**IN THE SUPREME COURT OF FLORIDA**

**CASE NO.**

**GEORGE PORTER, JR.,**

**Petitioner,**

**v.**

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

**Respondent,**

**and**

**ROBERT BUTTERWORTH,**
**Attorney General,**

**Additional Respondent.**

**PETITION FOR WRIT OF HABEAS CORPUS**

**KEVIN T. BECK**
**ASSISTANT CCC**
**FLORIDA BAR NO. 0802719**

**LESLIE ANNE SCALLEY**
**STAFF ATTORNEY**
**FLORIDA BAR NO. 0174981**
**CAPITAL COLLATERAL REGIONAL**
**COUNSEL - MIDDLE**
**3801 CORPOREX PARK DR., SUITE 210**
**TAMPA, FL 33619-1136**
**(813) 740-3544**
**COUNSEL FOR PETITIONER**

## PRELIMINARY STATEMENT

Article l, Section 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is filed to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution. These claims demonstrate that Mr. Porter was deprived of the rights to fair, reliable, and individualized trial and sentencing proceedings and that the proceedings resulting in his conviction and death sentence violated fundamental constitutional imperatives.

The following symbols will be used to designate references to the record in this instant cause:

"R." -- record on direct appeal to this Court;

"T" --transcript of the evidentiary hearing held on January 4-5, 1996.

## REQUEST FOR ORAL ARGUMENT

Mr. Porter has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Porter, through counsel, accordingly urges that the Court permit oral

argument.

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## INTRODUCTION

Significant errors which occurred at Mr. Porter's capital trial and sentencing were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel. The issues, which appellate counsel neglected, demonstrate that counsel's performance was deficient and that the deficiencies prejudiced Mr. Porter. "[E]xtant legal principles...provided a clear basis for **...** compelling appellate argument[s]." Fitzpatrick v. Wainwright, 490 So.2d 938, 940 (Fla. 1986). Neglecting to raise fundamental issues such as those discussed herein "is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome." Wilson v. Wainwriqht, 474 So.2d 1162, 1164 (Fla. 1985). Individually and "cumulatively," Barclay v. Wainwriqht, 444 So.2d 956, 959 (Fla. 1984), the claims appellate counsel omitted establish that "*confidence* in the correctness and fairness of the result has been undermined." Wilson, 474 So.2d at 1165 (emphasis in original).

Additionally, this petition presents questions which were ruled on in direct appeal, but should now be revisited in light of subsequent case law in order to correct error in the appeal process that denied fundamental constitutional rights. As this petition demonstrates, Mr. Porter is entitled to habeas relief.

## PROCEDURAL HISTORY

The Circuit Court of the Eighteenth Judicial Circuit, Brevard County, Florida, entered the judgments of conviction and sentence under consideration. Mr. Porter was charged by indictment dated October 28, 1986, for the first degree murders of his ex-lover, Evelyn Williams, and her boyfriend, Walter Burroughs, and the related offenses of armed burglary and aggravated assault.

On June 17, 1987, Sam Bardwell entered an appearance as Mr. Porter's counsel. On June 22, 1987, Mr. Bardwell, the State, and Judge Antoon signed a "stipulation" that Mr. Bardwell was "full counsel" for Mr. Porter. The record reflects no other action regarding Mr. Porter's counsel until the November 20, 1987, hearing at which Mr. Porter appeared pro se. Porter v. State, 564 So.2d 1060, 1061 (Fla.1990). Mr. Porter represented himself at the guilt/innocence portion of his trial. Id. at 1062. In the midst of his jury trial, Mr. Porter pled guilty to all charges. Id.

Thereafter, Mr. Porter attempted to withdraw his guilty pleas because they were made in response to threats that his family was in danger. Id. The court denied his motion to withdraw the guilty pleas and continued to penalty phase with Mr. Bardwell acting as defense counsel. Id.

On March 4, 1988, the trial court imposed a death sentence for the first-degree murder of Williams, finding four aggravating circumstances and no mitigating

circumstances. Id. The court imposed a life sentence for the first-degree murder of Burrows, noting that the aggravating circumstances in that murder were "technical". Id.

On direct appeal, this Court struck the circuit court's finding of the heinous, atrocious, and cruel aggravator, "this record is consistent with the hypothesis that Porter's was a crime of passion, not a crime that was *meant* to be deliberately and extraordinarily painful", but affirmed Mr. Porter's convictions and sentences. Id. at 1063. The United States Supreme Court denied certiorari on February 19, 1991, with Justice Marshall dissenting. Porter v. Florida, 111 S. Ct. 1024 (1991).

Mr. Porter filed a final verified amended Rule 3.850 motion for postconviction relief alleging a violation of his Sixth and Fourteenth Amendment rights to effective assistance of counsel. Porter v. State, 788 So.2d 917, 919 (Fla.2001). The circuit court, not the original trial and sentencing judge presiding, entered an order summarily denying all but two of Mr. Porter's claims. Id. On January 4-5, 1996, the circuit court held an evidentiary hearing on two issues: (1) whether Mr. Porter received ineffective assistance of counsel regarding counsel's failure to pursue mental health evaluations and (2) whether Mr. Porter received ineffective assistance of counsel regarding counsel's failure to present matters in mitigation. Id. On May 10, 1996, the lower court denied Mr. Porter relief. On May 3, 2001, this Court affirmed the circuit court's

denial of relief. Porter v. State, 788 So.2d 917 (Fla.2001).

## JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Florida Rule of Appellate Procedure 9.l00(a). See Art. l, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(a)(3) and Article V, Section 3(b)(9) of the Florida Constitution. This petition presents constitutional issues which directly concern the judgment of this Court during the appellate process and the legality of George Porter's death sentence.

This Court has jurisdiction, *see*, e.g., Smith v. State, 400 So.2d 956, 960 (Fla. 1981), because the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied George Porter' direct appeal. *See* Wilson, 474 So.2d at 1163 (Fla. 1985); Baggett v. Wainwright, 229 So.2d 239, 243 (Fla. 1969); cf. Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for George Porter to raise the claims presented herein. *See*, e.g., Way v. Duqqer, 568 So.2d 1263 (Fla. 1990); Downs v. Dugger, 514 So.2d 1069 (Fla. 1987); Rilev v. Wainwright, 517 So.2d 656 (Fla. 1987); Wilson, 474 So.2d at 1162.

This Court has the inherent power to do justice. The ends of justice call on the

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

## GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, George Porter asserts that his capital conviction and sentence of death were obtained and then affirmed during this Court's appellate review process in violation of his rights guaranteed by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

## CLAIM I

**MR. PORTER'S DEATH SENTENCE IS DISPROPORTIONAL, ARBITRARY, AND DISPERATE IN VIOLATION OF HIS RIGHTS UNDER THE FLORIDA CONSTITUTION, JUDICIAL AND STATUTORY LAW. AS A RESULT, MR. PORTER'S DEATH SENTENCE VIOLATES HIS EQUAL PROTECTION RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.**

**1. Mr. Porter's death sentence is disproportional**.

This Court reviews each death sentence to ensure that the death penalty is reserved for only the most aggravated and least mitigated crimes.

> Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. No longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex. If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great. Thus, the discretion charged in Furman v. Georgia, supra, can be controlled and channeled until the sentencing process becomes a matter of reasoned judgment rather than an exercise in discretion at all.

State v. Dixon, 283 So.2d 1, 10 (Fla.1973). Proportionality review "requires a discrete analysis of the facts", "of the underlying basis for each aggravator and

mitigator", and "requires this Court to consider the totality of the circumstances in a case and to compare the case with other capital cases". Terry v. State, 668 So.2d 954, 965 (Fla.1996); Urbin v. State, 714 So.2d 411, 416 (Fla. 1998); Voorhees v. State, 699 So.2d 602, 614 (Fla.1997). Such a review in Mr. Porter's case proves his death sentence is not a matter of reasoned judgment, and that is not proportional.

The evidence established throughout Mr. Porter's death penalty proceedings proves that his was not one of the most aggravated and least mitigated crimes. See Jones v. State, 705 So.2d 1364, 1366 (Fla.1998). When this Court conducted a proportionality review of Mr. Porter's death sentence on direct appeal, there was, due to penalty phase counsel's ineffective assistance, no mitigation to weigh against the aggravation. Porter, 564 So.2d at 1062. Postconviction proceedings, however, revealed extensive and substantial mitigation.

During postconviction proceedings, Mr. Porter presented uncontroverted and substantial evidence that he suffered from post traumatic stress disorder and brain damage (T. 211, 220, 234, 328). Mr. Porter is a war hero, who was psychologically injured while bravely representing his country during horrifying battles in the Korean Conflict (T. 138-39, 150-53). Mr. Porter's actions in the Korean Conflict helped to save the lives of thousands of American soldiers (T. 134-35). His courageous service for three years, two months, and twenty-one days is reflected in his **honorable**

discharge, and the Army awarded him the National Defense Service Medal for enlisting in time of conflict, the United Nations Service Medal for serving with United Nations forces in the Korean conflict, the Korean Service Medal with three (3) Bronze Service Stars, the Combat Infantryman's Badge Purple Heart (with first cluster), he was favorably considered for the Good Conduct Medal, and he is "entitled to award of (the) Korean Presidential Unit Citation" (T. 152-53). Mr. Porter was severely abused as a child; much of the abuse occurred because he tried to protect his mother (Wireman Depo p. 7; J. Porter Depo p. 12). He was an alcoholic (J. Porter Depo, pp. 22-24). He did not advance beyond the third grade in school (R. 1493, 1521, 1554, 1575). Moreover, the only psychologist that examined Mr. Porter for mitigation purposes determined that Mr. Porter suffered from extreme mental or emotional disturbance at the time of the crime, and his ability to conform his conduct to the requirements of the law was substantially impaired (T. 233, 234). § 921.141(6)(b), (f) Fla. Stat. (1987).

Mr. Porter's death sentence rests on three aggravators: prior violent felony, during the course of a felony, and cold, calculated, and premeditated. Each aggravating factor in this case is made less aggravating by the mitigation established during postconviction proceedings and circumstances of the offense. See Jorgenson v. State, 714 So.2d 423 (Fla.1998); Chaky v. State, 651 So.2d 1169, 1173 Fla. (1995).

