IN THE SUPREME COURT OF FLORIDA

NO. _____

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CLARENCE JONES,

Petitioner,

v.

MICHAEL W. MOORE, Secretary,
Department of Corrections, State of Florida,

Respondent.

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PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

This is Mr. Jones' first habeas corpus petition in this Court. Art. 1, Sec. 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Fifth, Sixth, Eighth and Fourteenth amendments to the United States Constitution, claims demonstrating that Mr. Jones was deprived of the effective assistance of counsel on direct appeal, that the proceedings resulting in his conviction and death sentence violated fundamental constitutional imperatives, and that his death sentence is neither fair, reliable, nor individualized.

JURISDICTION TO ENTERTAIN PETITION AND TO GRANT HABEAS CORPUS RELIEF

This is an original action under Fla. R. App. P. 9.100(a). See Art. 1, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents constitutional issues which directly concern the judgment of this Court during Mr. Jones' direct appeal.

This Court has consistently maintained an especially vigilant control over capital cases, exercising a special scope of review, see Elledge v. State, 346 So. 2d 998, 1002 (Fla. 1977); Wilson v. Wainwright, 474 So. 2d 1162 (Fla. 1985), and has

not hesitated in exercising its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital trial and sentencing proceedings. Jurisdiction in this action lies in this Court, see, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Jones' direct appeal. See Wilson, 474 So. 2d at 1163; Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969). A petition for a writ of habeas corpus is the proper means for Mr. Jones to raise the claims presented herein. See, e.g., Way v. Dugger, 568 So. 2d 1263 (Fla. 1990); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Wilson, 474 So. 2d at 1162.

This Court has the inherent power to do justice. The ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. The petition pleads claims involving fundamental constitutional error. See Dallas v. Wainwright, 175 So. 2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So. 2d 362 (Fla. 1984). The Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action.

PROCEDURAL HISTORY

On July 28, 1988, Clarence Jones was indicted in the Circuit Court of the Second Judicial Circuit, Leon County, Florida, for first degree murder, attempted first degree murder, robbery with a firearm, burglary of a dwelling with a firearm, and armed kidnapping (R. 1-3).[1] The armed kidnapping count was later nol prossed, and Mr. Jones was charged by information with aggravated assault (R. 458). Mr. Jones pled not guilty (R. 17).

Mr. Jones was tried by a jury. On September 22, 1989, the jury found Mr. Jones guilty on all charges (R. 128-33). On September 25, 1989, the jury recommended a death sentence by a vote of 11 to 1 for the first-degree murder conviction (R. 161). On September 26, 1989, the court imposed a death sentence as to the first-degree murder conviction and also sentenced Mr. Jones to three consecutive life terms, plus five years (R. 183-90).

On direct appeal, this Court affirmed Mr. Jones' convictions and sentences. Jones v. State, 580 So. 2d 143 (Fla. 1991) (Jones I). Mr. Jones filed a petition for writ of certiorari in the United States Supreme Court, which denied the petition on October 7, 1991. Jones v. Florida, 112 S. Ct. 221 (1991).

Mr. Jones filed a motion for post-conviction relief under Fla. R. Crim. P. 3.850 in the circuit court. After an evidentiary hearing, that court denied relief. On appeal, this

[1]"R. [page number]" refers to the record on direct appeal in this Court.

Court affirmed the denial of relief. Jones v. State, 732 So. 2d 313 (Fla. 1999) (Jones II).

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Jones asserts that his convictions and sentences were obtained and then affirmed during the Court's appellate review process in violation of his rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

CLAIM I

MR. JONES WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL TO THE FLORIDA SUPREME COURT AS REQUIRED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I §§ 9, 16(a) AND 17 OF THE CONSTITUTION OF THE STATE OF FLORIDA.

Mr. Jones' direct appeal was marked by a total lack of advocacy on the part of direct appeal counsel. The lack of appellate advocacy on Mr. Jones' behalf is identical to the lack of advocacy present in other cases in which this Court has granted habeas corpus relief. Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985). Counsel's written and oral presentations on direct appeal, along with the meritorious issues which were not presented, demonstrate that his representation of Mr. Jones involved "serious and substantial deficiencies." Fitzpatrick v.

Wainwright, 490 So.2d 938, 940 (Fla. 1986).[2]

The issues which appellate counsel neglected demonstrate that counsel's performance was deficient and that the deficiencies prejudiced Mr. Jones. "[E]xtant legal principles...provided a clear basis for ... compelling appellate argument[s]." Fitzpatrick, 490 So.2d at 940. The issues were preserved at trial and available for presentation on appeal. Neglecting to raise fundamental issues such as those discussed herein "is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome." Wilson, 474 So. 2d at 1164. Individually and "cumulatively," Barclay v. Wainwright, 444 So.2d 956, 959 (Fla. 1984), the claims omitted by appellate counsel establish that "confidence in the correctness and fairness of the result has been undermined." Wilson, 474 So.2d at 1165. (emphasis in original). In Wilson, this court said:

> [O]ur judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate. It is the unique role of that advocate to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deviations from due process. Advocacy is an art, not a science.

[2]On direct appeal, Mr. Jones was represented by the same attorney who represented him at trial.

Wilson, 474 So.2d at 1165. In Mr. Jones' case, appellate counsel failed to act as a "zealous advocate," and Mr. Jones was therefore deprived of his right to the effective assistance of counsel by the failure of direct appeal counsel to raise the following issues to the Florida Supreme Court. Mr. Jones is entitled to a new direct appeal.

A. THE STATE'S INTRODUCTION OF IRRELEVANT, PREJUDICIAL AND INFLAMMATORY EVIDENCE OF OTHER CRIMES AND BAD ACTS DEPRIVED MR. JONES OF A FAIR TRIAL, UNDERMINED THE RELIABILITY OF THE JURY'S GUILT/INNOCENCE AND SENTENCING DETERMINATIONS, AND VIOLATED THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

During Mr. Jones' trial, the state introduced irrelevant, prejudicial and inflammatory evidence of other crimes and bad acts allegedly committed by Mr. Jones. This evidence was in two categories: (1) details of Mr. Jones' and his codefendants' escape from a Maryland prison; (2) photographs of Mr. Jones and his codefendants with guns and money. Although this evidence was irrelevant to any issue at trial and its admission deprived Mr. Jones of a fair trial and sentencing determination, appellate counsel ineffectively failed to raise this claim on direct appeal.

