IN THE SUPREME COURT OF FLORIDA

NO. _____

BEAUFORD WHITE,

Petitioner,

vs.

RICHARD L. DUGGER, Secretary,
Department of Corrections, State of Florida,

Respondent.

PETITION FOR EXTRAORDINARY RELIEF, FOR A WRIT OF HABEAS CORPUS, REQUEST FOR STAY OF EXECUTION, AND APPLICATION FOR STAY OF EXECUTION PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

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I. INTRODUCTION

Mr. White has been before this Court twice before, once as the appellant, White v. State, 403 So.2d 331 (Fla. 1981)(White I), and once as the appellee, State v. White, 470 So.2d 1377 (Fla. 1985)(White II). Central to both his appearances were the troubling truths that he is a death-sentenced inmate (1) who did not kill or intend to kill, and (2) for whom the jury unanimously recommended a sentence of life. The courts before which Mr. White's case has appeared have recognized that he never killed, attempted to kill, or intended to kill. This Court recognized that he opposed killing the victims, and the trial prosecutor conceded that Mr. White did not kill anyone (R. 1465). The sentencing jury obviously relied on these facts in their unanimous recommendation of life. Each of these two unique characteristics [Mr. White's nonparticipation in the homicides and the jury's unanimous verdict for life] of Mr. White's case justify this Court's revisiting of claims previously ruled upon in White I and White II, because, as would befit such extremely relevant factors in capital sentencing jurisprudence, the law regarding the applicability of death to non-murderers, and the law regarding the reasonableness of a jury recommendation of life based upon the defendant's non-murderer status, has been dynamic. This Court has succinctly stated: "[t]he death sentence law as it now exists ... controls our review of this []sentencing. There have been multiple restrictions and refinements in the death sentencing process, by both the United States Supreme Court and this Court, ... and we are bound to fairly apply those decisions." Proffitt v. Florida, Nos. 65,507 and 65,637 (Fla. July 9, 1987), slip opinion, p.2. Mr. White invokes this Court's constitutional habeas corpus jurisdiction, to avail himself of the law as it now exists.

II. JURISDICTION

This is an original action under Fla. R. App. P. 9.100(a). This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents issues which directly concern the judgment of this Court on appeal and hence jurisdiction lies in this Court. See, e.g., Smith v. State, 400 So.2d 956, 960 (Fla. 1981).

As this Court has stated, "in the case of error that prejudicially demises fundamental constitutional rights . . . this Court will revisit a matter previously settled . . . ." Kennedy v. Wainwright, No. 68,264 (Fla. 1986). Such issues are presented herein.

III. FACTS UPON WHICH PETITIONER RELIES

The jury that heard the evidence in this case unanimously agreed, and told the judge, this Court, and the State, that Beauford White should not be executed. The unanimous jury found, pursuant to the sentencing judge's instructions, that the mitigating factors in this case outweighed any applicable aggravating factors (R. 1486, 1488). The jury's verdict was eminently resaonable.

Under the facts of the case, two substantial and related questions arise: (1) whether the constitution even permits Mr. White's execution, given his own limited personal culpability, and (2) regardless of whether execution is permitted based on what Mr. White did, whether the jury acted reasonably in unanimously recommending a life sentence. Both answers are enmeshed in the courts' sometimes belated recognition of evolving standards of decency. Cf. Woodson v. North Carolina, 428 U.S. 280 (1976). This Court's treatment of the above two questions has evolved to the point foreshadowed by now Chief Justice McDonald in his opinion in this case in 1985:

A review of the record supports the

> trial judge's findings that, in view of proscriptions enunciated in Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), White's death sentence was unlawfully entered and affirmed by this Court. White objected to the idea of killing the victims, did not take part in the killing, and refused to assist in disposing of the weapons. His role in guarding the door was to further a robbery, not a homicide. He did not kill, attempt to kill, or intend to kill. The record does not disclose that he contemplated that lethal force would be used, although he did know that all participants were armed. His failure to dissuade others from killing does not rise to a participation in the killing. Although I voted to affirm appellee's death sentence on direct appeal, I would have voted for life imprisonment if the Enmund decision had been released at that time. Indeed, such a result is mandated by Enmund. Also, this is a jury override case. A unanimous jury recommended life imprisonment at the penalty phase of trial, presumably after taking into account the factors later explained in Enmund. We failed to rule that this was a rational basis for the jury's recommendation.

White II, 470 So.2d at 1381 (McDonald, J., dissenting). The treatment of the mental culpability issue was first resolved in White I, in a manner that proved to be incorrect:

> [T]he defendant contends that the Florida death penalty statute violates the eighth amendment prohibition against cruel and unusual punishment and the United States Constitution in that it permits the infliction of death upon a defendant who lacks a purpose to cause the death of his victim . . . . A majority of the United States Supreme Court obviously has not adopted the view that the death penalty may not be imposed under the[se] circumstances . . . .

White I, 403 So.2d 331, 334-35 (Fla. 1981)(rendered pre Enmund v. Florida, 458 U.S. 782 (1982).) In post-conviction, and after Enmund, the Court, in reversing a grant of relief, made the following comments:

> Appellee . . . did none of the shooting . . . [and] verbally opposed the killing . . . [but] did nothing to disassociate himself from either the murder or robbery . . . . [I]t can hardly be said that he did not realize that lethal force was going to be used in carrying out the robbery.

White II, 470 So.2d 1377, 1380 (Fla. 1985).

This Court's jurisprudence and the United States Supreme Court's, see Tison v. Arizona, 107 S.Ct. 1676 (1976), now call for a fresh look.

A. MR. WHITE WAS TRAPPED AND SCARED, DID NOT KILL, AND DID NOT CONTEMPLATE DEATH.

As the record reveals, Mr. White intended to rob, but did not intend that he or anyone else would kill:

> Q But anyway Marvin told you that they were hired to kill two people, and then based on that conversation, you went to Beauford White and asked him if he knew about it. Is that correct?
>
> A Yes.
>
> Q What did he say when you asked him if he knew about it?
>
> A He told me he didn't know anything about it. He asked me if I was crazy.
>
> Q Did he tell you whether or not he would have gone if he had known about this?
>
> A I don't think that question was ever asked, you know. I didn't think he would.

(R. 1151).

> Q They never as far as you were able to ascertain from Marvin or Ferguson, anyone, they never told Beauford White that this was a contract killing and they were going to kill anybody, did they?
>
> A No.
>
> . . . .
>
> Q Getting back to the coming back to the motel. How would you describe the appearance and motions and the way Beauford was when you got back to the hotel or motel?
>
> MR. KAYE: Judge, I am going to have to object. I think he has gone into this area.
>
> THE COURT: Overruled, sir.
>
> Q [By Mr. Goodhart] Would this be a fair statement, sir, that he was shocked, he was paranoid, he had a blank expression on his face?
>
> MR. KAYE: I have to object now. He is going into---
>
> THE COURT: He can describe that which

he saw but not make any---

MR. KAYE: What I am saying, it is repetitious. He is going over the same ground, when he said in the state of shock.

THE COURT: Overruled, if that is your basis.

Q [By Mr. Goodhart] Would that be a fair statement, Mr. Archie?

A Yes. Yes, it would.

Q You have made that statement in the past, have you not?

A Yes.

Q That Beauford was completely in shock. He looked like he was paranoid and had a blank expression?

THE COURT: Sustained. Sustain it. Anything else?

Q [By Mr. Goodhart] Did you also make the statement that Beauford looked like he was glazed or dazed?

A Yes.

MR. KAYE: Same objection.

THE COURT: Overruled.

Q [By Mr. Goodhart] Beauford refused to have anything, sir, to do with disposing of the weapons. Is that correct?

A Yes, sir.

Q As a matter of fact, Marvin Francois got angry at him because he would not dispose of the weapons. Is that correct?

A Yes.

(R. 1164-66).

Q [By Mr. Goodhart] Did there come a time when you had a conversation with Marvin Francois when Marvin told you that Beauford did not do any shootings and he did not even want to go?

A Yes. He told me that Beauford didn't do any shootings, and if he had known, you know, he wouldn't have went.

Q If who had known he would not have went?

A Beauford.

(R. 1170).

[Detective]

He advised me that at this point he stated to Mr. Francois and Mr. Ferguson, "Come on, let's go. They don't have any drugs. Let's get out of here."

At that point, he advised that he was positioned by the front door of the residence. He had removed a color TV from the locked door and taken it to the front door with him.

He advised me that shortly after him getting to the front door area, waiting for the other two, he heard a series of gunshots.

(R. 852).

[Statement]

A Well it was after--after Ferguson came back from searching the Thunderbird, and I suggested that we go now because, you know, we didn't find nothing. So at that time Marvin and Ferg called each other off to the kitchen, and they started mumbling; which I got afraid at the time, and I moved toward the front door. And so Ferguson went and got the girl and her boyfriend, and took her to their room, and Marvin got the shotgun and the shells and went to Stocker's room.

Q Did they tell you what they had been talking about?

A No, sir, I never did know. In a way, I was afraid to ask.

Q You stated that you went and stood by the front door?

A Yes, sir.

(R. 941-42).

[Detective]

Q Beauford White was not a trigger man?

A To the best information that I have been given, no, sir.

Q None of the bodies reflected there was any shooting with a .22 caliber pistol, did they?

A No, sir, they don't.

(R. 978).

Q [By Mr. Goodhart] I asked you if you did not take a statement from one, Adolphus Archie?

A Yes, sir, I did.

Q What did Adolphus Archie say to you about Beauford White's knowledge of what was happening on the night of July 26, that is, did he know about any contract or did he know there was going to be any killing or did he know about Joe Swain.

A No, sir. I don't believe he did.

Q He did not have any knowledge of that, did he?

A No, sir. He went there--he thought there was going to be a robbery.

(R. 981).

Did they tell you what they had been talking about?

A No, sir. I never did know. In a way I was afraid to ask.

Do you recall that question and that answer that you see before you?

A Yes, sir, I do.

Q That was in reference to the conversation between Marvin Francois and John Ferguson. Is that correct?

A Yes, sir, it was.

Q Did you ever ask him why he was afraid to ask?

A At that point, it was during the oral interview. I believe he just told me he want to get out of there, and he was scared.

Q Beauford told you that?

A Yes, sir.

(R. 996).

Q You do know and you did find out and throughout the course of the investigation, since the time of the arrest of Beauford White, that Beauford White was not--did not shoot anybody in that residence?

