IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-2864

JUAN DAVID RODRIGUEZ,

Petitioner,

v.

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

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

This petition for habeas corpus relief is being filed in order to address substantial claims of error under the fourth, fifth, sixth, eighth and fourteenth amendments to the United States Constitution, claims demonstrating that Mr. Rodriguez was deprived of the effective assistance of counsel on direct appeal and that the proceedings that resulted in his conviction and death sentence violated fundamental constitutional guarantees.

Significant errors which occurred at Mr. Rodriguez's capital sentencing and trial were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel.

Citations to the Record on Direct Appeal shall be as (R. page number). All other citations shall be self explanatory

JURISDICTION

A writ of habeas corpus is an original proceeding in this Court governed by Fla. R. App. P. 9.100. This Court has original jurisdiction under Fla. R. App. P. 9.130

(a)(3) and Article V, § 3(b)(9), Fla. Const. The Constitution of the State of Florida guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." Art. I, § 13, Fla. Const.

Its constitutional guarantee imbues habeas corpus with special status, which this Court has long recognized:

> The writ of habeas corpus is a high prerogative writ of ancient origin designed to obtain immediate relief from unlawful imprisonment without sufficient legal reason . . . The writ is venerated by all free and liberty loving people and recognized as a fundamental guaranty and protection of their right of liberty.

Allison v. Baker, 11 So. 2d 578, 579 (1943). In fact, habeas corpus is a centuries-old right, deserving of more protection than even a constitutional right. A lower court has written:

> The great writ has its origins in antiquity and its parameters have been shaped by suffering and deprivation. It is more than a privilege with which free men are endowed by constitutional mandate; it is a writ of ancient right.

Jamason v. State, 447 So. 2d 892, 894 (Fla. 4th DCA 1983),

approved, 455 So. 2d 380 (Fla. 1984), cert. denied, 469 U.S. 1100 (1985). Regarding the application of procedural rules to petitions seeking the writ, this Court has explained:

> [H]istorically, habeas corpus is a high prerogative writ. It is as old as the common law itself and is an integral part of our own democratic process. The procedure for the granting of this particular writ **is not to be circumscribed by hard and fast rules or technicalities which often accompany our consideration of other processes.** If is appears to a court of competent jurisdiction that a man is being illegally restrained of his liberty, it is the responsibility of the court to brush aside formal technicalities and issue such appropriate orders as will do justice. **In habeas corpus the niceties of the procedure are not anywhere near as important as the determination of the ultimate question as to the legality of the restraint.**

Anglin v. State, 88 So. 2d 918, 919-20 (Fla. 1956)(emphasis added). Most recently, this Court has written:

> The fundamental guarantees enumerated in Florida's Declaration of Rights should be available to all through simple and direct means, without needless

> complication or impediment, and should be fairly administered in favor of justice and not bound by technicality.

Haag v. State, 591 So. 2d 614, 616 (Fla. 1992).

REQUEST FOR ORAL ARGUMENT

Mr. Rodriguez requests oral argument on this petition.

PROCEDURAL HISTORY

The Circuit Court of the Eleventh Judicial Circuit, Dade County, entered the judgments of conviction and sentence under consideration. Mr. Rodriguez' capital trial was held in January, 1990. A jury returned a verdict of guilty on all counts and recommended a death sentence. On March 28, 1990, the trial court imposed inter alia the death sentence on Count I.

This Court affirmed Mr. Rodriguez' convictions and sentences on direct appeal. Rodriguez v. State, 609 So. 2d 493 (Fla. 1992). The United States Supreme Court denied certiorari on October 4, 1993.

On September 12, 1994, over a year before the two year deadline for his Rule 3.850 motion, Mr. Rodriguez filed his initial Rule 3.850 motion. The State served a

response on July 17, 1995. On October 4, 1995, Mr. Rodriguez filed an amendment to his Rule 3.850 motion. The State responded on April 2, 1996. Following public records litigation, Mr. Rodriguez filed further amendments on July 31, 1997, and March 13, 1998. Following a Huff hearing, the lower court granted a very limited evidentiary hearing.

Following Mr. Rodriguez' Rule 3.850 motion, a limited evidentiary hearing was held on April 5,6,7, and 12, 1999. The lower court denied relief by order dated November 29, 1999. That case is currently pending on appeal before this Court.

This petition is timely filed. See Mann v. Moore, 794 So. 2d 595, 598 (Fla. 2001) ("to bar a habeas petition brought in reliance upon rule 3.851 b(2) continuing to apply to death row prisoners convicted and sentenced before January 1994 would be unjust."

GROUNDS FOR HABEAS CORPUS RELIEF

CLAIM I

APPELLATE COUNSEL FAILED TO RAISE ON APPEAL NUMEROUS MERITORIOUS ISSUES WHICH WARRANT REVERSAL OF THE CONVICTION AND/OR THE DEATH SENTENCE

A. INTRODUCTION

Mr. Rodriguez had the constitutional right to the effective assistance of counsel for the presentation of his direct appeal to this Court. Strickland v. Washington, 466 U.S. 668 (1984) "A first appeal, as of right, (1) is not adjudicated in accord with due process if the appellant does not have the effective assistance of an attorney". Evitts v. Lucey, 469 U.S. 387, 396 (1985). The Strickland test applies equally to ineffectiveness allegations of trial counsel and appellate counsel. See Orazio v. Dugger, 876 F. 2d 1508 (11th Cir. 1989).