1. Details of the Prison Escape

The state presented witness Antoine Garrett, a correctional officer from Maryland, to testify regarding the defendants' escape from a Maryland prison on June 25, 1988 (R. 2523-27, 2549-

60).[3] However, the state did not simply wish to elicit from Garrett the fact that the defendants had escaped from the Maryland prison, but wished to elicit all the details of how the escape was accomplished. Thus, Garrett explained that on the day of the escape, he was in the prison yard when an inmate asked him for a light off of his cigarette (R. 2552-53). Then, the inmate pulled a knife from under his jacket and "told me not to fucking move. And if I did, he would kill me" (R. 2554). That inmate was Irvin Griffin (R. 2554), Mr. Jones' codefendant. Griffin repeated this threat several times during the escape (R. 2554). Another inmate ran up to Garrett's right side, grabbed Garrett's radio and backed him into a corner in a crouch (R. 2555). A third inmate came to Garrett's left side (R. 2556). At this time, Garrett saw Goins and another inmate at the fence (R. 2556). Goins was cutting the fence with wirecutters (R. 2556-57). When Garrett tried to get another correctional officer's attention, he was again told not to move or he would be killed (R. 2557). After Goins cut through the interior fence, "they lit a bag and threw it towards the shotgun one post" and hollered "go" (R. 2558). The three inmates around Garrett ran to the hole

[3]Mr. Jones, Irvin Griffin and Henry Goins were the three codefendants in the homicide of the police officer in Tallahassee, Florida. These three and two other men had escaped from a Maryland prison about two weeks earlier. The other two escapees were recaptured soon after the escape. Mr. Jones, Griffin and Goins traveled together, ending up in Tallahassee, where they were charged in the homicide of the police officer. Goins entered a plea to the Florida charges, and Mr. Jones and Griffin were tried jointly.

in the interior fence (R. 2558). Five inmates went through the fence, four black men and one white man, Goins (R. 2559).

Defense counsel objected to admisssion of the details regarding the Maryland prison escape. Counsel objected that this evidence showed a crime for which Mr. Jones was not on trial and that the evidence was irrelevant (R. 2527). The state argued the evidence was being offered to show the motive for the homicide of the Tallahassee police officer (R. 2528).[4] Griffin's counsel argued that the testimony was not being limited to the simple fact that the codefendants were in prison and escaped from prison, but would go into the details of the escape (R. 2529-30).[5] Griffin's counsel argued that the only possibly relevant evidence was that the defendants were in custody and escaped, but that the specific details of the escape were not relevant and were highly prejudicial (R. 2530-31). The state responded that the evidence was intended to show that the codefendants escaped from custody and to establish the codefendants' state of mind (R. 2532). After a proffer of Garrett's testimony, Griffin's counsel argued:

> We're not arguing about the escape. We're arguing about the unnecessary testimony that's highly

[4]The state and defense also argued about whether the evidence was admissible under a felony murder theory, but that argument is not relevant to this issue.

[5]Although some of these arguments were made by Griffin's counsel, at the beginning of trial the two defense attorneys announced that their motions and objections were joint unless one defendant specifically opted out, and the court accepted that stipulation (R. 464).

> inflammatory and prejudicial as far as what alleged was said and done.
>
> We're not disputing the escape. The question is how far can they go. They said they need to prove up the escape. We've offered to stipulate to the escape. That's not an issue. What they want to do is talk about whether there were threats made, who made the threats.
>
> The testimony of the officer obviously recited from his report, we think is excessive and unnecessary to the issue. The issue is were they in custody on the 25th, and did they leave custody. That's not in dispute.
>
> How they are trying to dress it up is. We submit under 90.403 the way they want to do it is much more prejudicial than any probative value of the extent of this witness's testimony. If they can cut that down and get in and get out, that's one thing.

(R. 2543). The state again argued the evidence went to the codefendants' state of mind "not only when they went out but their continued state of mind when they killed Officer Ernie Ponce de Leon to prevent them from going back in" (R. 2544). Mr. Jones' counsel stated, "we don't concede that the escape itself is relevant," but that if the court limited the evidence to just the fact of the escape, Mr. Jones would stipulate to that (R. 2545). The court overruled the defense objections, and allowed the state to present the detailed testimony about the escape (R. 2533, 2544-45).[6]

[6]The defendants later renewed their objections to evidence regarding the escape when the state introduced their Maryland commitment documents (R. 2582-83, 2636).

2. Photographs of the Codefendants with Guns and Money

During trial, the state offered photographs which had been found in the car occupied by Mr. Jones, Griffin and Goins. The photographs showed both Mr. Jones and Griffin with handguns and machine guns (R. 2088, 2097). Some photographs also showed the codefendants with money (R. 2096). The defense objected to admission of the photographs, arguing that they were not relevant and suggested additional crimes for which the codefendants were not charged (R. 2086, 2092, 2096). The state argued the photographs were relevant to rebut a defense argument that other people in addition to Mr. Jones, Griffin, Goins and Beverly Harris were present at the time of the offense (R. 2090-91). The court ruled, "The relevance thing is not something I think needs to be argued," and while "[t]here's no question but that they are prejudicial . . . it is not my function here to exclude prejudicial evidence, only that which is irrelevant" (R. 2087-88). The court was "not concerned that it suggests the commission of another crime. All of these photographs suggest the commission of another crime" (R. 2096). The court ordered that any inscriptions on the photographs be deleted, denied admission of some of the photographs and allowed the photographs showing handguns and money to be admitted (R. 2095, 2096, 2098-99). The photographs were admitted (R. 2108-09).

3. Mr. Jones Was Denied a Fair Trial

Florida's evidence code provides for the introduction of evidence regarding other crimes, wrongs, or acts if that evidence is relevant to prove a material fact in issue. Sec. 90.404, Fla. Stat. See Williams v. State, 110 So. 2d 654 (Fla. 1959). Before a defendant's extraneous criminal acts may be introduced, there must be a demonstrated connection between the defendant and the collateral occurrences, and the probative value of the evidence must be weighed against its prejudicial effect. Sec. 90.403, Fla. Stat. In determining the admissibility of similar fact evidence, the "focal point of analysis is whether there is any similarity between the alleged misconduct and the crime for which appellant stands trial." Garron v. State, 528 So. 2d 353, 358 (Fla. 1988). The question is "does the 'similar' fact bear any logical resemblance to the charged crime." Id.

In Castro v. State, 547 So. 2d 111, 115 (Fla. 1989), this Court explained the analyis to be applied to the erroneous introduction of evidence of collateral misconduct:

> Because we find error, we must consider whether the state has met its burden of showing that the error here can be deemed harmless beyond a reasonable doubt. State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986). As we have noted above, the improper admission of this irrelevant collateral crimes evidence is presumptively harmful. . . . Moreover, we recognize that it is not enough to show that the evidence against a defendant is overwhelming. Error is harmless only "if it can be said beyond a reasonable doubt that the verdict could not have been affected by the error." [citation omitted].

Contrary to the state's justifications for introducing the evidence described above in Mr. Jones' case, the evidence had no similarity to the charges against Mr. Jones and was irrelevant to the facts in issue at trial. Garron. Rather, the evidence served no purpose other than to show Mr. Jones' bad character and propensity to commit crimes. The prison escape was not within the "res gestae" of the charged crimes because it was not "so connected with the main transaction as to be virtually and effectively a part thereof." Skipper v. State, 319 So. 2d 634, 637 (Fla. 1st DCA 1975). Nor is this a case where it would have been "impossible to give a complete or intelligent account of the crime charged without referring to the other crime." Tompkins v. State, 386 So. 2d 597, 599 (Fla. 5th DCA 1980). Introduction of this evidence deprived Mr. Jones of due process. United States v. Biswell, 700 F.2d 1310, 1319 (10th Cir. 1983).