A That's correct.

(R. 1014).

[Adolphus Archie]

Q Will you tell the Court what agreement you and your attorney, myself, Mr. Derringer entered into along with the Court.

A That I receive twenty years for testifying.

Q You were charged originally with what, sir?

A Six counts of first-degree murder, two counts attempted murder and four counts of armed robbery.

Q What did you plead guilty to?

A Second-degree murder.

Q Were all those counts to run together, concurrent?

A Yes.

Q Twenty years for each of the sentences to run concurrent?

Was there a proviso in addition to your taking this plea and receiving the twenty years that you would cooperate with the State and testify in the cases against Marvin Francois, Beauford White and John Ferguson?

A Yes, I did.

(R. 1093-94).

Q [By Mr. Kaye] So I understand, there are four people in the room?

A Yes.

Q Somebody is asking you to drop them some place. Who is that person?

A Ferguson and Marvin.

Q Did White indicate to you that he knew where this place was at the time?

A No, he didn't.

(R. 1108).

Q Do you recall who took what weapons when you left the Truf Motel?

A Marvin had the sawed-off shotgun, brown overnight case or suitcase or briefcase, whatever it is--

Q All right.

A --And Ferguson had a black briefcase. I guess the weapons was in there.

Q Did you have a weapon with you?

A No, I didn't.

Q Do you know whether Mr. White had a weapon with him at that time?

A No, he didn't.

(R. 1112).

Q What was next said?

A I was going to leave. That's when I said, "I'm going to leave." Marvin said, "You ain't going no place. You're involved now. I was supposed to keep you here, anyway. You ain't going nowhere, because you're a witness."

Q Marvin said this to you?

A Yes.

Q Did Marvin say, "Beauford, you, too?"

A Beauford was just sitting there like he seen a ghost.

(R. 1124).

Q Somebody said something about getting rid of the .38, I think is what you said before we took the break.

A Yes. Marvin and Ferguson was talking about getting rid of the guns. They asked Beauford to get rid of it.

Q What did Beauford say?

A Beauford said, "I ain't getting rid of nothing."

(R. 1131).

Q So you were supposed to be the driver, and it was supposed to be Francois and Ferguson, but they needed a third person, Beauford White, in the event the person they were after came home with more people than they expected. Is that correct?

A Yes.

Q What did you say to that?

A I said, "Why didn't you tell us you were going to kill somebody?" He said, "We started to tell you all. Do you remember when you went to get the ice," because when I was in the motel the first time, when I first bring them there, I get the ice pitcher and went around to get some ice.

Evidently Marvin and Ferguson had a conversation during that time before I returned.

A Marvin said, "We were going to tell you then but"---

A They decided not to.

Q You were not aware apparently that that is what was planned?

A No, I wasn't.

Q Did he tell you whether Beauford White was aware of what was planned?

A No, he didn't. He said that that's why he had to use Beauford and me. He said, "Beauford didn't do no killing." He said I wasn't nothing but a witness.

He said, "You better be glad Ferguson knows both of us because he is supposed to kill both of us.

MR. KAYE: Did everybody understand that?

JUROR CALAHAN: I didn't. Say it again.

Q [By Mr. Kaye] He said, "You better be glad Ferguson knows both of you?"

A Yes.

THE COURT: Keep your voice up, please.

A He said--Marvin told me that I better be glad that Marvin--I mean, Ferguson, know me and Beauford because he is supposed to kill both of us. He wasn't supposed to leave no witnesses.

Q Who was supposed to kill who?

A That is when he was telling me he was supposed to kill me and Beauford, also.

Q What I want to know, Marvin is telling you it is a good think that you know--

A Ferguson.

Q --Ferguson because who was supposed to kill you and White?

A Marvin said he did.

Q Obviously then he did not do it?

A No, he didn't.

Q Some time later, did you have an opportunity to talk to Mr. White?

A Yes, I did.

Q About the events that took place?

A Yes, I did.

Q When was that, sir?

A That's about three, four days later.

Q Where was that?

A At his motel.

Q Same place?

A Yes, sir.

Q What was the conversation you had then and Mr. Beauford White about the incident that took place?

A I asked him did he know--I told him that Marvin--I asked him did he know that they were supposed to kill somebody. He said, "No. Do you think I'm crazy or something?"

(R. 1139-41).

[Archie]

Q [By Mr. Goodhart] When was this?

A The same night.

Q The same night?

A After we came back from town.

Q Was Marvin mad at Beauford or upset with him?

A He showed anger.

Q He showed anger towards Beauford?

A Yes.

Q Just a few moments ago I believe you said, and I wrote this down, "Why didn't you tell us that they were going to kill somebody," in your conversation with Marvin. Is that what you just said, "Why didn't you tell us?"

A Yes.

Q Us meaning yourself and Beauford. Is that correct?

A Yes.

Q Then you said that Marvin and Mr. Ferguson talked it over and decided not to tell you all. Is that not the words you

used, "you all"?

A Yes.

Q You all meaning both you and Beauford White?

A Yes.

Q Is that correct?

A Yes.

Q Then you made a statement, "Beauford didn't do no killing."

A Yes.

Q Who said that?

A Marvin.

Q Marvin told you that Beauford didn't do any killing?

A Yes.

Q That is when you had the conversation about, "It's a good thing you know Ferguson, because he's supposed to kill both of you," that is, you and Beauford White?

A Yes.

Q Because you were the only witnesses that they were left at that time. Is that correct?

A Yes.

Q Then you said that you went and saw Beauford White a couple days later. Let me go back a minute.

You said when you were in the hotel afterwards, your words were, "Beauford looked like a ghost"?

A Yes.

(R. 1147-48).

Q At the time--you went over this I believe with Mr. Kaye--that you left from your car, you were receiving directions from whom, please, on how to get to Carol City?

A Ferguson and Marvin.

Q Did Beauford White know where you were going?

A No. No, he didn't.

(R. 1156).

B. THE JURY'S LIFE VERDICT WAS REASONABLE, WHILE THE JURY OVERRIDE WAS BASED UPON VICARIOUS RESPONSIBILITY, AND THE OVERRIDING JUDGE COMPLETELY OMITTED ANY REFERENCE TO THE MOST IMPORTANT STATUTORY MITIGATING CIRCUMSTANCE; CONSEQUENTLY, THIS COURT ERRED IN ALLOWING THE OVERRIDE TO STAND.

The jury that heard the above evidence unanimously recommended a life sentence for Beauford White. The state waived before the jury, but the judge found, two circumstances unrelated to the offense, as statutory aggravating circumstances: that Mr. White was on parole for selling marijuana and for escape, and that thirteen years earlier he had been convicted of attempted rape, an offense for which Mr. White was given a two-year sentence.

Offense-related statutory aggravating circumstances, other than felony murder simplicitur, of necessity reflected other people's conduct -- Mr. White did not kill, tried to stop the killing, and he was scared of his co-defendants when they revealed that they were considering violence. The first vicarious aggravating circumstance, according to the trial judge, was that a great risk of death to many people occurred, a finding reversed by this Court. White II. Second, the court found that the victims were killed to avoid arrest. Third, the court found the crime to be heinous, atrocious and cruel. Mr. White opposed the killings, and these factors were vicariously imputed to him on the basis of co-defendants' (Francois and Ferguson) conduct.

Judge Fuller then looked at the "full picture" and answered the major question of this case at odds with currently applicable law:

> In the writer's opinion, this crime was one of the most atrocious ever committed in Dade County, Florida. That six people should have died and two others critically wounded during the commission of a robbery, speaks directly to the personalities of the co-conspirators. Counsel for the defendant argues that since his client was not one of the "shooters" and since the fourth co-conspirator was allowed to plead guilty to

> Second Degree Murder and received a twenty year sentence, his client should receive a life sentence as advised by the jury.
>
> . . . .
>
> The plea agreement approved by the Court on defendant Archie was fair, considering his participation and ultimate willingness to give information and truth testimony at the trials of the other co-conspirators. The real issue for review before this Court is whether or not a non-shooting, active and present participant to one of the enumerated felonies should be excused from receiving the same penalty as a shooting participant, with all other criteria being generally equal. He obviously should not receive a more severe penalty but certain should receive the same. To rule otherwise would judicially remove felony murders from the classification of capital cases.

(R. 185). The problem is that all other criteria were not "generally equal."

At no point did the sentencing judge indicate that no reasonable jurors could consider Mr. White's comparatively limited participation and non-killing to be mitigating. In fact, the trial court listed and discussed the statutory mitigating circumstances a, b, c, e, f and g, seriatum, but completely omitted any reference to the most obvious mitigating circumstance: d -- relatively minor participation (compared to co-defendant's) in a capital felony.

Absolutely no effort was made by the judge in the sentencing order to explain that the jurors had been unreasonable in their recommendation. This Court did not find the recommendation to be unreasonable, and agreed that the circumstances of a killing by others could be used in aggravation. Those rulings were error; the jury's unanimous life recommendation had a rational basis. See infra, Section IV(B)(2).

IV. LEGAL BASIS FOR RELIEF

The answer to the question of what degree of mental culpability will support the imposition of death has, without question, been an evolving one generally, and especially so in

this case. Mr. White did not kill anyone or encourage anyone else to do so. In fact, he opposed the killings. A jury said unanimously that Mr. White should live. Including the members of the jury, fifteen people have so concluded -- two justices of this Court, Judge Klein, and the twelve jurors. We all know why the jury recommended life imprisonment. However, the first question presented here is whether death is even possible, under the eighth and fourteenth amendments. The question of whether the 12 people who recommended life acted reasonably is addressed in subsection B, infra.

A. TISON V. ARIZONA, 107 S.CT. 1676 (1987), CONTROLS THE DISPOSITION OF THIS CASE; A SENTENCE OF LIFE IS PROPER, OR, AT THE VERY LEAST, RESENTENCING IS PROPER.

This Court has twice addressed the Enmund claim in this case, once before Enmund was decided. The federal courts have likewise addressed the Enmund claim, White v. Wainwright, 809 F.2d 1478 (11th Cir. 1987); White v. Wainwright, 632 F. Supp. 1140 (S.D. Fla. 1986). This Court did not grant relief under Enmund in White II, and the federal courts have also declined to grant relief. The federal courts, however, also relied specifically upon Tison (the Arizona Supreme Court opinion), pre-United States Supreme Court action therein, in denying relief to Mr. White. Mr. White likewise wishes to rely upon Tison now that, as a direct result of United States Supreme Court action, Mr. Tison is being resentenced.

