IN THE SUPREME COURT OF FLORIDA

CASE NO: SC01-2808
LOWER TRIBUNAL NO: 94-537-CF

FLOYD DAMREN

Petitioner,

v.

Michael Moore, Secretary,
Department of Corrections, State of Florida,

Respondent.

AMENDED PETITION FOR EXTRAORDINARY RELIEF AND FOR A WRIT OF HABEAS CORPUS

JEFFERSON W. MORROW, P.A.

Florida Bar No. 369136
1301 Riverplace Blvd., Suite 2600
Jacksonville, FL 32207
Telephone: (904) 399-5626
Facsimile: (904) 399-5980

ATTORNEY FOR DEFENDANT

STATEMENT OF FONT

THIS Petition is written in Courier Font size twelve (12).

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla. R. App. P. 9.100(a). This court has original jurisdiction pursuant to Fla. R. App. P. 9.030 (a) (3) and Article V, sec. 3 (b) (9), Fla. Const. The petition presents constitutional issues which directly concern the judgement of this Court during the appellate process, and the legality of Mr. Damren's capital conviction and sentence of death. As reflected in this Court's recent precedents, the merits of the claims presented are properly before the Court at this juncture. Mr. Damren was sentenced to death and direct appeal was taken to this court. The trial court's judgement and sentence were affirmed.

Damren v. State, So. 2d. (Fla. 1987).

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 involved the appellate review process. See **Wilson v. Wainwright**, 474 So. 2d. 1163 (Fla. 1985); **Baggett v. Wainwright**, 229 So. 2d. 239, 243 (Fla. 1969); see also **Johnson v. Wainwright**, 392 So. 2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Damren to raise the claims presented herein. See e.g., **Downs v. Dugger**, 514 So. 2d. 1069 (Fla. 1987); **Riley v, Wainwright**, 517 So. 2d. 656 (Fla. 1987); **Wilson, supra**.

This Court has consistently maintained an especially vigilant control over capital cases, exercising a special scope of review, see **Elledge v. State**, 346 So. 998, 1002 (Fla. 1977); **Wilson v. Wainwright**, 474 So. 2d. At 1156, 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. Wilson; Johnson; Downs; Riley. This petition presents substantial constitutional questions which go to the heart of the fundamental fairness and reliability of Mr. Damren's capital conviction and sentence of death, and of this Court pursuant to its habeas corpus jurisdiction.

This Honorable Court has the inherent power to do justice. As shown

below, the needs 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. See e.g., Wilson; Johnson; Downs; Riley supra. The petition pleads claims involving fundamental constitutional error. See **Dallas v. Wainwright**, 175 So. 2d. 785 (Fla. 1965); **Palms v. Wainwright**, 460 So. 2d 362 (Fla. 1984). The petition includes claims predicted on significant, fundamental, and retroactive changes in constitutional law. See e.g., **Jackson v. Dugger**, 14 F.L.W. 355 (Fla. 1989); **Thompson v. Dugger**, 515 So. 2d. 173 (Fla. 1987); **Tafero v. Wainwright**, 459 So. 2d 1034, 1035 (Fla. 1984); **Edward v. State**, 393 So. 2d 597, 600 n. 4 (Fla. 3d. DCA), petition denied, 402 So. 2d 613 (Fla. 1981); cf. **Witt v. State,** 387 So. 2d 922 (Fla. 1980). The petition also involves claims of ineffective counsel on appeal. See **Knight v. State**, 394 So. 2d. 997, 999 (Fla. 1981); **Wilson v. Wainwright**, supra, **Johnson v. Wainwright**, supra . These reasons demonstrate that 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, as the petition shows, habeas corpus relief would be more than proper on the basis of Mr. Damren's claims.

Mr. Damren's claims are presented below. They demonstrate that habeas corpus relief is proper in this case.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, petitioner asserts that his convictions and his sentence of death were obtained and then affirmed during the Court's appellate review process in violation of his rights as guaranteed by the Fourth, Fifth, Sixth, Eighth and Fourteenth amendments to the United States Constitution, and the corresponding provisions of the Florida Constitution, for each of the reasons set forth herein. In Mr. Damren's case, substantial and fundamental errors occurred in the guilt and penalty phases of trial. These errors were uncorrected by the appellate review process. As shown below, relief is appropriate.