Here, the state introduced evidence showing bad acts by Mr. Jones which had no bearing on any issue at trial and whose probative value was clearly outweighed by the potential for prejudice. Mr. Jones was denied a fair trial and reliable sentencing proceeding. The state cannot show beyond a reasonable doubt that these errors were harmless. Castro. The errors were preserved by objections, and appellate counsel was ineffective in failing to raise this preserved issue on direct appeal. Habeas relief is proper.

B. THE TRIAL COURT'S DENIAL OF MR. JONES' MOTION TO SEVER HIS TRIAL FROM THAT OF HIS CODEFENDANT DEPRIVED MR. JONES OF A FAIR TRIAL AND VIOLATED THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Jones and codefendant Irvin Griffin were tried jointly. During the guilt/innocence phase of trial, Mr. Jones several times moved to sever his trial from Griffin's, but the trial court erroneously denied these motions. Appellate counsel provided ineffective assistance in failing to raise this issue on direct appeal.

In opening statement at the guilt/innocence phase, Griffin's counsel argued that Griffin "did not possess, hold, own, fire a .357 Magnum," that Griffin "did not shoot Ernie Ponce de Leon," that Griffin "did not take from the person of Ernie Ponce de Leon a .9 millimeter gun," and that Griffin "did not hold any gun to the head of nor threaten a Sidney Earle" (R. 1410-11). Griffin's counsel also argued the evidence "will not show that on July 8th, 1988, Irvin Griffin did anything to assist anybody in shooting Ernie Ponce de Leon" (R. 1412). Following this opening statement, Mr. Jones' counsel moved for a severance, arguing, "it appears there are obviously going to be antagonistic defenses in the case, and Mr. Jones would move for a severance and/or a mistrial, whatever would accomplish the purpose of not having to be joined prejudicially with the co-Defendant under these circumstances" (R. 1425). The court ruled, "the motion should be denied for now, but it is the kind of motion that can be

revisited. . . . I didn't hear anything in [Griffin's] opening statement that would necessarily lead me to believe that is the case" (R. 1425-26).

During trial, the state presented the testimony of Beverly Harris, who was in the car with Goins, Griffin and Mr. Jones on the morning of July 8, 1988. During cross of Harris, Griffin's counsel asked whether she saw Griffin shoot a police officer that morning, whether she heard Griffin tell Mr. Jones to shoot the police officer, whether Griffin loaded a gun and handed it to Mr. Jones, and whether Griffin said anything to Mr. Jones about taking out the officer (R. 2496-97). Harris answered "no" to all of these questions (R. 2496-97). Griffin's counsel also elicited from Harris that neither she, Griffin nor Goins did anything to shoot the police officer (R. 2497). Griffin's counsel further elicited from Harris that Mr. Jones was using powder and rock cocaine (R. 2502-03).

After Harris's testimony, Mr. Jones' counsel moved for a severance, arguing:

> [Griffin's counsel] has elicited evidence from the witness on the stand that perhaps my client was guilty of a crime and his client was not. He also introduced evidence that my client was using dangerous narcotic drugs on the date in question.
>
> It is obvious that the issue has gone beyond the abstract now as to whether or not his defense is antagonistic. And it certainly appears to be so at this time.

(R. 2510). The court denied the motion (R. 2510).

After a recess, Mr. Jones' counsel again renewed the motion for severance, citing Crum v. State, 398 So. 2d 810 (Fla. 1981); Kritzman v. State, 520 So. 2d 568 (Fla. 1988); and Rowe v. State, 404 So. 2d 1176 (Fla. 1st DCA 1981) (R. 2511). The court deferred ruling (R. 2512).

Later in the trial, the state proposed to present evidence that Griffin had shot a police officer in 1978 (R. 2721-63). Mr. Jones' counsel moved for a severance, arguing that the evidence was not admissible against Mr. Jones and that no limiting instruction to the jury would keep such evidence from adversely affecting Mr. Jones (R. 2748-49). After the court ruled the evidence could come in against Griffin with certain limitations (R. 2749-62), Mr. Jones' counsel again moved for a severance and a mistrial (R. 2762). The court denied the motion for mistrial and deferred ruling on the severance (R. 2762). The court instructed the jury that the evidence regarding Griffin's shooting a police officer in 1978 was to be considered only against Griffin (R. 2765-66), and the state presented the evidence (R. 2766-79). Mr. Jones renewed his previous motions as to this evidence, and the court abided by its previous ruling (R. 2780).

After the state rested (R. 2780), Mr. Jones' counsel renewed the motion for severance:

> [Griffin's counsel's] defense has been from the beginning to take the position that somebody might have

> killed the officer, but it wasn't his client. His client didn't help anybody and, specifically, he didn't help Clarence Jones do this or that, as he has just stated in his argument.
>
> It puts us in the same situation, although not quite as strict from an evidentiary standpoint yet. But being caught between both the State and a co-defendant, both pointing a loaded gun in our direction, I anticipate that as the Defense puts on its case in chief and Mr. Griffin does some things that I anticipate he might do that this condition would be worsened a great deal.
>
> This is a matter that we did not have the ability to anticipate in advance of trial. We can't get the work product of co-counsel, nor can we take the deposition of a co-defendant to know what their strategy is going to be and to know what they intend to do.
>
> So, it's a matter that was raised during the course of the trial after Mr. Taylor made his opening statement. It was apparent that that was his defense: Clarence Jones killed the officer. My client didn't help him do it.
>
> For that reason, we feel that we are entitled to a severance based on those cases. Particularly the Crum case that we gave earlier, the Kritzman case and the Rowe case. There is some interesting language in one of the cases on the exact situation we're in here. That language has to do with having both the State and the co-defendant pointing a finger at you.

(R. 2798-2800). The court denied the motion, ruling that Griffin's counsel had been pointing out the absence of evidence against Griffin, not prosecuting Mr. Jones (R. 2800). The court recognized that when there is a joint trial, "we all have to accept the fact that . . . there will be relative culpability. There will be relative degrees of evidence against each Defendant" (R. 2801). Although initially questioning whether the

issue had been brought up in a timely manner (R. 2802), the court then accepted Mr. Jones' counsel's argument that the motion could not have been made until after Griffin's opening statement, which was the first opportunity Mr. Jones had to learn Griffin's defense theory (R. 2803).

A motion for severance of defendants may be made during trial if severance appears necessary to achieve a fair determination of a defendant's guilt or innocence. Fla. R. Crim. P. 3.152(b). A severance motion should be made before trial unless the basis on which it is made during trial was unknown to the defendant before trial. Fla. R. Crim. P. 3.153. Here, the trial court accepted defense counsel's argument that the motion could not have been made until Griffin's opening statement revealed Griffin's defense theory, and thus the motion was timely.

