ORIGINAL

No. 69210

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IN THE

SUPREME COURT OF FLORIDA

JAMES FRANKLIN ROSE,

Petitioner,

v.

RICHARD L. DUGGER, Superintendent,
Florida State Prison; and LOUIE L.WAINWRIGHT,
Secretary, Florida Department of Corrections,

Respondents.

PETITION FOR WRIT OF HABEAS CORPUS

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No.______________

PETITION FOR WRIT OF HABEAS CORPUS

TO THE SUPREME COURT OF FLORIDA:

Petitioner, JAMES FRANKLIN ROSE, through the undersigned counsel, prays that this Court issue its writ of habeas corpus, and in support of his request states:

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to Article V, Sections 3(b)(1), (7), (9), Florida Constitution and Rule 9.030(a)(3), Florida Rules of Appellate Procedure. Two issues are presented by this petition and one issue is reserved. The first issue directly concerns 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); Foster v. State, 400 So.2d 1, 4 (Fla. 1981); Delap v. State, 350 So.2d 462 (Fla. 1977). The second issue is one for which habeas corpus proceedings are appropriate because petitioner has no other adequate and effective remedy at law. Dickens v. State, 165 So.2d 811 (Fla. 2d DCA 1964); State ex rel. Wilkins v. Sinclair, 162 So.2d 661, 662 (Fla. 1964).

STATEMENT OF THE CASE

Mr. Rose was indicted for first degree murder and kidnapping in Broward County, Florida. OR 9-10.[1] Trial by jury held in March, 1977 resulted in a mistrial after the jury had been unable to reach a verdict. OR 1332, 1478; App. 7a. After a change of venue to Hillsborough County, trial by jury was again held. After deliberating for seven hours, the jury separated for an overnight recess, OR 1273, returned the next morning and were given a "jury deadlock" charge, OR 1274, and an hour later reached a verdict of guilty as to both counts as charged. OR 1275. At the penalty trial, after presentation of evidence, the jury reported a deadlock as to the appropriate sentence and was again given a "jury deadlock" instruction. OR 1302-1303. The jury recommended and the judge imposed a death sentence. OR 1304. On direct appeal, this Court affirmed the convictions, but vacated the death sentence for resentencing before a jury. Rose v. State, 425 So.2d 521 (Fla. 1983). A death sentence was imposed upon resentencing and it was affirmed by this Court. Rose v. State, 461 So.2d 84 (Fla. 1985).

GROUNDS FOR ISSUANCE OF THE WRIT

POINT I

MR. ROSE HAS BEEN DENIED, SOLELY BECAUSE OF HIS INDIGENCY, THE OPPORTUNITY FOR FULL APPELLATE REVIEW OF HIS CONVICTION IN VIOLATION OF THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE CONSTITUTION OF THE UNITED STATES

A. Introduction

A fundamental error of constitutional dimension occurred in the appeal of the convictions in this case. It can be corrected only by the grant of habeas corpus relief permitting Mr. Rose to appeal anew. This error resulted from the trial court's and this

[1] The following symbols will be used to designate the records on appeal filed in the two direct appeals in this case: "OR" refers to the original record on appeal filed in the initial direct appeal of the judgment and conviction; "R" denotes the record on appeal filed in the appeal from resentencing. The symbol "App. ___a" refers to the Appendix filed herewith.

Court's rejection of Mr. Rose's repeated requests for transcription of his first jury trial held in March, 1977 which ended in a mistrial after the jury was unable to reach a verdict.

Because Mr. Rose is and was a pauper, he had no means by which to seek review of the legal sufficiency of the evidence in that first jury trial. The only reason offered in opposition to the transcription request -- that Mr. Rose had not moved to dismiss on former jeopardy grounds prior to the retrial -- is shown to be invalid by recent decisions of this Court and of the Supreme Court of the United States. State v. Johnson, 483 So.2d 420 (Fla. 1986) (double jeopardy is fundamental error, raisable at any time to void the conviction); Richardson v. United States, 104 S.Ct 3081 (1984) (no double jeopardy violation arises prior to retrial after a hung jury, it only would arise if on appeal after the retrial the evidence in the first trial were declared legally insufficient). Accordingly, the denial of review was erroneous and denied due process of law under the principles recognized in Evitts v. Lucey, 105 S.Ct. 830 (1985) and like decisions, and transgressed the guarantee of equal protection as explained in Griffin v. Illinois, 351 U.S. (1956) and its progeny.

To be sure, the issue presented here has been previously presented to this Court upon precisely the grounds now asserted. That Mr. Rose has been diligent in pressing his claim, however, does not defeat the Court's ability to correct the constitutional error, nor does it diminish the need to do so. The error is fundamental.

B. The Constitutional Mandate

The underlying constitutional principles mandating Mr. Rose's right to a full appeal must be examined. While the Constitution does not require the States to grant appeals as of right, McKane v. Durston, 153 U.S. 684 (1984), "if a State has created appellate courts as 'an integral part of the ... system for finally adjudicating the guilt or innocence of a defendant,' ... the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the

Constitution." Evitts v. Lucey, 105 S.Ct. at 834 (quoting Griffin v. Illinois, 351 U.S. at 18). There is no doubt that Florida makes the first direct appeal a matter of right and an integral part of the process of finally adjudicating a capital case.[2] The constitutional guarantees thus are fully applicable.

A defendant therefore must be permitted to appeal without disadvantage due to his indigence. Griffin v. Illinois, 351 U.S. at 20 (transcript cannot be denied to an indigent if it is the only way to assure an "adequate and effective" appeal); Eskridge v. Washington, 351 U.S. 214, 215 (1958) (invalidating rule that indigent could not be provided a transcript for appeal unless the judge found that "justice will thereby be promoted"); Lane v. Brown, 372 U.S. 477 (1963) (invalidating practice that meaningful appeal was possible only if the public defender decided that a transcript should be prepared); Draper v. Washington, 372 U.S. 487 (1963) (invalidating procedure denying transcript to an indigent if the judge found the appeal to be frivolous). See also Douglas v. California, 372 U.S. 353 (1963) (right to counsel on appeal); Entsminger v. Iowa, 386 U.S. 748 (1967) (right to effective assistance of counsel on appeal).

These are guarantees of the Equal Protection Clause. If there is an appeal as of right, an indigent must be given equal, unfettered access to such review. In addition to equal protection, the above decisions also rested independently upon the Due Process Clause. See Ross v. Moffitt, 417 U.S. 600, 608-609 (1974); Evitts v. Lucey, 105 S.Ct. at 840-41. "[E]ach Clause triggers a distinct inquiry." Evitts, 105 S.Ct. at 841. Inquiry

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2 § 921.141(4), Fla. Stat. (1985) (requiring "automatic review" upon "the entire record" in a capital case); Delap v. State, 350 So.2d 462, 463 (Fla. 1977) (full transcript necessary in capital appeal); cf. Vasil v. State, 374 So.2d 465, 471 (Fla. 1979) (mandating that a majority of the Supreme Court agree that a conviction or sentence be upheld, before a sentence of death can "lawfully be carried out"); Rule 9.140(f), Fla. R. App. P. ("In capital cases, the court shall review the evidence to determine if the interest of justice requires a new trial, whether or not insufficiency of the evidence is an issue presented for review"). See also § 924.06, Fla. Stat. (1985) (providing the criminal defendant the right to appeal).

under the Due Process Clause "'emphasizes fairness between the State and the individual dealing with the State.'" Id. (quoting Ross v. Moffitt, 417 U.S. at 609). In the present context due process concerns are invoked because a full appeal is provided as of right but the state courts "refused to offer [Mr. Rose] ... a fair opportunity to obtain an adjudication on the merits of his appeal." Evitts, 105 S.Ct. at 840. A remaining constitutional violation from the denial of a transcript for appeal does not require separate elaboration. Denying a complete transcript for appeal further denies the sixth amendment right to effective assistance of counsel, for appellate counsel is prevented from seeking adequate appellate redress on behalf of his client. Cf. Evitts v. Lucey, 105 S.Ct. 835-36 (recognizing the right to effective assistance of counsel on appeal); Entsminger v. Iowa, supra (counsel must act as an advocate for his appellate client); Anders v. California, 386 U.S. 738 (1967) (same).

C. The Denial of Mr. Rose's Right to Appeal

Each of those constitutional principles was violated by the procedure in the present case. Mr. Rose was tried before a jury on the charges for which he is currently imprisoned and sentenced to death. That trial, in March, 1977, ended in a mistrial when the jury was unable to reach a verdict. During that trial Mr. Rose moved for judgment of acquittal at the close of the prosecution's case and renewed his motion at the close of all evidence. OR 1332; App. 7a (Clerk's "Case Progress Report"); OR 1478; App. 8a (Clerk's "Record of Trial Proceedings"). These motions were denied by the trial court. Id. Mr. Rose was then retried, after a change of venue, and was convicted as charged -- although the verdict was reached only after eight hours of deliberation spanning two days and after an "Allen charge" was given over defense objections. The jury also was given an "Allen charge" in the penalty trial.

