IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-1504

ANTHONY WASHINGTON

Appellant,

v.

STATE OF FLORIDA

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT FOR PINELLAS COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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STANDARD OF REVIEW

Mr. Washington=s appeal involves mixed issues of law and fact and are to be reviewed de novo by this Court. Stephens v. State, 748 So.2d 1028 (1999).

REQUEST FOR ORAL ARGUMENT

The resolution of the issues in this action will determine whether Mr. Washington lives or dies. This Court has allowed oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims involved and the fact that a life is at stake. Mr. Washington accordingly requests that this Court permit oral argument.

STATEMENT OF THE CASE AND FACTS

I. PROCEDURAL HISTORY

1. On April 12, 1990, a Pinellas County grand jury returned a three-count indictment against Mr. Washington for first-degree murder, burglary of a dwelling, and sexual battery.

2. After a jury trial on July 14-16, 1992, before the Honorable Susan F. Schaeffer, Mr. Washington was found guilty, by a predominantly white jury, on all counts.

3. At Mr. Washington=s penalty phase, July 17, 1992, the jury recommended that Mr. Washington be sentenced to life imprisonment.

4. On the burglary and sexual battery counts, the Court sentenced Mr. Washington

as a habitual violent felony offender and sentenced him to consecutive life sentences, with a 15-year minimum. As to Mr. Washington=s murder conviction, the Court overrode the jury=s life recommendation and sentenced Mr. Washington to death.

5. On direct appeal, the Florida Supreme Court affirmed Mr. Washington=s convictions and sentences. On April 25, 1995, the Florida Supreme Court revised its opinion and affirmed Mr. Washington=s convictions and sentences. Washington v. State, 653 So.2d 362 (Fla. 1995). The United States Supreme Court denied certiorari on October 30, 1995. Washington v. Florida, 116 S.Ct. 387 (1995).

6. On March 1, 1999, pursuant to Fla. R. Crim. P. 3.850, Mr. Washington filed his Amended Motion to Vacate Judgments of Conviction and Sentence. A hearing was held on August 12, 1999, in accordance with Huff v. State, 622 So.2d 982 (Fla. 1992). On October 5, 1999, the circuit court issued an order granting an evidentiary hearing on claims I(c), I(d) and I(g), as they pertained to the penalty phase of the trial. The remainder of the claims was summarily denied. An evidentiary hearing was held on November 18-19, 1999. Judge Susan C. Schaeffer entered an order on June 5, 2000, denying all claims of Appellant=s 3.850 motion. Timely notice of appeal was filed on July 5, 2000. Mr. Washington was denied relief by the Florida Supreme Court on November 14, 2002. A motion for rehearing was filed on December 2, 2002, and was denied on January 10, 2003.

7. On February 19, 2003, Mr. Washington filed an Amended Motion to Vacate Judgments of Conviction and Sentences with Special Request for Leave to Amend. The

trial court denied the motion on November 18, 2003. Mr. Washington appealed the denial to the Florida Supreme Court on January 6, 2004. The lower court decision was affirmed on May 12, 2005. Washington v. State, 907 So.2d 512 (2005). Mr. Washington=s petition for a writ of certiorari was denied by the Supreme Court of the United States on December 5, 2005.

8. On September 26, 2003, pursuant to Fla.R.Crim.P. 3.853 Mr. Washington filed his AMotion to Release Evidence for DNA Testing.@ The trial court denied relief on October 10, 2005 and appeal was taken to the Florida Supreme Court. Relief was denied on October 13, 2006.

9. Subsequently, on June 20, 2007 Mr. Washington filed a Successive Motion for Post Conviction Relief which was denied by court order on July 23, 2007. This appeal follows.

II. SUMMARY OF THE ARGUMENT

A. Subsequent developments and clarification in the law clearly indicate that based upon the unique facts and circumstances of Mr. Washington=s case he is entitled to relief. Keen v. State, 775 So.2d 263, (Fla. 2000) establishes that Tedder v. State, 322 So.2d 908, (Fla. 1975) was not properly applied to Mr. Washington=s case. The trial court erred in a misapplication of the Tedder standard. The trial court disagreed with the jury life recommendation based on its view of the mix of aggravators and mitigators, rather than through the prism of a Tedder analysis.

B. The recent American Bar Association (hereinafter ABA) study establishes that the Florida Death Penalty Statute is unconstitutional on its face as applied and therefore Mr. Washington=s death sentence is unconstitutional.

C. The lower court=s use of procedural default in denying Mr. Washington=s claims violates the defendant=s due process, and is contrary to both state and federal law.

ARGUMENT I

SUBSEQUENT DEVELOPMENTS AND CLARIFICATION IN THE LAW CLEARLY INDICATE THAT BASED UPON THE UNIQUE FACTS AND CIRCUMSTANCES OF MR. WASHINGTON=S CASE HE IS ENTITLED TO RELIEF

A. 1. Keen establishes that Tedder was not properly applied to Mr. Washington=s case.

In the direct appeal of Mr. Washington=s case the court affirmed the jury override based upon Tedder v. State, 322 So.2d 908 (Fla. 1975). See Washington v. State, 653 So.2d 362, 365 (Fla. 1994). At the time of the decision, neither the trial court nor this Court had the benefit of the clarification of the Tedder standard set forth in Keen v. State, 775 So.2d 263 (Fla. 2000).

A. 2. An overview of the jury override in Florida.

Since the State of Florida reinstated the death penalty, approximately 150 cases involving judicial overrides of jury recommendations of life imprisonment have reached

this Court on direct appellate review.[1] As is seen from the discussion in this brief, it is clear that Aappealing a >life override= under Florida=s capital sentencing scheme is akin to Russian Roulette.@ Engle v. Florida, 108 S.Ct. 1094, 1098 (1988) (Marshall and Brennan, JJ., dissenting from the denial of petition for writ of certiorari).

In 1974, one override case was reviewed by this Court, and it was reversed,[2] resulting in a 100% reversal rate. In 1975, the year of the seminal decision in Tedder v. State, 322 So.2d 908 (Fla. 1975), five override cases reached the Court, three were reversed[3] and two were affirmed,[4] resulting in a 60% reversal rate. In 1976, five capital override cases were reviewed; three were reversed[5] and two affirmed,[6] again a 60% reversal rate. In 1977, four cases were reviewed; two were reversed[7] and two affirmed,[8]

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[1]Florida is one of only four states that allows a judge to override a capital sentencing jury=s recommendation of life imprisonment.

[2] Taylor v. State, 294 So.2d 648 (Fla. 1974)

[3] Swan v. State, 322 So.2d 485 (Fla. 1975); Tedder v. State, 322 So.2d 908 (Fla. 1975); Slater v. State, 316 So.2d 539 (Fla. 1975)

[4] Gardner v. State, 313 So.2d 675 (Fla. 1975); Sawyer v. State, 313 So.2d 680 (Fla. 1975).

[5] Chambers v. State, 339 So.2d 204 (Fla. 1976); Provence v. State, 337 So.2d 783 (Fla. 1976); Jones v. State, 332 So.2d 615 (Fla. 1976)

[6] Dobbert v. State, 328 So.2d 433 (Fla. 1976); Douglas v. State, 328 So.2d 18 (Fla. 1976).

[7] McCaskill v. State/Williams v. State, 344 So.2d 1276 (Fla. 1977); Burch v. State, 343 So.2d 831 (Fla. 1977).

[8] Hoy v. State, 353 So.2d 826 (Fla. 1977); Barclay v. State/Dougan v. State, 343

a 50% reversal rate. In 1978, two cases reached the Court, and both were reversed[9] **B** - a 100% reversal rate. In 1979, three cases were reviewed; two were reversed[10] and one affirmed,[11] a reversal rate of 66%. In 1980, six override cases were reviewed; five were reversed[12] and one affirmed,[13] an 83% reversal rate. In 1981, fourteen override cases reached the Court; eleven were reversed,[14] and three were affirmed,[15] resulting in a 78% reversal rate. In 1982, seven cases reached the Court; four were reversed[16] and three

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So.2d 1266 (Fla. 1977).

[9] Shue v. State, 366 So.2d 387 (Fla. 1978); Buckrem v. State, 355 So.2d 111 (Fla. 1978).

[10] Malloy v. State, 382 So.2d 1190 (Fla. 1979); Brown v. State, 367 So.2d 616 (Fla. 1979).

[11] Dobbert v. State, 375 So.2d 1069 (Fla. 1979).