Numerous constitutional violations occurred during Mr. Rodriguez' capital trial. Many of these violations

were both apparent in the record, yet inexplicably they were not raised on Mr. Rodriguez' direct appeal. "It cannot be said that the adversarial testing process worked in [Mr. Rodriguez'] direct appeal." Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). Appellate counsel's failure to present the meritorious issues discussed herein constitutes "serious and substantial deficiencies", Fitzpatrick v. Wainwright, 490 So. 2d 938, 940, (Fla. 1986). The cumulative effect of appellate counsel's omissions is such that "confidence in the correctness and fairness of the result has been undermined". Wilson v. Wainwright, 474 So. 2d 1162 (Fla. 1985). As in Wilson, the failure by Mr. Rodriguez' appellate counsel to raise issues involving reversible error means that a new direct appeal should be granted.

B. FAILURE TO RAISE MERITORIOUS PENALTY PHASE ISSUES

1. Improper prosecutorial argument

During prosecutor John Kastrenakis', closing

argument he urged the jurors to sentence Mr. Rodriguez to death on the basis of numerous impermissible and improper factors (R. 1839-1862).

"A prosector's concern `in a criminal prosecution is not that it shall win a case, but that justice shall be done.' While a prosecutor `may strike hard blows, he is not at liberty to strike foul ones.'" Rosso v. State, 505 So. 2d 611, (Fla. 3d DCA 1987) (quoting Berger v. United States, 295 U.S. 78 (1935)). Here. Kastrenakis' allegation that the jury somehow had a "legal"duty to recommend a death sentence did not comport with these essential requirements.

First of all, Kastrenakis argued that for the jury to vote for life would be to "take the easy way out" and would not be "in accordance with the law". (R. 1841). This is inaccurate, misleading and gives a false sense of the jury's responsibility. Kastrenakis next compounded his misleading allegations by exhorting that as members of the local community they had an obligation to recommend a death sentence. He told the jury that:

> As members of this community that you give to the Court, a recommendation of the community based on the facts of the case as to what the appropriate penalty should be.

(R. 1843)(emphasis added). This, in combination with his homily that murder is all too frequent in the local community was designed to mislead the jury that a death sentence would be an appropriate message to send to the "community" in which "murders happen all too frequently:"

> Its an unfortunate comment on the community we live in today that first degree murders happen all too often. Murders happen much much too often.

(R. 1844). By intimating that the jury was under a "legal" duty to impose the death penalty, the prosecutor misstated the law, in order to confuse and inflame the jury, to Mr. Rodriguez' substantial prejudice.

Kastrenakis' exhortations to the jury that it was under a "legal" and community imposed obligation to recommend a death sentence was further compounded by his wilful and misleading characterization of the evidence

of Dante Perfumo of the Miami Fire Rescue Department. Kastrenakis exaggerated and mischaracterized Perfumo's testimony by stating that Perfumo has said that:

> I've been to literally thousands of trauma scenes; this one stands out. The suffering that Aberlerdo Saladrigas was beyond belief, and it's unimaginable"

(R. 1384)(emphasis added).

In fact, and over objection, Mr Perfumo testified that :

> Mr Saladrigas was in extreme pain..... He asked me all the way into the hospital if he was going to make it. Like I said, I've been in this business 10 years and this case stands out in my mind. I told him we were going to do everything we could for him and there was a good chance he would survive.

(R. 1810). Perfumo did not make any reference to having attended the scenes of "literally thousands" of crime scene, nor did he describe the victim's suffering as"unimaginable" This gross hyperbole on the part of Kastrenakis is reversible error.

Prosecutorial misconduct in closing argument

constitutes grounds for reversing a conviction. Berger v. United States, 295 U.S. 78, 85-88 (1934). The prosecutor, while an advocate, is also a public servant "whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." Id., at 88. Prosecutorial misconduct is particularly dangerous because of its harmful influence on the jury. It is the responsibility of the trial court to ensure that final argument is kept within proper and accepted bounds. United States v. Young, 470 U.S. 1, 6 - 11 (1985). The court must be aware that "the prosecutorial mantle of authority can intensify the effect on the jury of any misconduct." Brooks v. Kemp, 762 F.2d 1383, 1399 (11th Cir. en banc 1985). As this Court pointed out:

> We expect prosecutors as representatives of the State to refrain form inflammatory and abusive argument, maintain their objectivity and behave in a professional manner.
>
> ***
>
> This type of excess is especially

> egregious in this, a death penalty case where both eh prosecutors and courts are charged with an obligation that the trial is fundamentally fair in all respects.

Gore v. State, 719 So. 2d,1197, 1202 (Fla. 1998). Here, despite defense counsel's objections to the aforementioned examples of inflammatory and misleading rhetoric, the trial court failed to "exceed the bounds of proper advocacy" Gore, 719 So. 2d at 1202.[1] However without tactic or strategy, appellate counsel failed to raise any of the aforementioned instances of prosecutorial misconduct, to Mr. Rodriguez' substantial prejudice.

The intention of Kastrenakis to inflame the passions of the jury is illustrated clearly in his use of emotive victim impact arguments relating to the home invasion

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[1] As in the Gore case, the trial court presiding over Mr. Rodriguez' capital trial was Judge Thomas Carney. As in Gore, Judge Carney completely failed in the required "vigilant exercise of [his] responsibility to ensure a fair trial" Gore at 1202, citing Bertollotti v. State, 476 So. 2d 130, 134 (fla. 1985)

which case was tried simultaneously with he homicide case. He postulated:

> What were the facts of that separate crime , totally separate from the murder that occurred the following day on an innocent family?

(R. 1846)(emphasis added).

***

> Remember, an innocent family in their own home. A man was shot. terrorized, kids. Nothing is more precious to us Americans than to be free and safe within our own homes.

