applies with equal force to the penalty phase of a capital proceeding. See Presnell v. Georgia, 439 U.S. 14 (1978). Here, felony-murder could have been the basis for the death penalty; under the eighth and fourteenth amendments, Mr. Bolender's sentence of death should not be allowed to stand.

CLAIM IX

MR. BOLENDER'S SENTENCING JUDGE USED A NON-RECORD REPORT TO SENTENCE MR. BOLENDER TO DEATH, IN VIOLATION OF GARDNER V. FLORIDA, AND THE FIFTH, SIXTH. EIGHTH, AND FOURTEENTH AMENDMENTS.

The sentencing court took into account previous sentencing reports that counsel apparently had no opportunity to rebut.

> THE COURT: Mr. Bolander has been before me, of course, on previous occasions, a number of probation occasions, because of

> problems concerning scheduling, and this case fell into my division as a result of the earlier probation upon which I had placed him, part of which, I think, had a term, some period of incarceration running concurrent with the Federal sentence or credit for times served in the Federal System which was imposed.

(R. 1404). It is unclear in the record whether counsel ever had access to the previous sentencing reports the Court may have used in determining the present death sentence. The Court then discussed aggravating and mitigating circumstances and stated: "I, for the life of me, cannot find a single [statutory] mitigating circumstance . . ." (R. 1406). Under these circumstances, it was impossible for counsel to have anticipated, much less rebutted, information to which he never had access. Cf. Gardner, 430 U.S. 349, 97 S. Ct. 1197 (1977); Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982).[19]

Mr. Bolender's sentencing was devoid of the safeguards so jealously guarded by the fifth, sixth, eighth, and fourteenth amendments. At the very least he should be provided a hearing wherein he can establish the fundamental unreliability of his sentence of death.

CLAIM X

> THE COURT'S FAILURE TO FULLY AND PROPERLY INSTRUCT THE JURY ON THE STATE'S BURDEN TO PROVE GUILT BEYOND A REASONABLE DOUBT VIOLATED MR. BOLENDER'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

The trial court never defined for the jury what the State's burden to prove guilt beyond a reasonably doubt was, how that concept applies to a criminal action, or even what the terms meant. This was fundamental error under the

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[19] In Proffitt, the court vacated a death sentence where the trial judge reviewed the report of a psychiatrist prior to imposing sentence. The trial judge's statement that the report was considered "for the limited purpose of ascertaining whether it supported the psychiatric mitigating circumstances" did not cure the error. Proffitt, 685 F.2d at 1255. Sentencing procedures in capital cases must be finely tuned to ensure the "heightened reliability in the determination that death is the apropriate punishment." Woodson v. North Carolina, 428 U.S. 280, 305 (1976). Prevention of error is also the central purpose of the sixth amendment right to confront and cross examine. See Chambers v. Mississippi, 410 U.S. 284, 295 (1973).

United States and Florida Constitutions. Florida's standard jury instructions have long included a definition of the term "beyond a reasonable doubt", a definition necessary for the jury's proper consideration of the evidence addressed. Here the trial court provided the jurors with absolutely nothing in this regard.

Mr. Bolender's defense was alibi. A definition of the beyond a reasonable doubt standard was therefore especially significant, for the State is constitutionally mandated to disprove alibi beyond a reasonable doubt. See Stump v. Bennett, 398 F.2d 111 (8th Cir. 1968); cf. Mullanev v. Wilbur, 421 U.S. 684 (1975). By failing to properly instruct on the beyond a reasonable doubt standard, the trial court rendered the capital trial and sentencing determinations in this case fundamentally unfair and unreliable. The court effectively,

> creat[ed] an artificial barrier to the consideration of relevant . . . testimony . . . [and] the trial judge reduced the burden of proof necessary for the [state] to carry its burden.

Coolv. United States, 409 U.S. 98, 104 (1972). Fundamental error has been shown, as has ineffective assistance of counsel -- counsel was plainly ineffective in failing to object. Relief is appropriate, and an evidentiary hearing is required.

CLAIM XI

MR. BOLENDER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN ALL PROCEEDINGS RESULTING IN HIS DEATH SENTENCE, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND WAS DENIED HIS RIGHT TO MEANINGFUL POST-CONVICTION REVIEW BECAUSE OF THE INEFFECTIVENESS OF FORMER COLLATERAL COUNSEL, IN DEROGATION OF DUE PROCESS, EQUAL PROTECTION, AND THE EIGHTH AMENDMENT.