In addressing a motion for severance, the objective of fairly determining a defendant's guilt or innocence should have priority over other considerations. Crum v. State, 398 So. 2d 810, 811 (Fla. 1981). Severance should be granted when a defendant faces two accusers--the state and the codefendant. Id. at 812.

In Mr. Jones' case, the trial court abused its discretion in denying the motions for severance. Mr. Jones not only faced two accusers, with codefendant Griffin assisting the state in

accusing Mr. Jones, but Mr. Jones also was required to be tried by a jury which heard about Griffin's 1978 shooting of a police officer. The combination of these factors deprived Mr. Jones of a fair trial.

Appellate counsel was ineffective in failing to present the denial of the motions for severance on direct appeal.[7] The motions were properly made, and thus the issue was preserved for appeal. Mr. Jones was prejudiced by appellate counsel's omission. Habeas relief is proper.

C. THE ADMISSION OF INFLAMMATORY AND GRUESOME AUTOPSY PHOTOGRAPHS VIOLATED MR. JONES' FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

During the guilt/innocence phase of Mr. Jones' trial, the state introduced numerous autopsy photographs over defense objection (R. 2149-55). The defense argued that the photographs were unnecessary to prove the victim's identity, had no evidentiary purpose, and were "gruesome, bloody, and inflammatory" (R. 2150). The defense had several times offered to stipulate to the cause of death and the victim's identity (R. 2150, 2151). The state argued the photographs were admissible to show the cause of death (R. 2152). The court excluded one photograph, but overruled the defense objections to the others (R. 2155). The photographs were admitted (R. 2568). Appellate

[7]While appellate counsel raised a kind of Williams rule argument regarding the evidence of Griffin's 1978 shooting of a police officer (see Initial Brief on direct appeal at 24-25), appellate counsel raised no issue regarding the denial of the motions for severance.

counsel failed to raise this issue on direct appeal.

There was no necessity or legitimate relevancy argument supporting admission of the number of photos submitted by the state. The jury was subjected to prolonged exposure to these photographs during the guilt/innocence phase, and the state then referred the jury to the photographs again during penalty phase closing argument, arguing:

> I want to show you the two pictures, and I don't show you this for shock effect. I know you have seen these before. But this is what we are here about today. Here is Ernie Ponce De Leon when he was alive. Here he is on the coroner's table on the morning of July 8, 1988. Dead because this man decided on his own that it was time for Ernie Ponce De Leon to die. That's why this picture is here. Because this man made a judgment and he killed Ernie Ponce De Leon, and he killed him by putting two bullets into his chest. And I was going to show you that photograph but I know you have seen that before. There's really no need to. You can take it back with you if you wish. But I don't really suspect any one of you will ever forget the size of those two bullet holes in his chest or the testimony of the doctor that examined him and said his heart was destroyed.

(R. 3524-25). Since the photographs were not relevant to any aggravating circumstance upon which the jury was instructed, the state clearly relied upon them for their inflammatory effect.

Photographs should be excluded when the risk of prejudice outweighs relevancy. Alford v. State, 307 So. 2d 433, 441-42 (Fla. 1975). Photographs should also be excluded when they are repetitious or "duplicates." Id.; see also Adams v. State, 412 So. 2d 850 (Fla. 1982) (excluding two photographs based on trial

court's determination that photos were "duplicates").

Florida law is clear that "[p]hotographs should be received in evidence with great caution." Thomas v. State, 59 So. 2d 517 (1952). Although relevancy is a key to admissibility of such photographs under Adams, limits must be placed on "admission of photographs which prove, or show, nothing more, than a gory scene." Thomas, 59 So. 2d at 517. While relevancy is the key to admissibility of photographs, this Court has indicated that courts must also consider the shocking nature of the photos, whether jurors are thereby distracted from fair factfinding, and whether admission of the photos is simply to inflame the jury. Ruiz v. State, 743 So. 2d 1 (Fla. 1999); Czubak v. State, 570 So. 2d 925, 928 (Fla. 1990).

The photographs admitted during Mr. Jones' trial did nothing more than inflame the passions of the jury by exposing the jurors to a "gory scene." The photographs were not relevant to proving that the victim was dead, nor to proving the cause of death, which was undisputed by the defense. The photographs were totally irrelevant to proving any aggravating circumstance, although the state referred the jury to them during penalty phase closing argument. Clearly, the state's purpose was to inflame the jury. The photographs were irrelevant and highly prejudicial.

The state's use of autopsy photographs distorted the

guilt/innocence phase and unfairly skewed the weight of aggravating circumstances at the penalty phase. Appellate counsel failed to raise this issue despite trial counsel's objections. Admission of the autopsy photographs was error, and habeas relief is proper.

D. THE PROSECUTOR'S INFLAMMATORY AND IMPROPER COMMENTS AND ARGUMENT DURING PENALTY PHASE CLOSING ARGUMENT CONSTITUTED FUNDAMENTAL ERROR THAT VIOLATED MR. JONES' SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

At the penalty phase of Mr. Jones' trial, the State presented numerous improper closing arguments which violated the Eighth and Fourteenth Amendments. Although defense counsel did not object to these improper arguments, the arguments constituted fundamental error which could have been raised on direct appeal. Appellate counsel was ineffective in failing to raise this issue on direct appeal.

The prosecutor argued:

> Now, I guess, of course, the first question is shall we give this defendant the same justice that he gave Ernie Ponce De Leon? And, of course, the answer to that is no. Because what he gave Ernie Ponce De Leon was not justice but murder. And that's not what we're here about. That's not what our system is about. But wouldn't it have been nice if Ponce De Leon had had the opportunity to plead his case? Wouldn't it be nice if there had been a judge and jury to determine what it was that he had done wrong in order for him to be killed like that? Wouldn't it be nice if he could have called witnesses on his behalf or a psychologist to talk about his early childhood? Wouldn't that have been nice?
>
> But, of course, that didn't happen and it couldn't happen because this defendant wasn't interested in

doing what was right. This defendant was interested in killing this man right here.

I want to show you the two pictures, and I don't show you this for shock effect. I know you have seen these before. But this is what we are here about today. Here is Ernie Ponce De Leon when he was alive. Here he is on the coroner's table on the morning of July 8, 1988. Dead because this man decided on his own that it was time for Ernie Ponce De Leon to die. That's why this picture is here. Because this man made a judgment and he killed Ernie Ponce De Leon, and he killed him by putting two bullets into his chest. And I was going to show you that photograph but I know you have seen that before. There's really no need to. You can take it back with you if you wish. But I don't really suspect any one of you will ever forget the size of those two bullet holes in his chest or the testimony of the doctor that examined him and said his heart was destroyed. That he was dead like that (snapping fingers), because that man, that man decided it was time for Ernie Ponce De Leon to leave us. No judge, no jury, no witnesses, nothing. This is time to go. They didn't give him a warning. He had no idea it was him time to go. They didn't give him due process like we're giving him. They didn't give him a chance to argue his case. They didn't even take any lesser possibilities. There was no question. When that man popped out of the car, death was on his mind, and it wasn't his own death. It was the death of Ernie Ponce De Leon.