[12] Williams v. State, 386 So.2d 538 (Fla. 1980); McCrae v. State, 395 So.2d 1145 (Fla. 1980); Phippen v. State, 389 So.2d 991 (Fla. 1980); Neary v. State, 384 So.2d 881 (Fla. 1980); Hall v. State, 381 So.2d 683 (Fla. 1980).

[13] Johnson v. State, 393 So.2d 1069 (Fla. 1980).

[14] Goodwin v. State, 405 So.2d 170 (Fla. 1981); Odom v. State, 403 So.2d 936 (Fla. 1981); McKennon v. State, 403 So.2d 389 (Fla. 1981); Stokes v. State, 403 So.2d 377 (Fla. 1981); Smith v. State, 403 So.2d 933 (Fla. 1981); Welty v. State, 402 So.2d 1159 (Fla. 1981); Barfield v. State, 402 So.2d 377 (Fla. 1981); Lewis v. State, 398 So.2d 432 (Fla. 1981); Jacobs v. State, 396 So.2d 713 (Fla. 1981). In two cases, the Court vacated and remanded for judge resentencings due to Gardner v. Florida error. Porter v. State, 400 So.2d 5 (Fla. 1981); Spaziano v. State, 393 So.2d 1119 (Fla. 1981).

[15] Buford v. State, 403 So.2d 943 (Fla. 1981); Zeigler v. State, 402 So.2d 365 (Fla. 1981); White v. State, 403 So.2d 331 (Fla. 1981).

[16] McCampbell v. State, 421 So.2d 943 (Fla. 1982); Walsh v. State, 418 So.2d 1000 (Fla. 1982); Gilvin v. State, 418 So.2d 996 (Fla. 1982); McCray v. State, 416 So.2d 804 (Fla. 1982).

were affirmed[17] a 57% reversal rate. In 1983, ten cases were appealed, seven were reversed[18], and three affirmed,[19] a 70% reversal rate. In 1984, nine cases reached the Court; two were reversed,[20] and seven were affirmed,[21] a 22% reversal rate. In 1985, seven cases were reviewed, two were reversed,[22] and five were affirmed,[23] a 28% reversal rate. In 1986, six override cases reached the Court; one was reversed for a new trial[24] and one was reversed because no written findings were entered by the trial judge in

[17] Bolender v. State, 422 So.2d 833 (Fla. 1982); Stevens v. State, 419 So.2d 1058 (Fla. 1982); Miller v. State, 415 So.2d 1262 (Fla. 1982).

[18] Norris v. State, 429 So.2d 688 (Fla. 1983); Herzog v. State, 439 So.2d 1372 (Fla. 1983); Richardson v. State, 437 So.2d 1091 (Fla. 1983); Hawkins v. State, 436 So.2d 44 (Fla. 1983); Washington v. State, 432 So.2d 44 (Fla. 1983); Webb v. State, 433 So.2d 496 (Fla. 1983); Cannady v. State, 427 So.2d (Fla. 1983)

[19] Routley v. State, 440 So.2d 1257 (Fla. 1983); Spaziano v. State, 433 So.2d 508 (Fla. 1983); Porter v. State, 429 So.2d 293 (Fla. 1983).

[20] Rivers v. State, 458 So.2d 762 (Fla. 1984); Thompson v. State, 456 So.2d 444 (Fla. 1984)

[21] Eutzy v. State, 458 So.2d 755 (Fla. 1984); Thomas v. State, 456 So.2d 454 (Fla. 1984); Groover v. State, 458 So.2d 226 (Fla. 1984); Parker v. State, 458 So.2d 750 (Fla. 1984); Gorham v. State, 454 So.2d 556 (Fla. 1984); Heiney v. State, 447 So.2d 210 (Fla. 1984); Lusk v. State, 446 So.2d 1038 (Fla. 1984).

[22] Huddleston v. State, 475 So.2d 204 (Fla. 1985); Barclay v. State, 470 So.2d 691 (Fla. 1985).

[23] Echols v. State, 484 So.2d 568 (Fla. 1985); Mills v. State, 476 So.2d 172 (Fla. 1985); Brown v. State, 473 So.2d 1260 (Fla. 1985); Francis v. State, 473 So.2d 672 (Fla. 1985); Burr v. State, 466 So.2d 1051 (Fla. 1985).

[24] Ramos v. State, 496 So.2d 121 (Fla. 1986).

violation of Florida Law.[25] Of the four remaining cases where the override was analyzed, all were reversed, for a 100% reversal rate.[26] In 1987, of the six cases reviewed, five were reversed,[27] and one was affirmed,[28] for an 83% reversal rate. In 1988, nine override cases were analyzed, eight were reversed[29] and one affirmed,[30] for an 89% rate of reversal. In 1989, six override cases were analyzed; five were reversed[31] and one was affirmed,[32] for an 83% reversal rate. In 1990, five override cases were reviewed by the Court, all were reversed.[33] In 1991, eleven overrides reached the high court; ten were

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[25] VanRoyal v. State, 497 So.2d 625 (Fla. 1986).

[26] Irizarry v. State, 496 So.2d 822 (Fla. 1986); Brookings v. State, 495 So.2d 135 (Fla. 1986); Nelson v. State, 490 So.2d 32 (Fla. 1986); Amazon v. State, 487 So.2d 8 (Fla. 1986).

[27] Wasko v. State, 505 So.2d 1314 (Fla. 1987); Masterson v. State, 516 So.2d 256 (Fla. 1987); Fead v. State, 512 So.2d 32 (Fla. 1987); Hansbrough v. State, 509 So.2d 1081 (Fla. 1987); Ferry v. State, 507 So.2d 1373 (Fla. 1987).

[28] Engle v. State, 510 So.2d 881 (Fla. 1987).

[29] Spivey v. State, 529 So.2d 1088 (Fla. 1988); Harmon v. State, 527 So.2d 182 (Fla. 1988); Brown v. State, 526 So.2d 903 (Fla. 1988); Caillier v. State, 523 So.2d 158 (Fla. 1988); Perry v. State, 522 So.2d 817 (Fla. 1988); Holsworth v. State, 522 So.2d 348 (Fla. 1988); Burch v. State, 522 So.2d 810 (Fla. 1988); DuBoise v. State, 520 So.2d 260 (Fla. 1988).

[30] Torres-Arboledo v. State, 524 So.2d 403 (Fla. 1988).

[31] Christian v. State, 550 So.2d 450 (Fla. 1989); Fuente v. State, 549 So.2d 652 (Fla. 1989); Freeman v. State, 547 So.2d 125 (Fla. 1989); Cochran v. State, 547 So.2d 928 (Fla. 1989); Pentecost v. State, 545 So.2d 861 (Fla. 1989).

[32] Thompson v. State, 553 So.2d 153 (Fla. 1989).

[33] Buford v. State, 570 So.2d 923 (Fla. 1990); Cheshire v. State, 568 So.2d 908 (Fla. 1990); Carter v. State, 560 So.2d 1166 (Fla. 1990); Hallman v. State, 560 So.2d

reversed[34] and one case, on appeal from a Hitchcock resentencing, was affirmed,[35] for a 91% reversal rate. In 1992, of the seven overrides appealed, four were reversed[36] and three affirmed,[37] for a 57% reversal rate. In 1993, the one override decided by the Court was affirmed.[38] In 1994, eight cases were decided on direct appeal, including Mr. Washington=s case; six were reversed[39] and two affirmed.[40] In 1995, one override case

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223 (Fla. 1990); Morris v. State, 557 So.2d 27 (Fla. 1990).

[34] Bedford v. State, 589 So.2d 245 (Fla. 1991); Savage v. State, 588 So.2d 975 (Fla. 1991); Craig v. State, 585 So.2d 223 (Fla. 1991); Wright v. State, 586 So.2d 1024 (Fla. 1991); McCrae v. State, 582 So.2d 613 (Fla. 1991); Cooper v. State, 581 So.2d 49 (Fla. 1991); Dolinsky v. State, 576 So.2d 271 (Fla. 1991); Downs v. State, 574 So.2d 1095 (Fla. 1991); Hegwood v.State, 575 So.2d 165 (Fla. 1991); Douglas v. State, 575 So.2d 127 (Fla. 1991).

[35] Ziegler v. State, 580 So.2d 127 (Fla. 1991).

[36] Scott v. State, 603 So.2d 1275 (Fla. 1992); Reilly v. State, 601 So.2d 222 (Fla. 1992); Jackson v. State, 599 So.2d 103 (Fla. 1992); Stevens v. State, 613 So.2d 402 (Fla. 1992).

[37] Coleman v. State, 610 So.2d 1283 (Fla. 1992); Robinson v. State, 610 So.2d 1288 (Fla. 1992); Marshall v. State, 609 So.2d 799 (Fla. 1992).