As will be shown in more detail later, Tison and this case are quite similar, and require similar results. However, the following provides the gist of the argument. The federal court described and relied upon Tison (pre-Supreme Court action) thusly in White:

> Thus, for example, respondent has cited State v. Tison, 142 Ariz. 454, 690 P.2d 755 (1984), cert. granted, -- U.S. --, 106 S.Ct. 1182, 89 L.Ed.2d 299 (1986), where the Supreme Court

of Arizona made a post-Enmund analysis and found the evidence sufficient to show that the defendant possessed the requisite intent, thereby supporting the imposition of the death penalty even though he was a non-shooter. The defendant in that case, Raymond Tison, was convicted of four counts of first degree murder, as well as two counts of robbery, three counts of kidnapping and one of theft of a motor vehicle. The facts were not in dispute. He and his two brothers assisted the escape of their father, one Gary Tison, and a Randy Greenawalt from the Arizona State Prison. The five men fled the prison in a car. Later they transferred to a second car which in turn became disabled with a flat tire. Four victims in a passing car stopped to render aid. The gang killed the four of them, took the car and were subsequently apprehended days later.

The facts of State v. Tison did not show however, that the defendant killed or attempted to kill anyone. The court's finding of intent was rooted in a record which showed that the defendant played an active role in preparing the breakout, including obtaining a getaway car and various weapons. At the breakout scene, the defendant played a crucial role by, among other things, holding a gun on the prison guards. Moreover, the defendant knew that Gary Tison's murder conviction arose out of the killing of a guard during an earlier prison escape attempt. Thus, the Supreme Court of Arizona said that "petitioner could anticipate the use of lethal force during the attempt to flee confinement." 690 P.2d at 757. They noted that defendant admitted later he would have been willing to kill in a very close life or death situation and that he recognized after the escape that there was a possibility of killing. And they emphasized that the defendant assisted the abduction by flagging down the victims as they drove by while the other members of the gang remained hidden and armed. Moreover, he escorted the victims to the murder site. At that site the Defendant and Greenawalt placed the gang's possessions in the victims' Mazda and the victims' possessions in the gang's disabled car. He watched, however, from a distance, as Gary Tison and Greenawalt fired in the direction of the victims. He did nothing to interfere and after the killings he did nothing to disassociate himself from either Tison or Greenawalt but rather used the victims' car to continue on a joint venture that lasted several more days.

Petitioner White's attempts to distinguish Tison from the instant care are largely unpersuasive. As in Tison and unlike Enmund, Petitioner was armed and present throughout; as in Tison and unlike Enmund, he participated in the activities leading

> directly up to the murders; and as in Tison, he continued on the venture after the murders had been effected by the actual shooters. In our view the evidence that Petitioner contemplated the use of lethal force is in some ways even more compelling here than in Tison. As we've noted, the only other real distinction between this case and Tison, and indeed between this case and virtually all of the other nonshooter cases which we have examined, is that Petitioner verbally objected to the use of lethal force. In every other way, however, his participation before, during and after the murders was as active, direct and significant as the participation of Tison.

White, 632 F.Supp. at 1155-56. This application of the Arizona Supreme Court's opinion came March 31, 1986. The Eleventh Circuit opinion affirming this action came January 20, 1987. However, the United States Supreme Court reversed and remanded the Arizona Supreme Court's decision on April 21, 1987, for the Arizona Supreme Court to conduct "further proceedings not inconsistent with this opinion. Cabana v. Bullock, 474 U.S. ___ (1986)." Tison v. Arizona, 107 S.Ct. 1676, 1688 (1987).

Without any further briefing in the Arizona Supreme Court, that Court entered the following order June 30, 1987:

> ORDERED: Vacating the sentences of death, and remanding to the trial court for such Enmund findings as may be appropriate under Tison v. Arizona, No. 84-6075, United States Supreme Court, decided April 21, 1987, and for resentencing.

(Att. 1) The Tisons are presently before the trial court, and resentencing is to occur. As the trial court has ordered:

> In this action the Supreme Court of this state has entered its order on June 30, 1987, vacating the sentences of death of Ricky Wayne Tison and Raymond Curtis Tison, and remanding the action to this court for Enmund findings as may be appropriate under Tison v. Arizona, No. 84-6075, United States Supreme court, decided April 21, 1987, and for resentencing. In its opinion the United States Supreme Court vacated the judgments and remanded the action for determination of whether either defendant acted with reckless indifference to human life, directing this be done ". . . in further proceedings not inconsistent with this opinion. . .", citing Cabana v. Bullock, 474 U.S. ___, 106 S.Ct. 689 (1986). The latter held Bullock was constitutionally entitled to a reliable

determination whether he was subject to the death penalty as one who has killed, attempted to kill, or intended that a killing take place or that lethal force be used. It also held (106 S.Ct. at 700):

> . . .The sentence currently in force may stand provided only that the requisite findings are made in an adequate proceeding before some appropriate tribunal -- be it an appellate court, a trial judge, or a jury. A new hearing devoted to the identification and weighing of aggravating and mitigating factors is thus, as far as we are concerned, unnecessary.

Cabana leaves to the state the choice of either imposing a sentence of life imprisonment or, within a reasonable time, obtaining a determination from its own courts of the factual questions Enmund poses.

It is ORDERED:

1. A hearing will be held before this court at 9:30 a.m. on Tuesday, August 18, 1987, at which the parties may present evidence and oral arguments relevant solely to the issue of whether, in participating in the murders for which they were convicted, either defendant Tison exhibited reckless indifference to human life.

(Att. 2) To borrow a phrase from the federal district court judge in White, "as in Tison," relief is proper here.

1. The procedural posture and state fact-finding procedures which occurred in Tison before resentencing was ordered.

At sentencing in Tison, the trial court found three statutory aggravating factors and no statutory mitigation. In an order that reads like this case, the following was found:

> The judge found three statutory aggravating factors:
>
> (1) the Tison's had created a grave risk of death to others (not the victims);
>
> (2) the murders had been committed for pecuniary gain;
>
> (3) the murders were especially heinous.
>
> The judge found no statutory mitigating factor. Importantly, the judge specifically found that that the crime was not mitigated by the fact that each of the petitioner's "participation was relatively minor." Ariz.

> Rev. Stat. Sec. 13-454(F)(3) (Supp. 1973) (repealed 1978). Rather, he found that the "participation of each [petitioner] in the crimes giving rise to the application of the felony murder rule in this case was very substantial." App. 284-285. The trial judge also specifically found, id., at 285, that each "could reasonably have foreseen that his conduct . . . would cause or create a grave risk of . . . death." Ariz. Rev. Stat. Ann. Sec. 13-454(F)(4) (Supp. 1973) (repealed 1978)

107 S.Ct. at 1680. In an opinion that seems more than a little like White I, the Arizona Supreme Court affirmed:

> On direct appeal, the Arizona Supreme Court affirmed. The Court found:
>
> > "The record establishes that both Ricky and Raymond Tison were present when the homicides took place and that they occurred as part of and in the course of the escape and continuous attempt to prevent recapture. The deaths would not have occurred but for their assistance. That they did not specifically intend that the Lyonses and Theresa Tyson die, that they did not plot in advance that these homicides would take place, or that they did not actually pull the triggers on the guns which inflicted the fatal wounds is of little significance." State v. (Ricky Wayne) Tison, 129 Ariz. 526, 545, 633 P.2d 335, 354 (1981).
>
> In evaluating the trial court's findings of aggravating and mitigating factors, the Arizona Supreme Court found the first aggravating factor--creation of grave risk to others--not supported by the evidence. All those killed were intended victims, and no one else was endangered. The Arizona Supreme Court, however, upheld the "pecuniary gain" and "heinousness" aggravating circumstances and the death sentences. This Court denied the Tison's' petition for certiorari. 459 U.S. 882 (1982).

Id.

In post-conviction, a divided Arizona Supreme Court (again, see White II for parallelism), affirmed the death sentence, and made Enmund findings. As recited by the United States Supreme Court:

> Petitioners then collaterally attacked their death sentences in state postconviction proceedings alleging that Enmund v. Florida, 458 U.S. 782 (1982), which had been decided in the interim, required reversal. A divided Arizona Supreme Court, interpreting Enmund to

require a finding of "intent to kill," declared in Raymond Tison's case "the dictate of Enmund is satisfied," writing:

> "Intend [sic] to kill includes the situation in which the defendant intended, contemplated, or anticipated that lethal force would or might be used or that life would or might be taken in accomplishing the underlying felony. Enmund, supra; State v. Emery, [141 Ariz. 549, 554, 688 P.2d 175, 180 (1984)] filed June 6, 1984.
>
> "In the present case the evidence does not show that petitioner killed or attempted to kill. The evidence does demonstrate beyond a reasonable doubt, however, that petitioner intended to kill. Petitioner played an active part in preparing the breakout, including obtaining a getaway car and various weapons. At the breakout scene itself, petitioner played a crucial role by, among other things, holding a gun on prison guards. Petitioner knew that Gary Tison's murder conviction arose out of the killing of a guard during an earlier prison escape attempt. Thus petitioner could anticipate the use of lethal force during this attempt to flee confinement; in fact, he later said that during the escape he would have been willing personally to kill in a 'very close life or death situation,' and that he recognized that after the escape there was a possibility of killings.
>
> "The use of lethal force that petitioner contemplated indeed occurred when the gang abducted the people who stopped on the highway to render aid. Petitioner played an active part in the events that led to the murders. He assisted in the abduction by flagging down the victims as they drove by, while the other members of the gang remained hidden and armed. He assisted in escorting the victims to the murder site. At the site, petitioner, Ricky Tison and Greenawalt placed the gang's possessions in the victims' Mazda and the victims' possessions in the gang's disabled Lincoln Continental. After Gary Tison rendered the Lincoln inoperable by firing into its engine compartment, petitioner assisted in escorting the victims to the Lincoln. Petitioner then watched Gary Tison and Greenawalt fire in the direction of the victims. Petitioner did nothing to interfere. After the killings, petitioner did nothing to disassociate himself from Gary Tison and Greenawalt, but instead used the victims' car to continue on the joint venture, a venture

that lasted several more days.