(R. 3523-25).

How many is enough, I guess is the question. How many times do people have to be put at risk? How many times is it okay for Clarence Jones to threaten people with weapons and then to kill them?

(R. 3526).

[Dr. Anis] told you also that the defendant had told him that basically he had a hard life; that his parents had divorced when he was young, that he lived with his father and his father died, his mother dies, and some brothers died. Ladies and gentlemen, ask yourself the question. What right does that give anybody to take the life of a good man that didn't have

> to die? Because Clarence Jones says that he had some misfortune in life? That gives him the right to take the life of a good man?

(R. 3528).

> You know, he gives you those certificates concerning his past. I think he got his GED. He got a certificate in a woodworking course. I think he got a prison ministries certificate; he got a couple of certificates from the PTL Club signed by Mr. Bakker. You know, we're not interested in his past.

(R. 3529).

The prosecutor urged to jury to vote for death because the victim, unlike Mr. Jones, had not been afforded any constitutional rights, and urged the jury to disregard Mr. Jones' mitigating evidence because “we’re not interested in his past.” The improper arguments were not relevant to any of the aggravating factors upon which the jury was instructed. Rather, the arguments were clearly inflammatory. Further, the law of Florida requires that the jury consider evidence of mitigating factors. The prosecutor argued an erroneous legal standard as to mitigation and resorted to completely inappropriate tactics by ridiculing Mr. Jones' mitigating evidence.

Arguments such as those presented in Mr. Jones' case have been long-condemned as violative of due process and the Eighth Amendment. See Cunningham v. Zant, 928 F.2d 1006, 1019-20 (11th Cir. 1991); Wilson v. Kemp, 777 F.2d 621 (11th Cir. 1985); Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985)(en banc); Newlon v. Armontrout, 885 F. 2d 1328, 1338 (8th Cir. 1989), quoting Coleman

v. Brown, 802 F. 2d 1227, 1239 (10th Cir. 1986)("'[a] decision on the propriety of a closing argument must look to the Eighth Amendment's command that a death sentence be based on a complete assessment of the defendant's individual circumstances . . . and the Fourteenth Amendment's guarantee that no one be deprived of life without due process of law"') (citations omitted). The arguments contaminated the proceedings with irrelevant, inflammatory, and prejudicial appeals to the jury's passions and prejudices.

Although a decision to impose the death penalty must "be, and appear to be, based on reason rather than caprice or emotion," Gardner v. Florida, 430 U.S. 349, 358 (1977)(Opinion of Stevens, J.), here, because of the prosecutor's unchecked, inflammatory argument, death was imposed based on emotion, passion, and prejudice. See Cunningham. Such arguments render a sentence of death fundamentally unreliable and unfair. Drake, 762 F.2d at 1460 ("[T]he remark's prejudice exceeded even its factually misleading and legally incorrect character ...."); Potts v. Zant, 734 F.2d 526, 536 (11th Cir. 1984)(because of improper prosecutorial argument, the jury may have "failed to give its decision the independent and unprejudiced consideration the law requires").

The prosecutor's arguments also violated the fourteenth amendment, and the due process violation requires relief.

Newlon, 885 F.2d at 1338. Indeed, the prosecutor's argument went so far beyond the bounds of propriety as to urge the jury to put Mr. Jones to death because he had availed himself of his constitutional rights. Such closing argument tactics are unconstitutional. Cunningham v. Zant, 928 F.2d at 1019-20. There can be no reliable adversarial testing when the prosecutor sees fit to ridicule the very protections that the Constitution provides to assure a reliable result.

Well before Mr. Jones' trial and direct appeal, this Court condemned improper penalty phase prosecutorial argument. Closing argument "must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law." Bertolotti v. State, 476 So. 2d 130, 134 (Fla. 1985). "When comments in closing argument are intended to and do inject elements of emotion and fear into the jury's deliberations, a prosecutor has ventured far outside the scope of proper argument." Garron v. State, 528 So. 2d 353, 359 (Fla. 1988). Prosecutorial comments upon the defendant's exercise of constitutional rights are improper "because the exercise of legal rights must not be used to enhance statutory aggravating factors." Bertolotti, 476 So. 2d at 133. Prosecutorial argument urging the jury to treat the defendant as he had treated the victim are improper. Urbin v.

State, 714 So. 2d 411, 421 (Fla. 1998). Prosecutorial arguments urging the jury to disregard the law and denigrating the defendant's mitigation evidence are improper. Id. at 420, 422 n.14. All of these proscriptions were violated in Mr. Jones' case.

There was unrebutted mitigating evidence in the record upon which the jury could reasonably have based a life recommendation, see Claim II, but no reasoned assessment of the appropriate penalty could occur. The proceedings were contaminated with irrelevant, inflammatory, and prejudicial considerations. As a result, Mr. Jones' death sentence is neither reliable nor individualized, and the state cannot show beyond a reasonable doubt that this error was harmless. State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986).

This fundamental error should have been raised on direct appeal. Although defense counsel failed to object, under established standards at the time of Mr. Jones' direct appeal, the comments of the prosecutor constituted fundamental error. Fundamental error occurs when the error destroys the "essential fairness" of the proceeding. Dukes v. State, 356 So. 2d 873, 874 (Fla. 4th DCA 1978). "When the prosecutorial argument taken as a whole is 'of such a character that neither rebuke nor retraction may entirely destroy their sinister influence . . . a new trial should be granted, regardless of the lack of objection or

exception.'" Ryan v. State, 457 So. 2d 1084, 1091 (Fla. 4th DCA 1984), quoting Peterson v. State, 376 So. 2d 1230, 1234 (Fla. 4th DCA 1979). See D'Ambrosia v. State,736 So. 2d 44, 46 (Fla. 5th DCA 1999) (discussing and citing cases on prosecutorial misconduct as fundamental error); Freeman v. State, 717 So. 2d 105 (Fla. 5th DCA 1998); DeFreitas v. State, 701 So. 2d 593 (Fla. 4th DCA 1997). See also Urbin v. State, 714 So. 2d 411 (Fla. 1998); King v. State, 623 So. 2d 486 (Fla. 1993). Appellate counsel was ineffective in failing to raise this fundamental error on direct appeal.