For his direct appeal to this Court, Mr. Rose sought a transcript of his first, March, 1977, jury trial in order to seek review of the trial court's orders denying the motions for judgment of acquittal. He first applied to the trial court for

that transcription based upon the authority of § 921.141(4), Fla. Stat. (1975); Fla. App. R. 6.16 (now Fla. R. App. P. 9.140(f)); and Delap v. State, 359 So.2d 461 (Fla. 1977), each of which require that the entire record be prepared. He further relied upon Rule 6.16(b), Fla. App. R. requiring review of the sufficiency of the evidence. The trial court denied that request. App. 9a.

Mr. Rose then sought review in this Court of the denial of his request for transcription. App. 10a. He alleged that he sought "[r]eview of the sufficiency of the evidence ... in order to determine whether the motion for judgment of acquittal should have been granted at the former trial." Id. If those motions for judgment of acquittal should have been granted, he asserted, "his later trial and conviction on such charge would be barred by the Fifth Amendment to the United States Constitution and Article I, Section 9, of the Florida Constitution." Id. Mr. Rose elaborated upon his grounds in his reply to Appellee's response in which he further presented the governing double jeopardy principles stemming from an erroneous denial of judgment of acquittal in the first trial, App. 12a, and alleging the denial, due to indigency, of his right to appeal unless the transcript were ordered: "Permitting appellant ... to have the tools to ultimately obtain a determination of the issue, i.e. the transcript of the evidentiary portion of the proceedings necessitates the aid of this Court due to appellant's insolvency." Id. at 13a. This Court denied that request for transcription by order dated May 15, 1981 which reads in full:

> It appearing to the Court that the issue of whether or not motions for judgments of acquittal should have been granted was not presented to the trial court, the Motion for Review of Order Denying Appellant's Motion for Transcription of Trial Proceedings That Ended in a Hung-Jury Mistrial is denied.

App. 14a. As will be shown below, if this order meant that Mr. Rose did not move for judgments of acquittal, the record shows otherwise; if the order is meant to hold that Mr. Rose should have moved to dismiss on grounds of double jeopardy prior to his second trial, the law is to the contrary for there can be no

jeopardy violation until after the evidence in the first trial is reviewed and declared insufficient on appeal. Richardson v. United States, 104 S.Ct 3081 (1984). There was no other valid justification for denying Mr. Rose the opportunity to seek review of an unquestionably proper appellate issue. Both Mr. Rose and the State informed this Court of the defects in its ruling.

Mr. Rose sought rehearing from this order, App. 15a, and the State filed a response, App. 17a. Both parties sought modification of the Court's order. Mr. Rose pointed out that he could not have further presented the issue at his second trial because the trial court had already denied the motions for judgment of acquittal during the first trial. App. 15a. As will be detailed below, these principles were and are constitutionally correct as informed by recent decisions.

As mentioned, the State also was critical of the Court's May 15th Order. It said that "Appellee does not understand what this court meant in its order of May 15, 1981" and explained that its position was not that the transcription "should have been denied because a motion for judgment of acquittal was not presented to the trial court." App. 17a. The State went on to explain that its position was that the issue should have been first presented by a motion to dismiss on former jeopardy grounds "in order to preserve the matter for appellate purposes." Id. As will be discussed below, the State's position in this latter regard is constitutionally erroneous. This Court denied rehearing of the order on July 8, 1981. App. 19a. Mr. Rose again pressed his request for transcription of the first jury trial in the appeal from his resentencing by presenting it first to the trial court and then to this Court on the same grounds. This Court again denied the request by Order dated January 6, 1984. App. 20a.

There is no doubt that Mr. Rose has been diligent in asserting both his need for and his right to the transcript of the first trial. The error in the denial of that transcription is equally clear. Statutorily, the "entire record" must be prepared for the appeal in a capital case. § 921.141(4), Fla.

Stat. (1985). Under this statutory mandate "the defendant has the right to a complete review" "of the entire record of the conviction and the sentence of death." Delap v. State, 350 So.2d at 463 n.1. As this Court pointed out in Delap, the Court's "own rule" requires the Court to independently review the sufficiency of the evidence. Id. The denial of the transcript not only precluded this Court from undertaking its duty to review the sufficiency of the evidence, it precluded Mr. Rose from advocating that question before this Court.

Beyond the strict statutory mandate, however, are the constitutional guarantees of equal protection and due process. Mr. Rose was denied review solely because of his indigency. Had he possessed the means to purchase the transcript, review could have been secured. Absent the transcript, no review was or is possible. The principles of Griffin v. Illinois, supra and its progeny, as discussed above, flatly demonstrate the constitutional error.

The State's position in opposing the transcription has been that no error was preserved for appeal because Mr. Rose did not move to dismiss on the grounds of former jeopardy prior to the second trial. App. 17a. Mr. Rose's position has been that he could not have filed a motion to dismiss on former jeopardy grounds "because the motions [for judgment of acquittal] had been denied." App. 15a. That Mr. Rose's position is correct, and this Court's ruling erroneous, is squarely confirmed by the holding of Richardson v. United States, 104 S.Ct. 3081 (1984). In that case the defendant had tried to litigate a former jeopardy claim after his first hung-jury mistrial and before his retrial. The Supreme Court held such a motion to be premature, because there had "been no termination of original jeopardy." 104 S.Ct. at 3082. The Court reasoned that since "the protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy," there is "no valid double jeopardy claim to prevent his retrial." Id. at 3086. Accordingly, Mr. Rose was manifestly correct when he asserted that he could not have

presented a double jeopardy claim prior to the retrial in order to seek review of the denial of his motions for judgment of acquittal.

The double jeopardy bar would become effective once it was determined that the judge erroneously denied the judgment of acquittal in the first trial. Once that was determined, double jeopardy protections would void the conviction resulting from the second trial and act to discharge Mr. Rose. See Burks v. United States, 437 U.S. 1 (1978) (holding that an appellate finding of insufficient evidence acts as an acquittal so as to bar a subsequent trial under the Double Jeopardy Clause). See also Simpson v. Florida, 403 U.S. 384, 387 (1971) (acquittal of offense arising out of same incident "vitiates" subsequent conviction). Just this year, this Court has held that a double jeopardy violation constitutes fundamental error that can be raised at any time. State v. Johnson, 483 So.2d 420 (Fla. 1986). Thus, in Johnson, the Court held that "the claim of double jeopardy may be raised ... after the second conviction," id. at 422, "[b]ecause ... the State, ... had no right to try [the defendant] 'at all,'" id. at 423.

Therefore, Mr. Rose was erroneously precluded from seeking review of the denial of his motions for judgment of acquittal. He was denied that right which is guaranteed to all like defendants in Florida solely for the reason that he is indigent. This was an error of the first magnitude. He did not waive the issue (even if former jeopardy could be waived) because he did all that he could do -- moving for judgments of acquittal at the first trial and asking the trial court and this court repeatedly, on specific grounds, for the transcript of that trial to enable him to present the issue. Both the statute and the Constitution demand that he be granted that right of review.

A showing of prejudice is not required for a double jeopardy violation. E.g., State v. Johnson, 483 So.2d at 423. Likewise, §921.041(4), Fla. Stat. mandating a complete review of the "entire record" requires no showing of merit as a prerequisite to a full appeal in a capital case. Indeed, the Court's own rule

demands that the sufficiency of the evidence be reviewed independently by the Court, regardless of whether it is presented as an issue by the appellant. Fla.R.App.P. 9.140 (f). More importantly, the Constitution would preclude a requirement of demonstrating merit to an appeal prior to providing an indigent a transcript for appeal. E.g., Draper v. Wainwright, supra; Lane v. Brown, supra; cf. Britt v. North Carolina, 404 U.S. 226 (1971); Reed v. State, 378 So.2d 899 (Fla. 1st DCA 1980).