> "From these facts we conclude that petitioner intended to kill. Petitioner's participation up to the moment of the firing of the fatal shots was substantially the same as that of Gary Tison and Greenawalt . . . . Petitioner, actively participated in the events leading to death by, inter alia, providing the murder weapons and helping abduct the victims. Also petitioner was present at the murder site, did nothing to interfere with the murders, and after the murders even continued on the joint venture.
>
> ". . . In Enmund, unlike in the present case, the defendant did not actively participate in the events leading to death (by, for example, as in the present case, helping abduct the victims) and was not present at the murder site." State v. (Raymond Curtis) Tison, 142 Ariz. 454, 456-457, 690 P.2d 755, 757-758 (1984).

Id., pp. 1680-81.

Thus, the Arizona Supreme Court, relying upon Enmund, sustained the death sentences, finding:

1. That because Tison knew that the person he broke out of prison was serving time for the killing of a guard, he "could anticipate the use of lethal force during this attempt to flee confinement." State v. Tison, 690 P.2d 747, 749 (Ariz. 1987);

2. That Tison assisted in abducting the victims by arming himself, hiding, escorting the victims to the murder site, he heard the victim beg "Jesus, don't kill me," he heard the shooter say he was "thinking about it," and he saw the shooter "brutally murder the four captives with repeated blasts from their shotguns." Tison, 107 S.Ct. at 1679; Tison, 690 P.2d at 749;

3. Tison did not make "an effort to help the victims," Tison, 107 S.Ct. at 1679, and, "[a]fter the killings, petitioner did nothing to disassociate himself [from his co-defendants], but instead used the victims' car to continue on the joint venture. . . ." Tison, 690 P.2d at 749; and

4. Tison "intended to kill" because "petitioner's participation up to the moment of the firing of the fatal shots

was substantially the same as [the shooters]." Then, he "did nothing to interfere with the murders, and after the murders even continued on the joint venture." Id.

The Arizona Supreme Court relied upon this Court's decision in Ruffin v. State, 420 So.2d 591 (Fla. 1982), to support its finding that Enmund was satisfied. Tison, 690 P.2d at 749. The federal district court in Mr. White's case then relied upon the Arizona Supreme Court's Tison opinion, White, 632 F. Supp. at 1155-56, and the Eleventh Circuit relied upon its opinion in Mr. Ruffin's co-defendant's case, Hall v. Wainwright, 733 F.2d 766 (11th Cir. 1987), to deny relief.

This has all changed. The United States Supreme Court spoke, and Mr. Tison is now in resentencing proceedings, "at which the parties may present evidence and oral arguments relevant solely to the issue of whether, in participating in the murders for which [he was] convicted, Tison exhibited reckless indifference to human life." Despite the findings already made, the constitution was not satisfied in Tison's case.

The United States Supreme Court remanded despite finding that Tison's "participation in the crime was anything but minor," and that Tison "subjectively appreciated that [his] acts were likely to result in the taking of innocent life." Tison, 107 S.Ct. at 1685; see also id., 107 S.Ct. at 1688. The Court concluded:

> Only a small minority of those jurisdictions imposing capital punishment for felony murder have rejected the possibility of a capital sentence absent an intent to kill and we do not find this minority position constitutionally required. We will not attempt to precisely delineate the particular types of conduct and states of mind warranting imposition of the death penalty here. Rather, we simply hold that major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the Enmund culpability requirement. The Arizona courts have clearly found that the former exists; we now vacate the judgments below and remand for determination of the latter in further

> proceedings not inconsistent with this opinion. Cabana v. Bullock, 474 U.S. ___ (1986).

Id., 107 S.Ct. at 1688.

Mr. Tison is being resentenced. Mr. White is scheduled for execution. These cases are not different, as the federal district court noted, but for two things: (1) Mr. White objected to the killing, and (2) his jury unanimously objected to his being killed.

2. The procedural posture and state fact-finding procedures which occurred in White, before the United States Supreme Court opinion in Tison.

When Mr. White's case was considered upon direct appeal, this Court "rejected the ultimate rationale adopted by the Supreme Court of the United states in Enmund v. Florida . . . ." White, 632 F. Supp. at 1144. After Enmund, Mr. White filed a motion for post-conviction relief, and Judge Klein found that "the defendant did not kill, attempt to kill or intend that a killing take place, and [that he] is therefore entitled to the protections afforded by the Enmund case." (R. 157)

This Court reversed. However, the Court made no specific findings regarding the two newly announced and required Tison findings, and, unlike the Arizona Supreme Court in Tison pre-reversal, this Court made no finding of intent to kill -- indeed, no such finding can be made. Instead, this Court distinguished the Enmund facts, stated that Mr. White "did nothing to disassociate himself from either the murders or the robbery," found that "it can hardly be said that he did not [come to] realize that lethal force was going to be used," and concluded "that Enmund does not bar the imposition of the death penalty under these facts and circumstances." White II, 470 So.2d at 1380. Two justices dissented. Mr. White did disassociate himself from the murders -- he opposed them, as this Court recognized. He did not intend that lethal force be used against

the victims -- he went along on a robbery.

3. Under Tison, a life sentence, or resentencing, is proper.

It is not possible meaningfully to distinguish Tison from this case. In Tison, the Supreme Court reiterated that "[a]rmed robbery is a serious offense, but one for which the death penalty is clearly excessive. . . ." Tison, 107 S.Ct. at 1683. Underlining its Enmund language, the Court wrote that "the focus [has to] be on his culpability, not on that of those who committed the robbery and shot the victims, for we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence.'" Id.

The Court rejected imposition of death upon findings such as the ones made in this case.

> Participants in violent felonies like armed robberies can frequently "anticipat[e] that lethal force . . . might be used . . . in accomplishing the underlying felony." Enmund himself may well have so anticipated. Indeed, the possibility of bloodshed is inherent in the commission of any violent felony and this possibility is generally foreseeable and foreseen; it is one principal reason that felons arm themselves. The Arizona Supreme Court's attempted reformulation of intent to kill amounts to little more than a restatement of the felony-murder rule itself. Petitioners do not fall within the "intent to kill" category of felony murderers for which Enmund explicitly finds the death penalty permissible under the Eighth Amendment.

Id. 107 S.Ct. at 484. This Court's analysis in White II likewise fits the Tison facts -- it can hardly be said that Tison "did not [come to] realize that lethal force was going to be used," Id., 470 So. 2d at 1380. A fortiorari, the Arizona Supreme Court found Tison intended death. (Mr. White never intended death.) However, the United States Supreme Court remanded the case for a state court determination regarding "reckless indifference to human life." Tison, 107 S.Ct. at 1688.

In response, the Arizona Supreme Court vacated the death sentence and ordered resentencing. Tison is now permitted to

produce evidence regarding the absence of reckless indifference. This Court, based upon Tison, should reverse the death sentence in this case. Because this is a jury override, a life sentence should be imposed. See Section B, infra.

Tison requires that the fact finder find, beyond a reasonable doubt, that a person have (1) major participation in the felony committed, and (2) reckless indifference to human life. These findings are more lacking in this case than they were in Tison.

First, it must be remembered that while "the possibility of bloodshed is inherent in the commission of any violent felony and . . . is . . . foreseen," Tison, 107 S.Ct. at 1684, armed robbery is nevertheless, an offense "for which the death penalty is plainly excessive." Id. at 1683. The two Tison findings must be made.

Mr. White was far from "indifferent." He was participating in an armed robbery at most, and as in Tison, the possibility of actually turning the inherent possibility of lethal force into a reality arose. Rather than being indifferent, Mr. White withdrew to the extent reasonably feasible under the circumstances. Unlike Tison, Mr. White "verbally opposed the killing," White II, 478 So.2d at 1380. The fact finder must key in upon what was done after a robbery turned into a possible murder, and at this point Mr. White objected, withdrew, and did not participate. Any more by him at that point would have resulted in his certain death at the hands of his co-defendants, as the evidence revealed. Any less may have subjected him to death at the hands of the state. But what he did do does not satisfy Enmund--he was not indifferent, much less needlessly so.

As to "major participation in the felony committed," it is important to note that Florida law provides a statutory mitigating circumstance that is relevant: "(d) the defendant was a accomplice in the capital felony committed by another person

and his participation was relatively minor." F.S. 921.141(6)(d). The sentencing judge examined seriatim, every other statutory mitigating circumstance, and found them wanting. However, the judge completely omitted any consideration of this circumstance at all. It simply, inexplicably, does not appear in the sentencing order. But Mr. White's participation in the murders was "minor" -- it was nonexistent. See also Enmund v. Florida, 458 U.S. 781, 798 (1982)("Enmund did not kill or intend to kill and thus his culpability is plainly different from that of the robbers who killed. . .").

B. THERE HAS BEEN A CHANGE IN LAW OF CONSTITUTIONAL DIMENSION SINCE THE COURT'S AFFIRMANCE OF MR. WHITE'S DEATH SENTENCE, WHICH DEMONSTRATES THAT THE JURY RECOMMENDATION WAS ONE WHICH A REASONABLE JUROR COULD MAKE.

In White I, this Court rejected non-killer status as a reasonable basis for the jury recommendation. Tied up in this rejection was the Court's "reject[ion of] the rationale ultimately adopted by the Supreme Court of the United States in Enmund v. Florida . . . ." White, 632 F.2d at 1144. Without question, the Court's disinclination to accept the prescient Enmund-type claim necessarily colored and controlled the resolution of whether the override was proper.

The override question was not revisited in White II. A habeas corpus petition is the proper manner in which to raise this Court's previous erroneous affirmance of the override procedure on direct appeal--there was an error in this Court's analysis, and it is this Court that should correct it.

Notwithstanding the override issue having not been revisited by the majority in White II, now Chief Justice MacDonald sua sponte recognized the jury override implications of Enmund, and his logic cannot be improved upon:

> A review of the record supports the trial judge's findings that, in view of proscriptions enunciated in Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73

> L.Ed.2d 1140 (1982), White's death sentence was unlawfully entered and affirmed by this Court. White objected to the idea of killing the victims, did not take part in the killing, and refused to assist in disposing of the weapons. His role in guarding the door was to further a robbery, not a homicide. He did not kill, attempt to kill, or intend to kill. The record does not disclose that he contemplated that lethal force would be used, although he did know that all participants were armed. His failure to dissuade others from killing does not rise to a participation in the killing. Although I voted to affirm appellee's death sentence on direct appeal, I would have voted for life imprisonment if the Enmund decision had been released at that time. Indeed, such a result is mandated by Enmund. Also, this is a jury override case. A unanimous jury recommended life imprisonment at the penalty phase of trial, presumably after taking into account the factors later explained in Enmund. We failed to rule that this was a rational basis for the jury's recommendation.