CLAIM I
THE FINDING OF THE AGGRAVATING FACTOR OF HEINOUS, ATROCIOUS AND CRUEL VIOLATED THE EIGHTH AMENDMENT, LEWIS V. JEFFERS, 110 S. CT. 3092 (1190), BECAUSE NO RATIONAL FACTFINDER COULD FIND THE ELEMENTS OF THIS AGGRAVATOR PROVEN BEYOND A REASONABLE DOUBT.

The case law from the Supreme Court of the United States requires

reconsideration of this claim presented on direct appeal. In **Lewis v. Jeffers**, the Supreme Court held that the Eighth Amendment requires sufficient evidence exist in the record to support a finding that a particular aggravating circumstance is present. In Mr. Damren's case, there is insufficient evidence under **Lewis v. Jeffers** and Mr. Damren's death sentence must be vacated.

In Florida, the State has the burden of proving aggravating circumstances beyond a reasonable doubt. **Hamilton v, State**, 547 So. 2d 630 (Fla. 1989). In **Proffitt v. Florida**, 428 U.S. 242 (1976), the Supreme Court approved the Florida Supreme Court's limiting construction of the 'heinous, atrocious or cruel' aggravating circumstance:

> [The Florida Supreme Court] has recognized that while it is arguable that all killings are atrocious, - - - still, we believe that the Legislature intended something 'especially' heinous, atrocious or cruel when it authorized the death penalty for first degree murder. **Tedder v. State**, 322 So. 2d, at 910. As a consequence, the court has indicated that the eighth statutory provision is directed only at the conscienceless or pitiless crime which is unnecessarily torturous to the victim. **State v. Dixon**, 283 So. 2d, at 9. See also, **Alford v. State**, 307 So. 2d 433, 445 (1975); **Halliwell v. State**, (323 So. 2d 557), at 561 (Fla. 1975). We cannot say that the provision, as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital case.

Proffitt, 428 U.S. at 255-56 (footnote omitted) (emphasis added). The Supreme

Court of Florida has held that it must be proven beyond a reasonable doubt that the victim was conscious when acts being used to urge this aggravator occurred. **Rhodes v. State**, 547 So. 2d 1201 (Fla. 1989). The victim's consciousness was not proved beyond a reasonable doubt but rather by inadmissable hearsay evidence.

Florida law states that simply because a victim is alive during an attack does not establish that he/she was conscious. An unconscious victim cannot suffer the unnecessarily tortuous trauma required for finding of the heinous aggravating factor. The State has the burden of proof to establish beyond a reasonable doubt that a victim is in fact conscious during an attack. The evidence presented at the trial level was hearsay evidence that the victim was conscious.

Under **Lewis v. Jeffers**, 110 S. Ct. 3092 (1990), question is whether a rational factfinder could have found the elements of this aggravator proven beyond a reasonable doubt. See **Jackson v. Virginia**, 443 U.S. 307, 319; **Jeffers**, 110 S. Ct. at 3120-03. Here, as the State conceded, there is no way to know. Accordingly, habeas corpus relief must be accorded now.

CLAIM II

FLORIDA'S STATUTE SETTING FORTH THE AGGRAVATING CIRCUMSTANCES TO BE CONSIDERED IN A CAPITAL CASE IS FACIALLY VAGUE AND OVERBROAD IN VIOLATION OF THE EIGHTH AND FOURTEENTH; THE FACIAL INVALIDITY OF THE STATUTE WAS NOT CURED IN MR. DAMREN'S CASE WHERE THE JURY DID NOT RECEIVE ADEQUATE NARROWING INSTRUCTIONS. AS A RESULT, MR. DAMREN'S SENTENCE OF DEATH IS PREMISED UPON FUNDAMENTAL ERROR WHICH MUST BE CORRECTED NOW IN LIGHT OF FLORIDA LAW, ESPINOSA V. FLORIDA AND RICHMOND V. LEWIS.

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

(5) AGGRAVATING CIRCUMSTANCES. Aggravating circumstances shall be limited to the following:

* * *

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

* * *

(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.

* * *

(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) establish that the

aggravating circumstances of heinous, atrocious or cruel is vague and overbroad under the Eighth Amendment. Richmond requires a resentencing before a jury in Mr. Damren's case.

