IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-1300

JAMES AREN DUCKETT,

Petitioner,

v.

MICHAEL C. MOORE,
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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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. Duckett was deprived of the effective assistance of counsel on direct appeal and that the proceedings that resulted in his convictions and death sentence violated fundamental constitutional guarantees.

Citations to the Record on the 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. 9.030(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.

REQUEST FOR ORAL ARGUMENT

Mr. Duckett is innocent. The resolution of the claims in this petition and in his appeal from the denial of his Motion to Vacate Convictions and Sentence, presently pending in this Court, will determine if an innocent man lives or denies. Mr. Duckett respectfully asserts that oral argument is necessary to allow the Court an opportunity to fully understand and address these critical issues.

PROCEDURAL HISTORY

On October 27, 1987, James Aren Duckett was charged by indictment in Lake County, Florida, with one count of first degree murder (R. 2251). On February 29, 1988, Mr. Duckett was charged by information with one count of attempt to commit sexual battery in violation of Fla. Stat. § 794.011(2) (R. 2306). The two cases were consolidated for trial upon stipulation of both parties on April 4, 1988 (R. 2325).

On November 3, 1987, attorney Jack Edmund filed a notice of appearance of counsel on Mr. Duckett's behalf (R. 2258). The assigned prosecutors were Steve Hurm and Thomas Hogan. Mr. Duckett entered pleas of not guilty to both counts.

Trial commenced on April 25, 1988, before Judge Jerry T Lockett and on May 10, 1988, the jury returned guilty verdicts on both counts (R. 2432-33, 2008).

Within a few hours of the conclusion of the first phase of the trial on May 10, 1988, the penalty phase proceeding began (*See* R. 2434-2441). Later that same day, the jury returned a recommendation of death by a vote of eight to four (R. 2442). On June 30, 1988, Judge Lockett imposed a sentence of death with regard to the murder count and a sentence of life with a 25 year minimum mandatory on the sexual battery count, to run consecutively (R. 2552).

On June 30, 1988, Mr. Edmund filed a Notice of Appeal in the circuit court (R. 2564). The notice erroneously stated that an appeal was being taken to the Fifth District Court of Appeal and then requested, again in error, that the clerk transmit a copy of the record to the Second District Court of Appeal (*Id.*). On July 12, 1988, Mr. Edmund filed an Amended Notice of Appeal which correctly stated that the appeal was to this Court (R. 2568).

Following the filing of the Notice of Appeal, Mr. Edmund moved to withdraw from the case citing irreconcilable differences with Mr. Duckett,[1] and on December 27, 1988, the trial court granted the motion (*See* Record on Appeal - Order Granting Motion to Withdraw, December 27, 1988). On February 1, 1989, the circuit court held a hearing concerning the appointment of counsel for the appeal (*See* Record on Appeal - Order, February 1, 1989). Due to illness, Mr. Edmund was not present at the hearing (*Id.*). A transcript of this hearing, if one exists, was not included in the Record on Appeal. Following the hearing, the circuit court rescinded the order relieving Mr. Edmund of his duties and appointed him to represent Mr. Duckett is his appeal (*Id.*).

[1]Mr. Duckett had written Mr. Edmund and dismissed him due to a lack of communication and total incompetence.

On February 1, 1989, Mr. Edmund filed his Initial Brief with this Court. On February 17, 1989, the Appellee filed a Motion to Strike the appellant's brief, because the appellant's brief did not reference the penalty phase at all in the initial brief and failed to even note that a penalty phase had been held in Mr. Duckett's case or that he had been sentenced to death (*See* Motion to Strike, February 17, 1989). This Court denied the Motion to Strike but ordered Mr. Edmund to file a supplemental brief addressing the penalty phase on or before April 10, 1989 (Order, Case No. 72,711, February 23, 1989). On April 7, 1989, Mr. Edmund filed an Amended Brief and on April 27, 1989, a 47 page Supplement to the Amended Brief which replaced the amended brief in its entirety. This brief raised four issues.