It is the denial of the right to full review itself which is the fundamental error in the present case. Even so, there is reason to question the legal sufficiency of the evidence in first trial. The legal sufficiency of the evidence at the second trial was close at best, as shown by Appellant's brief and this Court's analysis of the evidence in its opinion on direct appeal. 425 So.2d at 522-23. See also id. at 525 (Overton, J., concurring and dissenting) ("The challenge to the sufficiency of the evidence is apparently an arguable issue since the appellant's first trial ended in a mistrial because of the jury's inability to reach a verdict"). Without a transcript of the first trial it is not possible to know all of the differences in the evidence from that presented in the second trial. However, there are hints at the difference in the evidence. From the Clerk's Record of Evidence it appears that Detective Edward King did not testify at the first trial. OR 1478 App. 8a. At the second trial King testified regarding statements Mr. Rose made, OR 949, which were used to establish a motive of jealousy, OR 950-51, and to show inconsistencies in Mr. Rose's version of the events, OR 951-54, to purportedly show guilty knowledge. This Court relied upon King's testimony in finding sufficient circumstantial evidence to permit a conviction at the second trial. 425 So.2d at 522 (motive of jealousy); id. at 523 (inconsistent statements).[3]

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[3] The importance of King's testimony to the prosecutor's case is revealed by the prosecutor's closing argument. King was one of the few witnesses referred to by name, and his testimony was used by the prosecutor to supply specific parts of his case. OR 1218-19, 1225.

Perhaps more importantly, at the first trial the State apparently did not present the only credible evidence used in the second trial to connect the victim to Mr. Rose's van. This nonpresentation of such critical evidence is indicated by newspaper articles at the time which each report that the prosecution failed to present the expert testimony of George Duncan, the Broward Crime Lab serologist, regarding blood type found inside Mr. Rose's van. App 21a-26a.[4] These articles also reveal that the first question asked by the jury after beginning deliberations was "Did anyone identify the bloodstains found in the van?" App. 22a. Without such evidence there was quite likely insufficient evidence to show any connection of the victim to Mr. Rose's van, hence a substantial legal issue exists as to whether the evidence at the first trial was sufficient to prove a kidnapping and consequently to establish first degree felony murder.[5] It is unknown what other aspects of the evidence may have changed, but from at least these indications there is reason to question the sufficiency of the evidence at the first trial.

Mr. Rose asked for the opportunity to seek review of the denial of the motions for judgment of acquittal at his first trial. He had a right to review of that unquestionably proper question. He has been denied that review without reason except for his indigency. That denial was of constitutional dimension. Fortunately, this Court can rectify the due process and equal protection violations. It can do so by permitting Mr. Rose to

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4 The importance of this evidence is shown by the prosecutor's use of it in the second trial where in closing argument he specifically referred to and heavily relied upon the testimony both for proof of essential elements of its case and to bolster the "credibility" of the State's wholly circumstantial case. OR 1218-20.

5 That the prosecutor unwittingly neglected to present such important evidence, which he did not realize until the presentation of evidence had closed, raises also the question of the "manifest necessity" of granting a mistrial. The prosecutor may have prematurely sought a mistrial in order to have the opportunity to present his case anew. If that situation were shown by the record, then the double jeopardy bar would apply to bar a retrial regardless of the technical legal sufficiency of the evidence, for the State "received 'one fair opportunity to offer whatever proof it could assemble,' ... [and] is not entitled to another." Bullington v. Missouri, 451 U.S. 430, 446 (1981) (quoting Burks v. United States, 437 U.S. at 16).

present his direct appeal anew after having been provided the transcript of his first trial to which he is statutorily and constitutionally entitled. The Court has jurisdiction to grant such relief,[6] and only by doing so will it correct the fundamental error in this case.

POINT II

THE DEATH PENALTY IS IMPOSED IN FLORIDA IN AN ARBITRARY AND DISCRIMINATORY MANNER ON THE BASIS OF RACE AND OTHER ARBITRARY FACTORS, IN VIOLATION OF THE EIGHTH, THIRTEENTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

The question presented here is one that this Court has faced and has rejected in a number of cases. It is based upon statistical evidence which this Court has rejected summarily when it was presented as early as 1979 based upon the then-available evidence and when it was presented more recently upon much more comprehensive data.[7] Petitioner requests the Court to reconsider its rulings on this question both because of the importance of the issue to the fair administration of justice in Florida, and because of recent developments in the law.

The issue is presented by habeas corpus because it is only this Court that can alter the governing law of Florida that it has established. Absent a change in that governing law, petitioner and other capital defendants will be precluded absolutely from securing any review or relief in the courts of Florida. He has no other adequate and effective avenue of relief in the state courts. The trial court is bound by this Court's prior precedent

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6 Cf. Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985) (new appeal ordered because of ineffective assistance of appellate counsel); Barclay v. Wainwright, 444 So.2d 956 (Fla. 1984) (same); State v. Meyer, 430 So.2d 440 (Fla. 1983) (habeas corpus is appropriate procedure for seeking belated appellate review).

7 The rejection of the claim was first articulated in Henry v. State, 377 So.2d 692 (Fla. 1979) wherein the Court relied upon Spinkellink v. Wainwright, 587 F.2d 582 (5th Cir. 1978). Since Henry, the Court has treated the claim summarily, by citation to prior decisions. See Adams v. State, 380 So.2d 423, 425 (Fla. 1980); Meeks v. State, 382 So.2d 673, 676 (Fla. 1980); Thomas v. State, 421 So.2d 160, 162-63 (Fla. 1982); Hitchcock v. State, 432 So.2d 42, 44 (Fla. 1983); Riley v. State, 433 So.2d 976, 979 (Fla. 1983). For subsequent rulings, see n. 33 , infra.

determining that this claim, based upon the same evidence, is insufficient to warrant evidentiary consideration and thus appropriately summarily denied. Thus, were petitioner to present this claim by way of motion for post-conviction relief it would be summarily denied as "conclusively show[ing] that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850. This was the precise holding of the Court in State v. Henry, 456 So.2d 466 (Fla. 1984). Under Henry a trial court has no discretion to hear this claim. The trial judge in Henry had issued a stay of execution in order to hold an evidentiary hearing on the claim. Id. at 46. This Court found there to be "no colorable issue" and "no theory upon which Henry may proceed which would entitle him to relief." Id. (emphasis supplied). This Court vacated the stay of execution and itself went on to deny the motion for post-conviction relief summarily. Id. at 469. Accordingly, there is no theory upon which relief could be granted by the state trial court on post-conviction relief. State post conviction proceedings are thus foreclosed, except by "procedural formality," id., to petitioner on his claim.

Since the trial court has no discretion to give any plenary consideration to this claim, petitioner's only forum for review is this Court.

A petition for writ of habeas corpus is thus the appropriate vehicle for review of this question. The writ of habeas corpus is a constitutionally guaranteed right. Article I, Section 13, Florida Constitution. A procedural rule allowing judgments to be collaterally attacked is not exclusive, nor does it suspend the Court's authority to issue writs of habeas corpus. See generally Roy v. Wainwright, 151 So.2d 825 (Fla. 1963). "The availability of an effective post-conviction remedy by motion constitutes no intrusion on the organic assurance of the availability of habeas corpus." Mitchell v. Wainwright, 155 So.2d 868 (Fla. 1963).

It is true that where a procedural post-conviction motion remedy does lie, that procedure must be followed before habeas corpus will be available. Id. However, where the procedural

rule does not provide a remedy, habeas corpus is appropriate. The post-conviction "procedure must be adequate and effective, for, if it is not, the remedy of habeas corpus may be employed." Dickens v. State, 165 So.2d 811 (Fla. 2d DCA 1964). The exception to the exclusivity of Fla. R. Crim. P. 3.850, recognized shortly after the enactment of the then "Rule 1," applies to the present claim: an application for writ of habeas corpus may be entertained despite the existence of a post-conviction rule, where "it shall appear that the remedy ... [under the rule] is inadequate and ineffective to test the legality of their conviction." State ex rel. Wilkins v. Sinclair, 162 So.2d 661, 662 (Fla. 1964).

Where this Court has held specifically that a trial court in proceedings under Rule 3.850 is powerless to grant any plenary consideration of the claim herein presented, there can be no dispute that the Rule 3.850 procedure is "inadequate and ineffective." If petitioner were to present this claim by way of a Rule 3.850 motion, the trial court would be required to summarily deny the claim with no evidentiary consideration. However, "the acknowledged purpose of Rule 1.850 [now 3.850] [is] to facilitate factual determinations." State v. Wooden, 246 So.2d 755, 756 (Fla. 1971). Since the very purpose of the rule is arbrogated by binding precedent, only habeas corpus proceedings are presently available to petitioner for this claim. Of course, were petitioner to be successful here in persuading this Court that a prima facie case has been presented, then the Rule 3.850 procedure would no longer be "inadequate and ineffective" and he could and would seek relief under that procedure.[8] Beyond these legalities, the scope of this claim makes it one that is most appropriate for resolution by the State's highest court as the ultimate leader of the justice system, and in that role the Court has a compelling interest in the fairness of the system it administers.