[38] Williams v. State, 622 So.2d 456 (Fla. 1993). The defendant in Williams was the co-defendant of defendants Robinson and Coleman, whose overrides were affirmed in 1992.

[39] Turner v. State, 645 So.2d 444 (Fla. 1994); Barrett v. State, 649 So.2d 219 (Fla. 1994); Caruso v. State, 645 So.2d 389 (Fla. 1994); Esty v. State, 642 So.2d 1074 (Fla. 1994); Parker v. State, 643 So.2d 1032 (Fla. 1994); Christmas v. State, 632 So.2d 1368 (Fla. 1994).

[40] Garcia v. State, 644 So.2d 59 (Fla. 1994); Washington v. State, 653 So.2d 362 (Fla. 1994).

was decided and it was reversed,[41] for a 100% reversal rate. In 1996, three override cases were decided, and all were reversed,[42] for a 100% reversal rate. In 1997, three override cases were decided, and all were reversed,[43] for a 100% reversal rate. In 1998, three override cases were decided, one was affirmed[44] and two reversed.[45] In 1999, no override cases were decided by the Court. In 2000, one override case was decided, and it was reversed,[46] for a 100% reversal rate.

Significantly, many of the override cases affirmed on direct appeal have been reversed on collateral attack in either state or federal court, thereby decreasing the number of override death sentences originally affirmed on direct appellate review. The death sentence upheld in Gardner v. State, 313 So.2d 675 (Fla. 1975), was subsequently vacated by the United States Supreme Court. Gardner v. Florida, 430 U.S. 349 (1977). The death sentence affirmed in Douglas v. State, 328 So.2d 18 (Fla. 1976), was subsequently vacated by the Eleventh Circuit Court of Appeals. Douglas v. Wainwright,

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[41] Perez v. State, 648 So.2d 715 (Fla. 1995).

[42] Boyett v. State, 688 So.2d 308 (Fla. 1996); Strausser v. State, 682 So.2d 539 (Fla. 1996); Craig v. State, 685 So.2d 1224 (Fla. 1996).

[43] Pomeranz v. State, 703 So.2d 465 (Fla. 1997); Marta-Rodriguez v. State, 699 So.2d 1010 (Fla. 1997); Jenkins v. State, 692 So.2d 893 (Fla. 1997).

[44] Zakrzewski v. State, 717 So.2d 488 (Fla. 1998).

[45] San Martin v. State, 717 So.2d 462 (Fla.1998); Mahn v. State, 714 So.2d 391 (Fla. 1998).

[46] Keen v. State, 775 So.2d 263 (Fla. 2000). Keen was also afforded a new trial, but the Court=s opinion makes clear that the override was also improper.

714 F.2d 1532 (11th Cir.), cert. granted and remanded, 104 S.Ct. 3575 (1983), aff=d, 739 F.2d 531 (11th Cir. 1984). The death sentence affirmed in McCrae v. State, 395 So.2d 1145 (Fla. 1980), was vacated by a federal district court for Hitchcock error, and the reimposition of the death sentence over the jury=s life recommendation was reversed by this Court. McCrae v. State, 582 So.2d 613 (Fla. 1991). The death sentence affirmed in Buford v. State, 403 So.2d 943 (Fla. 1981), was also vacated in federal court due to Hitchcock error, and this Court reversed the reimposition of death following a resentencing. Buford v. State, 570 So.2d 923 (Fla. 1990). The death sentence affirmed in Thomas v. State, 456 So.2d 454 (Fla. 1984), was vacated by the Court in post conviction also due to Hitchcock error. Thomas v. State, 546 So.2d 716 (Fla. 1989). The death sentence affirmed in Eutzy v. State, 458 So.2d 755 (Fla. 1984), was vacated by the federal courts because penalty phase counsel failed to investigate and present mitigating evidence which would have precluded an override. Eutzy v. Dugger, 746 F. Supp. 1492 (N.D. Fla. 1989), aff=d, No. 89-4014 (11th Cir. 1990). This identical issue was raised by Mr. Washington in his motion for rehearing filed on December 2, 2002, and denied on January 10,2003. Mr. Washington=s federal pleadings have been held in abeyance pending the resolution of this appeal from his 3.851 motion. The death sentence affirmed in Burr v. State, 466 So.2d 1051 (Fla. 1985), was subsequently vacated in postconviction because the trial court relied on improper aggravating circumstances in overriding the jury=s life recommendation. Burr v. State, 576 So.2d 278 (Fla. 1991). The death sentences in Heiney v. State, 447 So.2d 210 (Fla. 1984), Torres-Arboleda v. State, 524

So.2d 403 (Fla. 1988), and Thompson v. State, 553 So.2d 153 (Fla. 1989), were reversed in postconviction due to ineffective assistance of penalty phase counsel because counsel failed to present mitigating evidence which would have precluded the override. Heiney v. State, 620 So.2d 171 (Fla. 1993); Torres-Arboleda v. Dugger, 636 So.2d 1321 (Fla. 1994); Thompson v. State, 731 So.2d 1235 (Fla. 1998). Torres-Arboleda is also cited in Mr. Washington=s motion for rehearing. The death sentence affirmed in Parker v. State, 458 So.2d 750 (Fla. 1984), was vacated by the United States Supreme Court in Parker v. Dugger, 111 S.Ct. 731 (1991), and on remand to this Court, the override was reversed. Parker v. State, 643 So.2d 1032 (Fla. 1994). The defendant whose override was affirmed in Engle v. State, 510 So.2d 881 (Fla. 1987), was eventually sentenced to life imprisonment during the pendency of state collateral proceedings because his co-defendant received life in Stevens v. State, 613 So.2d 402 (Fla. 1992). Likewise, the defendant in Brown v. State, 473 So.2d 1260 (Fla. 1985), was sentenced to life during the pendency of state collateral proceedings pursuant to an agreement with the State after his co-defendant received a life sentence in separate trial proceedings. With respect to the override affirmed in Porter v. State, 429 So.2d 293 (Fla. 1983), it was reversed by this Court due to judicial bias. Porter v. State, 723 So.2d 191 (Fla. 1998). Finally, the defendant whose override was affirmed in Spaziano v. State, 433 So.2d 508 (Fla. 1983), was awarded a new trial. State v. Spaziano, 692 So.2d 174 (Fla. 1997). From the overview, it is apparent that the Florida Supreme Court, in direct appeal and post conviction and the federal courts are in favor of respecting the jury recommendation.

The original intent of the legislature in including a judge=s power to override a jury=s recommendation of life imprisonment was to prevent inflamed juries from handing down improper death sentences. The Court in State v. Dixon, 283 So.2d 1, 8 (Fla. 1973) stated the function of the override provision in preventing improper death sentences:

> The third step added to the process of prosecution for capital crimes is that the trial judge actually determines the sentence to be imposed - - guided by, but not bound by, the findings of the jury. To a layman, no capital crime might appear to be less than heinous, but a trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard criminal activity which can only be developed by involvement with the trials of numerous defendants. Thus the inflamed emotions of jurors can no longer sentence a man to die; the sentence is viewed in the light of judicial experience.

Clearly, the intent of the jury override was to preclude the inflamed emotions of jurors from improperly sentencing a defendant to death. Unfortunately, the intent of the legislature has had an unintended effect as the override is used overwhelmingly to impose death over jury recommendations of life.

The jury override provision should be applied such that only recommendations of death can be overidden by the judge. Overrides by the judge of life recommendations by the jury should not be permitted. The dissent in Spaziano v. Florida, 468 U.S. 447, 468 (U.S. 1984), by Justices Stevens demonstrates that the decision as to whether a sentence of death is excessive in a particular case is best left to a jury:

> Because it is the one punishment that cannot be prescribed by a rule of law as judges normally understand such rules, but rather is ultimately understood only as an expression of the

> community=s outrage - - its sense that an individual has lost his moral entitlement to live - - I am convinced that the danger of an excessive response can only be avoided if the decision to impose the death penalty is made by a jury rather than a single governmental official. This conviction is consistent with the judgment of history and the current consensus of opinion that juries are better equipped than judges to make capital sentencing decisions. The basic explanation for that consensus lies in the fact that the question whether a sentence of death is excessive in the particular circumstances of any case is one that must be answered by the decisionmaker that is best able to Aexpress the conscience of the community on the ultimate question of life or death.@

(Footnotes omitted)

Where a jury concludes that a sentence of death is excessive, that decision should not be overridden by the judge because the jury has expressed Athe conscience of the community on the ultimate question of life or death.@ Id. at 468.