On direct appeal, this Court noted that "this record is consistent with the hypothesis that Porter's was a crime of passion". Porter v. State, 564 So.2d 1060, 1063. Thus, the prior violent felonies, which occurred contemporaneously to this murder, were also crimes of passion. In Jorgenson , this Court held that Jorgenson's prior violent felony, a second degree murder, was mitigated by the passionate circumstances surrounding the murder. Id. at 428. Mr. Porter's prior violent felonies are similarly mitigated.

The cold, calculated, and premeditated aggravator is also made less weighty because this crime was "grounded in passion". Porter, 564 So.2d at 1064; Maulden v. State, 617 So.2d 298, 299, 302-3 (Fla. 1993). In Maulden, Maulden decided to kill his ex-wife, obtained a gun, burglarized the house his ex-wife shared with her boyfriend, and killed his ex-wife and her boyfriend. Id. This Court held that the cold, calculated, and premeditated aggravator did not apply because, due to the emotional distress caused by the divorce, the murders were not cold. Id. at 303.

Additionally, Mr. Porter's mental status, which was established during postconviction proceedings, affects the application of this aggravator. In White v. State, 616 So.2d 21, (Fla.1993), White killed his girlfriend. White dated the victim and, after their relationship ended, White and the victim had several altercations. Id. at 22. As a result of those altercations, the victim obtained a restraining order against

White. Id. Nearly four months later, White broke into the victim's apartment and beat her companion with a crowbar. Id. White was charged and convicted of burglary, assault, and aggravated battery. Id. While in jail immediately after this attack, White told an inmate that he was going to kill the victim if he was released on bond. Id. Three days later, while released on bond, White obtained a gun from a pawnshop, drove to the victim's place of employment, shot her twice, and calmly drove away. Id. White was convicted of first degree murder, and the trial court sentenced him to death, finding the cold, calculated, and premeditated and prior violent felony aggravators were not outweighed by the mitigators of *questionable* extreme mental or emotional disturbance due to drug use, *questionable* substantial impairment of White's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law, personality change when using drugs, and he was upset and jealous due to his severed relationship with the victim. Id. at 24. On direct appeal, this Court held that the cold, calculated, and premeditated aggravator was negated by White's mental status which was established by questionable evidence that White was high when he killed the victim. Id. at 25.

Mr. Porter's case is distinguishable only to the extent that his mental status was more debilitated than White's. Mr. Porter was convicted of killing his former girlfriend. Porter, 564 So.2d 1060. Mr. Porter dated the victim and, after their

relationship ended, Mr. Porter and the victim had several altercations. Id. As a result of those altercations, the Mr. Porter left town. Id. Nearly three months later, Mr. Porter returned to Florida and attempted to see the victim. Id. The victim rebuffed his attempts to see her. Id. The evidence suggested that Mr. Porter took a gun from a friend a few days before the murder. Id. The night before the murder, Mr. Porter drank to intoxication. Id. At five thirty the next morning, Mr. Porter drove to the victim's house and shot her and her current boyfriend during a fight. Id. Evidence of Mr. Porter's mental status, brain damage, alcoholism, and post traumatic stress disorder, in addition to the fact that he was unquestionably intoxicated six and a half hours before the murder, his established personality change when intoxicated, and his upset and jealous feelings due to his severed relationship with the victim, render the cold, calculated, and premeditated likewise inapplicable in this case. Id. at 1064.

This evidence, when considered with the fact that this was a crime of passion and Mr. Porter was likely intoxicated at the time of the crime, renders his death sentence disproportional and arbitrary in light of other capital defendants who are similarly situated and received life sentences. "We pride ourselves in a system of justice that requires equality before the law. Defendants should nor be treated different upon the same or similar facts." Slater v. State, 316 So.2d 539, 542 (Fla.1975).

In Klokoc v. State, 589 So.2d 219, 219-222 (Fla. 1991), Klokoc, after threatening his wife and family, purposefully and with premeditation killed his daughter to hurt his estranged wife. Id. The trial court found one aggravating circumstance: the murder was cold, calculated, and premeditated, and five mitigating circumstances: no significant history of prior criminal activity (substantially diminished by Klokoc's admittedly criminal abuse of his wife), Klokoc's capacity to conform his conduct to the requirements of the law was impaired by his love/revenge emotions towards his wife and personality disorder, though violent at times, he was a good provider for his family, and his troubled relationship with his family. Id. The court sentenced Klokoc to death, finding that the mitigation did not outweigh the aggravator. Id. This Court vacated his death sentence, holding it was not proportional to other death sentences. Id.