A. FACTUAL BACKGROUND

At trial, Mr. Bolender was sentenced to death. According to the judge who overrode the jury's unanimous recommendation of life, "no Mitigating Circumstances exist which could possibly outweigh the Aggravating Circumstances"

(R. 235). On direct appeal, this Court found that two of the aggravating circumstances found by the circuit court were not applicable. However, the Court did not reverse.

After the direct appeal, Mr. Bolender's counsel filed a motion for post conviction relief, pursuant to Rule 3.850, Fla. R. Crim. P., and alleged, in part:

> During the penalty phase of his trial, Defendant's counsel failed to present any evidence of any mitigating circumstances to the jury or the trial court, despite the fact that evidence of such circumstances did exist and could have been discovered by little investigative effort. Defendant's counsel made only a brief argument to the court before sentencing. It consisted only of a suggestion that it was not clear as to which of the three defendants was the most culpable. This failure to present evidence of mitigating circumstances was of crucial importance since the trial court's decision to impose the death penalty was based in large part by the absence of such evidence. It also was the chief reason why the Florida Supreme Court upheld the death penalty.

On January 4, 1985 an evidentiary hearing was held on the motion for post-conviction relief before the Honorable Herbert M. Klein. This hearing concerned only the issue of ineffective assistance of counsel based on the failure of counsel to present mitigation.

At the hearing, post-conviction counsel presented the testimony of Mr. Bolender's mother, Beatrice Bolender, and his sister, Denise Crane. The State presented the testimony of the trial attorney, G. P. Della Fera.

Mrs. Bolender testified that Bernard was the second of three children and her only son. Her husband was an alcoholic from the time the oldest child was born. When Bernard was nine, the father deserted the family, they had to move out of their house, and Mrs. Bolender had to work two jobs to support her children (K. 8-9).

Bernard was a good student in school. He also was very successful in athletics, becoming a state champion in wrestling. Eventually he was offered an athletic scholarship to Iowa State. But Bernard did not take that scholarship.

Instead, he quit school in order to help support his family. He worked at almost anything he could, including driving a school bus, pumping gas, and clamming. Mrs. Bolender described Bernard as a very, very good son. Bernard was raised as a Catholic, and was an altar boy in the church. He never used profanity, and was never violent. He was not only a good brother to his sisters, but also was a good father to them (H. **10-12).**

Bernard got married when he was nineteen, subsequently had **two** children an proved to be a very supportive parent. Mrs. Bolender testifed that she had talked to Mr. Della Fera about Bernard's background and asked that she be allowed to testify. She attended the entire proceeding including the penalty and sentencing phases, but was never allowed to testify (H. **13-14).**

Denise Crane, Bernard's sister, testified at the hearing that Bernard was not only a big brother, but also a surrogate father to her. He had taken care of the family since she was a baby, and even quit school to take care of the family (H. **24).** Even after Bernard was married and had his **own** children, he continued to support his mother and sisters (H. **25).** Ms. Crane also said that she was present during Bernard's trial and sentencing, and offered to testify, but that Mr. Della Fera did not allow her to testify (H. **26-7).**

During the evidentiary hearing, post-conviction counsel argued that trial counsel was ineffective for failing to provide a reasonable basis for the jury's life recommendation and that had such a basis been provided, the override would have been improper. Post-conviction counsel and Judge Klein discussed this standard:

> THE COURT: **Is it** your contention that that case stands for the proposition that if there is any basis upon which a jury can recommend mercy, that is a mitigating factor if there is a reasonable basis? That if the jury does recommend mercy, that that recommendation is required to be followed?
>
> MR. DURANT: Yes, sir. I think that is the law, in my opinion. If **it** isn't, **it** ought to be.
>
> There is another case I want to refer to after Mr. Laeser

addresses it.

THE COURT: Do you think that maybe the Thompson case does stand for that proposition?

MR. DURANT: Yes, sir, I do. That is why I am offering it.

THE COURT: That the only time the judge can overrule the jury mercy recommendation was if there were no mitigating circumstances to base it on?

MR. DURANT: Yes, sir. That is all I would like to address at this time.

(H. 47-48).

After hearing the evidence and argument, Judge Klein vacated the death sentence, stating in part:

(2) As to Defendant's second claim, that counsel was ineffective for failing to present evidence as to mitigating circumstances during the penalty phase of his trial, the court finds that this claim requires that relief be granted.

(3) A hearing was held as to this issue. The facts addressed at that hearing reflect that counsel could have presented the testimony of Defendant's mother and sister which, briefly summarized, would have been to the effect that while growing up, Defendant was a good son and brother to them, that Defendant's alcoholic father left the family while Defendant was quite young and that Defendant gave up an athletic scholarship to college to work and support his family.