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[8] Alternatively, the Court could appoint the trial judge as a commissioner to hear the factual allegations presented by this petition. State v. Wooden, 246 So.2d at 756. This procedure would permit this Court to retain the ultimate resolution of this issue, while providing the Court with the facts necessary to make an informed decision.

There are several recent developments in the law that counsel for reevaluation of this Court's prior holdings on this question. First, the Eleventh Circuit Court of Appeals has rendered its decision in McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985) (en banc) setting forth new standards governing the evaluation of claims concerning the discriminatory application of the death penalty.[9] The intervention of these new standards caused the Eleventh Circuit to reconsider its holdings concerning the application of the death penalty in Florida. The court of appeals remanded a Florida case for reconsideration in light of McCleskey standards. Griffin v. Wainwright, 760 F.2d 1505, 1518 (11th Cir. 1985); cert. denied, 106 S.Ct. 1992, vacated on other grounds, 106 S.Ct. 1964 (1986).

The Supreme Court of the United States has granted certiorari to review McCleskey (see 106 S.Ct 3331 (order of July 7, 1986 granting certiorari)) and the Florida case of Hitchcock v. Wainwright, 106 S.Ct 2888 (June 9, 1986) (order granting certiorari).[10] Oral arguments are scheduled in these cases for October 15, 1986. Accordingly, the constitutional standards governing the discriminatory application of the death penalty are under active consideration by the Nations's highest court.

There is one further intervening decision that should inform the consideration of the present case. In Bazemore v. Friday, 106 S.Ct. 3000 (1986), an action under the federal Civil Rights Act concerning employment discrimination, the Court disapproved

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[9] These new standards disapprove of the reasoning of Spinkellink v. Wainwright, 578 F.2d 582, 605 (5th Cir. 1978) -- that the Supreme Court's finding of facial constitutionality of the Florida statute means that as a matter of law "the arbitrariness and capriciousness condemned in Furman have been conclusively removed" -- which, as we will show infra, lies at the base of this Court's rejection of the claim.

[10] The question presented by Hitchcock's certiorari petition is

> IV. Whether Mr. Hitchcock should be provided the opportunity to prove at an evidentiary hearing his claim that the death penalty is being arbitrarily applied in Florida on the basis of race and other impermissible factors in violation of the Eighth and Fourteenth Amendments especially in view of the new standards for evaluating such claims announced by the Court of Appeals?

See also 54 U.S.L.W. 3832 (summarizing certiorari issues).

of the lower court's treatment of multivariate or multiple regression statistical analysis. Id. at 3008-10. The lower court's view in Bazemore of statistical proof of discrimination was the same as the court of appeals in McCleskey and Hitchcock -- that to allege a prima facie claim of discrimination, multivariate analysis must account for all possible variables. This reasoning, by adoption, also has been the reasoning of this Court. See, e.g., Sullivan v. State, 441 So.2d 609, 614 (Fla. 1983). It is now apparent that such reasoning is erroneous.

Due to these recent developments in the law, this Court should reconsider its prior holdings as to this claim.[11] At least, the active consideration of the issue by the Supreme Court counsels for this Court to hold this case pending those decisions, for they will most certainly establish the constitutional principles governing the resolution of the claim presented here. This is so because this Court has relied upon the standards set by the federal courts in determining whether an evidentiary hearing is necessary. In an early case raising this claim of arbitrary application of the death penalty, though recognizing its appropriateness for post-conviction hearing, this Court ruled that under the court of appeals' rationale of Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), an insufficient preliminary showing had been made under constitutional standards to require an evidentiary hearing. Henry v. State, 377 So.2d 692 (Fla. 1979). Since that time, by citation and incorporation of prior opinions, this Court has continued to adhere to that reasoning. For example, in the recent decision in Harvard v. State, 486 So.2d 537 (Fla. 1986), the Court relied upon its prior decision in Sullivan v. State, 441 So.2d 609 (Fla. 1983). The Sullivan decision had in turn relied upon Spinkellink. Sullivan, 441 So.2d at 614 (also citing Henry v. State, supra). In its

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11 Petitioner acknowledges that these recent developments do not meet the "change of law" test set out in Witt v. State, 387 So.2d 922 (Fla. 1980) so as to require this Court to change its prior holdings. The developments are, however, significant enough in scope to permit this Court to revisit its prior rulings. Moreover, rulings by the Supreme Court in favor of McCleskey or Hitchcock would most certainly qualify to require reconsideration of the issue under the Witt test.

decision in Harvard, the Court also relied upon Adams v. State, 449 So.2d 819 (Fla. 1984) which relied in turn upon Sullivan. Accordingly, at bottom, the Florida resolution of this claim is based upon the federal court's reasoning in Spinkellink, and will depend for its resolution upon the constitutional standards to be considered by the Supreme Court in Hitchcock and McCleskey for the showing of a prima facie case.

The question to be resolved in this case is not whether Mr. Rose has proven discrimination in the application of the death penalty in Florida. Rather, the question at this stage of the proceedings is whether he has alleged a prima facie case. In post-conviction proceedings under Rule 3.850, the governing standard for a prima facie case is defined by the rule. A claim cannot be dismissed without evidentiary consideration unless allegations "conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850. The Florida standard for summary dismissal, which is based upon the federal standard,[12] is the same as that federal standard. Since the federal courts have defined the summary dismissal standards in more detail than have the courts of this state, it is appropriate to look to those standards for guidance. E.g. Roy v. Wainwright, supra. And under those standards, summary denial would be unwarranted. Mr. Rose sets out a prima facie case.

One of the remaining "badges and ... incidents of slavery," Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968), that still infects contemporary American society is the devaluation of the lives and rights of black people in relation to the lives and rights of white people. In the latter nineteenth and early twentieth centuries, the degradation of black people led to open tolerance for violence committed by whites against blacks. "With no legal or social restraints, white ruffians and sometimes ordinary citizens angered by some incident assaulted blacks without fear of reprisal." Shofner, Custom, Law, and History: The Enduring Influence of Florida's "Black Code", Fla. Hist. Q.

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[12] See, e.g., Roy v. Wainwright, 151 So.2d 825, 828 (Fla. 1963).

277, 291 (1977). Indeed, this was one of the evils that Congress sought to remedy when it enacted the Civil Rights Act of 1866 and the Ku Klux Klan Act of 1871. See Briscoe v. LaHue, 460 U.S. 325, 337-40 (1983) ("[i]t is clear from the legislative debates that, in the view of the [Ku Klux Klan] Act's sponsors, the victims of Klan outrages were deprived of 'equal protection of the laws' if the perpetrators systematically went unpunished").

Race discrimination in this form and in other forms "'still remain[s] a fact of life, in the administration of justice as in our society as a whole.'" Vasquez v. Hillery, ___U.S.___, 106 S.Ct. 617, 624 (1986) (quoting Rose v. Mitchell, 443 U.S. 545, 558-59 (1979)). As the allegations presented by this case demonstrate, it has continued to inform the decision to impose the death sentence for homicide in Florida. Society's most severe criminal sanction is still imposed -- as it historically has been -- significantly less often when the victim of the homicide is black than when the victim is white.

Had this Court's prior rejections of this claim in prior cases been on the basis of evidentiary hearings in the circuit courts, its rulings might have been unremarkable. However, its previous rulings were solely on the basis of the allegations set forth in the pleadings, for the claim has always been summarily denied.

Summary dispositions of this sort are allowed only in two circumstances: if, assuming the truth of the allegations, the petitioner is not legally entitled to relief;[13] or if the allegations are "wholly incredible."[14] Given the long-standing condemnation of racial discrimination in criminal proceedings, it is not likely that this Court has approved the summary dismissals of this claim on the basis of not being entitled to relief as a matter of law. Surely if the allegations are true -- that death sentences in Florida are imposed in significant part on the

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13 Rule 3.850, Fla. R. Crim. P. See also Machibroda v. United States, 368 U.S. 487, 495-96 (1962); Townsend v. Sain, 372 U.S. 293, 307, 312 (1963).

14 See Machibroda v. United States, 368 U.S. at 495-96; Blackledge v. Allison, 431 U.S. 63, 74, 76 (1977).

basis of racial considerations -- Mr. Rose is entitled to relief. See, e.g., Zant v. Stephens, 462 U.S. 862, 885 (1983); Rose v. Mitchell, 443 U.S. 545, 555 (1979); Gregg v. Georgia, 428 U.S. 153, 212 (1976) (White, J., concurring); Furman v. Georgia, 408 U.S. at 310 (Stewart, J., concurring); id. at 249-51 (Douglas, J., concurring); id. at 364-66 (Marshall, J., concurring).[15] Thus, this Court's previous approval of the summary dismissals of this claim must have been based upon a view that the "statistical study" relied on was wholly incredible.