In Farinas v. State, 569 So.2d 425 (Fla.1990), Farinas was angry with his ex-girlfriend for reporting to the police that he harassed her and her family. Id. Farinas ran his girlfriend's car off the road and kidnapped her. Id. When the car stopped at a light, his girlfriend jumped from the car and ran away. Id. Farinas chased her, shot her once in the back, and, after unjamming his gun three times, shot her twice in the back of her head. Id. After a trial, the court sentenced Farinas to death finding three aggravators: heinous atrocious, or cruel, cold, calculated, and premeditated, and in the

course of a kidnapping. Id. The court found that the two mitigators, Farinas was under the influence of a mental or emotional disturbance that *was not extreme* and Farinas' capacity to conform his conduct to the law or appreciate the criminality of his conduct was impaired *but not substantially so*, were entitled to little weight and did not outweigh the aggravation. Id. at 428. On direct appeal, this Court vacated the cold, calculated, and premeditated aggravator, found the mitigator of extreme mental or emotional disturbance, and held the death sentence was not proportional. Id. at 431.

In Ross v. State, 474 So.2d 1170 (Fla.1985), Ross was sentenced to death after he beat his wife to death. Id. The court found one aggravator, the murder was heinous, atrocious, or cruel, and no mitigation. Id. at 1172. On appeal, this Court held the death sentence was disproportionate and that the trial court did not consider mitigating factors that Ross was an alcoholic who had been drinking when he attacked the victim, the murder was the result of a domestic confrontation, and Ross had no prior history of violence. Id. at 1174.

In Wilson v. State, 493 So.2d 1019 (Fla.1986), Wilson was sentenced to death after he killed his father and five year old cousin and attempted to kill his stepmother. Id. at 1020. Wilson became enraged when his stepmother told him to stay out of the refrigerator. Id. at 1021. He attacked her with a hammer, and, when Wilson's father

intervened, Wilson attacked his father as well. Id. During the course of the fight, Wilson stabbed his five year old cousin with a pair of scissors. Id. After Wilson's stepmother retrieved a pistol, Wilson grabbed it and shot his father in the forehead. Id. Wilson then chased his stepmother and emptied the pistol into the closet in which she hid. Id. At trial, the jury convicted Wilson of two counts of first degree murder and attempted murder. Id. The court sentenced Wilson to death, finding the heinous, atrocious, or cruel, prior violent felony, and cold, calculated, or premeditated aggravators and no mitigation. Id. at 1023. On appeal, this Court struck the cold, calculated, or premeditated aggravator and reduced one first degree murder conviction to a second degree murder conviction. Id. Finding it significant that the murder occurred as a result of a heated domestic situation and that the premeditation existed for only a short duration, this Court held Wilson's death sentence was not proportional, vacated it, and remanded the case for imposition of a life sentence. Id. at 1023-24.

Mr. Porter's case is indistinguishable from those above. In light of the mitigation established through postconviction proceedings, Mr. Porter's death sentence is supported by three questionable and weak[1] aggravating circumstances

[1]The felony murder aggravator is entitled only to very little weight. This Court has repeatedly held that the felony murder aggravator is "weak" and, alone, will not support a death sentence. See Young v. State, 579 So.2d 721, 724 (Fla.1991)

which are overwhelmed by mitigating circumstances. Mr. Porter was suffering an extreme mental disturbance and his capacity to conform his conduct to the law was substantially impaired, he had brain damage and post traumatic stress disorder, he was severely abused as a child, much of the abuse occurred because he tried to protect his mother, he was an alcoholic, he did not advance beyond the third grade in school, he joined the army at age sixteen, he defended his country in some of the most devastating and gruesome battles in the Korean War, where his actions helped to save the lives of thousands of American soldiers, and the many awards he received for his military service. This evidence, when considered with the circumstances of the crime, clearly renders Mr. Porter's death sentence disproportional and arbitrary:

> [T]he record discloses that Porter had been drinking heavily, to the point of drunkenness, in the late night hours prior to the murder. Shortly after the murder he purchased more liquor and beer. This evidence, combined with evidence of Porter's emotionally charged, desperate, frustrated desire to meet with his former lover, is sufficient to render the death penalty disproportional punishment in this instance, although it certainly does not excuse the killing.

Porter v. State, 564 So.2d at 1065-66 (Barket, J., dissenting). See White v. State, 616 So.2d 21, (Fla.1993), (This Court reversed White's death sentence, holding it was not

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(citing Lloyd v. State, 524 So.2d 396 (Fla.1988) and Proffitt v. State, 510 So.2d 896 (Fla.1987); Sinclair v. State, 657 So.2d 1138 (Fla.1995); Terry v. State, 668 So.2d 954 (Fla.1996); Hess v. State, 2001 WL 521307 *14-15 (Fla.2001).

proportional. Id. On direct appeal, this Court held that the cold, calculated, and premeditated aggravator was negated by White's mental status which was established by questionable evidence that White was intoxicated when he killed the victim. Id. 25. This Court then held that the death sentence was not proportional, given the one remaining aggravator and the mitigation the trial court found questionably established. Id. at 26. ); Jorgenson v. State, 714 So.2d 423 (Fla.1998)(This court found the death sentence disproportional where the trial court found one aggravator and two nonstatutory mitigators: he was under the influence of drugs at the time of the crime and the disparity of treatment between Jorgenson and his codefendant, both of which the court gave little weight. Id.); Robertson v. State, 699 So.2d 1343, 1347 (Fla. 1997)(This Court found the death sentence disproportional where the sentence was based on two aggravators: during the course of a burglary with an assault and heinous, atrocious, or cruel, and five nonstatutory mitigators: age of 19, impaired capacity due to drug and alcohol use, abused and deprived childhood, history of mental illness, borderline intelligence. Id.); Nibert v. State, 574 So.2d 1059 (Fla.1990)(This Court found the death sentence disproportional where the heinous, atrocious, or cruel aggravator was offset by Nibert's abused childhood, extreme mental and emotional disturbance, and impaired capacity due to alcohol use. Id.); Chaky v. State, 651 So.2d 1169, 1170-71, 1073 (Fla. 1995)(This Court found the death sentence disproportional