B. The trial court erred because it was under a misapprehension of fact and law in overriding the jury recommendation of a life sentence and in ignoring non-statutory mitigation which the jury found in recommending a life sentence but which the trial court overrode

The trial court was under a misapprehension of fact and law when it denied Mr. Washington=s Amended Motion to Vacate Judgments of Conviction and Sentences. The trial court also erred in ignoring non-statutory mitigation found by the jury in support of a life recommendation. After ignoring the non-statutory mitigation, the trial court overrode the jury life recommendation and sentenced Mr. Washington to death.

At Mr. Washington=s penalty phase, defense counsel presented as witnesses Mr. Washington=s mother, Willie Mae Washington, and Dr. Sidney J. Merin. The witnesses presented non-statutory mitigation to the jury. The State did not present any evidence or

testimony to contradict the defense witnesses.

Willie Mae Washington testified that Mr. Washington had been gainfully employed by his father and was a good worker. (ROA. Vol. V - 1727) Mrs. Washington also testified that her son had three children and supported them when he was able. (ROA. Vol. V - 1727) When in high school he played football and wrestled. (ROA. Vol. V - 1730) He also completed high school. (ROA. Vol. V - 1729) She further testified that her son was good and respectful with whom she enjoyed a loving relationship. (ROA. Vol. V - 1728) Mrs. Washington also testified that her son never disobeyed her or caused her any problems. (ROA. Vol. V - 1729) She also recognized and acknowledged her son=s drug abuse. (ROA. Vol. V - 1730)

Dr. Merin testified that Mr. Washington was capable of being rehabilitated and he was not a psychopath or sociopath. (ROA. Vol. V - 1708, 1711, 1714) Dr. Merin also testified that based on his testing, Mr. Washington is not the type of person that would plan to kill someone and it is improbable that Mr. Washington planned to kill Berdat. (ROA. Vol. V - 1715) The State presented no expert to contradict the testimony of Dr. Merin.

At the conclusion of the penalty phase, the trial court read the following instruction:

> If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole for 25 years.
>
> Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances. Among the mitigating circumstances you may

> consider, if established by the evidence, are:
>
> 1. The age of the defendant at the time of the crime;
>
> 2. *Any other aspect of the defendant=s character or record or background, and any other circumstances of the crime.*
>
> (ROA. VOL. 9-1520) (emphasis added)

The jury made a life recommendation which the trial court overrode and sentenced Mr. Washington to death. In making a life recommendation the jury evidently relied on those aspects of Mr. Washington=s character or background, and the other circumstances of the crime which were presented by defense counsel in the penalty phase. Specifically, the jury must have relied upon the uncontroverted mitigation testimony of Willie Mae Washington and Dr. Sydney Merin.

In the Sentencing Order and in the Order Denying Amended Motion to Vacate Judgments of Conviction and Sentences, the trial court erroneously rejected the non-statutory mitigation presented by defense counsel. The trial court was under a misapprehension of fact in rejecting the non-statutory mitigation that Mr. Washington was a father of three children and supported them when he was able. The court erroneously concluded that Mr. Washington had been in prison for most of his adult life, when he had not been in prison for as long as the trial court believed.

The trial court, in the Sentencing Order, stated that Athis Defendant has been in custody as of August 31, 1992, for ten years and 216 days.@ Actually, Mr. Washington, as of that date, was in custody for 10 years, 2 months, and 20 days - a difference of 5 months and 14 days. Furthermore, the date the trial court used to calculate the time Mr.

Washington was incarcerated included the 3 years and 14 days since the date of the offense. Thus, as of August 17, 1989, the date of the offense, Mr. Washington was incarcerated for 7 years, 1 month, and 22 days. As of August 17, 1989, Mr. Washington, with a birth date of September 27, 1956, was an adult for 14 years, 10 months, and 20 days. Actually, of the time Mr. Washington was an adult, he was out of jail for 7 years, 9 months, and 2 days.

During the 7 years, 9 months, and 2 days that Mr. Washington was not in jail, he supported his children. This uncontroverted testimony was presented by the defense during Mr. Washington=s penalty phase. (ROA VOL 10 - 1727) The trial court denigrated this mitigating evidence - which the jury evidently relied on in making their life recommendation - first, by erroneously concluding that Mr. Washington spent greater time in prison than he actually did, and second, by boldly dismissing the support that he provided his children by saying that Ahe is not what could be called a good or financially responsible father.@ The point is not whether Mr. Washington was financially responsible; it is whether the jury found the evidence to be mitigating in support of a life recommendation. The jury found the evidence to be mitigating and it is not the province of the trial court to engage in an exercise of re-evaluation.

The trial court erred by rejecting the uncontroverted mitigating evidence which the jury found in support of their life recommendation. As held in Nibert v. State, 574 So.2d 1059, 1061 (Fla. 1990):

> Thus, when a reasonable quantum of competent,

> uncontroverted evidence of a mitigating circumstance is present, the trial court must find that the mitigating circumstance has been proved. A trial court may reject a defendant=s claim that a mitigation circumstance has been proved, however, provided that the record contains Acompetent substantial evidence to support the trial court=s rejection of these mitigating circumstances.@ (Quoting Kight v. State, 512 So.2d 922,933 (Fla.1987), cert. denied, 485 U.S. 929, 108 S.Ct. 1100, 99 L.Ed.2d 262 (1988)

The trial court did not rely on any competent substantial evidence in rejecting the non-statutory mitigation that Washington had been a hard worker, a good provider for his family, and a good father. There was nothing provided in the record that would support the court=s rejection of these mitigating circumstances. The reason there was nothing in the record to support the rejection of these mitigating circumstances is because the State presented no evidence to counter the testimony of the witnesses. Furthermore, the State did not challenge the mitigation testimony on cross examination - the testimony simply went unrefuted. Because the testimony went unrefuted, the trial court had no competent substantial evidence to support rejecting the mitigation.

The trial court, in overriding the jury=s life recommendation, committed error that went beyond rejecting the mitigation that served as the basis for the jury=s decision. The trial court engaged in a faulty and impermissible weighing process.

In Tedder v. State, 322 So.2d 908, 910 (Fla. 1975) the Court set the standard by which jury overrides are reviewed and held that Ato 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 no reasonable person could differ.@

In Tedder=s penalty phase, no additional evidence was presented other than his age - which was 20 years old. The Tedder jury returned a recommendation of life imprisonment after deliberating for only 16 minutes. The following day the trial judge conducted a hearing on which to base his recommendation for Tedder=s sentence. At that hearing, a pre-sentence investigation report was introduced showing that Tedder had been convicted on one prior occasion of breaking and entering with intent to commit a misdemeanor. Three aggravating circumstances identified by the trial judge were: (1) that defendant knowingly created a great risk of death to many persons; (2) that the crime was committed while the defendant was engaged in the commission of kidnapping; and (3) that the crime was especially heinous, atrocious or cruel. After the hearing, the judge overrode the jury recommendation and sentenced Tedder to death. On the facts and circumstances, the Court found no reason to override the jury=s advisory sentence. Id at 910.

In Mr. Washington=s case, much more mitigation existed than in Tedder yet Washington was denied a life sentence. Although Washington presented his age at the time of the crime - he was 32 - this mitigator was rejected by the trial court, unlike in Tedder. But also unlike in Tedder, Washington presented additional mitigation evidence. Washington presented evidence that he was a good worker, that he worked for his father, he supported his three children when he could, he wrestled and played football in high school, and he enjoyed a loving relationship with his mother. Washington also presented evidence that he was addicted to drugs. Through Dr. Merin, Washington presented expert

testimony that he could be rehabilitated, that he was not a psychopath or sociopath, and that he lacked the intent to kill Berdat. All of Washington=s mitigation evidence was uncontroverted and went unchallenged by the state. The aggravating circumstances found by the trial court in Mr. Washington=s case were: (1) a capital felony committed by a person under sentence of imprisonment; (2) previous conviction of another felony involving the use or the threat of violence; (3) a capital felony committed while engaged in the crimes of burglary and sexual battery, and (4) heinous, atrocious or cruel.

Even though Washington presented much more mitigation than did Tedder, and two of the aggravators in both cases were the same, Washington=s life recommendation was overridden and upheld whereas Tedder=s override was reversed. Based upon Tedder, Washington=s sentence should have been reduced to a life sentence.