(4) The law of the State of Florida is that a death sentence may not be imposed when any evidence of mitigating circumstances is presented. Thus, it is this court's conclusion that had Defendant's counsel presented the testimony of Defendant's mother and sister, the trial court could not have imposed the death sentences. Counsel was therefore ineffective.

(H. 22-23)(emphasis added).

On the State's appeal, the Florida Supreme Court reversed Judge Klein's order and directed the Circuit Court to reimpose the death penalty:

There are several problems with this statement. That the mere presentation of mitigating evidence precludes imposition of the death penalty is not and never has been a correct statement of this state's law. In determining if death is an appropriate penalty the sentencing judge must weigh any aggravating circumstances against any mitigating circumstances. State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974). . . . That Judge Klein, in our opinion, incorrectly found that the original trial judge had abused his discretion and improperly substituted his judgment for that of the original trial judge is beside the point because, first and foremost, Judge Klein did not apply the proper standard for deciding a claim of ineffective assistance of counsel.

State v. Bolender, 503 So. 2d 1247 (Fla. 1987).

B. THE POST-CONVICTION JUDGE WAS CORRECT IN HIS REVERSAL OF THE DEATH PENALTY, AND COLLATERAL DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY LITIGATE AND EXPLAIN THE PROPRIETY OF HIS ORDER TO THE COURT ON APPEAL, RENDERING THE RESULTS OF THOSE PROCEEDINGS UNRELIABLE.

As noted above, the circuit court vacated Mr. Bolender's death sentence because such a sentence "may not be imposed when any evidence of mitigating circumstances is presented." What was not clearly stated in that order (although Judge Klein had stated it on the record) and what was incomprehensibly not explained to the Florida Supreme Court on appeal by Mr. Bolender's counsel at the time was that Judge Klein was evaluating trial counsel's effectiveness in the context of a jury recommendation of life. Under the Tedder standard, Judge Klein's finding was perfectly valid. This Court's review was fundamentally erroneous because appellate counsel then failed to explain this.

This Court's cases reviewing death sentences imposed following a jury recommendation of life consistently make one point: such a death sentence cannot stand when the record demonstrates a "reasonable basis" for the jury's life recommendation.[20] When such a "reasonable basis" appears in the record, this Court does not hesitate to reverse an override:

> [W]hen there is a reasonable basis in the record to support a jury's recommendation of life, an override is improper . . . . When there are valid mitigating factors discernible from the record upon which the jury could have based its recommendation an override may not be warranted.

Ferry, supra, 507 So. 2d at 1376 (emphasis added).

Because the jury recommendation is an essential part of the Florida capital sentencing proceeding, the Court has rejected the suggestion that it assess the

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[20] See, e.g., Burch v. State, 522 So. 2d 810 (Fla. 1988); DuBoise v. State, 520 So. 2d 260 (Fla. 1988); Fead v. State, 512 So. 2d 176 (Fla. 1987); Ferry v. State, 507 So. 2d 1373 (Fla. 1987); Wasko v. State, 505 So. 2d 1314 (Fla. 1987); Brookings v. State, 495 So. 2d 135 (Fla. 1986); Amazon v. State, 487 So. 2d 8 (Fla. 1986); Huddleston v. State, 475 So. 2d 204 (Fla. 1985); McCampbell v. State, 421 So. 2d 1072 (Fla. 1982); Tedder v. State, 322 So. 2d 908 (Fla. 1975).

propriety of an override based solely on the reasonableness of the trial judge's findings. See Ferry, 507 So. 2d at 1376-77.

Accordingly, a defense attorney's objective at a Florida capital sentencing proceeding is to obtain a life sentence from the judge. An integral part of that process is obtaining a life recommendation from the jury. See Tedder v. State, 322 So. 2d 908 (Fla. 1975). Since under Florida law, a jury recommendation of life can be overridden, a defense attorney has the duty to persuade the judge to accept the jury's life recommendation and to provide a "reasonable basis," i.e., mitigation, in support of the jury's life recommendation. Only by reasonably fulfilling these responsibilities does a defense attorney provide effective assistance. If counsel fails to present a reasonable basis for a jury's life recommendation when such a basis is available for presentation, that is unreasonable attorney conduct, which, within the context of the Florida death penalty, is prejudicial. See Porter v. Wainwright, 805 F.2d 930, 936 (11th Cir. 1986); Stevens v. State, supra. If the mitigating evidence counsel unreasonably failed to develop and present establishes a "reasonable basis" for the jury's recommendation, confidence in the outcome is undermined. Stevens, supra.