This Court affirmed Mr. Duckett's convictions and sentence of death on November 14, 1990. The Court found that the admission of the testimony of Kimberly Ruetz pursuant to Williams v. State[2] was error, but ruled it harmless. Duckett v. State, 568 So. 2d 891, 895 (Fla. 1990).

Mr. Duckett thereafter sought relief pursuant to Fla. R. Crim. P. 3.850 on May 1, 1992 (PC-R. 1859-70). An Amended Motion was filed in November of 1994 (PC-R. 337-470). On May 23, 1995, the court ordered

[2]Williams v. State, 110 So. 2d 654 (Fla. 1959).

evidentiary hearings on claims I, II - A, C (¶22-23), D, E and F, III, V and IX[3] (PC-R. 778). Evidentiary hearings were conducted on January 7-8, 1997, October 28-30, 1997, December 17, 1997, October 26-27, 1998, and February 19, 1999. On August 13, 2001, circuit court denied relief on all claims (PC-R. 1782-1819). An appeal from that order was taken to this Court. The initial brief was filed on May 31, 2002, and the appeal is presently pending in this Court.

CLAIM I

JAMES DUCKETT IS INNOCENT AND HIS EXECUTION WOULD BE A MISCARRIAGE OF JUSTICE.

James Duckett is innocent, and his execution (and continued imprisonment) would constitute a miscarriage of justice, in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, the corresponding provisions of the Florida Constitution and Florida law. Because the execution or imprisonment of someone who is innocent of the charges would constitute a miscarriage of justice,

[3]The evidentiary hearing was held on Claim XI rather than Claim IX. This was a typographical error in the court's order.

this Court must set aside Mr. Duckett's conviction and death sentence.

James Duckett is innocent. This Court has before it evidence that the key witness against Mr. Duckett lied at trial to insure that the state gain a conviction. None of the evidence presented by the state at trial stands unrebutted at this point. The facts are that several better and more likely suspects in the case were never investigated after the Lake County Sheriff's Office decided James Duckett was their man. The focus and intent of investigators was to secure a conviction at any cost, regardless of the truth. The result was that an innocent man now awaits execution.

Because Mr. Duckett is actually innocent of murder, his execution would constitute a miscarriage of justice and would be violative of the Eighth Amendment to the United States Constitution and the analogous provision of the Florida Constitution.

In Herrera v. Collins, 506 U.S. 390 (1993), the United States Supreme Court addressed, for the first time, whether a colorable claim of actual innocence was cognizable in postconviction proceedings. That issue was not expressly resolved but a majority of the Court

spoke to the issue. Justices O'Connor and Kennedy firmly held that "the execution of a legally and factually innocent person would be a constitutionally intolerable event." Herrera, at 419. However, because they concluded that Mr. Herrera's evidence of actual innocence was wholly unpersuasive they determined no constitutional violation would occur upon his execution.[4]

Similarly, Justice White "assume[d] that a persuasive showing of 'actual innocence' . . . would render unconstitutional the execution of Petitioner. . ." *Id*. at 429. Again, because Mr. Herrera could not "show that based on proffered newly discovered evidence and the entire record before the jury that convicted him, 'no rational trier of fact could [find] proof of guilt beyond a reasonable doubt,'" *Id*., he found no relief was appropriate.

Justice Blackmun, joined by Justices Stevens and Souter, found that "nothing could be more contrary to

[4]The evidence of Mr. Herrera's innocence consisted of statements, mostly hearsay, from family members of the defendant that purported to exonerate the defendant. An eyewitness put Mr. Herrera at the scene of the crime, the victim's blood was found on Mr. Herrera and Mr. Herrera's social security card was found at the scene. Conversely, the evidence of innocence in Mr. Duckett's case is overwhelming.

contemporary standard of decency, or more shocking to the conscience, than to execute a person who is actually innocent." *Id*. at 430 (citations omitted). Justices Blackmun, Stevens and Souter would have remanded the case to the district court for an evidentiary hearing on the actual innocence claim. Finally, Chief Justice Rehnquist, assumed "for the sake of argument in deciding [Herrera], that in a capital case a truly persuasive demonstration of 'actual innocence' . . . would render the execution of a defendant unconstitutional." *Id*. at 417. The Chief Justice found, however, like Justices O'Connor, Kennedy and White, that the evidence proffered by Mr. Herrera was insufficient to make a truly persuasive showing of actual innocence.