In Mills v. Moore, 786 So.2d 532, 539 (Fla. 2001) the Court addressed the application of Tedder. The Court stated, A[i]n applying Tedder we emphasized the fact that a trial court=s analysis in an override situation should focus on *the record evidence* supporting the jury=s recommendation and should not be the same weighing process that is used when the jury recommends death.@ (emphasis added) In Mr. Washington=s case, the trial court should have focused only on the record evidence which supported the jury=s recommendation. The jury=s recommendation had to be based on the testimony of Willie Mae Washington and Dr. Sidney J. Merin as their testimony was the only evidence of mitigation presented on the record. It is only the record that the trial court should have relied upon in conducting a Tedder analysis. The trial court should not have gone outside

the record in search of evidence to support an override.

Furthermore, the trial court, in rejecting the mitigation relied upon by the jury, engaged in an impermissible weighing process forbidden by Keen v. State, 775 So.2d 263 (Fla. 2000). The Court found Athat the standards for weighing aggravators and mitigators in a death recommendation case have been transposed with those applicable to consideration of a jury recommendation of life imprisonment.@ Id. at 283. As in Keen, the trial court applied the standards for weighing aggravators and mitigators in this jury life recommendation case. The trial court transposed a weighing process into the analysis:

> Mrs. Washington said her son had been kind and loving toward her. (R. 59). He had never been disobedient to her (R. 60) She said and the PSI verifies that he has a high school diploma, and that he wrestled and played football in high school. (R. 61) These facts are uncontroverted and therefore are found to be positive character traits, a mitigating circumstance. *They will be given weight by this Court, although in light of the Anegative@ character traits discussed above, the weight to be given this Apositive@ evidence is minimal.*
> (ROA Vol. 9 -1587) (emphasis added)

The trial court transposed the weighing process later in the order again violating the dictates of Keen:

> This Court has now evaluated each category of mitigating evidence the Defendant has asked her to consider. This Court has found each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence. The last step of the *Campbell* formula is to weigh the aggravating circumstances found against the mitigating circumstances found. The Court found four aggravating factors (See Aggravating Factors, *supra*)and a very small part of one category as a mitigating factor. (See Category 2

> discussion, *supra*) *This Court finds the aggravating factors far outweigh the non-statutory mitigating factor,* and they do so beyond all reasonable doubt.
> (ROA Vol. 9 - 1591) (emphasis added)

The last line emphasized above indicates that the wrong standard was ultimately applied in consideration of the jury=s life recommendation. Keen at 283. Finally, the trial court, at the conclusion of the order, demonstrated error by stating both that a weighing process was done and that the trial court went outside the record:

> But, today the law and the evidence in this case compel me to find that the aggravating circumstances present in this case so far outweigh the mitigating circumstances that a sentence of death for ANTHONY WASHINGTON is so clear and convincing that virtually no reasonable people, armed with all the facts and all the law, could differ.
> (ROA. Vol. 9 - 1594)

The reasoning and process used by the trial court in overriding the jury =s life recommendation is nearly identical to the reasoning by the trial court in Keen:

> The Court finds the evidence in mitigation is minimal compared to the magnitude of the crime that has been committed by the defendant. In the final analysis, the mitigating circumstances found to exist have no relationship to the crime committed to such a degree that the jury could reasonably conclude life is a proper penalty. Furthermore, the jury=s decision during the guilt phase of this proceeding essentially disregards any theory that the death of Anita Keen was accidental. If the jury believed that the victim=s death was the result of premeditated murder, then the cold and calculated plan to kill her must necessarily outweigh the mitigating circumstances presented by the defense. This Court can only conclude that the jury=s hasty recommendation of life indicates that it was based on something other than the sound judgment required in such cases. Had the jury considered the aggravating and mitigating circumstances, the facts suggesting

> a sentence of death are so clear and convincing that virtually no reasonable person could differ. The mitigating evidence is wholly insufficient to outweigh the aggravating circumstances in support of a life sentence.
> Keen at 283.

Clearly, the trial court in Mr. Washington=s case conducted the same faulty analysis as did the court in Keen in overriding the jury life recommendation. The result in Mr. Washington=s case should be the same as that in Keen.

In Keen v. State, 775 So.2d 263 (Fla. 2000), the Court held:

> The appropriate standard in analyzing a jury override is well known: ATo sustain a jury override, this Court must conclude that the facts suggesting a sentence of death are >so clear and convincing that virtually no reasonable person could differ.=@ *San Martin v. State,* 717 So.2d at 462, 471 (Fla. 1998) (quoting *Tedder v. State* 322 So.2d 908, 910 (Fla. 1975). AIn other words, we must reverse the override if there is a reasonable basis in the record to support the jury=s recommendation of life.@ *San Martin,* 717 So.2d at 471 (citations omitted). In that manner, the narrow inquiry to which we are bound honors the underlying principle that this jury=s advisory sentence reflected the Aconscience of the communityA at the time of this trial. *See Strausser v. State,* 682 So.2d 539, 542 (Fla. 1996) *Dolinsky v. State,* 576 So.2d 271, 274 (Fla. 1991); *Richardson v. State,* 437 So.2d 1091, 1095 (Fla. 1983). The trial judge=s sentencing order is thoughtful and well written; he obviously considered his decision in a very deliberative, serious manner. Reasonable arguments can certainly be presented to support his order. However, we find that the standards for weighing aggravators and mitigators in a death recommendation case have been transposed with those applicable to consideration of a jury recommendation of life imprisonment. The following passage from the sentencing order illustrates the trial judge=s reasoning: The Court finds the evidence in mitigation is minimal compared to the magnitude of the crime that has been committed by the defendant. In the final analysis, the

> mitigating circumstances found to exist have no relationship to the crime committed to such a degree that the jury could reasonably conclude life is a proper penalty. Furthermore, the jury=s decision during the guilt phase of this proceeding essentially disregards any theory that the death of Anita Keen was accidental. If the jury believed that the victim=s death was the result of premeditated murder, then the cold and calculated plan to kill her must necessarily outweigh the mitigating circumstances presented by the defense. *This Court can only conclude that the jury=s hasty recommendation of life indicates that it was based on something other than the sound reasoned judgment required in such case.* Had the jury considered the aggravating and mitigating circumstances, the facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ. *The mitigating evidence is wholly insufficient to outweigh the aggravating circumstances in support of a life sentence*. (Emphasis added.) The last line emphasized above indicates that the wrong standard was ultimately applied in consideration of the jury=s life recommendation. The singular focus of the *Tedder* inquiry is whether there is a Areasonable basis in the record to support the jury=s recommendation of life. *San Martin,* 717 So.2d at 471, rather than the weighing process which a judge conducts after a death recommendation. Id. at 282-83.

The trial court used almost identical wording in its order denying Mr. Washington=s 3.850 motion following the evidentiary hearing:

> My conclusion would be the same as it was in my original sentencing order, for all the reasons stated herein and therein: *The aggravating circumstances in this case so far outweigh the mitigating circumstances that a sentence of death is so clear and convincing that virtually no reasonable people, armed with all the facts and all the law could differ.* (FSC PCR- 306) (emphasis added.)

Had the trial court applied the correct standard in Tedder, it would not have overridden the jury recommendation. Instead,

> the focus of the analysis was not upon finding support for the jury=s recommendation, i.e., determining if a reasonable basis existed for the jury=s decision, but rather toward proving that the jury got it wrong and lacked any reasonable basis to recommend life. In other words, the trial judge disagreed with their recommendation based on his view of the mix of aggravators and mitigators, rather than through the prism of a Tedder analysis.
> Keen, 775 So.2d at 284.

The penalty phase jury heard all the aggravation. The penalty phase jury also heard the un-rebutted mitigation presented by defense counsel. By their recommendation of life, they have determined that the mitigation outweighed the aggravation in this case. The trial court=s weighing process violated the underlying principle that this jury=s advisory sentence reflected the Aconscience of the community@ at the time of this trial. The trial court=s opinion of the aggravators and the record non- statutory mitigation was an interesting exercise, but it was not necessary. The jury had done its duty.