***

> Think about what plan was that the defendant helped mold at that home. Tie up, handcuff people in their own homes. Do you remember Willy Gonzalez?, 10 year old kid, tied up within a home, handcuffed, terrorized?

(R. 1847)(emphasis added). These characterizations about the victims of the home invasion, not the homicide are clearly impermissible victim impact opinion, yet despite trial counsel's objections the Court allowed the jury to hear them.

The cumulative effect of the various instances of prosecutorial misconduct during the State's closing argument at penalty phase is further exacerbated by the one instance of improper prosecutorial argument that was raised in Mr. Rodriguez' direct appeal. In a cursory four pages of argument, Mr. Rodriguez' appellate counsel raised the issue that improper comments on Mr. Rodriguez' demeanor in the courtroom rendered the proceedings unfair. This Court acknowledged that:

> [T]he prosecutor's reference to the fact that the defendant appeared to be sleeping during closing arguments was clearly improper. The defendant's demeanor off the witness stand is not a proper subject for argument and in some cases may be unduly prejudicial"

Rodriguez v. State 609 So. 2d 493 (Fla. 1992). However, while this Court did not consider reversal on this narrow issue to be warranted, this Court was not presented with the numerous other instances of improper inflammatory and prejudicial argument at Mr. Rodriguez' penalty phase. The cumulative effect of the repeated

improper arguments combined with the trial court's failure to restrain Kastrenakis' over zealousness totally pervaded the penalty phase closing arguments.

In Jones v. State, 569 So. 2d 1234 (Fla. 1990) this Court vacated a capital sentence and remanded for a new sentencing proceeding before a jury because of "cumulative errors affecting the penalty phase." Id. at 1235 (emphasis added). In Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990) cumulative prosecutorial misconduct was the basis for a new trial. When cumulative errors exist the proper concern is whether:

> even though there was competent substantial evidence to support a verdict . . . and even though each of the alleged errors, standing alone, could be considered harmless, the cumulative effect of such errors was such as to deny to defendant the fair and impartial trial that is the inalienable right of all litigants in this state and this nation.
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> Seaboard Air Line R.R. Co. v. Ford, 92 So. 2d 160, 165 (Fla. 1956) (on rehearing); see also, e.g., Alvord v. Dugger, 541 So. 2d 598, 601 (Fla. 1989) (harmless error analysis reviewing the errors "both individually and

> collectively"), cert. denied, ____ U.S. ____, 110 S. Ct. 1834, 108 L.Ed.2d 963 (1990); Jackson v. State, 498 So. 2d 906, 910 (Fla. 1986) ("the combined prejudicial effect of these errors effectively denied appellant his constitutionally guaranteed right to a fair trial").

Jackson v. State, 575 So. 2d 181, 189 (Fla. 1991).

Appellate counsel's failure to raise not only the individual instances of improper prosecutorial argument but also the cumulative effect thereof rendered Mr. Rodriguez' direct appeal fundamentally unfair. Relief is warranted.

2. Improper doubling of aggravating circumstances instructions to the jury and failure by appellate counsel to raise the issue on direct appeal

Mr. Rodriguez' jury was instructed on the aggravating factors of "committed during a robbery" and "committed for financial gain" (R. 1881) This permitted impermissible doubling by the jury. Mr. Rodriguez' appellate counsel was ineffective for failing to raise this claim on direct appeal.

This Court has consistently held that "doubling" of aggravating circumstances is improper. See Richardson v. State, 437 So. 2d 1091 (Fla. 1983); Provence v. State, 337 So. 2d 783, 786 (Fla. 1976); Clark v. State, 379 So. 2d 97, 104 (Fla. 1980); Welty v. State, 402 So. 2d 1139 (Fla. 1981). The jury in Mr. Rodriguez' case was instructed on both of the aggravating factors listed above (R. 1881). This doubling of aggravating circumstances was flatly improper. This Court has explained that "application of both of these aggravating factors is error where they are based on the same essential feature of the capital felony." Bello v. State, 547 So. 2d 914, 917 (1989). These aggravating circumstances therefore were improperly doubled in this case because the State relied on the same facts to support both aggravating factors.

The jury, a co-sentencer, was allowed to rely upon all of these aggravating factors in reaching a recommendation for death. The jury is a co-sentencer in Florida, and must be given adequate jury instructions.

Espinosa v. Florida, 112 S.Ct. 2926, 2928 (1992). This type of "doubling" renders a capital sentencing proceeding fundamentally unreliable and unfair. It also results in an unconstitutionally overbroad application of aggravating circumstances, Godfrey v. Georgia, 446 U.S. 420 (1980), and fails to genuinely narrow the class of persons eligible for death.

Mr. Rodriguez is entitled to relief because his death sentence is unreliable in violation of the Eighth Amendment. Appellate counsel was ineffective for failing to raise this claim on direct appeal.

3. Failure to raise burden shifting argument

Under this Court's precedent, a capital sentencing jury must be:

> [T]old that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed . . .
>
> [S]uch a sentence could be given if the state showed the aggravating circumstances outweighed the mitigating circumstances.

State v. Dixon, 283 So. 2d 1 (Fla. 1973)(emphasis added). This straightforward standard was never applied at the penalty phase of Mr. Rodriguez' capital proceedings nor was it raised on direct appeal. To the contrary, the trial court shifted to Mr. Rodriguez the burden of proving whether he should live or die. In Hamblen v. Dugger, 546 So. 2d 1039 (Fla. 1989), a capital post-conviction action, this Court addressed the question of whether the standard employed shifted to the defendant the burden on the question of whether he should live or die. The Hamblen opinion reflects that these claims should be addressed on a case-by-case basis in capital post-conviction actions. Mr. Rodriguez herein urges that the Court assess this significant issue in his case and, for the reasons set forth below, that the Court grant him the relief to which he is entitled.