Thus, there are at least 5 Justices who unequivocally found that the United States Constitution, specifically the Eighth Amendment's prohibition against cruel and unusual punishment, prohibits the execution of an innocent person. The only thing left to determine is the appropriate standard by which an "actual innocence" claim is to be evaluated. While historically it was understood that postconviction relief could not be

granted on solely a free-standing claim of innocence, that notion has been eroding in the states since the early 1920's. Neely v. State, 565 So.2d 337 (4th D.C.A. Fla. 1990) (relief granted on grounds of newly discovered evidence), People v. Ross, 191 Ill. App. 3d 1046, 548 N.E. 2d 527(1989)(newly discovered evidence is proper basis for relief), Wadsworth v. State, 507 So. 2d 572 (Ala. Crim. App. 1987), Edgemon v. State, 292 Ark. 465, 730 S.W. 2d 898 (1987), In re Kirschke, 53 Cal. App. 3d 405, 125 Cal Rptr. 680 (1975). The trend across the country is to give relief in post-conviction proceedings for a claim of actual innocence where there is new evidence. "Newly discovered evidence is a ground for postconviction habeas corpus in seven states -- California, Connecticut, Georgia, Nevada, Texas, Utah, and Washington." Wilkes, State Postconviction Remedies and Relief § 1-13, at 31 (1996). *See*, *e.g.*, Callier v. Warden, 111 Nev. 976, 901 P.2d 619 (1995); Casida v. Deland, 866 P.2d 599 (Utah App. 1993); Talton v. Warden, 33 Conn. App. 171, 634 A.2d 912 (1993); Stewart v. State, 830 P.2d 1159, 275 Cal. Rptr. 729 (1991); Valenzuela, 253 Ga. 793, 325 S.E.2d 370 (1985); In re Hall, 30 Cal. 3d 408, 637 P.2d

690, 179 Cal. Rptr. 223 (1981); In re Wright, 78 Cal. App. 3d 788, 144 Cal. Rptr. 223 (1981); In re Branch, 70 Cal. 2d 200, 449 P.2d 174, 74 Cal. Rptr. 238 (1969); Gallegos v. Turner, 17 Utah 2d 273, 409 P.2d 386 (1965).

Society recoils at state execution of an innocent person. Such a barbaric act is "at odds with contemporary standards of fairness and decency", Spaziano v. Florida, 468 U.S. 447, 465 (1984), and would be "bound to offend even hardened sensibilities." Rochin v. People of California, 342 U.S. 165, 172 (1952). As Judge Learned Hand recognized, our justice system in fact is "haunted by the ghost of the innocent man" executed. Charles E. Silberman, Criminal Violence, Criminal Justice 262 (1978); *see also* Pulley v. Harris, 465 U.S. 37, 68 (1984) ("The execution of someone who is completely innocent . . . [is] the ultimate horror case.") (Brennan, J., dissenting) (quoting John Kaplan, The Problem of Capital Punishment, 1983 U. Ill. L. Rev. 555, 576) (internal quotations omitted).[5] "The infliction of a severe

[5]Sir John Fortescue relayed the story of a judge who allowed a person to be executed. It subsequently came to light that the person was innocent. Fortescue remarked of the judge: "Never in his life

punishment by the state cannot comport with human dignity when it is nothing more than the pointless infliction of suffering." Furman v. Georgia, 408 U.S. 238, 279 (1972) (Brennan, J., concurring). The "natural abhorrence civilized societies feel at killing" an innocent person, Ford v. Wainwright, 477 U.S. 399, 409 (1986), requires that the law remove that possibility as much as is humanly possible. Society's abhorrence at the idea of executing an innocent person finds expression in the United States Supreme Court's Eighth Amendment and Fourteenth Amendment jurisprudence. First, as a matter of substantive Fourteenth Amendment law, "no person can be punished

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would he purge his mind of that deed of his." John Fortescue, De Laudibus Legum Anglie (1490). The Attorney General for Texas from 1983 to 1991 feared this "abhorrent" possibility: "My worst nightmare would have been the execution of an innocent person." Jim Mattox, "On Not Executing an Innocent Prisoner," Apr. 3, 1992.