In the 3.850 order the trial court wrote:

> ACounsel made a judgment call not to investigate and present to the jury defendant=s drug abuse and possible emotional disorders because of that abuse. His judgment was sound. It was reasonable. It should not be second-guessed. (See FSC PCR Vol. II-302)

Mr. Washington contends that by stating that trial counsel=s judgment was sound and reasonable and should not be second-guessed, the un-rebutted record mitigation was also sound and reasonable and should not be second guessed. The trial court actually ratifies the presentation of the penalty phase evidence when it wrote: “Trial counsel were not ineffective in the way they decided to present the evidence in the penalty phase. To the

contrary, they were quite effective in their choice of mitigation to be presented. It resulted in a life recommendation from the jury." (See FSC PCR Vol. II-304)

Elsewhere in the 3.850 order, the trial court went on to state: "The trial jury heard only uncontroverted testimony that he was a good worker. (This court refuted this in her sentencing order, and the evidence presented at the evidentiary hearing causes this previously uncontroverted evidence to be quite controverted). (See FSC PCR Vol. II-303). In other words, the penalty phase jury was presented with uncontroverted, unrebutted, record evidence with which the jury relied upon in following the instructions of the court itself in returning a recommendation of life. It was the job of the prosecutor to rebut the record mitigation evidence. The trial court had the right to question the witnesses in front of the jury in an effort to "clarify" matters and then give the attorneys, both the State and defense, an opportunity to ask further questions based upon the court's questioning of the witnesses. Instead, the trial court contested the mitigation in the peace of a quiet chamber and did the prosecutor's job for him out of the presence of the jury. The penalty phase jury heard competent, sound, unrebutted record mitigation and the evidence and the subsequent recommendation of life resulting from the jury evaluation of said evidence should not be "second guessed."

The trial court=s misapplication of Tedder is obvious from a reading of the conclusion of the 3.850 order:

> My conclusion would be the same as it was in my original sentencing order, for all the reasons stated herein and therein: The aggravating circumstances in this case so far outweigh the

> mitigating circumstances that a sentence of death is so clear and convincing that virtually no reasonable people, armed with all the facts and all the law could differ. (Exhibit A, PP 22-23). (See FSC PCR Vol. II-306).

Although the Tedder standard, AIn 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@; lacks the additional underlined wording which the trial court added, Mr. Washington contends that the jury was armed with all the facts. They were armed with the un-rebutted mitigation presented by trial counsel in the penalty phase. The penalty phase jury was armed with all the law. The trial court gave it to them when the court instructed the penalty phase jury that they could consider in mitigation Aany other aspect of the defendant=s character or record or background, and any other circumstances of the offense.@ Just because the trial court did not agree with how the jury applied the facts to the law, does not mean that the recommendation of life should not be respected.

Further, this Court in its de novo review, (See Stephens v. State, 748 So.2d 1028 (Fla. 1999)), should apply Tedder as clarified in Keen.

In Parker v. State, 643 So.2d 1032 (Fla. 1994), The Florida Supreme Court reversed a jury override. The Court held:

> A defendant=s capacity to form loving relationships with his family and friends is worthy of a jury=s consideration in recommending punishment for capital murder. *See, e.g., Scott v. State,* 603 So.2d 1275,1277 (Fla. 1992); *Bedford v. State,* 589 So.2d 245,253 (Fla. 1991), *cert. denied,* 503 U.S. 1009, 112 S.Ct. 1773, 118 L.Ed.2d 432 (1992). A difficult

> childhood is valid nonstatutory mitigating evidence upon which a jury is entitled to rely. *See, e.g., Scott* 603 So.2d at 1277. Jurors also may consider remorse or repentance. *See Stevens v. State,* 613 So.2d 402, 403 (Fla. 1992). As we said in *Scott,*@[w]hile some persons may disagree with the weight of this evidence, or may even disbelieve portions of it altogether, clearly other reasonable persons would be convinced by it.@ 603 So.2d at 1277. We also note that the jury was apparently quite capable of reasonably sorting out the facts and applying the law in the guilt phase, where it distinguished the Dalton murder from the Padgett and Sheppard murders in handing down their guilty verdicts, all of which were supported by the record. *See Parker v. State,* 458 So.2d at 754. There is no reason to believe that the same jury was less capable of reasonably applying the aggravation and mitigating circumstances in the penalty phase of the trial. Thus, we conclude that the override was improper because jurors reasonably could have relied on these nonstatutory factors established in the record to recommend a life sentence under the totality of circumstances in this case. Id. at 1035.

In Mr. Washington=s trial the jury was apparently quite capable of reasonably sorting out a massive amount of DNA evidence and applying the law in the guilt phase. The Parker court rejected the State=s claim that the Florida Supreme Court should defer to a trial judge=s discretionary decision regarding the weight of mitigating evidence regardless of the jury=s recommendation. Id.

The non-statutory mitigation un-rebutted by the State was obviously given great weight by the penalty phase jury. Washington=s ability to live within the prison setting, the opinion of Dr. Merin regarding the high improbability of this defendant planning the murder, Mr. Washington=s childhood, his good work habits, his support of his children, and the other non-statutory mitigation outlined in defendant=s sentencing memorandum

and supported by case law, were un-rebutted by the State and in the record for the jury to consider. Since the facts of the Parker penalty issues closely resemble Mr. Washington=s mitigation, why did the Florida Supreme Court reverse *Parker* and not Mr. Washington=s override?

In Turner v. State, 645 So.2d 444 (Fla. 1994), the Florida Supreme Court reversed the override on the basis that Athere is ample mitigation on which the jury could have relied in making its life recommendation.@ Id. at 447. The mitigation in Washington >s case was more than ample. Again, why is Mr. Washington the victim of disparate treatment?

In Esty v. State, 642 So.2d 1074 (Fla. 1994), The Florida Supreme Court held:

> For a trial judge to override a jury recommendation of life, Athe facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.@ *Tedder v. State*, 322 So.2d 908, 910 (Fla. 1975). An override is improper if there is a reasonable basis in the record to support the jury=s recommendation. *Ferry v. State*, 507 So.2d 1373, 1376 (Fla. 1987). The record in this case reveals a number of factors that support the jury=s recommendation, including Esty=s age of eighteen at the time of the murder, his lack of criminal history, his *potential for rehabilitation, and the possibility that he acted in an emotional rage.*(Emphasis added.) Thus, we conclude that jury override was improper because the jurors could have relied on these factors established in the record to recommend a life sentence in this case. Id. at 1080.

In Mr. Washington=s case his potential for rehabilitation, lack of intent to kill, and other prior mentioned mitigating factors have been established in the record for the penalty phase jury to rely upon in recommending a life sentence. Why then would the reviewing court disregard its own case precedent and not reverse the override in Mr. Washington=s

case?

In Caruso v. State, 645 So.2d 389 (Fla. 1994), after discussing the defendant=s age of 21 as a valid mitigator, the Florida Supreme Court noted that he was known by family members as loving, nonviolent, and a good worker, citing Scott and Bedford. The Florida Supreme Court held that there was a reasonable basis for the jury=s recommendation and reversed the override. *Id.* at 397. Mr. Washington had similar, among other, un-rebutted record mitigation, yet he was not granted the same relief. Why?

In Barrett v. State, 649 So.2d 219 (Fla. 1994), The Supreme Court of Florida held again that the facts in the record show a reasonable basis on which the jury could have concluded that life imprisonment was the appropriate sentence. After detailing the other mitigation which should have been considered, the Court noted Ahis potential for rehabilitation and positive personality traits@ and Ahis capacity to form loving relationships with his family and friends@ citing Stevens and Scott respectively. Id. at 223. The override was reversed. In Garcia v. State, 644 So.2d 59 (Fla. 1994),@Garcia chose not to present any evidence in the penalty phase.@ Id. at 61. In Mr. Washington=s case he did elect to present evidence of non-statutory mitigation, there was a valid of record un-rebutted mitigation which the jury obviously used in its deliberations. The historical overview of jury overrides in Florida from 1974 until 2000, make clear the fact that the jury override has been applied in an arbitrary manner.

The reversal rate on direct appeal is impressive in the relief granted defendants by the direct appeal Court. The reversal rate in post-conviction and federal proceedings

fortify the contention that courts do not believe that trial courts should presume to second guess the penalty phase jury if there is mitigation in the record. To assume that the penalty phase jury did not find certain non-statutory mitigation to be consequential and instead relied upon an Aimproper mitigator@ would require the use of a crystal ball. Neither the trial court nor the reviewing Court had the benefit of the clarification of the Tedder standard in Keen. The trial court used the same weighing process in an override case that should only be used when the jury recommended death.

Mr. Washington=s jury override claim is not procedurally barred. In Mr. Washington=s initial brief filed August 21, 2001, previous post-conviction counsel asserts that despite adverse rulings, due process and fundamental fairness in the context of a capital case mandate that this claim should be considered on the merits. (See Appellant=s Initial Brief page 60-61). Mr. Washington further preserved the claim in his motion for rehearing filed on December 2, 2002, citing Keen. The cases of Ring v. Arizona, 122 S.Ct. 2428, 536 U.S. 584 (2002), King v. Moore, 831 So.2d 143 (Fla.2002), and Bottoson v. Moore, 833 So.2d 693 (Fla.2002) were decided in 2002. The Supreme Court of Florida rendered its opinion on Mr. Washington=s case on November 14, 2002. The motion for rehearing was denied on January 10, 2003. Had the Supreme Court of Florida rendered its opinion subsequent to June 24, 2002, when Ring was decided and prior to October 24, 2002 when King and Bottoson were decided, the Washington case would have been ripe for review. The concurring opinions by Justice Lewis and others in the King and Bottoson opinions regarding jury overrides state that jury overrides Acertainly

now be of questionable continuing vitality.@ Bottoson at 725. The trial court=s awareness of the opinions quoted in its order on page 22, indicate that Mr. Washington=s case should be considered by this Court.