Under Hitchcock v. Dugger, 481 U.S. 393 (1987), Florida juries must be instructed in accordance with Eighth Amendment principles. Due to erroneous

instructions at his trial, Mr. Rodriguez' death sentence is neither "reliable" nor "individualized." This error undermines the reliability of the jury's sentencing determination because it prevented the jury and the judge from assessing the full panoply of mitigation contained in the record. Shifting the burden to the defendant to establish that mitigating circumstances outweigh aggravating circumstances conflicts with the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), and Dixon, for such instructions unconstitutionally shift to the defendant the burden with regard to the ultimate question of whether he should live or die. In so instructing a capital sentencing jury, a court injects misleading and irrelevant factors into the sentencing determination, thus violating Caldwell v. Mississippi, 472 U.S. 320 (1985), Hitchcock, and Maynard v. Cartwright, 108 S. Ct. 1853 (1988).

Judicial instructions at Mr. Rodriguez' capital penalty phase required that the jury impose death unless Mr. Rodriguez proved that the mitigation he provided

outweighed and overcame the aggravation. The trial court then employed the same standard in sentencing Mr. Rodriguez to death. See Zeigler v. Dugger, 524 So. 2d 419 (Fla. 1988)(trial court is presumed to apply the law in accord with manner in which jury was instructed). This standard obviously shifted the burden to Mr. Rodriguez to establish that life was the appropriate sentence and limited consideration of mitigating evidence to only those factors proven sufficient to outweigh the aggravation. The instructions gave the jury inaccurate and misleading information regarding who bore the burden of proof as to whether a death recommendation should be returned.

The standard upon which the judge instructed Mr. Rodriguez' jury, and upon which the judge relied is a distinctly egregious abrogation of Florida law and therefore the Eighth Amendment. See McKoy v. North Carolina, 110 S. Ct. 1227, 1239 (1990)(Kennedy, J., concurring)(a death sentence arising from erroneous instructions "represents imposition of capital

punishment through a system that can be described as arbitrary or capricious"). In this case, Mr. Rodriguez was required to establish (prove) that life was the appropriate sentence, and the jury's and judge's consideration of mitigating evidence was limited to mitigation "sufficient to outweigh" aggravation.

In his penalty phase instructions to the jury, the judge explained that the jury's job was to determine if the mitigating circumstances outweighed the aggravating circumstances:

> Should you find sufficient aggravating circumstances to exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.

(R. 1882). There can be no doubt that the jury understood that Mr. Rodriguez had the burden of proving whether he should live or die. In addition, this instruction communicates to the jury that only mitigating evidence which rose to the level of "outweighing" aggravation need be considered. Therefore, Mr. Rodriguez is entitled to relief in the

form of a new sentencing hearing in front of a jury, due to the fact that his sentencing was tainted by improper instructions.

Appellate counsel's failure to raise this claim on direct appeal constitutes the ineffective assistance of counsel and undermines confidence in this Court's opinion on direct appeal. Habeas relief should issue.

4. The jury's sense of responsibility was unconstitutionally diluted and appellate counsel failed to raise the claim.

Mr. Rodriguez' jury was instructed by the court and the prosecutor that it's role was merely advisory in violation of law. Time and again the jury was told that their role in sentencing was just a "recommendation." These instructions and comments infected Mr. Rodriguez' trial.

During voir dire, the court conditioned the prospective jurors by telling them their decision was only an advisory verdict and emphasized the bifurcated nature of the trial

(R. 318-319). The state attorney bolstered the court's previous comments and further diluted the jury's sense of responsibility during voir dire (R. 423, 495, 514-515). The state attorney continued to dilute the jury's role (R. 1839-1840), and

emphasized that it was "the judge's, final decision with regard to what should be done in this case. . . " (R. 1843), thereby, diminishing any reference made to great weight. Furthermore, the judge instructed the jury:

> As you have been told, the final decision as to what punishment shall be imposed is the responsibility of myself.

(R. 1880).

The judge did not instruct the jury that their recommendation would be given great weight. Contrary to the judge's instructions and the thrust of the prosecutor's argument, great weight is to be given to the jury's recommendation because the jury is a sentencer. Espinosa v. Florida, 112 S. Ct. 2926 (1992). Here the jury's sense of responsibility was diminished

by the misleading comments and instructions regarding the jury's role. This diminution of the jury's sense of responsibility violated the Eighth Amendment. Caldwell v. Mississippi, 472 U.S. 320 (1985). See Pait v. State, 112 So. 2d 380 (Fla. 1959). Appellate counsel's failure to raise this claim on direct appeal constitutes the ineffective assistance of counsel and undermines confidence in this Court's opinion on direct appeal. Habeas relief should issue

5. The pecuniary gain aggravating circumstance instruction given was unconstitutionally overbroad and vague and appellate counsel failed to raise the claim

The jury was given the following instruction regarding the murder for pecuniary gain:

> The crime for which the defendant is to be sentenced was committed for financial gain.

(R. 1881). Such instruction was vague and overbroad. Florida law has limited this circumstance to situations where the primary motive for the homicide was pecuniary gain. The jury was not so advised. Under Espinosa v.

Florida, 112 S. Ct. 2926 (1992), the instruction given to the jury violated Mr. Rodriguez' rights under the Eighth and Fourteenth Amendments. Mr. Rodriguez is entitled to relief. Appellate counsel's failure to raise the issue on direct appeal was ineffective assistance of counsel. Habeas relief should issue.