Further, according to the law at the time of Mr. Jones' direct appeal, this error could and should have been raised on direct appeal as ineffective assistance of trial counsel for failing to object to the improper arguments. Foster v. State, 387 So. 2d 344 (Fla. 1980); Gordon v. State, 469 So. 2d 795 (Fla. 4th DCA 1985). Ineffective assistance of trial counsel is cognizable on direct appeal when the ineffectiveness is apparent on the face of the record such that "it would be a waste of judicial resources to require the trial court to address the issue." Blanco v. Wainwright, 507 So. 2d 1377, 1384 (Fla. 1987). Since Mr. Jones' trial counsel also represented him on direct appeal, counsel could not raise his own ineffectiveness. Breedlove v. Singletary, 595 So. 2d 8, 11 (Fla. 1992); Adams v. State, 380 So. 2d 421 (Fla. 1980). Thus, the ineffectiveness of

trial counsel for failing to object is cognizable in this petition. Id. Under case law existing at the time of Mr. Jones' trial, the prosecutorial argument discussed above was clearly improper. Thus, trial counsel rendered deficient performance in failing to object and failing to protect Mr. Jones' Eighth and Fourteenth Amendment rights. Since unrebutted mitigation was in the record, Mr. Jones was prejudiced by counsel's deficient performance, for the prosecutorial misconduct prevented the jury from making a reasoned assessment based upon appropriate considerations of the sentence.

Prosecutorial misconduct deprived Mr. Jones of a fair, reliable and individualized sentencing proceeding. This misconduct constituted fundamental error which should have been raised on direct appeal, but which appellate counsel ineffectively failed to raise. Alternatively, trial counsel rendered ineffective assistance in failing to object, an issue which is cognizable in this petition. Habeas relief is proper.

E. CONCLUSION

Mr. Jones was deprived of the effective assistance of counsel on direct appeal. This Court should grant him habeas corpus relief.

CLAIM II

THIS COURT APPLIED AN INCORRECT LEGAL STANDARD TO MR. JONES' DIRECT APPEAL CLAIM THAT THE SENTENCING COURT ERRED IN FAILING TO FIND MITIGATING FACTORS.

At the penalty phase, Mr. Jones presented evidence in mitigation that was unrebutted. This evidence fell into the categories of:

(1) Mr. Jones' abused or deprived childhood, including his father being killed in a fire while trying to rescue a family member (R. 3440); the sudden or violent deaths of other family members (R. 3443); his difficulty adjusting to a new male father figure who was abusive (R. 3441).

(2) Mr. Jones' drug and alcohol abuse (R. 3442);

(3) Mr. Jones' expression of remorse for the police officer who died (R. 3449);

(4) Mr. Jones' borderline intelligence which was lower than 97% of the population (R. 3447);

(5) Mr. Jones' efforts to improve himself in spite of his intellectual shortcomings, including obtaining his GED (R. 3446);

(6) Mr. Jones' feelings of helplessness, hopelessness, low self-esteem and inadequacy (R. 3444);

(7) Mr. Jones' HIV positive medical condition (R. 3446).

The trial court found that none of this evidence rose "to the level of a nonstatutory mitigating circumstance" (R. 229). However, the court *did not find* that the facts listed above were

not proved. Rather, the court discussed these facts in the sentencing order, pointing out the evidence of Mr. Jones' "troubled family life," his history of drug abuse, his low self-esteem, his low intelligence placing him in the bottom 3% of the population, his "poor environment, upbringing and family life," and his feelings of helplessness (R. 218-20). The court accepted these facts, but concluded:

> The Court has carefully considered these facts, but the defendant's deprived childhood, given its remoteness to the event in question, is hereby rejected as a nonstatutory mitigating circumstance. [citations omitted].
>
> The facts related to the defendant's upbringing and family life are relevant in that they provide some explanation for the defendant's conduct in light of his background. However, the Court does not find that these factors rise to the level of a nonstatutory mitigating circumstance.

(R. 220).

On direct appeal, Mr. Jones argued that the trial court erred in failing to find mitigating circumstances based upon the unrebutted evidence of mitigation (Initial Brief at 37). This Court rejected the argument, saying:

> The court found that none of the statutory mitigating circumstances applied and, after carefully examining the nonstatutory mitigating evidence, found that no mitigators had been established. Jones argues that the court should have found statutory and nonstatutory mitigators, but "[t]he resolution of factual conflicts is solely the responsibility and duty of the trial judge, and, as the appellate court, we have no authority to reweigh that evidence." Gunsby v. State, 574 So. 2d 1085, 1090 (Fla. 1991). Although cultural deprivation and a poor home environment may be

> mitigating factors in some cases, sentencing is an individualized process. We cannot say the trial court erred in finding the evidence presented insufficient to constitute a relevant mitigating circumstance. See Cook [v. State, 542 So. 2d 964 (Fla. 1989)]; Kight v. State, 512 So. 2d 922 (Fla. 1987), cert. denied, 485 U.S. 929, 108 S. Ct. 1100, 99 L.Ed.2d 262 (1988). Therefore, the trial court's conclusion that death is the appropriate penalty in this case is affirmed.

Jones I, 580 So. 2d at 146.

Under Florida law, a mitigating factor should be found if it "has been reasonably established by the greater weight of the evidence: 'A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established.'" Campbell v. State, 571 So. 2d 415, 419-20 (Fla. 1990), quoting Fla. Std. Jury Instr. (Crim.) at 81. "[W]hen a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved." Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990). In assessing mitigation, the trial court first considers whether the facts alleged are supported by the evidence and then "must determine whether the established facts are of a kind capable of mitigating the defendant's punishment, i.e., factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed." Rogers v. State, 511 So.

2d 526, 534 (Fla. 1987). The first step described in Rogers is a factual determination, while the second step is a legal determination.

Here, however, although under the applicable standard of proof, Mr. Jones' unrebutted evidence established recognized mitigating factors, the trial court refused to weigh any mitigating factors. The court did not reject the facts Mr. Jones presented, but made an erroneous conclusion of law that these facts did not establish mitigating factors.

Florida and federal courts have recognized that the kind of unrebutted evidence presented regarding Mr. Jones establishes valid mitigation. See Eddings v. Oklahoma, 455 U.S. 104, 110 (1982) (disadvantaged background; emotional problems); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (disadvantaged background; emotional problems); Cheshire v. State, 568 So. 2d 908 (Fla. 1990) ("Events that result in a person succumbing to the passions or frailties inherent in the human condition necessarily constitute valid mitigation under the Constitution"); Campbell v. State, 571 So. 2d 415 (Fla. 1990) (abused or deprived childhood); Holsworth v. State, 522 So. 2d 348, 354 (Fla. 1988) (childhood trauma); Hansbrough v. State, 509 So. 2d 1081, 1086 (Fla. 1987) (difficult childhood); Amazon v. State, 487 So. 2d 8, 13 (Fla. 1986) (defendant raised in negative family setting); Hansbrough, 509 So. 2d at 1086 (emotional problems); Morris v. State, 557 So.