In Christmas v. State, 632 So.2d 1368 (Fla. 1994) the Supreme Court of Florida held:

> In this case, however, we find that the *Tedder* standard has *not* been met given that evidence exists in this record upon which a jury could have recommended life imprisonment. We disagree with the State=s contention that the mitigation in this case Apales in significance@ against the strong aggravating circumstances; especially given that the trial judge erroneously found that the killings were heinous, atrocious, and cruel. Id. at 1371-72.

The trial court in its ORDER DENYING AMENDED MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCES dated November 18, 2003, on page 15 reveals the fatal flaw in its reasoning regarding the denial of defendant=s motion. The trial court stated:

> Even if the heinous, atrocious, or cruel aggravating factor, and the murder while under a sentence of imprisonment were to be eliminated completely from this court=s consideration, the override should still be sustained based on the two aggravating circumstances that do not violate *Apprendi/Ring*, and Ano statutory mitigating circumstances, and inconsequential non-statutory mitigating circumstances.@ *Washington v. State,* 653 So.2d 362, 366 (Fla. 1994). (See Order at page 15).

Mr. Washington respectfully contends that pursuant to *Apprendi/Ring*, the heinous, atrocious, or cruel aggravating factor, and the murder while under a sentence of imprisonment mandate complete elimination from the court=s consideration as the above

mentioned aggravating factors had not been proven beyond a reasonable doubt. The trial court=s analysis of the aggravation is skewed. The trial court is assuming that aggravation existed when there is no evidence to demonstrate that the aggravation had been proven beyond a reasonable doubt. The fatal flaw in the trial court=s reasoning is two pronged. When the trial court termed the non-statutory mitigation as Ainconsequential@, it was expressing the trial court=s opinion, not the penalty phase jury=s. Barring a special verdict form requiring the jury to list both aggravation proven beyond a reasonable doubt *and* requiring the jury to list mitigation proven by a preponderance of the evidence, nobody can speculate as to which evidence was used by the jury in their deliberation of this case. The trial court=s analysis of why the jury recommended a life sentence, although an interesting theory is still just a theory. (See Order pages 17-18). Another special circumstance that this Court should be aware of is that the jury was not polled, nor was the Asplit@ -if there was one -indicated on the verdict form. What is clear from the record is that the penalty phase jury was presented with un-rebutted non-statutory mitigation.

Justice Stevens= assessment of the jury=s comparative advantage in determining, in a particular case, whether capital punishment will serve that end in Ring addresses the unique responsibility of the jury in capital cases in this manner:

> In respect to retribution, jurors possess an important comparative advantage over judges. In principle, they are more attuned to Athe community=s moral sensibility,@ *Spaziano*, 468 U.S., at 481, 104 S.Ct. 3154 (STEVENS, J., concurring in part and dissenting in part), because they Areflect more accurately the composition and experiences of the community as a whole,@ *id.*, at 486, 104 S.Ct. 3154.

> Hence they are more likely to Aexpress the conscience of the community on the ultimate question of life or death,@ *Witherspoon v. Illinois,* 391 U.S. 510, 519 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), and better able to determine in the particular case the need for retribution, namely, Aan expression of the community=s belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.@ Id. at 615-16, *2447

In Mr. Washington=s case the jurors did express the conscience of the community on the ultimate question of life or death when the penalty phase jury rendered their life recommendation. Their recommendation should be respected. Mr. Washington=s plea for mercy was found to have merit by a jury of his peers. In 1994, his plea for justice went unheeded when the 1994 Florida Supreme Court allowed the trial court to improperly weigh un-rebutted record non-statutory mitigation and deem it Ainconsequential.@ The 1994 Court did not have the benefit of Keen when it rendered its decision.

Time passed, the composition of the Court changed, and with it, the courts of this country continued to evolve.

Justice Scalia, in his concurring opinion in Ring wrote:

> Although Athe doctrine of *stare decisis* is of fundamental importance to the rule of law[.]=... [o]ur precedents are not sacrosanct.@ *Patterson v. McLean Credit Union,* 491 U.S. 164, 172, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989) (quoting *Welch v. Texas dept. of Highways and Public Transp.,* 483 U.S. 468, 494, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987)). A[W]e have overruled prior decisions where the necessity and propriety of doing so has been established.@ 491 U.S., at 172, 109 S.Ct. 2363. We are satisfied that this is such a case. Id. at 608, *2442-43.

Mr. Washington respectfully contends that the Florida Supreme Court=s lengthy concurring opinions in Bottoson and King indicate a willingness to address the override issue. As noted by the trial court in its order on page 22, Awe should not suggest the continuing validity of the concept of trial court=s overriding jury recommendations of life imprisonment in these cases.@ Bottoson at 726, and Justice Quince=s comments regarding the Bottoson case: AThis case is not the appropriate vehicle to raise the multiple concerns involving a jury override which may result from the Ring decision.@ Bottoson at 702, Quince,J. concurring. Mr. Washington=s case is the appropriate vehicle.

Undersigned counsel is not seeking that this Court declare the override provision invalid. As cited above, the override provision was originally drafted to prevent inflamed juries from causing injustice. One of the unique factors to be considered in the case at bar is that an inflamed trial court indulged in an improper weighing process. Another factor to be considered is that in 1994, there was a disparity in the rulings regarding overrides. This was due to the fact that there was no clarification of the Tedder standard until 2000, when this Court decided Keen. Yet another factor is the ruling in Ring regarding improper aggravation. It clarifies and bolsters the holding in Christmas, a case decided the same year as the Washington direct appeal. Although undersigned counsel agrees with Justice Lewis= concurring opinion that Awe should not suggest the continuing validity of the concept of trial court=s overriding jury recommendations of life imprisonment in these cases,@ these cases should be evaluated on a case by case basis given the totality of the circumstances. Given the totality of the circumstances in this case, and this case only, it is

clear that Washington has suffered an injustice. The courts of this state and this country exist to right injustice. May they do so in Mr. Washington=s case.

ARGUMENT II

THE RECENT ABA STUDY ESTABLISHES THAT THE FLORIDA DEATH PENALTY STATUTE IS UNCONSTITUTIONAL ON ITS FACE AS APPLIED AND THEREFORE MR. WASHINGTON=S DEATH SENTENCE IS UNCONSTITUTIONAL.

In 1997, the ABA responded to a growing concern that the capital jurisdictions did not provide fairness and accuracy in the administration of justice and called for a moratorium on executions until the states had an opportunity to study and implement changes to their systems. Florida did not heed the ABA=s advice and no moratorium was imposed, nor any comprehensive study conducted. Instead, Florida continued to impose the death penalty and carry out executions.

Mr. Washington=s conviction was based precisely upon the constitutional deficiencies identified in the 2006 ABA critique of Florida=s death penalty called, American Bar Association, Evaluating Fairness and Accuracy in State Death Penalty Systems: The Florida Death Penalty Systems: The Florida Death Penalty Assessment Report (2006). The ABA report identifies the Florida practice of the judicial override as one that is constitutionally deficient. Mr. Washington=s conviction was imposed upon him arbitrarily and capriciously when his jury recommended life in prison and the sitting judge overrode the life recommendation and sentenced Mr. Washington to death. The

unconstitutional practice of the jury override has been challenged but now identified by the ABA as a practice that should be abolished especially in the wake of the United States Supreme Court=s decision in Ring v. Arizona, 122 S.Ct. 2428, 536 U.S. 584 (2002).

The ABA=s assessment team identified a number of the areas in the report Ain which Florida=s death penalty system falls short in the effort to afford every capital defendant fair and accurate procedures.@ ABA Report at iii. Recommendations were made to assist Florida in fixing the system. The team cautioned that the apparent harms in the system Aare cumulative@ and must be considered so - Aproblems in one area can undermine sound procedures in others.@ Id. At iii-iv. The report shows that Florida=s death penalty scheme is deficient for many of the same reasons the schemes at issue in Furman were found to be unconstitutional. Death sentences like Mr. Washington=s are a product of an arbitrary and capricious system.