6. Failure by appellate counsel to properly raise the unconstitutionality for Florida's death penalty statute

At the time of Mr. Rodriguez' trial, sec. 921.141, Fla. Stat., provided in pertinent part:

> (b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
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> ****
>
> (d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

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(f) The capital felony was committed for pecuniary gain.

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(h) The capital felony was especially heinous, atrocious, or cruel.

The United States Supreme Court's opinions in Richmond v. Lewis, 113 S.Ct. 528 (1992) and Espinosa v. Florida, 112 S.Ct. 2926 (1992), require a resentencing before a jury in Mr. Rodriguez' case.

Mr. Rodriguez' penalty phase jury was not given "an adequate narrowing construction," but instead was simply instructed on the facially vague statutory language. Following the death recommendation, the sentencing judge imposed a death sentence. Under Florida law, the judge was required to give great weight to the jury's verdict. Espinosa.

As the United States Supreme Court recognized in Espinosa, in Florida a sentencing judge in a capital case is required to give the jury's verdict "great

weight." As a result, it must be presumed that a sentencing judge in Florida followed the law and gave "great weight" to the jury's recommendation. 112 S. Ct. at 2928. Certainly nothing in Mr. Rodriguez' case warrants setting aside that presumption. Florida law requires that where evidence exists to support the jury's recommendation, it must be followed. Scott v. State, 603 So. 2d 1275 (Fla. 1992). Here the judge considered, relied on, and gave great weight to the tainted jury recommendation. A "new sentencing calculus" free from the taint, as required by Richmond, had not been conducted. The judge was not free to ignore the tainted death recommendation. Scott.

Richmond demonstrates that Mr. Rodriguez was denied his Eighth Amendment rights. His jury was permitted to consider "invalid" aggravation because the aggravating factors specified by Fla. Stat. § 921.141(5)(b),(d),(f) and (h) are unconstitutionally vague. The jury was not given proper narrowing constructions so the facial unconstitutionality of the statute was not cured.

Relief is required because the jury is a sentencer:

> Florida has essentially split the weighing process in two. Initially, the jury weighs aggravating and mitigating circumstances, and the result of that weighing process is then in turn weighed within the trial court's process of weighing aggravating and mitigating circumstances.

Espinosa, 112 S. Ct. at 2928.

In Mr. Rodriguez' case, the jury must be presumed to have considered invalid statutory provisions and to have weighed these factors against the mitigation. Espinosa. Unless the Respondent can establish beyond a reasonable doubt that the consideration of the invalid statutory provisions had no effect upon the weighing process, the errors cannot be considered harmless. The mitigation in the record establishes that the errors were not harmless beyond a reasonable doubt. Espinosa and Richmond require that Mr. Rodriguez receive a new sentencing proceeding in front of a jury that comports with the Eighth Amendment.

Florida's capital sentencing scheme denies Mr.

Rodriguez his right to due process of law, and constitutes cruel and unusual punishment on its face and as applied in this case. Florida's death penalty statute is constitutional only to the extent that it prevents arbitrary imposition of the death penalty and narrows application of the penalty to the worst offenders. See Proffitt v. Florida, 428 U.S. 242 (1976). The Florida death penalty statute, however, fails to meet these constitutional guarantees, and therefore violates the Eighth Amendment to the United States Constitution.

The capital sentencing statute in Florida fails to provide any standard of proof for determining that aggravating circumstances "outweigh" the mitigating factors, Mullaney v. Wilbur, 421 U.S. 684 (1975), and does not define "sufficient aggravating circumstances." Further, the statute does not sufficiently define for the consideration each of the aggravating circumstances listed in the statute. See Godfrey v. Georgia, 446 U.S. 420 (1980). These deficiencies lead to the arbitrary

and capricious imposition of the death penalty and violate the Eighth Amendment to the United States Constitution.

Florida's capital sentencing procedure does not have the independent reweighing of aggravating and mitigating circumstances required by Proffitt v. Florida, 428 U.S. 242 (1976).

The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner, and juries receive unconstitutionally vague instructions on the aggravating circumstances. See Godfrey v. Georgia; Espinosa v. Florida, 112 S. Ct. 2926 (1992).

Florida law creates a presumption of death if a single aggravating circumstance is found. This creates a presumption of death in every felony murder case, and in nearly every premeditated murder case. Once an aggravating factor is found, Florida law provides that death is presumed to be the appropriate punishment, which can only be overcome by mitigating evidence so

strong as to outweigh the aggravating factor. This systematic presumption of death does not satisfy the Eighth Amendment's requirement that the death penalty be applied only to the worst offenders. See Furman v. Georgia, 408 U.S. 238 (1972); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988).

Because of the arbitrary and capricious application of Florida's death penalty, the statute as it exists and as applied is unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution.

"...[D]espite the effort of the States and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake." Callins v. Collins, No. 93-7054, slip op. at 3 (February 22, 1994)(Blackmun, J., dissenting).

"Because I no longer can state with any confidence that this Court is able to reconcile the Eighth Amendment's competing constitutional commands, or that the federal judiciary will provide meaningful oversight

to the state courts as they exercise their authority to inflict the penalty of death, I believe that the death penalty, as currently administered, is unconstitutional." Callins v. Collins, No. 93-7054, slip op. at 12 (February 22, 1994)(Blackmun, J., dissenting).

While it is true that appellate counsel raised the constitutionality of Florida's death penalty statute in Mr. Rodriguez' direct appeal, it was allotted a mere half page. No case law, other than Maynard v. Cartwright 486 U.S. 356, (1988) was cited. Rather than set forth meaningful argument supported by relevant authority, appellate counsel merely laid out conclusory allegations with no attempt to explain his logic. This Court was not given any meaningful framework upon which to predicate relief under this claim. Appellate counsel did not adequately argue this meritorious claim and relief is warranted.