Charles Dickens opposed the death penalty due to the "possibility of mistake," Selected Letters of Charles Dickens 215 (David Paroissien ed., 1985), as did Jeremy Bentham. *See* Jeremy Bentham, 1 Works of Jeremy Bentham 447 (John Bowring ed., 1843). While the reasons that the rest of the western world abolished capital punishment vary somewhat among nations, one common thread is the fear of executing an innocent person and public reaction to the execution of innocent persons. *See, e.g.*, Elizabeth Tuttle, The Crusade Against Capital Punishment in Great Britain, 106-20 (1961); Edna Nixon, Voltaire and the Calas Case (1961); Ludovic Kennedy, Ten Killington Place (1961).

criminally save upon proof of some specific criminal conduct," Schad v. Arizona, 501 U.S. 624, 632 (1991), beyond a reasonable doubt. *See* Jackson v. Virginia, 443 U.S. 307 (1979). A vast array of due process protections helps to assure that no innocent person is convicted of a crime.[6]

Second, as a matter of substantive Eighth Amendment law, "a person who has not in fact killed, attempted to

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[6]See, e.g., Coy v. Iowa, 487 U.S. 1012 (1988) (defendant has the right to confront witnesses against him); Taylor v. Illinois, 484 U.S. 400 (1988) (defendant has right to present witnesses in his own defense); Strickland v. Washington, 466 U.S. 668 (1984) (defendant has right to the effective assistance of counsel); In re Winship, 397 U.S. 538 (1970) (state must prove defendant's guilt beyond a reasonable doubt); United States v. Wade, 388 U.S. 218 (1967) (defendant has right to counsel at post-indictment lineup); Brady v. Maryland, 373 U.S. 83 (1963) (state has affirmative duty to disclose exculpatory evidence); In re Murchison, 349 U.S. 133 (1955) (defendant is entitled to a fair trial before impartial tribunal).

It is common (and tragic) knowledge that mistakes are made in criminal trials. "[O]ur system of criminal justice does not work with the efficiency of a machine--errors are made and innocent as well as guilty people are sometimes punished. The sad truth is that a cog in the machine often slips: memories fail; mistaken identifications are made; those who yield the power of life and death itself--the police officer, the witness, the prosecutor the jurors, and even the judge--become overzealous in their concern that criminal be brought to justice." Foreword, J. Frank and B. Frank, Not Guilty 11-12 (1957).

"[A]rriving at the truth is a fundamental goal of our legal system," United States v. Havens, 446 U.S. 620, 626 (1980) (citing Oregon v. Hass, 420 U.S. 714, 722 (1975)). "'[T]he twofold aim [of criminal law] is that guilt shall not escape or innocence suffer." United States v. Nixon, 418 U.S. 683, 709 (1974) (quoting Berger v. United States, 295 U.S. 78, 88 (1934)). Whenever the state discovers a mistake has been made the laws must allow corrective action.

kill, or intended that a killing take place or that lethal force be used may not be sentenced to death," Cabana v. Bullock, 474 U.S. 376, 386 (1986), and if such a sentence is imposed the "Eighth Amendment violation can be adequately remedied by any court that has the power to find the facts and vacate the sentence," *id.* at 386, and "prevent the execution . . ." *Id.* at 390; *cf.* Tison v. Arizona, 481 U.S. 137 (1987).[7] The most basic equitable principle is that courts must prevent a fundamental miscarriage of justice. *Cf.* McCleskey v. Zant, 499 U.S. 467, 496 (1991). The execution of James Duckett, an innocent person, is the paradigm of a fundamental miscarriage of justice.