At issue in Richmond was whether an Arizona aggravating factor, statutorily defined as especially heinous, atrocious, cruel or depraved, was constitutionally applied in Mr. Richmond's case. In that case, the trial court had found three (3) aggravating factors, including the especially heinous, atrocious, cruel or depraved factor, determined that these factors out weighed the mitigation which the defendant had presented, and sentenced him to death. On direct appeal, the five member Supreme Court of Arizona affirmed the defendant's sentence with two (2) justices finding that the especially heinous, atrocious, cruel or depraved aggravating factor was properly applied, two (2) justices finding that the factor was not properly applied but concluding that the sentence of death appropriate even absent the factor, and one (1) justice dissenting. The United States District Court for the District of Arizona denied habeas corpus relief and the United States court of appeals for the Ninth Circuit affirmed, finding that the Arizona Supreme Court had applied a valid narrowing construction of the especially heinous, atrocious, cruel or depraved factor, or in the alternative, that the case was distinguishable from **Clemons v. Mississippi**, 494 U.S. 738 (1990) (requiring either appellate reweighing or a valid

harmless error analysis after an appellate court strikes an aggravating factor) because under the statute at issue in **Clemons** the invalidation of an aggravating circumstance neccessarily rendered any evidence of mitigation 'weightier' or more substantial in a relative sense, while the same could not be said under the terms of the Arizona statute. Challenging the latter determination, Mr. Richmond petitioned the United states Supreme Court for certiorari, arguing that the statute in question was unconstitutionally vague and that invalidity during the appellate process.

In analyzing the issue, the Supreme Court stated:

> The relevant Eighth Amendment law is well defined. First, a statutory aggravating factor is unconstitutionally vague if it fails to furnish principled guidance for the choice between death and a lesser penalty. S4e e.g., **Maynard v. Cartwright**, 486 U.S. 356, 361-361 (1988); **Godfrey v. Georgia**, 446 U.S. 420, 427-433 (1980). Second, in a weighing State, where the aggravating and mitigating factors are balanced against each other, it is constitutional error for the sentencer to give weight to an unconstitutionally vague aggravating factor, even if other valid aggravating factors obtain. See e.g., **Stringer v. Black**, 503 U.S. (1992) (slip op.,at 6-9); **Clemens v. Missippi**, supra, 748-752. Third, a state appellate court may rely upon an adequate narrowing construction of the factor in curing this error. See **Lewis v. Jeffers**, 497 U.S. 764 (1991); **Walton v. Arizona**, 497 U.S.639 (1990). Finally, in federal habeas corpus proceedings, the state court's application of the narrowing construction should be reviewed under the rational factfinder standard of
> **Jackson v. Virginia**, 443 U.S. 307 (1979). See **Lewis v. Jeffers**, supra, at 781.

Since a majority of the Arizona Supreme Court had found that the trial Court had applied the heinous, atrocious, cruel or depraved aggravating circumstance contrary to that court's narrowing construction through an appellate reweighing or to conduct any meaningful harmless error analysis, the United States Supreme Court vacated Mr. Richmond's sentence of death and remanded for a new sentencing.

The same result is required here. In Mr. Damren's case, the Florida Statute defined the heinous, atrocious or cruel aggravating factors as follows: the capital felony was especially, heinous, atrocious or cruel. The Statute did not further define these aggravating factors. This statutory language is and was facially vague. Richmond, 113 S. Ct. at 535; **Espinosa v. Florida**, 112 S. Ct. 2926 (1992)

Damren's judge instructed the jury on HAC in the following manner:

> The crime for which the Defendant is to be sentenced was especially heinous, atrocious or cruel. 'Heinous' means extremely wicked or shockingly evil. 'Atrocious' means outrageously wicked and file. 'Cruel' means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. The kind of crime intended to be included as heinous, atrocious or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.(Trial 989)

While the Supreme Court has adopted narrowing constructions of these two statutory provisions, the United states Supreme Court held in Richmond that, not

only must a state adopt an adequate narrowing construction, but that construction must also be applied either by the sentencer or by the appellate court in a re-weighing in order to cure the facial invalidity. Richmond, 113 S. Ct. at 252 ('Where 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.').