7. Improper admission of Dante Perfumo's opinion

testimony

At Mr. Rodriguez' penalty phase, the State sought to introduce the testimony of Dante Perfumo of the City of Miami Fire Department. in order to support the heinous, atrocious, or cruel aggravating circumstance. Mr Perfumo testified that :

> Mr Saladrigas was in extreme pain..... He asked me all the way into the hospital if he was going to make it. Like I said, I've been in this business 10 years and this case stands out in my mind. I told him we were going to do everything we could for him and there was a good chance he would survive.

(R. 1810). Trial counsel objected to this testimony on the grounds that Perfumo was not a medical doctor and by implication, not entitled to give a medical opinion.

The admission of Perfumo's gratuitous opinions was highly prejudicial to Mr. Rodriguez. It was clearly intended to bolster improperly the confusing and inconsistent testimony elicited by the State at the guilt phase. Perfumo was clearly not a qualified

medical doctor or pain specialist and was not qualified to give an expert opinion on the amount of pain experienced by Saladrigas. The jury was left with an inaccurate and misleading impression to buttress the State's argument of the aggravating circumstance.[2]

The use of Perfumo's testimony was clearly improper. See e.g. Gianfranco v. State 670 So. 2d 377, (Fla. 4th DCA 1990) (reversible error as testimony of police officer as to opinion of relative culpability of alleged accomplices was attempt to bolster credibility of accomplice); Kendrick v. State, 532 So 2d 279 (Fla. 4th DCA 1994). (Police officer's testimony bolstering testimony of witnesses adverse to defendant was reversible error because jury may have regarded police officers as disinterested and objective and thereby highly credible.)

Any probative value attaching to Perfumo's testimony was clearly outweighed by its prejudicial effect to Mr.

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[2] This is especially egregious given the inflation and misrepresentation of Perfumo's testimony noted supra.

Rodriguez. Trial counsel raised sufficient objection to Perfumo's testimony, yet without strategy, appellate counsel failed to raise the issue on direct appeal. Relief is warranted.

C. FAILURE TO RAISE GUILT PHASE ISSUES

1. Introduction of gruesome and misleading photographs

At Mr. Rodriguez' capital trial, the prosecution was permitted to introduce into evidence gruesome photographs that were inflammatory, cumulative, and prejudicial, and admitted solely to inflame the passion of the jurors based on impermissible factors. The admission of these photographs allowed the state free rein in inflaming the passions of the jury. The probative value of these photographs was not only outweighed by their prejudice. The prejudicial effect of the photographs undermined the reliability of Mr. Rodriguez' conviction and death sentence. The photographs themselves did not independently establish any material part of the state's case nor were they

necessary to corroborate a disputed fact. The trial court's error in admitting these photographs cannot be considered harmless beyond a reasonable doubt. Chapman v. California, 87 S. Ct. 824 (1967); State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

The admission of these photographs provides further record demonstration of the trial court's levity while conducting this, a death penalty case. At one instance, trial counsel objected to the introduction of State Exhibit 53 as "morbid" (R. 812). However, the trial court facetiously brushed aside counsel's objection stating that the picture in question was "pretty mild"

In addition, numerous crime scene phonographs were introduced over trial counsel's objection. These photographs were misleading, being taken in daylight, some time after the incident, but nonetheless were admitted. (R. 812).

Use of these gruesome, misleading and irrelevant photographs, which were cumulative, inflammatory, and appealed improperly to the jury's emotions, denied Mr.

Rodriguez a fair trial in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and to corollary provisions within the Florida Constitution. However, appellate counsel inexplicably failed to raise the issue despite trial counsel's properly preserved objections. Relief is warranted.

2. Improper exclusion of testimony regarding "Tata's" non arrest

The picture painted by the State of this incident was that Juan Rodriguez was the master mind of this crime. However the trial court erroneously failed to allow trial counsel to ask any questions of the lead detective as to the arrest status of a key codefendant, Carlos Sponsa, aka "Tata". Nevertheless, despite the evidence of Tata's linchpin role, Tata was not and has never been apprehended for this offense. However, notwithstanding Tata's role, during his cross examination of Detective Francisco Castillo, trial counsel was prohibited from asking the detective whether

"Tata" had ever been arrested for his role in the incident:

> [by Mr. Kalisch] Now, you have just told me that all these individuals, Lazaro, Sergio, all these other guys are involved in the home invasion?
>
> [Castillo] Yes.
>
> [Q] They are not involved in the homicide?
>
> [A] Except for David
>
> [Q] Exactly. I am talking about Lazaro, Sergio, Angel, George all of those people?
>
> [A] Yes.
>
> {q} What about Tata? Is he involved in the homicide?
>
> {A] Yes he is.
>
> [Q] <u>Have you ever arrested this person by the name of Tata?</u>

(R. 971). The State then objected on the grounds that this question was beyond the scope of direct examination and the trial court sustained the objection. Counsel for Mr. Rodriguez then noted that he had been

given specific permission to go down this line of cross examination at a pretrial conference, but the trial court reaffirmed its ruling and denied trial counsel's request for a bench conference on the matter. The Court erred. Not only was its ruling capricious and in stark contrast to its prior ruling that counsel could pursue this line of cross examination but the Court precluded trial counsel for making a comprehensive record of his position.[3] Relief is warranted.