CLAIM II

[7]"The death penalty is said to serve two principle social purposes: retribution and deterrence of capital crimes by prospective offenders." Gregg v. Georgia, 428 U.S. 153, 183 (1976) (opinion of Stewart, Powell, & Stevens, JJ.). Executing innocent persons would not deter crime, and because retribution has as its benchmark "that punishment should be directly related to the personal culpability of the criminal defendant," California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring), obviously there is no retribution in executing an innocent person. Such an execution could serve no other function than the gratuitous infliction of suffering.

A punishment violates the Eighth Amendment if it is excessive. Harmelin v. Michigan, 501 U.S. 957 (1991). Clearly, the execution of an innocent person is excessive under any understanding of the term.

DURING THE DIRECT APPEAL, THE STATE OF FLORIDA FAILED TO DISCLOSE PERTINENT FACTS WHICH WERE NECESSARY TO THIS COURT'S CONSIDERATION OF THE ISSUES RAISED BY MR. DUCKETT, AND AS A RESULT, THE DIRECT APPEAL DID NOT COMPORT WITH THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

A. . . . . INTRODUCTION.

The State of Florida having given Mr. Duckett a state law right to a direct appeal was obligated to afford Mr. Duckett with an appeal that comported with due process and provided Mr. Duckett with a fair opportunity to vindicate his constitutional rights. As the United States Supreme Court has held: "A first appeal as of right [] is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." Evitts v. Lucey, 469 U.S. 387, 396 (1985). Certainly, the same principle applies when the State withholds pertinent and exculpatory information regarding the factual circumstances underlying the issues raised in the appeal.

B. THE STATE WITHHELD CRITICAL EXCULPATORY

EVIDENCE CONCERNING HAIR EXPERT MICHAEL MALONE.

In Issue III of the Supplementary Brief, Mr. Edmund argued that the trial court had committed error when it qualified Michael Malone as an expert (*See* Supplement to Amended Brief of Appellant, pp. 18-20). The crux of the argument was that Michael Malone had lied on the stand about the number of hair comparisons he had made, and thus should not have been believed on other issues. What Mr. Edmund did not know because the state did not disclose the information was that Mr. Malone had lied in previous testimony in another court.

In April of 1997, the U.S. Department of Justice issued a report on misconduct in the FBI laboratories (PCR[8], D. Exh. 69). The report investigated Malone's testimony in a 1985 hearing relating to former U.S. District Judge Alcee Hastings. Malone testified in the 1985 hearings in the Hastings case that he had performed a particular test and testified to the results of that

[8]Record from Appeal of denial of Rule 3.850 Motion.

test. The DOJ investigation disclosed that not only had Malone not performed the test in question, but that his testimony was in "[d]irect contradiction to laboratory findings supported by data" and that he "present[ed] apparently and potentially exculpatory information as incriminating" (*Id*. at 383). The report concluded that Malone had "falsely testified that he had himself performed the tensile test and that he testified outside his expertise and inaccurately concerning the test results" (*Id.* at 385; *see also* PC-R. 1783)[9]. The DOJ found that Malone's false testimony was inexcusable and criticized the FBI for failing to properly address the problem (D. Exh. 69, p. 17).

Additionally, Malone testified falsely in Mr. Duckett's trial that he was not initially aware the pubic hair had been previously tested by the FDLE when he performed his examination (R. 1028). In fact, Mr. Malone learned that the hair had been previously tested when he received the initiating letter in the case.

[9]In response to the FBI's contention that it was inappropriate to characterize Malone's testimony as false, the DOJ responded: "We here use the term 'false' as it is employed in other legal contexts; that is, to describe something that is untrue or not in accord with the facts" (D. Exh. 69, p. 385).

When the Lake County Sheriff's Office requested that the FBI examine the question hair in this case, they sent a letter specifically noting that the evidence had been previously tested (PCR, D. Exh. 73). Malone receives a copy of the initiating letter when he is assigned a case (PC-R. 1773). It is the initiating letter which explains the facts of the case and what evidence needs to be tested. As the investigating agency of the prosecution team sent this letter, and as this letter was contained within the files of the investigating agency, there can be no argument that the prosecution was unaware that Mr. Malone was testifying falsely. Yet, neither when the false testimony occurred nor during the briefing and argument of the issue to this Court of Malone's truthfulness, did the state notify the defense of this additional falsehood. In Strickler v. Greene, 119 S.Ct. 1936, 1948 (1999), the Supreme Court reiterated the "special role played by the American prosecutor" as one "whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." *See* State v. Hugins, 788 So.2d 238 (Fla. 2001); Florida Bar v. Cox, 794 So.2d 1278 (Fla. 2001); Rogers v. State, 782 So.2d