where it was supported by the prior violent felony aggravator and mitigated by Chaky's military service in Vietnam, remorse, and potential for rehabilitation. Id. ); Maulden v. State, 617 So.2d 298, 299, 302-3 (Fla. 1993)(This Court held Maulden's death sentence was disproportional due to the substantial mitigation: Maulden was under the influence of mental or emotional disturbances, his capacity to control his conduct was substantially impaired, he cooperated with the police, showed remorse, and had no disciplinary reports during 16 months in jail. Id. )

**2. Mr. Porter's disproportional death sentence violates his rights under the Equal Protection Clause of the United States Constitution.**

Mr. Porter's rights under the Equal Protection Clause of the Fourteenth Amendment are violated because his death sentence is disproportional, arbitrary, and disperate. "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution by its duly constituted agents." Sioux City Bridge Co. v. Dakota County, 260 U.S. 441, 445 (1923). In Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000), the United States Supreme Court held that one person who has been intentionally discriminated against has a valid Equal Protection claim. "Our cases have recognized successful equal protection claims brought by a "class of one," where

the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000). Recently, in Bush v. Gore, 531 U.S. 98, 104 (2000), the United States Supreme Court noted that a single person may also have an equal protection claim when a decision from this Court permits arbitrary treatment. In Bush v. Gore, the Court held that once the state vested in each individual citizen the right to vote, the state could not, intentionally or unintentionally, value one person's vote over that of another by later arbitrary and disperate treatment. "When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter." Bush v. Gore, 531 U.S. 98, 104 (2000).

Like the right to vote, the right against a disproportionate death sentence is also a fundamental right, vested in each individual by the United States Constitution and Florida law. The constitutionality Florida's death penalty sentencing scheme rests on this Court's proportionality review. Proffitt v. Florida, 428 U.S. 242, 255-56 (1976). Proportionality review is mandated by Florida Statute 921.141, which requires the trial judge to justify a death sentence in writing for submission to this Court, as well as by implication from the mandatory, exclusive jurisdiction this Court has over death

appeals, and Article 1, section 17 of the Florida Constitution. State v. Dixon, 283 So.2d 1, 8 (1973); Tillman v. State, 591 So.2d 167, 169 (Fla.1991).

> The requirement that death be administered proportionately has a variety of sources in Florida law, including the Florida Constitution's express prohibition against unusual punishments. It clearly is "unusual" to impose death based on facts similar to those in cases in which death previously was deemed improper. Moreover, proportionality review in death cases rests at least in part on the recognition that death is a uniquely irrevocable penalty, requiring a more intensive level of judicial scrutiny or process than would lesser penalties. Proportionality review also arises in part by necessary implication from the mandatory, exclusive jurisdiction this Court has over death appeals. The obvious purpose of this special grant of jurisdiction is to ensure the uniformity of death-penalty law by preventing the disagreement over controlling points of law that may arise when the district courts of appeal are the only appellate courts with mandatory jurisdiction. Thus, proportionality review is a unique and highly serious function of this Court, the purpose of which is to foster uniformity in death-penalty law.

Tillman, 591 So.2d at 169. Thus, the right not to be punished by a disproportional death sentence is a fundamental right which receives protection under the Equal Protection Clause.

Mr. Porter has a fundamental right not to be executed. The mitigation established throughout his postconviction proceedings prove that his was not one of the most aggravated and least mitigated crimes. Other similarly situated people, who

had the benefit of penalty phase counsel who investigated and presented mitigation at their penalty phases, have been sentenced to life. Because Mr. Porter's penalty phase counsel's preparation consisted only of a little over fifteen minutes preparing subpoenas and interviewing witnesses, Mr. Porter was denied a proper proportionality review by this Court on direct appeal (T. 68). As a result, Mr. Porter's disproportional death sentence is arbitrary, and his Equal Protection rights mandate imposition of a life sentence. "Equal protection applies as well to the manner of its exercise. Having once granted the right [against a disproportionate death sentence], the state may not, by later arbitrary and disperate treatment, value one person's [life] over that of another." Bush, 531 U.S. at 105.

## CLAIM II

### APPELLATE COUNSEL FAILED TO RAISE ON APPEAL NUMEROUS MERITORIOUS ISSUES WHICH WARRANT REVERSAL OF MR. PORTER'S CONVICTIONS AND SENTENCES.

### 1. Introduction

Under the dictates of Strickland v. Washington, 466 U.S. 668 (1984), appellate counsel had the "duty to bring to bear such skill and knowledge as will render the [appeal] a reliable adversarial testing process." Strickland, 466 U.S. at 688. To establish that counsel was ineffective, Strickland requires a defendant to demonstrate

(1) unreasonable attorney performance, and (2) prejudice. Id.