D. FAILURE BY APPELLATE COUNSEL TO ENSURE A COMPLETE RECORD

Appellate counsel failed to ensure that the record on appeal was complete. As a result, Mr. Rodriguez was denied a proper direct appeal against his judgements of convection and death sentence in violation of the Sixth,

[3] Unfortunately, the record of Mr. Rodriguez' direct appeal does not contain any transcript of such pretrial proceedings. Appellate counsel was ineffective for failing to ensure that the e record on appeal was complete and that all pretrial proceedings were transcribed for the purposes of the appeal. See Claim D. infra.

Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution due to omissions in the record.

The due process constitutional right to receive trial transcripts for use at the appellate level was acknowledged by the Supreme Court in Griffin v. Illinois, 351 U.S. 212 (1956). An accurate trial transcript is crucial for adequate appellate review. Id. at 219. The Sixth Amendment also mandates a complete transcript. In Hardy v. United States, 375 U.S. 277, 288 (1964), Justice Goldberg, in his concurring opinion, wrote that, because the function of appellate counsel is to be an effective advocate for the client, counsel must be equipped with "the most basic and fundamental tool of his profession . . . the complete trial transcript . . . anything short of a complete transcript is incompatible with effective appellate advocacy." In Mr. Rodriguez' case, the record on appeal does not contain any transcript of any pretrial hearings. The first transcript contained

within the record dates from proceedings held on January 22, 1990, the date when jury selection began.

Complete and effective appellate advocacy requires a complete trial record. A trial record should not have missing portion. However, in Mr. Rodriguez' case, a number of hearings were not included within the record on appeal, rendering complete and accurate appellate review impossible. A number of pretrial motions were filed by both the State and by Mr. Rodriguez' counsel during the period between Mr. Rodriguez' indictment in May 1989 and the commencement of trial in January 1990. These motions include, inter alia Defendant's motions to suppress Defendant's statement (R. 45-46) and Defendant's motion to suppress pretrial identification. (R. 48-49). No corresponding written court order is included within the record for each of these motions. Apparently the trial court ruled from the bench at the conclusion of each of the hearings on these motions. However, since there is no transcript of any pretrial hearings at all contained within the record, it is

impossible to determine neither what argument was made by either the State for Mr. Rodriguez' counsel nor the basis of any ruling by the judge. Appellate counsel was clearly aware that these pretrial motions hearings had occurred, yet inexplicably he failed to ensure that they were transcribed and included within the record on appeal. In his designation to the court reporter filed with the lower court on May 26, 1990, appellate counsel requested inter alia:

> Transcripts of pretrial motions including motion to suppress and motion in limine. January 22, 1990 (Friedman and Lombardi, Kimberly Scott).

(Designation to the Court Reporter at 1). However, the only transcript filed by the designated agency for January 22, 1990 consists of three pages of transcript involving a potential plea for Mr. Rodriguez. (R. 306-308). There is no transcript of any pretrial motions hearing on January 22, 1990 or any other date. Despite this obvious omission in the record, however, appellate counsel failed to follow up to ensure that the record

was complete. Appellate counsel failed to file a motion to supplement the deficient record with the missing transcripts nor failing. If for some technical reason, the court reporter had been unable to produce the transcripts, appellate counsel could have sought reconstruction of the missing hearings, yet there is no indication that any attempt to follow up the missing transcripts was made by appellate counsel following his receipt of the incomplete record.

In addition, portions of the record of the jury trial are missing. The entire opening argument of the trial defense counsel is absent from the record. Numerous unrecorded sidebars took place. Furthermore there are several typographical errors that suggest that the courtroom acoustics were seriously deficient. This is particularly pertinent since a number of the witnesses chose to testify in Spanish, through a Court interpreter. The existence of such obvious errors casts doubt on the accuracy of the entire transcript.

As a result of the numerous and significant

omissions in the record, this Court and any reviewing court in the future was and will be unable to determine whether Mr. Rodriguez's constitutional rights were violated. Appellate counsel had no way of knowing what happened during a critical phase of trial without a complete record, yet failed to ensure that the record was complete.

The circuit court is required to certify the record on appeal in capital cases, Fla. Stat. Ann. sec. 921.141(4), Fla. Const. art. 5, sec. 3(b)(1), and when errors or omissions appear, re-examination of the complete record in the lower tribunal is required. Delap v. State, 350 So. 2d 462 (Fla. 1977). Relief is warranted.

E. CONCLUSION

Appellate counsel clearly did not present several meritorious arguments. Given the paucity of argument advanced by appellate counsel the prejudice to Mr. Rodriguez is exacerbated. Individually and cumulatively, appellate counsel's errors show that Mr.

Rodriguez was denied the effective assistance of counsel at his direct appeal and that relief is warranted.

CLAIM II

THIS COURT FAILED TO CONDUCT A MEANINGFUL HARMLESS ERROR ANALYSIS WHEN CONSIDERING THE EFFECT OF IMPROPER PROSECUTORIAL ARGUMENT AND INADMISSIBLE HEARSAY TESTIMONY

In its opinion affirming Mr. Rodriguez; death sentence on direct appeal, this Court clearly recognized that the prosecutor, John Kastrenakis had made improper closing argument at Mr. Rodriguez' penalty phase:

> Firs, we address claim 2 dealing with improper comments by the prosecutor. During argument on the aggravating factor of heinous, atrocious, or cruel the prosecutor made the following comments:
>
> *This is torture. And who inflicted it? This man with his eyes closed, sleeping over here.*
>
> Defense objected, moved for a mistrial and pointed out that the "defendant was listening to the interpreter" rather than sleeping. The trial court denied the motions stating that whether[the defendant] was sleeping or not is up to the jury to decide."