It is clear that Judge Klein was considering the ineffectiveness issue in light of the jury override when he stated that if any evidence of mitigation is presented, the sentencing judge cannot override a recommendation of life. In this context, Judge Klein found that trial counsel had failed under both the performance and prejudice prongs of Strickland v. Washineton, 466 U.S. 668 (1984). First, the judge found that the testimony of Mr. Bolender's mother and sister was available for presentation by trial counsel, but was not presented. Second, Judge Klein found that this testimony established mitigation which, if presented, would have prevented the trial judge from overriding the jury's life recommendation under the Tedder standard. This Court has in fact held that

evidence such as that which defense counsel failed to present is valid mitigation, mitigation which establishes a "reasonable basis" for a jury recommendation of life, and mitigation which precludes an override. Brown v. State, 526 So. 2d 903 (Fla. 1988); Perry v. State, 522 So. 2d 817 (Fla. 1988).

Judge Klein recognized that trial counsel was ineffective for failing to present mitigation to sustain a life recommendation. He recognized that had such mitigation been presented, the override of the life recommendation would not have occurred or would not have been upheld on appeal. And lastly, he recognized that such mitigation was presented at the evidentiary hearing. At the evidentiary hearing, Judge Klein made it clear that he was considering the correct standard. In his reasoned judgment, if the defense had presented a reasonable basis for the jury's life recommendation, as counsel's duty to provide reasonably effective assistance required, then the sentencing judge would not have been able to override the jury recommendation. Indeed, this Court, Stevens, 552 So. 2d 1082, and the Eleventh Circuit have recognized that the Strickland standard is easier to satisfy in an override setting than in a non-override setting. Porter, 805 F.2d at 936, n.6.

Mr. Bolender's situation is identical to that in Stevens and Porter. His attorney also failed to present testimony of family members relative to his disadvantaged background, the fact that his father deserted the family when Bernard was very young, that he was a good son and brother, and that he supported his family. The post-conviction court was clearly correct in finding defense counsel ineffective for not presenting this evidence in mitigation. Courts have consistently recognized this type of evidence as mitigating, and the circuit court entered the proper relief, vacating the sentence of death.

Had Judge Klein's order been explained on the State's appeal from the grant of relief by a reasonably effective collateral attorney, the Court would not have interpreted the post-conviction judge's order as misstating the applicable

law. Viewed in the context of the jury override, Judge Klein's order was eminently reasonable and correct. Judge Klein understood and applied the proper legal standard, as it should be presumed that he would. Judge Klein is, after all, a circuit court judge entrusted with presiding over criminal trials, and, as such, is presumed to know and follow the law. As the record clearly shows, Judge Klein did understand the law and applied the law properly. Post-conviction appellate counsel was grossly ineffective for failing to explain wh t it was that Judge Klein's order was addressing.

In the order vacating the death penalty, Judge Klein stated that "a death sentence may not be imposed when any evidence of mitigating circumstances is presented." In the hearing upon which this Order was granted, he stated his understanding of the law: "the only time the judge can overrule the jury mercy recommendation was if there were no mitigating circumstances to base it on." He was absolutely correct. Mr. Bolender's original death sentence was imposed in violation of the sixth, eighth, and fourteenth amendments. The reimposition of that sentence following the reversal of Judge Klein's grant of relief is similarly violative of the Constitution. Such a death sentence is completely lacking in reliability and cannot be allowed to stand. The post-conviction process failed in this action, because collateral counsel failed his client. Habeas corpus relief, at a minimum, is appropriate. Indeed, at the September 4, 1987, hearing after the remand, Mr. Durant, former collateral counsel, withdrew from the case precisely because he did not feel competent to continue.

Bernard Bolender did not receive effective assistance from counsel at his sentencing proceeding. Ironically, the assistance provided in post-conviction proceedings was also sorely lacking in effectiveness. As a result, his death sentence lacks any indicia of the reliability required in capital sentencing and stands in violation of the sixth, eighth, and fourteenth amendments. It is

precisely errors such as this that Rule 3.850 and this Court's habeas corpus jurisdiction are intended to correct.

CONCLUSION

For the foregoing reasons, Mr. Bolender respectfully requests that this Honorable Court vacate his convictions and sentences of death. At a minimum, an evidentiary hearing should be ordered to resolve the substantial issues present in this case.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been forwarded by Federal Express Delivery to Fariba Komeily, Assistant Attorney General, Department of Legal Affairs, 401 NW 2nd Avenue #921N, Miami, Florida 33128, this 19th day of March, 1990.

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