"Obvious on the record" constitutional violations occurred during Mr. Porter's trial which "leaped out upon even a casual reading of the transcript", yet appellate counsel failed to raise those errors on appeal. Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). Appellate counsel's failure to raise the meritorious issues addressed in this petition prove his advocacy which involved "serious and substantial deficiencies" which individually and "cumulatively" establish that "confidence in the outcome is undermined". Fitzpatrick v. Wainwright, 490 So.2d 938, 940 (Fla.1986); Barclay v. Wainwright, 444 So.2d 956, 959 (Fla.1984); Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985).

**2. Appellate counsel was ineffective for not raising on appeal that Mr. Porter's Fifth, Sixth, Eighth, and Fourteenth Amendment Rights under the United States Constitution and his corresponding rights under the Florida Constitution were violated by the prosecutor's inflammatory and improper antics, comments, and arguments.**

Throughout Mr. Porter's trial, the prosecutor injected improper and inflammatory matters into the proceedings. Knowing that Mr. Porter's competence was questionable, Mr. Porter had only a third grade education, could write "very little", could not understand everything he read, and was tired, the prosecutor took advantage of Mr. Porter's deficiencies to turn the trial into a sham (R. 1493, 1521, 1554, 1575). The prosecutor laughed at Mr. Porter's attempts to represent himself (R.

1023-23). The prosecutor sarcastically responded to Mr. Porter's ineffectual attempts to defend himself (R. 570, 698). The prosecutor laid on the floor to illustrate a hypothetical position of the victim (R. 957-58, 2216). The prosecutor refused to allow Mr. Porter to pick up any evidence or approach any witness during his direct and cross examinations (R. 556). The prosecutor became so irate at the Judge's adverse ruling that the courtroom was cleared and the Judge was forced to calm him down in the hall outside the courtroom in an ex parte, off record discussion (R. 2096, 2141-45). The prosecutor improperly directed witnesses to look at the state's counsel table for answers to Mr. Porter's cross examination questions (R. 860, 1842-44). The prosecutor refused to control his family witnesses in the audience who cried and made such a commotion in the courtroom that the Judge twice admonished them (R.933-34, 2222-23). Knowing that Mr. Porter did not know or understand legal procedures, the prosecutor purposefully violated a pre-trial order to proffer evidence of bad acts (R. 1272).

Sua sponte, the trial court attempted to control the proceedings, risking an ex parte communication with the prosecutor to return order to the circus-like atmosphere that the prosecutor created throughout Mr. Porter's trial and penalty phase (R.2141-45). The court denied Mr. Porter's motion for mistrial and attempted to cure the chaos by instructing the jury to disregard some of the prosecutor's courtroom antics (R.

1024, 570, 698, 2223, 934, 1272, 2145).

The prosecutor's antics were improper and prejudicial. In Florida, "prosecuting officers are clothed with quasi judicial powers and it is consonant with the oath they take to conduct a fair and impartial trial. The trial of one charged with a crime is the last place to parade prejudicial emotions or exhibit punitive or vindictive exhibitions of temperament." Stewart v. State, 51 So.2d 494 (Fla. 1951). This misconduct was especially egregious because, in capital cases, prosecutors "are charged with an extra obligation to ensure that the trial is fundamentally fair in all respects". Gore v. State, 719 So.2d 1197, 1202 (Fla. 1998); Stewart v. State, 51 So.2d 494 (Fla. 1951). While isolated incidents of overreaching may or may not warrant a mistrial, the cumulative effect of one impropriety after another is so overwhelming that they preclude a fair trial. See Nowitzke v. State, 572 So. 2d 1346, 1350 (Fla. 1990). The fact that Mr. Porter plead guilty after much of the prosecutor's misconduct did not render the misconduct harmless. At the close of the penalty phase, the jury was instructed, "Your advisory sentence should be based upon the evidence you have heard while trying the case – I'm sorry, while trying the guilt or innocence of the defendant and the evidence that has been presented to you in this proceeding." (R. 2263). The prosecutor's closing argument referenced his improper antics (R. 2216). Thus, the jury did consider the prosecutor's improper and inflammatory antics when deciding

whether to recommend life or death.

The prosecutor distorted Mr. Porter's trial and sentencing with improper commentary and actions, thus destroying any chance of a fair determination. Mr. Porter was constrained from conducting his own defense by his own ignorance of the law and was forced to endure the prosecutor's overreaching. Mr. Porter endured the physical hardship of the trial, forced to hobble around the courtroom with a heavy soled boot to prevent him from escaping; he was threatened by the victim's family members so the Judge ordered heightened courtroom security; he was deprived of pain medication for the first half of the trial; he suffered lack of sleep because he was awakened at five o'clock in the morning for trial which lasted until nine o'clock at night; the arduous court schedule left Mr. Porter with little or no time to prepare his defense (R.1034-36, 1565, 1608, 647-54, 1521, 1585). All of these factors compounded the prejudice the prosecutor's misconduct caused.