In this light, the Court's prior rulings raise the following question for determination: Can the claim that there is systematic race-of-victim-based discrimination in the imposition of death sentences in Florida be summarily dismissed as "wholly incredible" when the statistical analysis alleged in support of the claim has shown a large race-based disparity, and to a significant extent, has "eliminate[d] the most common nondiscriminatory reasons" for it, Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981)?

Thus, the question presented here goes to the allegations necessary to state a prima facie case of discrimination, not to whether that case has been proved by a preponderance of the evidence in light of all the evidence adduced by both parties in an evidentiary hearing. Whether a claimant has stated a prima facie case depends solely upon the allegations made by the claimant. If the unrebutted allegations would permit a rational trier of fact to find discrimination, they are not "wholly incredible" and must be considered in the adversarial testing process of an evidentiary hearing. Burdine, 450 U.S. at 254 n. 7 ("[t]he phrase 'prima facie case' ... describe[s] the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue"). In contrast, whether a claimant has proved discrimination by a preponderance of the evidence in such

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15 Just last Term, the Supreme Court emphasized that the Constitution cannot tolerate even the "risk of racial prejudice infecting a capital sentencing proceeding...." Turner v. Murray, ___U.S.___, 106 S.Ct. 1683, 1688 (1986) (emphasis supplied).

a hearing "will depend in a given case on the factual context of each case in light of all the evidence presented by both the [claimant] and the [respondent]." Bazemore v. Friday, 106 S.Ct. at 3009.

In the remainder of his brief, Mr. Rose will discuss the allegations presented in support of his claim and will then show why these allegations must not be dismissed without appropriate evidentiary consideration. In the Appendix to this petition Mr. Rose has set out the specific allegations upon which he relies and asserts his claim. App. 27a.

A. Mr. Rose's Prima Facie Case: The Statistical Analysis Alleged In Support Of His Claim

In support of his claim Mr. Rose presents, among other studies, the findings of a multivariate statistical analysis conducted by Professor Samuel Gross and Professor Robert Mauro.[16] Comparing the data reported to the FBI by local police agencies concerning all homicides in Florida and seven other states[17] between 1976 and 1980, with similar data concerning the homicides during this period for which death sentences were imposed, Professors Gross and Mauro examined the effects of eight independent variables upon the sentencing outcomes of all homicides during this five-year period.[18]

Initially, Gross and Mauro found that 43.3% of the victims of homicide in Florida during this period (1683 out of 3486) were black, but only 10.9% of the death sentences (14 out of 128) were imposed for black-victim homicides. Id. at 55. To determine whether non-racial factors might explain this extreme race-based

16 Gross & Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization, 37 Stan. L. Rev. 27 (Nov. 1984).

17 The other states were Arkansas, Georgia, Illinois, Mississippi, North Carolina, Oklahoma, and Virginia. 37 Stan. L. Rev. at 49.

18 The data concerning all homicides was collected from Supplementary Homicide Reports that are filed with the FBI by local police agencies, and the data concerning homicides for which the death sentence was imposed was collected from Death Row U.S.A., published by the NAACP Legal Defense and Educational Fund. 37 Stan. L. Rev. at 49-50. The process by which the researchers matched the homicides as reported to the FBI with the homicides for which death sentences were imposed is described at 50-54.

disparity, Gross and Mauro examined eight factors for their individual and cumulative impact on the death sentencing determination: (1) the race of the defendant; (2) the race of the victim; (3) the commission of the homicide in the course of a felony; (4) the relationship of the offender and victim (stranger or non-stranger); (5) the killing of multiple victims; (6) the killing of a female victim; (7) the use of a gun; and (8) the location of the homicide (urban or rural). Id. at 49-66.[19] They found that five of these factors had a "strong aggregate effect" on the likelihood that a death sentence would be imposed: the commission of a homicide in the course of another felony, the killing of a stranger, the killing of multiple victims, the killing of a white victim, and the commission of the homicide by a black suspect. Id. at 55-56.[20]

Because the three non-racial factors were so highly correlated with death sentences, Gross and Mauro explored whether any of these factors individually might explain the striking disparity in sentencing which appeared to occur because of the race of the suspect and victim. None did. Even when a non-racial factor highly associated with capital sentencing was present, the homicides which, in addition, involved white victims or both black suspects and white victims, were much more likely to result in death sentences. Id. at 56-61.[21]

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19 These factors were identified because they are the subject of the FBI's Supplementary Homicide Reports. Id. at 49.

20 While the raw data showed that white homicide suspects were, on the whole, about twice as likely to be sentenced to death as black suspects, "the relationship between the suspect's race and the likelihood of a death sentence appears to be due entirely to the fact that black suspects were more likely to kill black victims and white suspects were more likely to kill white victims. Indeed, when we control for the race of the victim, blacks who killed whites were several times more likely to be sentenced to death than whites who killed whites in each state." Id. at 55-56.

21 There was one exception to this finding with respect to the race of the suspect. "Controlling for both race of the suspect and felony circumstance does not dilute the capital sentencing disparities by race of victim but it does change the race-of-suspect pattern[:]... there are no substantial differences in capital sentencing rates between blacks who kill whites and whites who kill whites [in the course of committing a felony] in Florida." Id. at 57-58.

In order to determine whether the racial disparities might be explained by a combination of the highly predictive, non-racial aggravating factors acting together, Gross and Mauro undertook two additional investigative steps involving multivariate analysis. Id. at 66-69. First, they examined for the cumulative effect of these variables by using a "scale of aggravation." See id. at 70-75 (categorizing all homicide cases by number of major aggravating factors present -- 0, 1, or 2-3). While this analytical step explained away the race-of-suspect disparity, the race-of-victim disparity persisted just as strongly.[22] Gross' and Mauro's findings on the "scale of aggravation" were also of extraordinarily high statistical significance. Id. at 74.[23] Second, they undertook a multiple regression analysis of the known variables affecting a Florida capital sentencing decision. Id. at 75-83.[24] Through this analysis, Gross and Mauro found, as well,

> large and statistically significant race-of-victim effects on capital sentencing in ... Florida.... After controlling for the effects of all of the other variables in our data set,

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22 "Controlling for level of aggravation ... essentially eliminates any independent race-of-suspect effect. [The data] reveal[] only small and inconsistent differences in death sentencing rates between blacks who killed whites and whites who killed whites, at each level of aggravation." Id. at 71.

23 Gross and Mauro report the overall level of statistical significance as $p < .001$, and explain the concept of statistical significance (in terms of the "p-value") and the meaning of it at 71 n.118. While the Court is familiar with the meaning of statistical significance, its prior decisions have discussed significance in terms of "two or three standard deviations." See, e.g., Castaneda v. Partida, 430 U.S. 482, 496-97 n. 17 (1977)("As a general rule for ... large samples, if the difference between the expected value and the observed number is greater than two or three standard deviations," that difference can be properly deemed not due to chance but instead to the operation of the factor tested for). Professors Baldus and Cole have explained that a rule requiring two or three standard devitions "is essentially equivalent to a rule requiring significance [in terms of "p-value"] at a level in the range below 0.05 or 0.01." D. Baldus & J. Cole, Statistical Proof of Discrimination 295-97 (1980). Thus the overall level of statistical significance reported by Gross and Mauro for the "scale of aggravation" analysis, $p < .001$, is ten times stronger than the level of significance required by the Court in Castaneda to support an inference of discrimination.

24 See generally Bazemore v. Friday, 106 S.Ct. at 3008-3009 (explaining that multiple regression analysis is an appropriate evidentiary tool for the proof of discrimination because of its capacity to account for nondiscriminatory factors that might explain racially disparate results).

> the killing of a white victim increased the odds of a death sentence by an estimated factor of ... about five in Florida....

Id. at 83 (emphasis supplied).[25]

To determine whether appellate review may have resulted in a correction of the wide racial disparities found at the trial level, Gross and Mauro also analyzed the racial patterns of death sentences affirmed by this Court compared to the racial patterns of all homicides, controlling in the process for the most predictive non-racial aggravating factors. They found that the disparity between white-victim death sentences and black-victim death sentences persisted at a ratio of six to one (2.2% to 0.4%) and could not be explained by any of the non-racial predictors of capital sentencing. Id. at 90.