2d 27, 30 (Fla. 1990) (low intelligence); Duboise v. State, 520 So. 2d 260, 266 (Fla. 1988) (same); Amazon v. State, 487 So. 2d 8, 13 (Fla. 1986) (history of drug abuse); Hansbrough, 509 So. 2d at 1086 (same); Cochran v. State, 547 So. 2d 928, 932 (Fla. 1989) (remorse).

The trial court's definition of mitigation is contrary to Lockett v. Ohio, 438 U.S. 586 (1978). Mitigating factors can be anything in the life of the defendant which might militate against the appropriateness of the death penalty and favor a life sentence. Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett; Rogers. The Eighth and Fourteenth Amendments require that the sentencer in a capital trial not refuse to consider, as a mitigating factor, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. Lockett, 438 U.S. at 604.

Since recognized mitigating factors were proved at the penalty phase under the applicable standard of proof, the sentencers were required by the United States Constitution and Florida law to weigh them against the aggravating factors regardless of any theory of mitigation espoused by the trial court. By limiting the definition of mitigating factors, the trial court violated Lockett and its progeny, and this Court erred on direct appeal in deferring to the trial court's

erroneous legal standard for mitigating factors. Habeas relief is proper.

CLAIM III

DESPITE MR. JONES' ARGUMENT ON DIRECT APPEAL THAT CERTAIN AGGRAVATING FACTORS SHOULD NOT HAVE BEEN PRESENTED TO THE JURY, THIS COURT ERRONEOUSLY DID NOT ADDRESS THAT ARGUMENT.

On direct appeal, Mr. Jones argued that the jury should not have been instructed on the "great risk of death to many" and "committed during a robbery" aggravating factors (Initial Brief at 33-34) ("WHETHER OR NOT THE COURT ERRED IN . . . INSTRUCTING THE JURY AS TO THOSE IMPROPER AGGRAVATING FACTORS?"). This Court struck the "committted during a robbery" aggravator because the robbery "was only incidental to the killing, not the reason for it." Jones I, 580 So. 2d at 146, citing Parker v. State, 458 So. 2d 750 (Fla. 1984). However, the Court did not address Mr. Jones' argument that the jury should not have been instructed on this legally inapplicable aggravator or the similarly legally inapplicable "great risk of death to many" aggravator.

During the penalty phase charge conference, Mr. Jones objected to the jury being instructed on the "great risk of death to many" aggravator, arguing, "The evidence was such that the only danger to anybody was to the officer who was shot. The shot was at close range directed directly at him" (R. 3500). The court responded:

> Well, I'll tell you, I am not sure whether I would make that finding. I'd have to review the cases. But the test on whether to give the jury instruction is a different one. If there is any evidence to support it, I should give it. And based on that test, I'm going to give it. I don't rule out, Mr. Davis, that I wouldn't find that as an aggravating circumstance. I may not.

(R. 3500) (emphasis added). The court did not find this aggravator (See R. 216-17), apparently after "review[ing] the cases." The court thus instructed the jury on this aggravator, even though a "review [of] the cases" indicated it was legally inapplicable. The court thus erred in instructing the jury on this aggravator based on the test of whether there was any evidence to support the instruction rather than on a determination of whether the aggravator was legally applicable. As Mr. Jones pointed out on direct appeal, the aggravator was legally inapplicable (Initial Brief at 33, quoting Kampff v. State, 371 So. 2d 1007 (Fla. 1979)).

Also at the penalty phase charge conference, Mr. Jones argued that the jury should not be instructed on the "committed during a robbery" aggravator because "[h]e was supposedly killed to keep his fugitive status. The robbery [was] after the death and didn't have anything to do with the murder" (R. 3501). On direct appeal, this Court agreed that this aggravator was legally inapplicable, as the robbery "was only incidental to the killing, not the reason for it." Jones I, 580 So. 2d at 146. Since the aggravator was legally inapplicable, the jury should not have

been instructed on it.

Mr. Jones' jury was overbroadly instructed on aggravating factors, an error which fails to genuinely narrow the class of persons eligible for the death penalty. Maynard v. Cartwright, 108 S. Ct. 1853, 1859 (1988); Zant v. Stephens, 103 S. Ct. 2733, 2743 (1983); Godfrey v. Georgia, 446 U.S. 420 (1980); Cannady v. State, 620 So. 2d 165, 169 (Fla. 1993) (aggravating factors must genuinely narrow the class of defendants eligible for the death penalty). The jury had no way to know that two of the aggravators upon which it was instructed were legally inapplicable to Mr. Jones. See Sochor v. Florida, 112 S. Ct. 2114, 2122 (1992) ("a jury is unlikely to disregard a theory flawed in law"). It therefore must be presumed that the jury found and relied upon these inapplicable aggravators. Espinosa v. Florida, 112 S. Ct. 2926, 2928 (1992). The jury's weighing process was thus skewed in favor of death. Stringer v. Black, 112 S. Ct. 1130 (1992). Since there was unrebutted evidence of mitigating factors in the record, see Claim II, the state cannot show beyond a reasonable doubt that the errors in instructing the jury on these two legally inapplicable aggravators was harmless. DiGuilio.

The errors in instructing the jury on two legally inapplicable aggravators were objected to at trial and raised on direct appeal. This issue is therefore cognizable in this

proceeding. James v. State, 615 So. 2d 668 (Fla. 1993). This Court erred on direct appeal in not addressing Mr. Jones' argument that the jury should not have been instructed on these two legally inapplicable aggravators. Habeas relief is proper.

CLAIM IV

THIS COURT FAILED TO CONDUCT A CONSTITUTIONALLY ADEQUATE HARMLESS ERROR ANALYSIS ON DIRECT APPEAL AFTER STRIKING AN AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF MR. JONES' RIGHT TO DUE PROCESS, EQUAL PROTECTION, AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

On direct appeal, this Court found that the aggravating factor that the homicide was committed during a robbery was legally incorrect, in that the robbery "was only incidental to the killing." Jones I, 580 So. 2d at 146, citing Parker v. State, 458 So. 2d 750 (Fla. 1984). Thus, the Court struck this aggravator. However, the Court then affirmed Mr. Jones' death sentence without assessing the fact that the jury heard the improper aggravator and its death recommendation was therefore tainted under the Eighth Amendment. Rather, the Court held that reversal was not warranted because the trial judge had stated: "This circumstance is not determinative; the sentence of death would be imposed even if it were not applied." Jones I, 580 So. 2d at 146. This Court's analysis of the Eighth Amendment error was constitutionally flawed.