White II, 470 So.2d at 1381 (McDonald, J., dissenting); see also id. at p. 1380 (Overton, J., dissenting).

Even if this Court believes that Enmund/Tison does not preclude imposition of the death penalty under the facts of this case, the considerations that make the case like Enmund/Tison, do provide a reasonable and rational basis for the unanimous recommendation. Thus, just as this Court's affirmance of the override in White I was colored by a view that was anti-Enmund, now that it has been made crystal clear what Enmund requires, the reasonableness of the jury recommendation should be rethought, from the constitutionally required point of view.

It is inescapable that even Enmund-imperfect facts provide a reasonable basis for a jury recommendation of life. The jury override was consequently reversible error.

1. This Court has as of late underlined the reasonableness of jury recommendations of life based upon the factors present in this case.

"The death sentence law as it now exists . . . controls our review. . . ." Proffitt. DuBoise v. State, No. 67,082 (Fla. 1987), reflects override law "as it now exists":

> The trial judge's findings failed to take into account the standard we enunciated in Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), that "[i]n order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." One of the factors upon which a jury can reasonably base a recommendation of life imprisonment is the disparate treatment of others who are equally or more culpable in the murder. E.g., Brookings v. State, 495 So.2d 135 (Fla. 1986); McCampbell v. State, 421 So.2d 1072 (Fla. 1982). According to the only direct evidence of the circumstances of the murder (appellant's statements to cellmate Butler), appellant's two companions were the actual perpetrators of the killing. These principal perpetrators of the murder were never arrested or charged for the crime. This fact could reasonably have influenced the jury and was a reasonable basis for the jury to recommend life imprisonment. Moreover, although we note that the jury, in finding appellant guilty of first-degree murder, could have based its verdict either on the felony murder doctrine or on circumstantial evidence of appellant's joiner in the premeditated intent of the others to kill the victim, in making its sentencing recommendation the jury could have been influenced by the lack of direct evidence of such premeditated intent on the part of the appellant. We therefore conclude that the trial court should have followed the jury's recommendation.

And so it is here. If the jury was reasonable in DuBoise, it was reasonable in Mr. White's case. It is quite plain that "reasonable people could differ as to the propriety of the death penalty in this case, [and so] the jury's recommendation of life must stand." Brookings v. State, 495 So.2d 135, 143 (Fla. 1986). See also Wasko v. Florida, No. 65,547 (Fla. March 5, 1987)("[T]he jury may have questioned the respective roles of Wasko and Pierson in this homicide. These [and other] factors gave the jury a reasonable basis for recommending life imprisonment.")

In Ferry v. Florida, No. 67,759 (Fla. April 30, 1987), the Court stated:

> [W]hen there is a reasonable basis in the record to support a jury's recommendation of life an override is improper . . . .
>
> 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.

Slip op., p. 7.

This Court's review and balancing of aggravating and mitigating factors in White I to sustain the override was consequently incorrect. The Court emphasized that "we do not believe" that the balance of aggravation and mitigation should have resulted in life. What the Court failed to do was recognize that regardless of the Court's predilections, the jury recommendation was a reasonable one. This Court and the jury's opposite conclusions simply illustrate why the law requires that the recommendations be left intact -- reasonable people differ in this case, which, under the law of Florida, means that the jury's life verdict should stand.

As a final note, judge knowledge of information in addition to what the jury knew does not ipso facto make an override proper. The question is whether what the jury did was reasonable, not whether what the judge did was reasonable. Otherwise, there would be no need or function for a recommendation, which is not the law. In any event, the judge in this case knew no more about the offense than the jury did. The same situation occurred in Ferry, supra, where, according to the sentencing order, the judge knew more about the defendant's criminal history than did the jury, based upon a presentence

investigation report. Att. C. That, however, did not keep the jury's (or the judge's) action from being reasonable. It is just that when the jury is reasonable, and life is recommended, life is the result.

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, 104 S.Ct. 3154, 3166 (1984). This Court must monitor and apply the "significant safeguard[s]" built into the override procedure. If the jury override here, and the method through 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." Id. To allow the override to stand in this case would be a procedure providing no meaningful basis to distinguish between those persons who receive life (when a judge does not override, or when an override is reversed) and those who receive death, in violation of the eighth and fourteenth amendments.

2. The Jury's Life Verdict Was Eminently Reasonable.

The jury in Mr. White's case could reasonably have relied upon a number of "reasonable" factors in reaching their decision recommending life, factors which in fact this Court has found to "reasonable." On direct appeal, this Court recognized the "colorable mitigating circumstance" that Mr. White was "not the triggerman." White I, 403 So.2d at 340. Mr. White opposed killing the victims. See, e.g., White II, 470 So.2d at 1380. The trial prosecutor, in fact, told the jury "[Mr. White] did not kill anyone by his own act, and I admit that" (R. 1465). Mr. White then refused to assist Francois and Ferguson by disposing of the guns. In essence, once he discerned that the accomplices

were contemplating a murder, not a robbery, Mr. White renounced his participation and opposed the killings, and tried to get them not to do it. Cf. Smith v. State, 424 So.2d 726, 732 (Fla. 1982). The jury's consideration of such mitigating evidence was more than a reasonable basis on which to reject death. Cf. Hitchcock v. Dugger, 107 S. Ct. 1821 (1987). And there was more.

Other traditionally recognized mitigating evidence was before the jury: Mr. White had a history of epilepsy (R. 1453); he confessed his involvement in the offense; and, a similarly situated co-defendant [Archie] who also, like Mr. White, never killed, nor intended to kill, was given a twenty-year sentence.

As this Court has recognized, the latter factor was worthy of the jury's consideration even if the judge may have deemed it insufficient. Accordingly, in Brookings v. State, 495 So. 2d 135 (Fla. 1986), this Court reversed such an "override" because the jury's life recommendation could well have rested on the independent nonstatutory mitigating effect of the life sentence given to an accomplice. Id. at 142-43; accord McCampbell v. State, 421 So.2d 1072 (Fla. 1982). This Court held that the disparate treatment given to a similarly situated accomplice, as opposed to the treatment given the capital defendant, were "reasonable" mitigating factors to be considered by the jury and the court at the penalty phase. Brookings, 495 So.2d at 142-43. Thus, much more than a "rational basis" existed for the jury's life recommendation, as Chief Justice McDonald and Justice Overton recognized in White II.

In this regard, it must be remembered that the additional "factors" which the sentencing judge "noted" in rejecting the jury's recommendation (Mr. White's parole status and his 1965 attempted rape conviction) were not put before the jury because the trial prosecutor failed to exercise due diligence in obtaining those records before the jury's recommendation (see R. 1428, 1431-32, 1435, 1437). These convictions were never proven

beyond a reasonable doubt; the "findings" on those convictions were based only on the presentence investigation report. It is wholly unfair to allow a capital defendant to be so bootstrapped into an override of a jury's life recommendation. The jury did not have that "evidence" because the State failed to produce it.

Even so, those convictions do not overcome the jury's unanimous life recommendation, else there would be no need for a recommendation. That recommendation had much more than a rational basis. However, although striking three of the aggravating circumstances found by the sentencing judge on direct appeal, this Court allowed the override to stand. White I. Mr. White respectfully submits that this Court erred. Even in cases involving jury recommendations of death, and no mitigating circumstances, this Court has remanded for resentencing after striking aggravating factors found by the sentencing court. See Nibert v. State, 508 So.2d 1 (Fla. 1987)(remanding for resentencing because "[a]lthough death may be the proper sentence in this situation, it is not necessarily so."); see also Rembert v. State, 445 So. 2d 337 (Fla. 1984). Mr. White's case involved a unanimous, reasonable jury recommendation of life.

C. STATUTORY AGGRAVATING CIRCUMSTANCES WERE VICARIOUSLY APPLIED TO MR. WHITE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The trial court found the following aggravating circumstances: under sentence of imprisonment; prior conviction of violent felony; great risk of death to many persons (reversed by this Court); felony-murder; pecuniary gain (reversed by this Court for improper doubling); witness elimination; hinder law enforcement (reversed by this Court for improper doubling); and heinous, atrocious and cruel. Two of the aggravating circumstances remaining after appeal involved not Mr. White's actions, but the actions of his co-defendants: witness elimination and heinous, atrocious, or cruel. Yet those

aggravating factors involved the conduct of the co-defendants, not Mr. White. Mr. White opposed the killings.

The application of these circumstances were sustained on direct appeal. Their application however, violates the eighth and fourteenth amendments. Tison is again instructive:

> As the Court notes, ante, at--n. 2, it has expressed no view on the constitutionality of Arizona's decision to attribute to petitioners as an aggravating factor the manner in which other individuals carried out the killings. On its face, however, that decision would seem to violate the core Eighth Amendment requirement that capital punishment be based on an "individualized consideration" of the defendant's culpability, Lockett v. Ohio, 438 U.S. 386, 605 (1978). It therefore remains open to the state courts to consider whether Arizona's aggravating factors were interpreted and applied so broadly as to violate the Constitution. Godfrey v. Georgia, 446 U.S. 420 (1980).

Tison, 107 S.Ct. at 1689-90, fn. 3 (Brennan, J., dissenting). The majority did not reach this issue, but four justices joined in this opinion.

It is wholly unfair to allow a jury life recommendation to be overridden when two of the aggravating factors which were sustained did not involve Mr. White's conduct but were vicariously attributed to him on the basis of others' conduct. The eighth and fourteenth amendments do no countenance such a result. Here, as in Tison and Enmund, "[t]he question . . . is not the disproportionality of death as a penalty for murder, but rather the validity of capital punishment for [Mr. White's] own conduct." Enmund v. Florida, 458 U.S. at 798. Thus,

> [t]he focus must be on his [Mr. White's] culpability, not on that of those who committed the robbery and shot the victims, for we insist on "individualized consideration as a constitutional requirement in imposing the death sentence," Lockett v. Ohio, 438 U.S. 586, 605, 98 S. Ct. 2954, 2965, 57 L.Ed.2d 973 (1978)(footnote omitted), which means that we must focus on "relevant facets of the character and record of the individual offender." Woodson v. North Carolina, 428 U.S. 280, 304, 96 S. Ct. 2978, 2991, 49 L.Ed.2d 944 (1976). [Mr. White] himself did not kill or attempt to

> kill; and . . . [Mr. White had no] intention of participating in or facilitating a murder. . . . It is fundamental that "causing harm intentionally must be punished more severely than causing the same harm unintentionally." H. Hart, Punishment and Responsibility 162 (1968). [Mr. White] did not kill or intend to kill and thus his culpability is plainly different from that of the robbers who killed; yet the State treated them alike and attributed to [Mr. White] the culpability of those who killed. . . . This was impermissible under the Eighth Amendment.