In Mr. Damren's case, the narrowing construction was not applied by one of the constituent sentencers. His penalty phase jury was not given 'an adequate narrowing construction,' but instead was simply instructed in the facially vague statutory language. Following the jury's vote of 12 to 0 for 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 promulgated 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. Noting existed in Mr. Damren's case to warrant 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 jury recommendation. A new sentencing calculus free from taint, as required by Richmond, had not been conducted. The judge is not free to ignore the tainted death recommendation. **Scott** , **Richmond**, demonstrates that Mr. Damren was denied his Eight Amendment Rights. His jury was permitted to consider invalid aggravating factors specified by Fla. Stat. S. 921.141 (5) (h) was unconstitutionally vague. The jury was not given the proper narrowing construction so the facial onconstitutionality 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 with the trial court's process of weighing aggravating and mitigating circumstances.

Espinosa , 112 S. Ct. at 2928.

Therefore, even if the trial court did not directly weigh any invalid aggravating circumstances, it must be presumed that the jury did so. Id. in imposing the death sentence, the trial court presumably considered the jury recommendation, also presumably giving it the great weight required by Florida law. Id. Thus, the trial court indirectly weighed the invalid aggravating factors that we must presume the

jury found. This kind of indirect weighing of invalid factors creates the same potential for arbitrariness as the direct weighing of an invalid aggravating factor and the result, therefore, was error.

Considering invalid aggravating factors adds weight to death's side of the scale, Stringer, 112 S. Ct. at 1137, creating the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusionary circumstance. Id. at 1139. The errors resulting from the unconstitutional instruction regarding the heinous, atrocious or cruel aggravating circumstance provided to Mr. Damren's jury were not harmless beyond a reasonable doubt. When the weighing process has been infected with a vague factor the death sentence must be invalidated. Stringer, 112 S. Ct. at 1139. In Florida the sentencer weighs aggravation against mitigation in determining the appropriate sentence. Stringer. Thus, assessing whether an error occurring during the sentencing process was harmless or not requires assessing the effect of the error on the weighing process. In Mr. Damren's case, the jury must be presumed 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 substantial mitigation in the record establishes that the errors were not harmless beyond a reasonable doubt. **Espinosa**. and

Richmond require that Mr. Damren receive a new sentencing proceeding in front of a jury that comports with the Eighth Amendment. Appellate counsel was ineffective for not raising this issue on direct appeal.

Accordingly, habeas corpus must be accorded now.

CLAIM III

TRIAL COUNSEL WAS INEFFECTIVE BY LEADING THE JURY TO BELIEVE THAT THE RESPONSIBILITY FOR DETERMINING THE APPROPRIATENESS OF THE PETITIONER'S DEATH RESTS ELSEWHERE

The trial judge instructed the jury that their recommendation was advisory (not binding) on the court, meaning the judge and the ultimate responsibility to sentence the defendant. [Trial 989]. In this regard it is clear that the trial counsel rendered ineffective assistance because he was totally ignorant of long standing Florida law. The trial counsel ad no strategic reason for his inaction to educate the trial jury. It resulted from a lack of awareness or the law and tus constituted deficient performance. It is therefore proven Damren was prejudiced in the second prong of the **Washington v. Strickland**, supra test.

The claim is not procedurally barred because it is fundamental error for the trial court to impose a death sentence without conducting a reasoned weighing of the aggravation and mitigating circumstances. See **Dixon**, 283 So. 2d at 10. Moreover, 'this Court absolutely required the propriety of the judgement of

conviction in death penalty cases, and that duty cannot be defeated by type procedural bar that would apply in judgments resulting in lesser sentence.' **Wournos v. State**, 676 So. 2d. 966 968 (1995) in order to review the judgement in this case, this Court must review this claim since it is a constitutional violation which formed the basis of Mr. Damren's sentence. **Koenig v. State**, 597 so. 2d 256, 257 n.1 (1992).

CONCLUSION

Petitioner urges that the Court grant him habeas corpus relief, or, alternatively a new appeal, for all of the reasons set forth herein, and that the Court grant all other and further relief which the Court may deem just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Curtis French, attorney General's office, Tallahassee, Florida and to Floyd Damren, Raiford, Florida, this _____day of January, 2002.

CERTIFICATE OF COMPLIANCE

THIS Petition is written in Courier Font size twelve (12).

Respectfully submitted,

JEFFERSON W. MORROW, P.A.

Jefferson W. Morrow, P.A.
Florida Bar No. 369136
1301 Riverplace Blvd., Suite 2600
Jacksonville, FL 32207
Telephone: (904) 399-5626
Facsimile: (904) 399-5980

ATTORNEY FOR DEFENDANT