373 (Fla. 2001). The State's duty to disclose exculpatory evidence is applicable even though there has been no request by the defendant. Strickler at 280. The State also has a duty to learn of any favorable evidence known to individuals acting on the government's behalf. *Id.* at 281. Exculpatory and material evidence is evidence of a favorable character for the defense which creates a reasonable probability that the outcome of the guilt and/or capital sentencing trial would have been different. Garcia v. State, 622 So. 2d 1325, 1330-31 (Fla. 1993). This standard is met and reversal is required once the reviewing court concludes that there exists a "reasonable probability that had the [unpresented] evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 680 (1985).

In addressing this issue on direct appeal, this Court noted that counsel had argued the same facts to the jury concerning Malone's credibility and that the expert's credibility was resolved by the jury. Duckett

v. State, 568 So. 2d at 895.[10] Unfortunately for Mr. Duckett, neither he nor this Court were aware that there was more to the story. Had this Court been properly informed of these other instances of false testimony, the Court would have had no choice but to rule that Mr. Malone should not have been allowed to testify as a hair expert.[11] Had the state fulfilled its obligations under Brady, there can be no doubt that the results of the proceeding would have been different. A new trial is warranted.

CLAIM III . . . . . .

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[10]With respect to whether the trial court erred in qualifying Malone as an expert, this Court simply said there was no error. Duckett v. State, 568 So. 2d at 895. The Court then notes that trial counsel did not choose to voice his objections to Malone when given the opportunity at trial. *Id.* There can be no strategical nor tactical reason for failing to voice objections for the record or for a ruling, and the failure of trial counsel to do so was error. Trial counsel's failure to properly object and to fully brief those issues in this Court denied Mr. Duckett the effective assistance of counsel to which he was entitled.

[11]Mr. Duckett has raised several issues with respect to Mr. Malone and the hair evidence in general in his appeal from the denial of his Motion to Vacate Convictions and Sentence. Mr. Duckett asserts that each of these issues on its own requires relief from his unconstitional convictions and sentences. Additionally, this Court must look to the cumulative effect of all of the errors in determining whether Mr. Duckett's convictions and sentence can stand. *See* Kyles v. Whitley, 514 U.S. 419 (1995); Jones v. State, 709 So. 2d 512 (Fla. 1998).

APPELLATE COUNSEL FAILED TO RAISE ON APPEAL NUMEROUS MERITORIOUS ISSUES WHICH WARRANT REVERSAL OF EITHER OR BOTH THE CONVICTIONS AND SENTENCE OF DEATH.

Mr. Duckett had the constitutional right to the effective assistance of counsel for purposes of presenting his direct appeal to this Court. Strickland v. Washington, 466 U.S. 668 (1984). "A first appeal as of right [] is not adjudicated in accord with due process of law 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).

In his direct appeal, numerous constitutional deprivations were not raised nor adequately briefed. For example, counsel failed to raise the issues of the improper prosecutorial argument and comments; the constitutionally defective jury instructions with respect to the mitigating and aggravating factors; the lack of factual support for the aggravating factors of heinous, atrocious or cruel and in the course of a sexual battery; the improper instructions and comments by the court and the prosecution which minimized the

jury's role in the sentencing process; and instructions and arguments which shifted the burden of proof at sentencing from the prosecution to the defense. Because the constitutional violations which occurred during Mr. Duckett's trial were "obvious on the record" and "leaped out upon even a casual reading of transcript," it cannot be said that the "adversarial testing process worked in [Mr. Duckett's] direct appeal." Matire v. Wainwright, 811 F. 2d 1430, 1438 (11th Cir. 1987). The lack of appellate advocacy on Mr. Duckett's 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). Appellate counsel's failure to present the meritorious issues discussed in this petition demonstrates that his representation of Mr. Duckett involved "serious and substantial deficiencies." Fitzpatrick v. Wainwright, 490 So.2d 938, 940 (Fla. 1986). 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 light of the serious reversible errors that appellate counsel never raised, there is more than a reasonable probability that the outcome of the appeal would have been different, and a new direct appeal must be ordered.