Enmund, supra, at 798 (emphasis in original).

Vicariously holding Mr. White responsible for the aggravating factors applicable to his co-defendants' conduct was, under the eighth amendment, impermissible. Using such vicariously applied factors to override a jury's unanimous life recommendatin was flatly wrong.

D. THE AUTOMATIC AGGRAVATING CIRCUMSTANCE OF FELONY MURDER WAS UNCONSTITUTIONALLY APPLIED.

The death penalty in this case is predicated upon an unreliable automatic finding of a statutory aggravating circumstance. Automatic death penalties upon conviction of first degree murder violate the Eighth and Fourteenth Amendments, as was recently stated by the United State Supreme Court in Sumner v. Shuman, No. 86-246 (June 22, 1987), new law which makes revisiting this issue proper. The precise question presented in this claim is currently pending before the United States Supreme Court in Lowenfield v. Butler, No. 86-6867, cert. granted, 55 U.S.L.W. 3892 (June 22, 1987). The Court agreed to hear Lowenfield the day Shuman was decided.

In Florida, first degree murder is punishable by death. First degree murder is either 1) willful, deliberate, malicious, and premeditated killing, or 2) felony murder--i.e., killing during the perpetration of a robbery. Mr. White was indicted for and convicted of felony murder, R. 1307, that is, murder during the perpetration of a robbery. Felony murder was then found as a

statutory aggravating circumstance.

The sentencer was then entitled to automatically return a death sentence upon a finding of guilt of first degree (felony) murder. Statutes which allow an automatic death penalty for particular types of homicides reflect arbitrariness not allowed by the Eighth Amendment. Godfrey v. Georgia, 446 U.S. 420 (1980); Roberts v. Louisiana, 428 U.S. 325 (1979). Every felony-murder would involve, by necessity, the finding of a statutory aggravating circumstance, a fact which violates the eighth amendment: an automatic aggravating circumstance is created, which does no narrowing ("[A]n aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty . . . ." Zant v. Stephens, 462 U.S. 862, 876 (1983). In short, Mr. White was convicted for felony murder, and he then faced statutory aggravation for felony murder. This is too circular a system meaningfully to differentiate between who should live and die, and it violates the eighth and fourteenth amendments.

The United States Supreme Court identified the evil in Sumner v. Shuman, No. 86-246 (June 22, 1987):

> The Nevada mandatory capital-sentencing statute under which Shuman was sentenced to death precluded a determination whether any relevant mitigating circumstances justified imposing on him a sentence less than death. Redefining the offense as capital murder and specifying that it is a murder committed by a life-term inmate revealed only two facts about respondent--(1) that he had been convicted of murder while in prison, and (2) that he had been convicted of an earlier criminal offense which, at the time committed, yielded a sentence of life imprisonment without possibility of parole. These two elements had to be established at Shuman's trial to support a verdict of guilty of capital murder. After the jury rendered that verdict of guilty, all that remained for the trial judge to do was to enter a judgment of conviction and impose the death sentence. The death sentence was a foregone conclusion.
>
> These two elements of capital murder do not provide an adequate basis on which to determine whether the death sentence is the appropriate sanction in any particular case.

Slip op., pp. 13-14. In Mr. White's case, the statutory aggravating factor "had to be established at . . . trial to support a verdict of guilty of capital murder." Id. In a very real sense, all that remained was to impose the death sentence.

The Lowenfield petition for writ of certiorari, which was granted, presented the issue in the following way:

> All parties to this capital case concede that petitioner's death sentence rests upon a single statutory aggravating circumstance that merely repeats an element of the underlying offense. Petitioner's case presents a square conflict in the circuits and, indeed, highlights a sharp divergence of views among a number of state high courts as well.
>
> In Collins v. Lockhart, 754 F.2d 258 (8th Cir. 1985), the Eighth Circuit found unconstitutional the Arkansas capital sentencing scheme which provided an aggravating circumstance that merely repeated an element of the underlying crime. That court held, as petitioner argues here, that the Arkansas provision was constitutionally infirm because it failed "to distinguish a particular defendant on whom the jury has decided to impose the death sentence from other defendants who have committed the same underlying capital crime," thereby running afoul of the Court's concerns expressed in Furman v. Georgia, 408 U.S. 238 (1972). Collins, 754 F.2d at 264. State high courts have joined in this concern over "double-counting" of aggravating circumstances.
>
> In petitioner's case and others, the Fifth Circuit has declined to adopt the Eighth Circuit's view on the constitutional infirmities created by such a system. (Appendix at ___). See, e.g., Welcome v. Blackburn, 793 F.2d 672 (5th Cir.), cert. denied, 107 S.Ct. 9 (1986); Wingo v. Blackburn, 783 F.2d 1046 (5th Cir. 1986), cert. denied, 55 U.S.L.W. 3346 (U.S. May 4, 1987) (No. 86-5026). Indeed, in petitioner's case, the Fifth Circuit remained unmoved by a failure to guide sentencer discretion far more severe than that confronted by the Collins court. In Collins, the Eighth Circuit overturned a death sentence based on three statutory aggravating circumstances when one such circumstance overlapped with the definition of the crime. Here, the definition of petitioner's crime is identical to the sole aggravating circumstance -- with nothing else supporting his sentence of death.
>
> The bedrock principle upon which this

> Court's modern capital punishment doctrine is based is that, "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia, 427 U.S. 153, 189 (1976) (Opinion of Stewart, Powell, & Stevens, JJ.). Strict adherence to this doctrine of guided sentencer discretion is crucial due to the qualitative difference of death from all other punishments and the corresponding need for greater scrutiny of and certainty in a capital sentencing determination. See e.g., California v. Ramos, 463 U.S. 992, 998-99 (1983); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (Opinion of Stewart, Powell, & Stevens, JJ.).
>
> The Louisiana capital sentencing scheme under which petitioner is sentenced to die runs squarely afoul of these constitutional requirements.

This claim was addressed, but incorrectly resolved, on Mr. White's direct appeal.

E. THIS COURT FAILED TO APPLY THE ELLEDGE STANDARD ON DIRECT APPEAL, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

On direct appeal, this Court recognized that the "colorable [nonstatutory] mitigating circumstance" that Mr. White was "not the triggerman" existed in this case. White I, 403 So. 2d at 340. The Court also struck three aggravating circumstances found by the sentencing judge. However, the Court refused to direct a resentencing. Mr. White respectfully submits that the Court erred. Given the existence of a mitigating factor (recognized by this Court) and the Court's striking of three aggravating factors, resentencing was required. See Elledge v. State, 346 So. 2d 998 (Fla. 1977). Given the jury's unanimous verdict for life, the need for application of the Elledge standard in this case is even more compelling. Mr. White urges that the Coiurt stay his execution, and correct this error.

V. RULE 3.851 DOES NOT BAR CONSIDERATION OF THIS HABEAS CORPUS ACTION

On September 18, 1987, the Criminal Law Section of the Florida Bar, Judge Cocalis, presiding, will meet, as requested by this Court, to study and evaluate Rule 3.851. Rule 3.851 is intended "to provide more meaningful and orderly access to the courts when . . . death warrants are signed. "In re. Florida Rules of Criminal Procedure, Rule 3.851, 12 F.L.W. at 92. Under the Rule, and absent certain circumstances, a litigant must file state court pleadings within thirty days after a warrant is signed, if the execution date is sixty or more days from the warrant signing. This Court realizes that "some adjustments and changes to this Court's drafted rule may be appropriate," In re Amendments to Florida Rules of Criminal Procedure -- Rule 3.851, No. 69,921, slip op. at 1 (May 11, 1987), and the Bar's invited efforts are directed to that end.

Rule 3.851 has yet to be applied and interpreted. But for this case, it may never be applied because a.) it may change, upon Bar input, and b.) the Governor has announced a change in warrant procedures that will circumvent the rule in the vast majority of warrant situation, most notably this case. For example, yesterday the Governor signed three warrants, providing thirty days before execution.

The rule has not been applied to date because, inter alia, this Court granted an extension of the time period in one case, Thompson v. Dugger, the first case to which the rule could have applied, and because other litigants, i.e. Gerald Stano, Kenneth Hardwick, and James Agan, filed or will file in federal rather than state court. Consequently, this Court is called upon for the first and perhaps last time to decide what Rule 3.851 means, and how it operates.

Mr. White requested that the Rule 3.851 time period be extended in this case. The Court had set a tentative oral

argument date in this Court for the thirtieth day, and denied the requested extension. Despite the fact that an extension was denied, a pleading may still be filed and considered upon the merits if a.) the facts upon which the claim is predicated were unknown to the movant, despite the exercise of due diligence, or b.) the law changed. Mr. White will demonstrate that he falls into the exceptions. First, however, he challenges the rule itself, and urges holding its application, to him alone, in abeyance, pending Bar study.

A. APPLICATION OF RULE 3.851 TO THIS STATE HABEAS CORPUS ACTION VIOLATES THE STATE PROHIBITION AGAINST SUSPENDING THE GREAT WRIT.

"The great writ has its origins in antiquity and its parameters have been shaped by suffering and deprivation. It is more than a privilege . . . it is a writ of ancient right." Jamason v. State, 447 So.2d 892, 894 (Fla. 4th DCA 1983). The writ may not be suspended and it "'is not to be circumscribed by hard and fast rules or technicalities . . . . [I]t is the responsibility of the court to brush aside formal technicalities and issue such appropriate orders as will do justice. In habeas corpus the niceties of the procedure are not anywhere near as important as the determination of the ultimate question as to the legality of the restraint.'" Id. at 895 (quoting Anglin v. Mayo, 88 So.2d 918, 919-20 (Fla. 1956)).

This petition is being filed seven days before execution, and fourteen days before the expiration of the death warrant. Only through a mechanistic application of Rule 3.851, without regard to the purpose or effect of the rule, may this Court find refusal to address the merits of the petition to be proper. This Court will be required to, in effect, suspend the writ, and selectively so--Mr. William Thompson requested and received an extension of time under the exact same circumstances, and this Court later stayed his execution.