The prosecutor's misconduct in this case was fundamental error, and appellate counsel should have raised it on appeal. State v. Johnson, 616 So.2d 1 (Fla. 1993); Fuller v. State, 540 So.2d 182, 184 (5DCA 1989). Fundamental error is that which denies due process and it can occur when prosecutorial comments are "so inflammatory and impermissible as to vitiate the fairness of the entire proceeding". Kent v. State, 702 So.2d 265, 269 (5DCA 1997). This occurred in George Porter's

case, and appellate counsel ineffectively failed to raise the issue on direct appeal. "If the prejudicial conduct in its collective import is so extensive that its influence pervades the trial, gravely impairing a calm and dispassionate consideration of the evidence and the merits by the jury, a new trial should be awarded regardless of the want of objection." Tyrus v. Apalachicola Northern Railroad Co., 130 So.2d 580, 587 (Fla.). *See also* State v. Townsend, 635 So.2d 949 (Fla. 1994). Confidence in the outcome is undermined. Strickland, 466 U.S. at 461.

**3. Appellate counsel was ineffective for not raising on appeal that the state's introduction of and the trial court's consideration of non-statutory aggravators violated Mr. Porter's Fifth, Sixth, Eighth, and Fourteenth Amendment rights under the United States Constitution and his corresponding rights under the Florida Constitution.**

In sentencing Mr. Porter to death, the trial court considered and relied on non-statutory aggravating circumstances. The court relied upon the fact that the crime occurred at 5:45 in the morning, the path of the bullet somehow indicated how much suffering the victim felt, and the number of shots as nonstatutory aggravating factors supporting the death sentence (R. 2775-86).

The judge's consideration of improper and unconstitutional non-statutory aggravating factors starkly violated Florida law and the Eighth Amendment and prevented the constitutionally required narrowing of the sentencer's discretion. See Elledge v. State, 346 So.2d 998 (1977); Stringer v. Black, 112 S.Ct. 1130 (1992);

Maynard v. Cartwright, 108 S. Ct. 1853, 1858 (1988). As a result, these impermissible aggravating factors evoked a sentence that was based on an "unguided emotional response," a clear violation of Mr. Porter's constitutional rights. Penry v. Lynaugh, 108 S.Ct. 2934 (1989). Appellate counsel was ineffective for not raising this issue in Mr. Porter's direct appeal.

**4. Appellate counsel was ineffective for failing to raise on appeal that the trial court failed to find mitigating circumstances which were established by evidence in the record, rendering Mr. Porter's death sentence arbitrary and capricious in violation of the Eighth and the Fourteenth Amendments of the United States Constitution and the corresponding provisions of the Florida Constitution.**

At the sentencing phase of his capital trial, Mr. Porter presented uncontraverted evidence that he had a good relationship with his son (R.2043), he had a drinking problem (R.2046), the crime occurred as a result of a domestic dispute (R. 2202), he underwent a drastic personality change when he drank (R. 2075), and he was drunk just six hours before the offense (R. 2081). The court specifically asked Mr. Porter about his military service in Korea, and knew he was wounded while fighting there (R. 1574, 2365).

Each of these factors constitute a mitigating circumstances. Cheshire v. State, 568 So. 2d 908 (Fla. 1990). The court was required to weigh this mitigation against the aggravating factors. "Mitigating evidence must be considered and weighed when

contained "anywhere in the record, to the extent it is believable and uncontroverted." LaMarca v. State, 785 So.2d 1209, 1215 (Fla.2001) (quoting Robinson v. State, 684 So.2d 175, 177 (Fla.1996). The sentencing order reveals that the court did not weigh this mitigation or misunderstood the law and refused to consider it (R.2784). Mr. Porter was deprived of the individualized sentencing required by the Eighth and Fourteenth Amendments and was entitled to a new sentencing hearing. Zant v. Stephens, 462 U.S. 862, 879-80 (1983); Eddings v. Oklahoma, 455 U.S. 104, 110-12 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). Appellate counsel was ineffective for not raising this claim.

**5. Appellate counsel was ineffective for not raising on appeal penalty phase counsel's ineffective assistance which violated Mr. Porter's Sixth, Eighth, and Fourteenth Amendment rights under the United States Constitution and his corresponding rights under the Florida Constitution and was revealed in the record on appeal.**

Due in large part to the court's urging ("Do you understand that if I go back and find that two or three of these aggravating circumstances, or all four in the case of Ms. Williams, those aggravating circumstances exist and I find that there are no mitigating circumstances; that I will impose the death penalty?"), Mr. Porter asked his appointed penalty phase attorney to argue mitigating circumstances to the court (R. 2391, 2397). However, counsel's argument consisted of vague ramblings regarding the circumstances of the crime and, with the exception of "[w]e had a strong emotional