> As the State concedes, the prosecutor's reference to the fact that the defendant appeared to be sleeping was clearly improper. The defendant's demeanor off the witness stand is not a proper subject for argument and in some cases may be prejudicial. Pope v. Wainwright, 406 So. 2d 798, 802 (Fla.1986), cert denied 480 U.S. 851 (1987). However, under the circumstances reversal is not warranted

Rodriguez v. State, 609 So. 2d 493, 509 (Fla. 1992)

In addition, relating to the guilt phase, appellate counsel raised the issue of inadmissible hearsay being introduced to bolster the testimony of the chief prosecution witness, Detective Castillo. As the State conceded and this Court found

> ..the testimony of Detective Castillo recounting the information gathered by police from witnesses concerning Mr. Saladrigas' dying declarations, as well as the detectives testimony concerning Jose Arzola's description of the man who came to the auto parts store just prior to the murder was hearsay for which there was no valid exception. Although we find the admission of this testimony harmless beyond a reasonable doubt, Parker v. State, 476 So. 2d at

> 137, we take this opportunity to caution trial courts to guard against allowing the jury to hear prior consistent statements which are not properly admissible.

Rodriguez at 507.

In both instances, this Court's harmless error analysis was Eighth and Fourteenth Amendment error. The harmless error test was set forth by the United States Supreme Court in Chapman v. California, 386 U.S. 18 (1967). In order for constitutional error to be harmless, the State must show "beyond a reasonable doubt that the error complained of did not contribute to the [outcome] obtained." Yates v. Evatt, 111 S. Ct. 1884 (1991), citing Chapman v. California. The burden is on the State to show the harmlessness of the error and to overcome a presumption of harm. Arizona v. Fulminante, 111 S. Ct. 1246 (1991). If there is a reasonable possibility that the constitutional error might have contributed to the jury's recommendation, the error is not harmless beyond a reasonable doubt and Mr. Rodriguez

is entitled to relief. Chapman v. California; Yates v. Evatt.

Florida adopted the Chapman test in State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986), which held that the State as beneficiary of the error must prove beyond a reasonable doubt that the error complained of did not contribute to the verdict, or alternatively stated, that there is no reasonable possibility that the error contributed to the conviction or sentence.

In Mr. Rodriguez' penalty phase, the jury was left with the inference that not only was the crime heinous, atrocious, or cruel, but that by allegedly sleeping through the argument, he was showing contempt for the proceedings and lack of remorse. The judge and jury that sentenced Mr. Rodriguez were presented with and considered non-statutory aggravating circumstances. The sentencer's consideration of improper and unconstitutional non-statutory aggravating factors starkly violated the Eighth and Fourteenth Amendments to the United States Constitution, and prevented the

constitutionally required narrowing of the sentencer's discretion. See Stringer v. Black, 112 S. Ct. 1130 (1992); Maynard v. Cartwright, 486 U.S. 356 1988). As a result, these impermissible aggravating factors evoked a sentence that was based on an "unguided emotional response," a clear violation of Mr. Thomas' constitutional rights. Penry v. Lynaugh, 492 U.S. 302 (1989).

Limitation of the sentencer's ability to consider aggravating circumstances other than those specified by statute is required by the Eighth Amendment. Maynard v. Cartwright, 486 U.S. 356 (1988). Aggravating circumstances specified in Florida's capital sentencing statute are exclusive, and no other circumstances or factors may be used to aggravate a crime for purposes of the imposition of the death penalty. Miller v. State, 373 So. 2d 882 (Fla. 1979).

The penalty phase of Mr. Rodriguez' trial did not comport with these essential principles. The prosecutor made clearly improper arguments and thus inflamed the

jury's passions by setting before them an improper non statutory aggravating circumstance. This argument of a non statutory aggravating circumstance was Eighth Amendment error and was not harmless. This Court's harmless error analysis on direct appeal did not comport with the requirements of Chapman, DiGuilio, and Stringer. Relief is warranted.

CLAIM III

THE CONSTITUTIONALITY OF THE FIRST-DEGREE MURDER INDICTMENT MUST BE REVISITED IN LIGHT OF APPRENDI V. NEW JERSEY

On direct appeal, Mr. Rodriguez challenged his conviction as disproportionate inter alia because it was predicated on felony murder. As appellate counsel summarized the argument, Mr. Rodriguez' sentence of death is "...first of all, in this armed-robbery felony-murder case, a disproportional, cruel and unusual punishment" Initial Brief at 19. The Court found the issue without merit based on a comparison with other death penalty cases.

The Court's rejection of the argument should be revisited in light of Apprendi v. New Jersey, 120 S.Ct. 2348 (2000). In Apprendi, the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at

2362-63. The constitutional underpinnings of the Court's holding are the Sixth Amendment right to trial by jury, as well as the Fourteenth Amendment right to due process. Id. at 2355 ("At stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without `due process of law,' Amdt. 14, and the guarantee that `[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury,' Amdt. 6"). "Taken together, these rights indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.'" Id. (quotation omitted).

Mr Rodriguez submits that this matter is ripe for reconsideration in light of the rule discussed in Apprendi. If the Sixth and Fourteenth Amendments are violated under the New Jersey scheme in Apprendi, then Florida's failure to require the State to charge and prove the underlying elements of either premeditated or

felony murder suffers from a similar constitutional flaw. Thus, this issue should be revisited at this time.

CONCLUSION

For all of the reasons discussed herein, Mr. Rodriguez respectfully urges the Court to grant habeas corpus relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing petition has been furnished by United States Mail, first class postage prepaid, to Lisa Rodriguez Esq. Assistant Attorney General, 444 Brickell Avenue, Suite 950, Miami, Fl 33131; on this 28th day of December, 2001.

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that this petition complies with the font requirements of rule 9.100(l), Fla. R. App. P.

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