B. APPLICATION OF RULE 3.851 TO THIS HABEAS CORPUS ACTION VIOLATES EQUAL PROTECTION AND DUE PROCESS OF THE LAW.

William Thompson was represented by pro bono publico volunteer counsel when his death warrant was signed this year. Because CCR had to become involved in this case, and because CCR had no prior knowledge of or contact with the case before the warrant was signed, a request for an extension of time was filed. It was granted.

Mr. White is in the exact same situation. The rule has not been applied against any other similarly situated litigant in the past, and will likely not be applied against any similarly situated litigant in the future. Mr. White urges that the Court not deny merits review of his claims for such an action would violate the equal protection and due process clauses of the fourteenth amendment. See James v. Kentucky, 466 U.S. 341 (1984)(only "firmly established and regularly followed state practice can prevent implementation of federal constitutional rights."); Barr v. city of Columbia, 378 U.S. 146, 149 (1964)(procedural requirements which are not regularly and strictly followed are insufficient to bar review of federal constitutional claims); Hathorn v. Lovorn, 457 U.S. 255, 262-63 (1982)("state courts may not avoid deciding federal issues by invoking procedural rules that do not apply evenhandedly). It would be wholly unfair to single Mr. White out as the sole litigant against whom Rule 3.851 is to be applied.

C. APPLICATION OF RULE 3.851 TO THIS PETITION VIOLATES DUE PROCESS OF LAW, AND THE SEPARATION OF POWERS DOCTRINE.

CCR has filed with this Court its Comments and Recommendations regarding Rule 3.851. Included in that document are two arguments regarding the constitutionality of the rule: due process, and separation of process. That pleading is filed

herewith as an attachment (Att. D). Rather than repeating those arguments, they are incorporated herein by specific reference.

D. APPLICATION OF RULE 3.851 TO THE PETITION IS NOT IN THE INTERESTS OF JUSTICE.

Mr. white's claims do not involve technical niceties. They call into question whether he was ever eligible for a sentence of death. They involve errors of the most fundamental constitutional dimension -- this man simply does not deserve to die. The constitutional errors in this case resulted in a death sentence that was flatly improper. Mr. White's claims are that he is per se ineligible for death, making him "innocent" in the only sense relevant to a capital sentencing proceeding.

Given these circumstances, the procedural requirements of Rule 3.851 simply should not be applied to bar review of Mr. White's claims. The interests of justice require that they be addressed, for a person underserving of death now faces imminent execution. Cf. Murry v. Carrier, ___ U.S. ___, 106 S.Ct. 2639, 2650 (1986); see also Kuhlman v. Wilson, ___ U.S. ___, 106 S.Ct. 2616 (1986).

E. EVEN IF RULE 3.851 IS APPLIED, IT IS PROPER UNDER THE RULE TO ADDRESS THE MERITS OF THE CLAIMS PRESENTED.

Under the Rule, the thirty-day time limitation period does not apply if "the facts upon which the claim is predicated were unknown to the movant and could not have been ascertained by the exercise of due diligence prior to the end of the thirty-day period." Certainly it is counsel, not Mr. White, whose due diligence must be examined. If anyone is to be penalized if this Court finds a lack of due diligence, it is counsel. However, due diligence can be shown, and the exception applies.

1. The time limitation period has been met, or it does not apply.

In the Motion for Extension of Time Within Which to File Post-Conviction Motions, the following was set-out:

1. Petitioner's death warrant was signed on June 4, 1987, and his execution set for August 26, 1987. Pursuant to this Court's recent adoption of Florida Rule of Criminal Procedure 3.851, all motions and petitions for post-conviction or collateral relief must be filed by July 6, 1987. See In re Florida Rules of Criminal Procedure, 12 FLW 92 (1987).

2. Petitioner was represented by Mr. Thomas G. Murray, Assistant Public Defender for the Eleventh Judicial Circuit, at the time of the signing of the death warrant. Undersigned counsel, the Office of the Capital Collateral Representative (CCR), agreed to enter the case at the behest of Mr. Murray who wrote a letter to CCR dated Friday, June 19, 1987. In that letter, which was received Monday, June 22, 1987, Mr. Murray advised Mr. Larry Spalding, the Capital Collateral Representative, that "[i]t had always been my intention to turn the case over to your office if I was unsuccessful in the Supreme Court." Attachment 1. As is discussed below, the matter of success in the United States Supreme Court is yet to be determined. Nevertheless, CCR has agreed to represent Mr. White.

3. CCR contacted Mr. Murray's office, began receiving files from him June 23, 1987, and finally received all files possessed by Mr. Murray on July 1, 1987. Because of other commitments, no one at CCR has met Mr. White, the client. An intake appointment is scheduled with Mr. White today at Florida State Prison. No background investigation has occurred, and no other investigation for post-conviction issues has been possible. One staff attorney has been reading the record to determine whether any issues are apparent therefrom. Despite the exercise of due diligence by counsel, at this time CCR is not prepared to present post-conviction pleadings to the state courts.

4. Actions are, however, pending in federal court. On June 4, 1987, the date Petitioner's warrant was signed, Petitioner had nineteen (19) days remaining within which to file his petition for writ of certiorari from the Eleventh Circuit Court of Appeals in the United States Supreme Court, from the decision in White v. Wainwright, 809 F.2d 1478 (11th Cir. 1987). On June 23, 1987, Mr. White's certiorari petition was timely filed in the Supreme Court, along with an application for stay of execution. Thus, Mr. White's habeas corpus petition is still pending in the federal system.

5. Petitioner is required under Rule 3.851 to prepare and file a successive post-conviction motion by July 6, 1987, even

though his appeal to the United States Supreme Court on his initial post-conviction motion is still pending. In Ford v. Florida, No. 70,467, pending before this Court, appellant was in the same procedural posture as Mr. White. Mr. Ford had federal habeas corpus proceedings pending in federal court when he filed a successor Rule 3.850 motion in state trial court. The State's position, contained in a motion to dismiss, was that since a petition was pending in federal court, actions filed in state court were ipso facto dismissible. Motion to Dismiss, Record on Appeal, pp. 10-11. The trial court accepted the state's position, and dismissed:

> The Defendant also states in his Motion that he presently has pending in the federal system certain collateral proceedings. Accordingly, the Court finds that this presently pending Motion for Post-Conviction Relief should be denied on this basis as well. State v. Meneses, 392 So.2d 905 (Fla. 1981).

Order entered February 17, 1987, pp. 12-13, Record on Appeal.

6. Accordingly, Mr. White faces a classic Hobson's choice: he can file a successor motion while the federal proceedings are pending, and face dismissal per Ford, or he can wait until the federal action is finally ruled upon, placing himself outside of the Rule 3.851 time limits, and face dismissal. Such traps for the unwary are untenable, and violate due process of law.

7. In a recent order addressing the effect of Rule 3.851, this Court recognized that "some adjustments and changes to this Court's drafted rule may be appropriate," In re Amendment to Florida Rules of Criminal Procedure--Rule 3.851, No. 69,931, slip op. at 1 (May 11, 1987), and invited the Criminal Rules of Procedure Committee of the Florida Bar "to study and evaluate" the rule. Id. The instant case presents circumstances under which some slight adjustment is appropriate. Here, the stated purpose of the Rule, i.e., "to provide more meaningful and orderly access to the courts when death warrants are signed," In re Florida Rules of Criminal Procedure, Rule 3.851, 12 FLW at 92, will be better served by granting the requested extension.

8. The CCR is currently solely responsible for the litigation of three cases under death warrant, and is co-counsel in a case in which this Court entered a stay just last Thursday. In addition, the CCR recently became sole counsel in another warrant case, that of Douglas Ray Meeks, when the volunteer attorney withdrew after a death warrant was

signed. CCR is now facing an expedited briefing schedule in the Eleventh Circuit in Mr. Meeks' case, imposed after that court granted a stay of execution. Further, CCR is responsible for conducting an evidentiary hearing Wednesday, July 8, 1987, in Tampa, Florida, which requires extensive further preparation.

9. CCR's budgetary, staffing, and logistical problems have been well documented, and have been presented to this Court on several prior occasions. While CCR still contends that Rule 3.851 violates the state and federal constitutions, as set out in In Re: Florida Rules of Criminal Procedure--Rule 3.851, Comments and Recommendations by the Office of the Capital Collateral Representative (March 30, 1987), and fully incorporated herein, this motion is made in good faith under the Rule for the reasons stated herein.

10. CCR is currently, in addition to its regular case load, litigating three warrant cases. Petitioner's case presents a record well into the thousands of pages. Because CCR only recently became involved in the case, undersigned counsel is just beginning in the process of assuring that the entire record has been assembled, and has just begun the careful preparatory review process which is required in cases of this magnitude.

11. Even is CCR was able to devote all of its resources to the Petitioner's case, it would still be practically impossible to file the necessary state post-conviction motions by July 6, 1987, in the responsible and professional manner which is required by the severity of the sentence involved and to which the Petitioner is entitled. Facts upon which some of the claims which must be raised in the state courts will be based are still in the process of being developed, and are therefore are at least partially "unknown" for the purposes of Rule 3.851. See Fla. R. Crim. P. 3.851(a)(1). Undersigned counsel and staff are currently working literally around the clock to investigate, prepare, and present Petitioner's state post-conviction motions in a timely manner, but are woefully behind the current schedule, through no fault of Petitioner or counsel.

12. Undersigned counsel is not asking this Court, other than as heretofore stated, to suspend completely the operation of Rule 3.851. Rather, counsel is seeking an extension of time which will best accommodate the interests of all concerned and the stated purposes of the Rule itself. Undersigned counsel is simply requesting that this Court grant the Petitioner a 20-day extension of the time within which to file his state post-

> conviction motions ude to exigent circumstances. Given the critical and irrevocable nature of the penalty involved, and the unique posture of Petitioner's case, it is wholly fitting and proper for undersigned counsel to take a fresh and objective look at the record, rather than relying on previous efforts of volunteer counsel. To do so, counsel needs the additional time afforded by the requested extension. Moreover, the necessity of filing a second 3.850 motion might well be rendered moot should his pending application to the United States Supreme Court prove successful.
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> 13. This is manifestly not the type of case wherein "petitions and motions for postconviction relief [will be] filed scant day, and even hours, before scheduled execution[]," leaving "little time for judicial consideration." In re Florida Rules of Criminal Procedure, Rule 3.851, 12 FLW at 92. Petitioner's execution is set for August 26, 1987, fifty-one (51) days from the current due date and thirty-one (31) days from the requested due date. This Court will still have the time and opportunity to give Petitioner's case the careful and studied consideration which it provides all capital cases, as will all other courts involved in the process.
>
> 14. The instant request is made in good faith and is not interposed for the sake of delay or to otherwise disrupt the orderly processes established by this Court. Counsel simply cannot prepare and present Petitioner's case in the careful and professional manner which the critical and irrevocable nature of the death penalty demands without the additional time requested herein. Petitioner's life literally hangs in the balance, and he is without fault in the circumstances which have led to the necessity of the filing of the instant motion.