Before reaching their conclusions on the basis of these findings, Gross and Mauro undertook two additional steps of analysis. First they considered whether information not included in their data might explain the racial disparities on non-racial grounds. In this regard, they reasoned that in order for an omitted variable to change the findings to any significant degree, the variable would have to meet three conditions: "(1) it must be correlated with the victim's race; (2) it must be correlated with capital sentencing; and (3) its correlation with capital sentencing must not be explainable by the effects of the variables that are already included in our analysis." Id. at 100. After analyzing several omitted variables in relation to these conditions,[26] they concluded: "[W]e are aware of no

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[25] As Gross and Mauro explained, "In multiple regression, the coefficients of the independent variables are estimates of the size of the effects of these variables on the outcome variable.... [T]hese coefficients can be re-expressed in a more accessible form -- as multipliers of the odds of the outcome.... [Thus,] [i]n Florida the overall odds of an offender receiving the death penalty for killing a white victim were 4.8 times greater than for killing a black victim." Id. at 77-79 (emphasis supplied). The statistical significance for the results of this regression analysis was also $p < .001$, again, ten times stronger than the Castaneda threshold. See n. 23 , supra.

[26] These included the strength of the evidence of the defendant's guilt and the criminal record of the defendant. Id. at 101.

plausible [omitted variable] that might explain the observed racial patterns in capital sentencing in legitimate nondiscriminatory terms." Id. at 102.

Second, Gross and Mauro considered the findings of other research in order to assess the validity of their findings. They concluded that the findings of other research conducted in Florida "closely parallel" their findings showing a sizable race-of-victim-based disparity in capital sentencing. Id. at 102.[27] Further, the findings of other research confirm "that the racial patterns in capital sentencing that we have observed from 1976 through 1980 have been stable phenomena in ... Florida ...." Id.[28]

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[27] Gross and Mauro here cite to Bowers & Pierce, Arbitrariness and Discrimination Under Post-Furman Capital Statutes, 26 Crime & Delinq. 563 (1980). 37 Stan. L. Rev. at 102. However, their earlier discussion of four other Florida studies, id. at 43-44, shows that the findings of other researchers as well were identical concerning the race-of-victim effect on capital sentencing decisions. See Note, Discrimination and Arbitrariness in Capital Punishment: An Analysis of Post-Furman Murder Cases in Dade County, Florida, 1973-1976, 33 Stan. L. Rev. 75 (1980); Zeisel, Race Bias in the Administration of the Death Penalty: The Florida Experience, 95 Harv. L. Rev. 456 (1981); Radelet, Racial Characteristics and the Imposition of the Death Penalty, 46 Am. Soc. Rev. 918 (1981); Radelet & Pierce, Race and Prosecutorial Discretion in Homicide Cases [now published at 19 Law & Soc. Rev. 587 (1985)]. While not cited by Gross and Mauro, three other studies have found the same racial effects. See Foley, The Effect of Race on the Imposition of the Death Penalty (paper presented to syposium of the American Psychological Association, September 1979); Foley & Powell, The Discretion of Prosecutors, Judges, and Juries in Capital Cases, 7 Crim. Just. J. 16 (1982); Bowers, The Pervasiveness of Arbitrariness and Discrimination Under Post-Furman Capital Statutes, 74 J. Crim. L. & Criminology 1067 (1983).

[28] This is so because the data analyzed in all of the other studies (except the Arkin study, 33 Stan. L. Rev. 75) was for the period 1972-1978 and was collected through a different process than that utilized by Gross and Mauro: It was collected by a field investigation method similar to that employed by Professor Baldus in Georgia. See Radelet & Pierce, supra, 19 Law & Soc. Rev. at 595-96. The process of data collection and the kind of data collected were described in Foley & Powell, supra, 7 Crim. Just. Rev. at 17-18:

> The information was gathered from court records by law students using a standard form. The data consisted of demographic information on the offender and victim, information concerning the offense, and information concerning the trial and its outcome. The demographic information consisted of: age, race, sex, education (of defendant and victim), occupation (of defendant and victim -- unemployed, illegal occupation, unskilled, skilled, or professional), and prior convictions of defendant (none, misdemeanors, felony). Information collected on the offense included: crime as

With respect to research conducted in Georgia and Mississippi, Gross and Mauro found not only further confirmation of their findings, but more significantly, strong confirmation of the validity of their analytical methodology. The Baldus study in Georgia and the Berk study in Mississippi considered many more sentencing variables than Gross' and Mauro's study -- "as many variables as one could ever hope to collect [information on] in a study of sentencing practices." Id. at 104-105. Since the major question concerning the validity of their study was the impact of omitted variables, Gross and Mauro believed it crucial to examine the effects on racial disparities of the inclusion of variables they could not take into account. Because Gross' and Mauro's study had also focused upon Georgia and Mississippi, the studies by Baldus and Berk in those two states provided the opportunity. In comparing their findings in Georgia and Mississippi to the findings of Baldus and Berk, Gross and Mauro noted

> two important facts: (1) The race-of-victim coefficient remains statistically significant regardless of the other variables included in the equations. (2) After controlling for the variables in our study, the introduction of any number of additional control variables either has little impact on the magnitude of the race-of-victim effect, or else it increases the size of the race-of-victim disparities.

Id. at 104; see also id. at 104-05. Accordingly, Gross and Mauro concluded that

> the consistency between the Baldus and Berk findings and our own ... validates our methodology.... The major potential problem with our study is the impact of omitted variables; the Baldus study indicates that given the variables

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charged (every case studied was an indictment for first degree murder), additional offenses (whether or not there were any accomplices), county, and circumstances of the crime (spouse on spouse, parent on child, victim is other member of family, argument over money, argument while drinking, lovers quarrel, quarrel with someone other than lover, felony, possible felony), relationship between the defendant and victim (relative; lover; ex-spouse; estranged spouse or ex-lover; lover of spouse, ex-spouse, or present lover; friend; acquaintance; none), and weapons used (firearms, knives, other weapon, or hands). Information on the trial included: whether the trial was held or charges were dismissed, whether defendant pleaded guilty or not guilty, type of attorney (public defender, court appointed, or private), sentence recommended by jury, and sentence given by the judge.

> that are reported in our data and analyzed in this article, it is unnecessary to our conclusion to control for other variables which are missing.

Id. at 105.[29]

On the basis of these analytical steps, Gross and Mauro concluded that "[t]he major factual finding of this study is simple: There has been racial discrimination in the imposition of the death penalty under [Florida's] post-Furman statute[].... The discrimination that we found is based on the race of the victim, and it is a remarkably stable and consistent phenomenon.... Id. at 105.

B. The Allegations Set Forth In Support Of Mr. Rose's Claim Are Not "Wholly Incredible" And Thus Are Not Subject To Summary Dismissal

A claim supported by factual allegations which, if proved, would establish the right to relief, may nevertheless be dismissed summarily if those allegations are "wholly incredible," Blackledge v. Allison, 431 U.S. at 74. "The critical question is whether [the] allegations, when viewed against the record ... [are] so 'palpably incredible,' ... so 'patently frivolous or false,'... as to warrant summary dismissal." Id. at 76 (citations omitted). Factual allegations are not wholly incredible under this test simply because they may appear "improbable." Machibroda v. United States, 368 U.S. at 495-96. Thus, if "the specific and detailed factual assertions of the petitioner, while improbable, cannot at this juncture be said to be incredible," id. at 496, the claim which rests upon those allegations must receive appropriate evidentiary consideration.

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29 To a lesser extent than the Baldus and Berk studies, but still to a significant extent, studies by Foley and Powell (1982) and Bowers (1983), see n.27 , supra, lend further corroboration to the Gross-Mauro methodology for these same reasons. Because the Foley-Powell and Bowers studies utilized field investigation to collect data, see n. 28 , supra, these studies analyzed the effects of more independent variables -- fourteen in the Foley-Powell study, 7 Crim. J. Rev. at 18, and seventeen in the Bowers study, 74 J. Crim. L. & Criminology at 1072-73 -- yet still found sizable race-of-victim disparities in capital sentencing. Foley & Powell, at 19, 21; Bowers, at 1074, 1080, 1085.

When fairly considered, Mr. Rose's claim, based upon the Gross-Mauro study and other studies of Florida capital sentencing decisions, cannot be found "wholly incredible."

If discrimination can be shown by statistical evidence, a claimant's allegations must be "sufficient" in two respects in order to survive summary dismissal. First, the allegations must reveal racial disparities of a sufficient magnitude to permit the factfinder to infer that race has been a consideration in the imposition of death sentences. Second, the petitioner's allegations must sufficiently eliminate the potential nondiscriminatory reasons for the racial disparities to permit the factfinder to infer that the disparities are "unexplainable on grounds other than race," Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266 (1977). While significant racial disparities alone would be enough in some circumstances to permit the inference of discrimination, id. at 266 & n.13, these circumstances have been limited to cases involving "stark" disparities like those presented in Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 1073 (1886) (ordinance excluding 100% of Chinese citizens and 0% of non-Chinese citizens from further conduct of laundry business) and Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960) (statute redefining the boundaries of Tuskegee, Alabama to "remove from the city all save four or five of its 400 Negro voters while not removing a single white voter"), and to jury composition cases which, though involving less extreme disparities, permit an inference of discrimination "[b]ecause of the nature of the jury-selection task...." Village of Arlington Heights, 429 U.S. at 266 n.13. Neither of these circumstances is presented here, for the disparities are not as stark as those in Yick Wo or Gomillion,[30] and the jury selection task is far simpler than the capital sentencing task.[31] Accordingly, "a

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[30] In comparison to those cases, where the disparities were or nearly were 100 percentage points, the racial disparity in Florida's capital sentencing decisions is 32.4 percentage points (43.3% of homicide victims are black but only 10.9% of all the death sentences imposed are for black-victim homicides).