In Sochor v. Florida, 112 S.Ct. 2114 (1992), the United

States Supreme Court, in finding that Maynard v. Cartwright, 486 U.S. 356 (1988), was applicable in Florida, held that Eighth Amendment error occurring before either the trial court or the jury requires application of the harmless-beyond-a-reasonable doubt standard. Specifically, the Supreme Court held:

> In a weighing State like Florida, there is Eighth Amendment error when the sentencer weighs an "invalid" aggravating circumstance in reaching the ultimate decision to impose a sentence. See Clemons v. Mississippi, 494 U.S. 738, 752 (1990). Employing an invalid aggravating factor in the weighing process "creates the possibility . . . of randomness," Stringer v. Black, 503 U.S. ___, ____, 112 S.Ct. 1130, 1139, 117 L.Ed.2d 367 (1992), by placing a "thumb [on] death's side of the scale," id., thus "creat[ing] the risk of treat[ing] the defendant as more deserving of the death penalty." Id. Even when other valid aggravating factors exist as well, merely affirming a death sentence reached by weighing an invalid aggravating factor deprives a defendant of "the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances." Clemons, 494 U.S. at 752 (citing Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982)); see Parker v. Dugger, 498 U.S. ___, 111 S.Ct. 731, 739, 112 L.Ed.2d 812 (1991). While federal law does not require the state appellate court to remand for resentencing, it must, short of remand, either itself reweigh without the invalid aggravating factor or determine that weighing the invalid factor was harmless error. Id. at ___, 111 S.Ct. at 738.

Sochor, 112 S.Ct. at 2119. Sochor further held that the harmless error analysis must comport with constitutional standards. Id. at 2123.

Moreover, in Stringer v. Black, 112 S. Ct. 1130 (1992), the Supreme Court held that the "use of a vague or imprecise

aggravating factor in the weighing process invalidates the sentence and at the very least requires constitutional harmless-error analysis or reweighing in the state judicial system." Id. at 1140. In Stringer, the Supreme Court also set forth the correct standard to be employed by state appellate courts when conducting the harmless-error analysis, a standard not utilized by this Court in affirming Mr. Jones' death sentence.

Sochor established that when a reviewing court strikes an aggravating factor on direct appeal, the striking of the aggravating factor means that the sentencer considered an invalid aggravating factor and that eighth amendment error therefore occurred. When an aggravating factor is "invalid in the sense that the Supreme Court of Florida had found [it] to be unsupported by the evidence[,] . . . . [i]t follows that Eighth Amendment error did occur when the trial judge weighed the . . . factor." Sochor, 112 S.Ct. at 2122. When this kind of Eighth Amendment error occurs before a Florida capital sentencer, this Court must conduct a constitutionally adequate harmless error analysis. Id.

This principle was reaffirmed by the United States Supreme Court in Richmond v. Lewis, 113 S. Ct. 528 (1992). In Richmond, the Supreme Court reiterated its Sochor holding that only "constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant

received an individualized sentence." Richmond, 113 S. Ct. at 535. The Court went on to conclude that "[w]here the death sentence has been infected by a vague or otherwise constitutionally invalid aggravating factor, the state appellate court or some other state sentencer must actually perform a new sentencing calculus, if the sentence is to stand." Id. In Mr. Jones' case, this Court "did not purport to perform such a calculus, or even mention the evidence in mitigation." Id.

Under Sochor, the appropriate harmless error analysis is that of Chapman v. California, 386 U.S. 18 (1967). Sochor, 112 S. Ct. at 2123. Under Sochor, this Court's application of the Chapman standard to Eighth Amendment error does not comport with constitutional requirements. When discussing this Court's failure to conduct harmless error analysis in Sochor, the United States Supreme Court cited to Yates v. Evatt, 111 S. Ct. 1884 (1991). In Yates, the jury had been given two unconstitutional instructions which created mandatory presumptions. Yates, 111 S. Ct. at 1891. In denying relief, the South Carolina Supreme Court "described its enquiry as one to determine 'whether it is beyond a reasonable doubt that the jury would have found it unnecessary to rely on the erroneous mandatory presumption,'" Id. at 1890, and then "held 'beyond a reasonable doubt . . . the jury would have found it unnecessary to rely on either erroneous mandatory presumption.'" Id. at 1891. The United States Supreme Court

found the lower court's analysis constitutionally inadequate because the lower court "did not undertake any explicit analysis to support its view of the scope of the record to be considered in applying Chapman" and because "the state court did not apply the test that Chapman formulated." Id. at 1894. In Yates, the Supreme Court explained that the "Chapman test is whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" Id. at 1892 (quoting Chapman, 386 U.S. at 24). The Supreme Court elaborated, "To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question." Yates, 111 S. Ct. at 1893.

In Sochor, the Supreme Court found this Court's analysis deficient for the same reasons the lower court's analysis was found deficient in Yates: "Since the Supreme Court of Florida did not explain or even 'declare a belief that' this error "was harmless beyond a reasonable doubt" in that "it did not contribute to the [sentence] obtained,' Chapman, supra, at 24, the error cannot be taken as cured by the State Supreme Court's consideration of the case." Sochor, 112 S.Ct. at 2123. Thus, in Sochor, relying upon Yates, the Supreme Court established that this Court has not been properly applying Chapman in the context of Eighth Amendment error.

"[M]erely affirming a sentence reached by weighing an invalid aggravating factor deprives a defendant of `the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances.'" Sochor, 112 S.Ct. at 2119 (citing Clemons v. Mississippi, 494 U.S. 738, 725; Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982); Parker v. Dugger, 498 U.S. ___ (1991)). Moreover, "[e]mploying an invalid aggravating factor in the weighing process `creates the possibility . . . of randomness.'" Sochor, 112 S.Ct. at 2119.

This court does not reweigh aggravation and mitigation. Brown v. Wainright, 392 So. 2d 1327, 1331-32 (Fla. 1981); State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973) ("[T]he weighing process is left to the carefully scrutinized judgment of jurors and judges"). Thus, this Court could only conduct a harmless error analysis of the error before the jury. Sochor. Mitigation was in the record, but this Court did not discuss the mitigation or the error before the jury. The record contains evidence of the following mitigating factors: (1) deprived childhood, including Mr. Jones' father being killed in a fire while trying to rescue a family member (R. 3440) and the sudden or violent deaths of other family members (R. 3443); (2) Mr. Jones' drug and alcohol abuse (R. 3442); (3) Mr. Jones' difficulty adjusting to a new male father figure who was abusive (R. 3441); (4) Mr. Jones'

expression of remorse for the police officer who died (R. 3449); (5) Mr. Jones' borderline intelligence and the efforts he made to improve himself in spite of his intellectual shortcomings, including obtaining his GED (R. 3446-47); (6) Mr. Jones' HIV positive medical condition which enhanced his feeling of helplessness and hopelessness (R. 3446). This Court did not assess the error before the jury in light of this mitigation evidence, but deferred to the trial court's finding of no mitigating factors. Jones I, 580 So. 2d at 146. The failure to reverse and remand for resentencing is in direct conflict with Eighth and Fourteenth Amendment requirements.

CONCLUSION

Based upon the discussion and citation to authority presented in this petition, Mr. Jones respectfully urges this Court to grant habeas corpus relief.

I HEREBY CERTIFY that a true copy of the foregoing Petition For Writ Of Habeas Corpus has been furnished by United States Mail, first-class postage prepaid, to all counsel of record on March __, 2000.

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