CCR did not even have the files in the case until July 1, 1987. As this Court is aware, the first step was for counsel to read the transcript and investigate. Given other commitments of counsel, it was impossible to read the record and prepare within the thirty day period, despite the exercise of due diligence. Rule 3.851 should be interpreted in light of these facts.

The existence of exceptions to the rule's time limitation indicates that it is not jurisdictional or absolute. Limitations are remedial in nature; that is, they act upon the remedy, not the right. The defense of limitations therefore may be waived by

failure to properly assert it, e.g., Wetzel v. A. Duda & Sons, 306 So.2d 533, 534 (Fla. 4th DCA 1975), and the one against whom a claim is made may be estopped from raising the affirmative defense of limitations, see, e.g., Salcedo v. Asociacion Cubana, Inc., 368 So.2d 1337, 1339 (Fla. 3d DCA 1979); North v. Culmer, 193 So.2d 701, 704 (Fla. 4th DCA 1967). Limitations, therefore, are "not jurisdictional." Thorney v. Clough, 438 So.2d 985, 986 (Fla. 3d DCA 1983). The limitation in the rule is analogous to limitations applied in certain civil actions where the period does not commence until discovery or notice of the cause of action, or when the last element constituting the cause of action occurs. See, e.g., Sec. 95.031, Sec. 95.11(4)(a), Fla. Stat. (1985)("limitations shall run from the time the cause of action is discovered or should have been discovered with the exercise of due diligence"); Pinkerton v. West, 353 So.2d 102 (Fla. 4th DCA 1977).

Rule 3.851 provides, in language similar to that applied in other civil actions, that the limitations do not apply if "the facts upon which the claim is predicated were unknown to the movant or his attorney and could not have been ascertained by the exercise of due diligence."[1] Under the language of this

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[1]There is no history of the adoption of the amendment to Rule 3.581. However, it has language like that used in the time limitation for Rule 3.850, which also has little history, because the concept of a time limit was expressly rejected by The Florida Bar and thus not proposed by the Bar to the Supreme Court. Rather, that rule was adopted by the Court on its own after the suggestion was made by then Chief Justice Alderman in his concurring opinion in McCraw v. State, 437 So.2d 1388, 1391 (Fla. 1983). The actual formulation of the rule was proposed by the Attorney General. The amendment was adopted on November 30, 1984. The Florida Bar Re Amendment to Rules of Criminal Procedure (Rule 3.850), 9 FLW 501 (Fla. 1984). The Bar moved for clarification asking that its opposition to the time limits be reflected in the opinion. That motion was granted and the rule was adopted. The Florida Bar Re Amendment to Rules of Criminal Procedure (Rule 3.850), 460 So.2d 907 (Fla. 1984). The Bar's opposition explains why there are no Committee Notes dealing with the time limit and why this Court's opinion expressly disavows the Committee Notes that refer to the Bar's proposal of adopting the "delayed petitions" provision followed in the federal courts,

(footnote continued on next page)

provision, if facts previously unknown were discovered, there would be no applicable time limit. Read alone, the rule's exception would apparently mean that if the facts were unknown at the time of the signing of the warrant, then a post-conviction pleading could be filed "at any time" -- as was true prior to the rule. One ambiguity is therefore the failure to specify a time limit for cases where the exceptions are established.

A second ambiguity is that the rule does not identify when the later discovery of the facts supporting the claim qualifies for the exception to the time limitation. That is, when must the facts supporting the claim be "unknown." Under the rule, a prisoner who discovered the facts supporting his claim a day before the expiration of his limitation period would have only a day to research, prepare and file his pleading. It is suggested that this interpretation of the rule should not be adopted because it would result in inequities and hardship that cannot be assumed as being intended. There is a more logical and equitable construction of the rule.

The construction of the rule suggested by Mr. White takes into account the intent of the rule of providing orderly but also fair access for redress of legitimate claims. The rule can logically be read only one way. If the facts upon which the claim is based were known by counsel at the time the warrant is signed, counsel would have thirty days in which to file his or her pleadings. Where, on the other hand, the facts supporting the claim are unknown until after the warrant is signed, there either is no time limit or, if the time limit does apply it does not commence until the discovery of the facts supporting the claim (or the announcement of the law change).

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[1] (cont.) Rule 9, Rules Governing Section 2254 Cases in the United States District Courts. A year later the rule was amended to make certain technical changes to make the language consistent and to extend the date for filing the motion to January 1, 1987 for pre-1985 cases. In re Rule 3.850 of the Florida Rules of Criminal Procedure, 481 So.2d 480 (Fla. 1985).

Establishing the date of discovery of the facts supporting the claim or "due diligence" are not unfamiliar inquiries for the courts. They are undertaken frequently in civil actions as questions of fact. E.g. Pinkerton v. West, supra; Schetter v. Jordan, 294 So.2d 130 (Fla. 4th DCA 1974). Such factual determinations are appropriate in post-conviction proceedings, since "the acknowledged purpose of Rule 1.850 [is] to facilitate factual determination." State v. Wooden, 246 So.2d at 756.

The time limitations in the rule should be narrowly construed because they are contrary to the prior practice and generally disfavored as restricting access to the courts. In addition to the constitutional prohibition on suspension of the writ of habeas corpus, Art. I, Sec. 13, Fla. Const., the constitution further guarantees access to the courts. Art. I, Sec. 21, Fla. Const. See generally Overland Const. Co., Inc. v. Sirmons, 369 So.2d 572 (Fla. 1979)(statutory limitation held violative of right to access to courts). Specifically, time limits on the availability of post-conviction remedies have been disfavored. As previously mentioned, The Florida Bar opposed time restrictions for Rule 3.850, as have others who have studied the question. See Uniform Post-Conviction Procedure Act (1966), 11 U.L.A., Crim. Law and Proc. 513 (Supp. 1974); ABA Standards for Criminal Justice, Standards Relating to Post-Conviction Remedies, Std. 22-2.4(a) (2d ed. 1980)("a specific time period as a statute of limitations to bar post-conviction review of criminal convictions is unsound"). The general opposition to restriction upon post-conviction motions underscores the serious nature of such restrictions and the consequential need to construe such restrictions in favor of the prisoner's right to seek redress unless explicitly precluded by the rule. If there are several possible reasonable interpretations of the rule, the interpretation favoring the right to seek redress must be accepted. It is a general rule of construction that the

provision under consideration must be interpreted logically rather than illogically. The only logical reading of the rule is that the time limit commences at the time of the warrant if the claim is known at that time, or at the time that the facts supporting the claim become known (or with due diligence should have become known) or when the constitutional law change is announced.

Applying the rule thusly to this case, it would not be unreasonable to find that new counsel in a case would need a reasonable period of time within which to review, investigate, and research a case before filing pleadings. Having received all files by July 1, undersigned counsel, by exercising due diligence, could "discover" facts about claims perhaps in two - three weeks. At that point, the thirty-day period would begin to run, and the filing of this petition is well within the thirty-day period.

2. Counsel has exercised due diligence by filing this pleading as soon as was possible.

Counsel will not repeat all of the information about which this Court is familiar regarding understaffing, underfunding, and overwork at CCR. Without even discussing the normal abnormally unmanageable day to day work required for a very small state agency to represent 150 clients, it is apparent that in the emergency situation extent during Mr. White's warrant, his attorney could do no more. However, the Court should at least be apprised of the most recent "under warrant" work-load of CCR.

As the Court is aware, CCR did not have files, and had not met the client, as of July 1, 1987. Undersigned counsel, Mark Evan Olive, also represents Mr. Stano, scheduled to be executed with Mr. White. Kenneth Hardwick and William Thompson were scheduled to be executed July 23, 1987. Mark Olive, undersigned counsel, was counsel for both individuals. James Agan, another client of Mr. Olive's, had just received a stay of execution,

when involvement in Mr. White's case began.

Undersigned counsel, without time off, without vacation, and without being dilatory, attempted to represent all the crisis clients. No other experienced attorneys were available to represent these clients. After the Hardwick and Thompson situations were under control, attention was turned to the current warrants. It is impossible to describe the sense of responsibility felt by undersigned counsel, especially in a "successor" setting, as here, when preparing a case from scratch for a client whom you have known for a matter of days. No stone goes unturned, and no decision is made without constant inner turmoil. Counsel has not sat and waited for the "ideal" moment to spring a habeas corpus petition on this Court and counsel for the state. It has been prepared under intense and unrelenting pressure, and despite the anticipated name-calling, derisive comments, and charges of unprofessionalism that will come, but which, in all likelihood, will not be tested by proof.

This product is in fact a professional and competent pleading. It was filed as early as humanly possible. It does what this Court, the legislature, and the public should want--presents legitimate and substantial issues in an appropriate forum with substantial time for their resolution. If less is desired, then some other system should be established.

Finally, Mr. White should not be penalized for the real or perceived shortcomings of undersigned counsel. If due diligence and/or unprofessionalism is a question, an evidentiary hearing should be allowed so as to allow counsel to prove that the diligence given is much more than anyone's reasonable perception of what is "due". If counsel is condemned, counsel should suffer the consequences, professional or otherwise. However, Mr. White should not be executed because his lawyer, due to circumstances

beyond Mr. White's control and not of his doing, could not file this pleading until a week before the execution.

Respectfully submitted,

LARRY HELM SPALDING
Capital Collateral Representative

MARK EVAN OLIVE
Chief Assistant Capital
Collateral Representative

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By: _____

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail, postage prepaid to Richard Kaplan, Assistant Attorney General, Ruth Bryan Owen Rhode Building, Suite 820, 401 NW 2nd Avenue, Miami, Florida 33128 this 4th day of August, 1987.

_____
Attorney