The ABA Report identifies the Florida practice of the judicial override as one that is constitutionally deficient. The ABA Report states that:

> Between 1972 and 1999, 166 of the 857 first-time death sentences imposed (or 19.4 percent) involved a judicial override of a jury=s recommendation of life imprisonment or life imprisonment without the possibility of parole. Although the Team is not aware of any trial judge decision since that time to override a jury=s recommendation of life imprisonment without the possibility of parole, Florida law still authorizes the practice. Not only does judicial override open up an additional window of opportunity for bias - as stated in 1991 by the Florida Supreme Court=s Racial and Ethnic Commission - but it also affects jurors= sentencing deliberations and decisions. A recent study of death cases in Florida and nationwide found: (1) that when deciding whether

> to override a jury=s recommendation for a life sentence without the possibility of parole, trial judges take into account the potential Arepercussions of an unpopular decision in a capital case,@ which encourages judges in judicial override states to override jury recommendations of life, Aespecially so in the run up to judicial elections;@ and (2) that the practice of judicial override makes jurors feel less personally responsible for the sentencing decision, resulting in shorter sentencing deliberations and less disagreement among jurors. Additionally, in the wake of the United States Supreme Court=s decision in Ring v. Arizona, the constitutionality of judicial override remains in doubt. (Footnotes omitted)

The ABA also recommends that second and successive post-conviction proceedings be given consideration. The ABA recommends that:

> State courts should give full retroactive effect to United States Supreme Court decisions in all proceedings, including second and successive post-conviction proceedings, and should consider in such proceedings the decisions of federal appeals and district courts.
>
> Post-conviction courts in Florida give full retroactive effect to changes in the law announced by the United States Supreme Court only in limited circumstances. Specifically, post-conviction courts will give retroactive effect to new rules of criminal procedure in collateral post-conviction proceedings only when the new rule (1) emanates from the Florida Supreme Court of the United States Supreme Court; (2) is constitutional in nature, and (3) constitutes a development of fundamental significance.
>
> The Florida Supreme Court has stated that a new rule is one of Afundamental significance@ when it either places Abeyond the authority of the state the power to regulate certain conduct or impose certain penalties,@ or when the rule is Aof sufficient magnitude to necessitate retroactive application@ by considering the purpose to be served by the new rule, the extent of reliance on the old rule, and the effect on the administration of justice of a retroactive application of the

new rule. (Footnotes omitted)

To the extent that the lower court denied this claim in relying on Diaz v. State, 945 So.2d 1136 (Fla. 2006); Rolling v. State, 944 So.2d 176, 181 (Fla. 2006); and Rutherford v. State, 940 So.2d 1112 (Fla. 2006) the defendant urges this Court to reconsider those rulings because adhering to them would violate his right to due process in accordance with the Fifth and Fourteenth Amendments of the United States Constitution.

ARGUMENT III

THE LOWER COURT=S USE OF PROCEDURAL DEFAULT IN DENYING MR. WASHINGTON=S CLAIMS VIOLATES THE DEFENDANT=S DUE PROCESS, AND IS CONTRARY TO BOTH STATE AND FEDERAL LAW.

In the lower court=s order on which this appeal is based, Judge Schaeffer stated, AAlso encompassed within the Defendant=s ABA report claim is the allegation that this court erred in misapplying case law regarding judicial overrides when it overrode the jury recommendation of life and imposed the death penalty. As previously noted in the Order, however, the Florida Supreme Court in its May 12, 2005 decision in this case, stated that this issue is procedurally barred from consideration in a postconviction proceeding, as it could and would have been raised at trial on direct appeal. *See* Washington v. State, 907 So.2d 512, 514 (Fla. 2005). Furthermore, the Court ruled on the merits that any misapplication of the jury override law in the Defendant=s case was harmless. Accordingly, the claim is also denied.@ The defendant flatly contends that this argument

falls contrary to federal law.

The United States Supreme Court held in Chapman v. California, 386 U.S. 18,21, 87 S.Ct. 824, 826 (1967):

> The application of a state harmless-error rule is, of course, a state question where it involves only errors of state procedure or state law. But the error from which these petitioners suffered was a denial of rights guaranteed against invasion by the Fifth and Fourteenth Amendments, rights rooted in the Bill of Rights, offered and championed in the Congress by James Madison, who told the Congress that the >independent= federal courts would be the guardians of those rights. Whether a conviction for crime should stand when a State has failed to accord federal constitutionally guaranteed rights is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied. With faithfulness to the constitutional union of the States, we cannot leave to the states the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights. Id at 21, *826.

By invoking the Aprocedural bar@ in Mr. Washington=s case, the State and lower court are attempting to enact authoritative laws, rules and remedies designed to protect people from infractions by states that violate federally guaranteed rights. The Supreme Court has consistently emphasized the uniqueness of death as a criminal punishment. Death is Aan unusually severe punishment, unusual in its pain, in its finality, and in its enormity.@ Furman, 408 U.S. at 287 (Brennen, J., concurring). It differs from lesser sentences Anot in degree but in kind. It is unique in its total irrevocability.@ Id at 306 (Stewart, J., concurring) The severity of sentence Amandates careful scrutiny in the

review of any colorable claim of error." Zant v. Stephens, 462 U.S. 862, 885 (1983). The lower court=s ruling denies Mr. Washington=s right to have his claim heard on the merits, and declares his resulting impeding death as Aharmless@.

The recently decided case of Mungin v. State, 932 So.2d 986 (Fla. 2006) clarifies the reason that Mr. Washington is entitled to an evidentiary hearing on this claim. Footnote 8 on page 996 clearly states:

> 8. For all death case post-conviction motions filed after October 1, 2001, Florida Rule of Criminal Procedure 3.851 requires an evidentiary hearing Aon claims listed by the defendant as requiring a factual determination.@ Fla. R. Crim. P. 3.851 (f) (5) (A) (I); see also Amendments to Fla. Rules of Criminal Procedure 3.851, 3.852, &3.993, 802 So.2d 298, 301 (Fla. 2001). However, prior to the 2001 amendments to rule 3.851, rule 3.850 (d) applied to the summary denials of post-conviction motions in both death and nondeath cases. See McLin v. State, 827 so.2d 948, 954 n.3 (Fla. 2002). Because Mungin=s motion for post-conviction relief was filed in 1998, the summary denial standard set forth in rule 3.850 (d) applies in this case.

The reasoning for granting an evidentiary hearing is further detailed in Allen v Butterworth, 756 So.2d 52 (Fla. 2000):

> In addition to the unnecessary delay and litigation concerning the disclosure of public records, we have identified another major cause of delay in post-conviction cases as the failure of the circuit courts to grant evidentiary hearings when they are required. This failure can result in years of delay. This Court has been compelled to reverse a significant number of cases due to this failure. When a case gets reversed for this reason, the entire system is put on hold, as the hearing on remand takes many months to be scheduled and completed, and the appeal therefrom takes many additional months in order for the record on appeal to be prepared and the briefs to be filed

> in this Court. In order to alleviate this problem, our proposed rules require that an evidentiary hearing be held in respect to the initial motion in every case. This single change will eliminate a substantial amount of the delay that is present in the current system
> Id. At 66,67.

The Florida Supreme Court frequently relies on procedural defaults to preclude consideration of meritorious issues that go to the reliability of the conviction and sentence of death. *See* Swafford v. State, 828 So. 2d 966, 977-78 (Fla. 2002); Jones v. State, 709 So. 2d 512, 519-20, 525 (Fla. 1998). The refusal to consider such issues increases the risk that the innocent or the legally undeserving will be executed. It diminishes a Ameaningful basis for distinguishing the few cases in which [death] is imposed from the many cases in which it is not@ Furman, at 313 (White, J., concurring). The ABA Report recommended that AState courts should permit second and successive post-conviction proceedings in capital cases where counsels: omissions or intervening court decisions resulted in possibly meritorious claims not previously being raised, factually or legally developed, or accepted as legally valid.@ ABA Report at 241. As it is, the Florida death penalty scheme violates Furman. Mr. Washington should not be procedurally barred from raising his claims before this Court.

CONCLUSION AND RELIEF SOUGHT

In light of the facts and arguments presented above, Mr. Washington contends the trial court erred in overriding the jury life recommendation. Mr. Washington moves this Honorable Court to:

1. Vacate the sentence of death, and sentence him to life imprisonment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to all counsel of record on October __, 2007.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing, Initial Brief of Appellant was generated in a Courier New, 12 point font, pursuant to Fla. R. App. P. 9.210**.**

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