[31] See Gross, Race and Death: The Judicial Evaluation of Evidence of Discrimination in Capital Sentencing, 18 U.C.D.

litigant who wishes to prove racial discrimination in sentencing must also show that plausible nonracial factors do not explain any apparent racial disparity." Gross, 18 U.C.D. L. Rev. at 1310.

Mr. Rose's allegations reveal that the magnitude of the race-based disparity in capital sentencing in Florida is virtually identical to the magnitude of the disparity in Georgia. After multiple regression analysis of the Florida data, Gross and Mauro found that the likelihood of receiving a death sentence in Florida for killing a white victim was 4.8 times greater than for killing a black victim. Using the same methodology, Baldus found a 4.3 times greater likelihood of death for killing a white victim in Georgia. McCleskey v. Kemp, 753 F.2d at 897.[32]

While the statistical analysis must "eliminate[] the most common nondiscriminatory reasons" for the racial disparity, Texas Department of Community Affairs v. Burdine, 450 U.S. at 254 (emphasis supplied), it is not required to eliminate every conceivable reason -- either for the claimant to survive summary dismissal or for the claimant to prevail in an evidentiary hearing. See also Bazemore v. Friday, 106 S.Ct. at 3009. That there may be "many [other] factors go[ing] into" the allegedly discriminatory decisions does not defeat the prima facie case if it is otherwise sufficient to permit an inference of discrimination. Id. at 3010 n.14. While respondents may defend against a prima facie case on this basis in an evidentiary hearing, they cannot defeat it by simply "declar[ing] ... that many [other] factors go into" the decisions. Id. Rather, they must "demonstrate that when these [other] factors [are] properly organized and accounted for there [is] no significant disparity...." Id. (emphasis supplied). Accordingly, if the claimant's statistical

L. Rev. 1275, 1309-1310 (1985) (explaining why racial disparity alone can permit the inference of discrimination in jury-selection cases, since "no criteria other than eligibility are supposed to be considered," and in contrast, why racial disparity alone cannot permit a similar inference in capital cases, since "many factors are supposed to be considered in sentencing").

32 The method for computing this expression of "odds" is described by Gross and Mauro, supra, 37 Stan. L. Rev. at 77.

analysis eliminates the most common nondiscriminatory explanations for discrimination, he or she is entitled to proceed to an evidentiary hearing, where all of the nondiscriminatory explanations deemed relevant by the parties can be presented, and in light of both parties' analyses, the trier of fact can determine whether "it is more likely than not that impermissible discrimination exists...." Id. at 3009.[33]

Mr. Rose's allegations plainly meet these threshold requirements. The studies by Gross and Mauro and other Florida researchers have explicitly taken into account the "most common" nondiscriminatory reasons for capital sentencing disparities based on race. As Gross and Mauro found, killing during the commission of a felony, killing multiple victims, and killing a stranger are all nondiscriminatory factors highly predictive of -- that is, among the most common reasons for -- a death sentence. Yet when these factors are taken into account, the likelihood of a defendant receiving the death sentence remains almost five times greater if the victim is white instead of black.[34]

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33 Of course, the State has never been required to make such a showing, since there has never been an evidentiary hearing in the state (or federal) courts on this claim of discrimination. This Court has consistently held, as with similar allegations predating the Gross-Mauro study, see n. 7 , supra, that this study "do[es] not constitute a sufficient preliminary factual basis to state a cognizable claim" since being first presented with it in Sullivan v. State, 441 So.2d 609, 614 (Fla. 1983). See Adams v. State, 449 So.2d 819, 820-21 (Fla. 1984); Ford v. Wainwright, 451 So.2d 471, 474-75 (Fla. 1984); Jackson v. State, 452 So.2d 533, 536 (Fla. 1984); State v. Washington, 453 So.2d 389, 391-92 (Fla. 1984); Dobbert v. State, 456 So.2d 424, 429 (Fla. 1984); State v. Henry, 456 So.2d 466, 468 (Fla. 1984); Smith v. State, 457 So.2d 1380, 1381 (Fla. 1984); Sireci v. State, 469 So.2d 119, 120 (Fla. 1985); Bundy v. State, ___ So.2d ___, 11 F.L.W. 294 (Fla. 1986).

34 It should be noted as well that Gross' and Mauro's accounting for the relationship between the defendant and the victim has eliminated two of the four factors presented by the State of Florida, in Spinkellink v. Wainwright, supra, as the nondiscriminatory reasons for the race-of-victim disparity in Florida's capital sentencing decisions. "As a general rule, the State contended, murders involving black victims have not presented facts and circumstances appropriate for imposition of the death penalty ... [,] [such murders] hav[ing] in the past fallen into the category of 'family quarrels, lovers quarrels, liquor quarrels, [and] barroom quarrels.'" 578 F.2d at 612 & n.37. Taking into account only homicides in which the defendant and the victim were strangers, however -- thus eliminating homicides arising from family quarrels or lovers' quarrels -- Gross and Mauro found that even in such circum-

Moreover, the capital sentencing studies in Georgia and Mississippi by Baldus and Berk -- which have eliminated all or virtually all of the potential nondiscriminatory reasons for racial disparities in capital sentencing -- and the capital sentencing studies in Florida undertaken by Foley, Powell, and Bowers -- which have eliminated potential nondiscriminatory reasons for these racial disparities in addition to those eliminated by Gross and Mauro -- have led to identical findings concerning race-of-victim disparities. The disparities found by Gross and Mauro in Georgia, Mississippi, and Florida have not been reduced or explained when additional explanatory factors have been taken into account. Thus, it is reasonable to infer, as Gross and Mauro have, that their Florida study is just as valid an assessment of sentencing decisions.

Having demonstrated racial discrimination of an unconstitutional magnitude and having eliminated the most common nondiscriminatory factors that might explain away the racial disparities in Florida's capital sentencing decisions, Mr. Rose's proffered statistics manifestly permit an inference of discrimination. Nothing more can be or should be required in order for a post-conviction claim to survive summary dismissal. There is, however, an additional compelling reason for this conclusion in Mr. Rose's case: the "unique opportunity for racial prejudice to operate but remain undetected" in capital sentencing proceedings. Turner v. Murray, 106 S.Ct. at 1687.

As the Supreme Court recognized in Turner, "[b]ecause of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected." Id. Since "[t]he risk of racial prejudice infecting a capital sentencing proceeding is especially

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stances, a death sentence was five times more likely to be imposed when the victim was white instead of black.

When Foley and Powell, and thereafter Bowers, controlled for the other two nondiscriminatory factors urged by the State -- "liquor quarrels and barroom quarrels" -- the race-of-victim disparities remained and were just as sizable. See Foley and Powell, n. 27, supra, at 18-22; Bowers, n. 27, supra, at 1073-75, 1078-81, 1083-86.

serious in light of the complete finality of the death sentence," id. at 1688, the Court was unwilling to tolerate that risk in a capital sentencing proceeding, even though it has been willing to tolerate it to a limited extent in non-capital trials. Id. at 1688 n.8 (distinguishing Ristaino v. Ross, 424 U.S. 589 (1976)).

What is shown starkly by Mr. Rose's allegations is a far greater "risk of racial prejudice influencing ... capital sentencing proceeding[s]" than was shown in Turner. The only showing of this risk in Turner was that the defendant was black and the victim white. Id. at 1694-95 (Powell, J., dissenting).[35] Here, in contrast, there are substantial and detailed factual allegations showing not only a greater risk of racial prejudice affecting capital sentencing, but also an actual, measurable (and measured) effect of racial prejudice upon capital sentencing proceedings during the very period within which Mr. Hitchcock was tried and sentenced.

The teaching of Turner is plain in relation to Mr. Rose's claim. Because of the unique opportunity for racial prejudice to operate in capital sentencing proceedings, as well as the unique seriousness of its operation in this context, the Constitution requires greater attentiveness to the risk that racial prejudice may have been a factor in capital sentencing determinations. Where, as here, a methodologically-sound statistical analysis has found marked and systematic racial effects upon capital sentencing decisions, the claim drawn from that analysis is at least entitled to evidentiary consideration.