It is clear that several meritorious arguments were available to be raised on direct appeal, yet appellate counsel unreasonably failed to assert them. Particularly when compared with the arguments that appellate counsel did advance, the unreasonably prejudicial performance of appellate counsel is obvious. These errors, singularly or cumulatively, demonstrate that Mr. Duckett was denied the effective assistance of his appellate counsel.

CLAIM IV

FLORIDA LAW DEPRIVED MR. DUCKETT OF HIS RIGHT TO HIS SIXTH AMENDMENT RIGHT TO HAVE ALL ELEMENTS OF HIS CRIME TO A FULL AND FAIR TRIAL BEFORE A JURY.

Florida law provides that capital crimes must be charged by presentment or indictment of a grand jury. Fla. Const. Art. I, § 15(a) (1980). This Court has held that indictments need not state the aggravating circumstances upon which the State may rely to establish that a crime is eligible for the death

penalty. State v. Sireci, 399 So.2d 964, 970 (Fla. 1981).

Early in the history of the State's post-1972 death penalty law, the Florida Supreme Court explained in State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), what constitutes a capital crime, and from where the definition comes:

> The aggravating circumstances of Fla. Stat. § 921.141(6), F.S.A., actually define those crimes–when read in conjunction with Fla. Stat. § § 782.04(1) and 794.01(1), F.S.A.–to which the death penalty is applicable in the absence of mitigating circumstances.

The sentence for first-degree murder is specified in §775.082, Florida Statutes:

> A person who has been convicted of a capital felony ***shall*** **be punished by life imprisonment** and shall be required to serve no less than 25 years before becoming eligible for parole ***unless*** **the proceedings held to determine sentence** according to the procedure set forth in § 921.141 **result in *a finding by the court* that such person shall be punished by death**, and in the latter event such person shall be punished by death. Fla. Stat. § 775.082 (1979) (emphasis added).

The jury's advisory recommendation does not specify what, if any, aggravating circumstances the jurors found to have been proved. Neither the consideration of an aggravating circumstance nor the return of the jury's advisory recommendation requires a unanimous vote of the jurors.

Florida law violates the principles recognized as applicable to the States in Apprendi v. New Jersey, 530 U.S. 466 (2001). As a result, the Florida death penalty scheme under which petitioner was sentenced violates the Sixth and Fourteenth Amendments.

Florida's scheme violates the Sixth Amendment because the maximum sentence allowed upon the jury's finding of guilt is life imprisonment. A death sentence is only authorized upon the finding of additional facts. Since under Florida, there is no requirement of a jury trial to determine the existence of those necessary facts, the Sixth Amendment is violated.

Mr. Duckett acknowledges that the United States Supreme Court has granted a petition for a writ of certiorari to decide how the decision in Apprendi impacts capital cases. State v. Ring, 25 P.3d 1139 (Ariz. 2001), cert granted, 122 S.Ct. 865 (2002). Nonetheless, Mr. Duckett asserts that under Apprendi, he is entitled to relief from his sentence of death.

CONCLUSION

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Habeas Corpus has been furnished by Federal Express, overnight delivery, to Kenneth Nunnelley, Office of the Attorney General, 444 Seabreeze Blvd, Floor 5, Daytona Beach, Florida 32118-3958, on June 6, 2002.

CERTIFICATE OF COMPLIANCE AS TO TYPE SIZE AND STYLE

I HEREBY CERTIFY that this Petition for Writ of Habeas Corpus complies with the font requirements of Fl. R. App. P. 9.210(a)(2) typed in Courier New, 12 point type, not proportionately spaced, this date, June 6, 2002.

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. . . . . .
. . . . . By: _____
. . . . . .
. . . . . .
. . . . . Counsel for James A. Duckett