For these reasons, the denial of Mr. Rose's claim without evidentiary consideration would be improper.

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[35] Indeed Justice Powell indicated that the demonstration of this risk would have been stronger had Turner presented studies -- apparently similar to the Gross-Mauro study -- "purport[ing] to show that a black defendant who murders a white person is more likely to receive the death penalty than other capital defendants ... in Virginia." Id.

C. Conclusion: The Enduring Influence Of Race Discrimination

Among southern states, Florida has been extreme in its degradation of black people. Its approval of and reliance upon slavery, resistance to Reconstruction, devotion to white supremacy, enactment of Black Codes and innumerable other discriminatory statutes, and resistance well into the mid-years of this century to eradicating the badges and incidents of slavery, are well-documented. See, e.g., Shofner, Custom, Law, and History: The Enduring Influence of Florida's "Black Code", Fla. Hist. Q. 277 (Jan. 1977) (focusing upon this history between 1865 and 1965); Vandiver, Race, Clemency, and Executions in Florida: 1924-1966 (Dec. 1983) (Unpublished Master's Thesis, Florida State University).[36]

A persistent feature of this heritage has been official approval of and tolerance for violence against black people. As described by Professor Shofner, this method of subjugating black people became "firmly entrenched" after the failure of Reconstruction.

> As the possibility of United States intervention diminished in the 1880's and the doctrine of white supremacy became more firmly entrenched, violence as a means of repressing blacks increased. The brutal Savage-James lynching at Madison in 1882 went without serious investigation. Another in Jefferson County in 1888 resulted in the arrest of five white men, but all of them were acquitted by all-white juries. Two especially repugnant lynchings in the mid-1890's led Governor William D. Bloxham to deplore the practice in his 1897 inaugural address, but he offered no remedy. The praise of white supremacy and persistent reminders of its alternatives from prominent men perpetuated a climate of tolerance for violence by whites against blacks.

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36 See also McLaughlin v. Florida, 379 U.S. 184 (1964) (state statute prohibiting interracial cohabitation); Debra P. v. Turlington, 474 F. Supp 244, 251 & n.13 (M.D. Fla. 1979), aff'd in pertinent part, 644 F.2d 397, 407 & n.15 (5th Cir. 1981) (history of school segregation); Walker v. Ford Motor Co., 684 F.2d 1355, 1359 (11th Cir. 1982) (racial slurs); Robinson v. Florida, 345 F.2d 133 (5th Cir. 1965) (state statute authorizing arrest of persons seeking service at "whites only" establishments); Baker v. City of St. Petersburg, 400 F.2d 294 (5th Cir. 1968) (discrimination in classifications of police officers); Dowdell v. City of Apopka, 698 F.2d 1181, 1184-86 (11th Cir. 1983) (municipal services); State of Florida, ex rel. Hawkins v. Board of Control, 93 So.2d 354 (Fla. 1957) (admission to law school); Jones v. City of Sarasota, 89 So.2d 346 (Fla. 1956) (licensing).

Shofner, Fla. Hist. Q. at 288.

In light of this legacy, the allegations made by Mr. Rose must be taken as substantial indicia of the continuing effects of a way of life that is now universally condemned but not totally eradicated. The manifest commitment of the Constitution to "eradicat[ing] the last vestiges of a society half slave and half free," Jones v. Alfred H. Mayer Co., 392 U.S. at 441 n. 78, demands that these allegations be heard and be heard fairly.

POINT III

MR. ROSE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL

Present counsel for Mr. Rose are disabled from independently evaluating, presenting or arguing a claim regarding the ineffective assistance of counsel on appeal due to a "hopeless conflict of interest which precludes ... representation," Adams v. State, 380 So.2d 421, 422 (Fla. 1980), since present counsel also represented Mr. Rose in his appeals. The issue is presented here, to establish that Mr. Rose does not waive any questions regarding the effectiveness of his counsel's representation on appeal by the filing of the present petition. Mr. Rose previously presented this question in his "Application for Stay of Execution to Permit Determination of and Orderly Transition of Counsel" filed in this Court on August 19, 1986. That application was denied on August 21, 1986 for want of jurisdiction since no substantive action had been filed. Mr. Rose by separate application filed herewith is renewing his previous application on the basis of jurisdiction now invoked by the filing of this petition. To demonstrate to this Court that a claim of ineffective appellate representation is at least colorable and warranting further analysis, we will set out possible issues that could have been presented on appeal but were not presented:

1. The jury was permitted to separate overnight after beginning its deliberations on guilt or innocence. This issue was previously discussed at pages 5-6 of his Application for Stay filed August 19, 1986 and will not be detailed again here. To that discussion can be added that any objection by counsel would

have been futile because, during voir dire, the trial judge told the jury that he would not under any circumstances sequester the jury once it had begun deliberations. OR 1606. Also, there is no indication from the record that Mr. Rose was personally present when the jury was permitted to separate.[37] To answer a contention made by the State in response to the stay application, the record does not indicate that counsel agreed to permit the jury to separate overnight. The record indicates only that counsel agreed to not having the proceedings reported. OR 1273. While inferences can be drawn by the State, its flat statement regarding the record was incorrect.

2. During the resentencing trial, the trial judge told prospective jurors of this Court's affirmance of guilt and reversal of the death sentence on a technical "instructional" error, and implied that he did not agree with the Court's disposition. R 96. Defense counsel objected, R 96-97, but the judge's instruction could not cure the error. The judge later agreed that the jury knew of Mr. Rose's previous death sentence. R 822. The jury was thus told, before hearing any evidence: (a) the other jury which had heard the evidence found Mr. Rose guilty of murder and kidnapping, findings the jurors could not question; (b) nonrecord information of the previous death recommendation (though not of the close vote) and that the trial judge had previously sentenced Mr. Rose to death; (c) that any errors that were made were subjected to close scrutiny on appeal, and that this Court had vacated the previously imposed death sentence only because of an "instructional" error; and (d) the judge was displeased with the reversal. Such information was improper under the Eighth Amendment principles of <u>Caldwell v. Mississippi</u>, 105 S.Ct 2633 (1985).

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[37] Newspaper articles of the first trial, wherein the jury had also been permitted to separate during deliberations, indicate that Mr. Rose was <u>not</u> present when that separation occurred at the first trial. App. 21a. That it occurred at the first trial could also be colorable evidence that it happened here.

3. During the jury selection proceedings for the resentencing trial, two prospective jurors were questioned outside of Mr. Rose's presence, and were ultimately excused. R 112-15, 205-207. There is no record of a waiver by Mr. Rose of his right to be present. The denial of a capital defendant's right to be present without an affirmative waiver(or subsequent ratification) constitutes fundamental error. Francis v. State, 413 So.2d 1175 (Fla. 1982); Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982), modified on reh., 706 F.2d 311 (1983).

CONCLUSION

For the foregoing reasons, Mr. Rose respectfully requests this Honorable Court to issue its Writ of Habeas Corpus granting relief as follows:

1. Directing transcription of the jury trial proceedings held in this cause in March, 1977, in the Seventeenth Judicial Circuit of Florida, In and For Broward County;

2. Vacating the Court's prior decision on the direct appeal of this cause, and permitting Mr. Rose to present his appeal upon the record of his first jury trial;

3. With regard to Point II, concerning the discriminatory application of the death penalty, this Court should remand the claim to the trial court for plenary evidentiary consideration; and

4. Grant such further relief as the justice of the cause required.

Respectfully Submitted,

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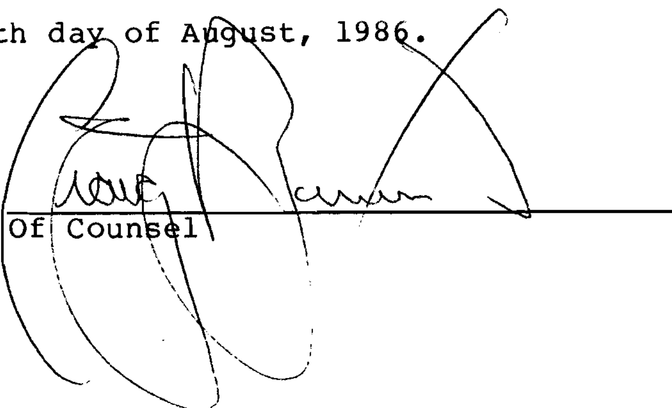
BY
Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been hand delivered to RICHARD BARTMON, Assistant Attorney General, Elisha Newton Dimick Building, Room 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, this 25th day of August, 1986.



Of Counsel