situation that he couldn't control because of problems between his ears. I mean he obviously cannot go through life with the record he has without having some problem, you know. Obviously we can get a doctor out here – we can't Baker Act him. But the statutes do not address the notion of mental illness. They are arguing about emotional disturbance.", counsel did not address any mitigation. The record established several nonstatutory mitigators: a good relationship with his son (R.2043), a drinking problem (R.2046), the crime occurred as a result of a domestic dispute (R. 2202), Mr. Porter underwent a drastic personality change when he drank (R. 2075), he was drunk just six hours before the offense (R. 2081), his military service in Korea, and he was wounded while fighting there (R. 1574, 2365). Counsel's ramblings prove, not only that counsel did not understand the law regarding nonstatutory mitigation, counsel did not under stand that, under Florida law, mental illness can cause both of the statutory mental health mitigators as well as be a separate nonstatutory mitigator. § 921.141(6) Fla. Stat. (1987). Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964-65 (1978); See also Eddings v. Oklahoma, 455 U.S. 104, 114, 102 S.Ct. 869, 876-77 (1982); Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821 (1987). Had counsel known the importance of nonstatutory mitigation in the Florida death penalty sentencing scheme and argued nonstatutory mitigation in support of a life sentence, the court would have had substantial mitigation to weigh against the aggravation and a basis for a life

sentence. Confidence in the out come is undermined. Strickland, 466 U.S. at 461.

**6. Mr. Porter's Sixth, Eighth, and Fourteenth Amendment rights under the United States Constitution and his corresponding rights under the Florida Constitution were violated because appellate counsel failed to ensure that this Court reviewed an accurate transcript of his capital trial. As a result, reliable appellate review was and is impossible and there is no way to ensure that which occurred in the trial court was or can be reviewed on appeal, and the judgment and sentence must be vacated.**

Though this Court held this issue was meritless and procedurally barred in the appeal of the circuit court's denial of Mr. Porter's 3.850 motion for postconviction relief, it is raised herein to preserve the issue for federal review. Porter, 788 So.2d 917, 926 (Fla.2001).

Complete and effective appellate advocacy requires a complete trial record. A trial record should not have missing portions. Yet, Mr. Porter's record on direct appeal to this court contained numerous omissions. Portions of the record were missing or altered from Mr. Porter's appeal including, but not limited to, the testimony of the trial pathologist, Dr. Dunn, Time Palymale, Otto Lenke, Sandra Corey, and Amy Ambrose. These errors of constitutional magnitude extend throughout the entire transcript of Mr. Porter's trial. Appellate counsel was ineffective for failing to ensure a complete record for Mr. Porter's appeal. Absent a complete record, the resulting prejudice to the appellate process was sufficient to undermine the confidence in its outcome.

The record on appeal that appellate counsel used contained clear indications that

it was inadequate. Substantial pre-trial and trial proceedings were made off the record. Mr. Porter was arrested on August 11, 1989, and his trial commenced on May 1, 1990. Except for two motions for continuances in late April of 1990, the record on appeal is devoid of proceedings occurring before the start of trial. This record clearly indicated that prior proceedings had taken place, motions filed and argued and issues otherwise litigated, including ex-parte communications between the state and the trial court.

After receiving a transcript from the Titusville clerk and realizing that transcript revealed that the transcript making up the record on direct appeal was not accurate, Mr. Porter filed a Motion to Recall the Mandate and/or to Reopen the Direct Appeal and a Motion to Supplement the Record on Appeal. This Court denied the motion on October 16, 1995. A cursory comparison of the volumes filed in Titusville with the record on appeal, received from Melbourne, illustrate the errors in the transcript. Mr. Porter sent several exhibits to this Court, and this Court supplemented the 3.850 post conviction record with those exhibits. Mr. Porter's exhibit, marked "AD", is dated January 22, 1988. On March 1, 1988, this exhibit was certified as a true and correct transcription of the proceedings, and it was filed with the Titusville Clerk of Court on March 11, 1988. However, a comparison to Mr. Porter's exhibit, marked "AC", which is a volume of the original record on appeal sent to this court,

illustrates a significant difference between the transcripts. Exhibit "AD" represents the proceedings that occurred on January 22, 1988, but exhibit "AC" indicates that the proceedings occurred on January 21, 1988. Furthermore, the proceedings that occur in exhibit "AD", from pages two (2) through nine (9), are similar to those in exhibit "AC" from pages 1783-90; however, the next portion of what occurs in exhibit "AC" is not included in "AD". In the record on appeal sent to this Court, the transcript proceeds from this point with "preliminary matters" regarding witness management. In Mr. Porter's transcript these "matters" do not occur, instead the court discusses jury instructions.

Similarly, in Mr. Porter's exhibit "AD", pages twenty three (23) through thirty-seven (37) appear on pages 2126 through 2140 of the record on appeal sent to this Court. Again, the difference appears in what precedes and follows these pages. Both transcripts indicate that at this point the parties were "back in chambers"; however, the matters discussed in chambers are not the same. Instead, entirely different matters are discussed in the Titusville transcript than what was recorded in the record on appeal. Also, in the record on appeal, the matter discussed regards an issue that arose during the examination of a guilt phase witness, Dr. Dunn. At this point, Mr. Porter had already pled guilty and the court was conducting a penalty phase. Such a conference could not have occurred at this stage because Judge Antoon specifically says that the

issue occurred "this morning" (R. 2141). Dr. Dunn testified on December 2, 1987 (R. 926 - 971). This was another clear indication that the record was inaccurate, and appellate counsel failed to notice and address the issue.

Perhaps the most crucial inaccuracies between the transcripts concerns the plea colloquy that occurred during Mr. Porter's trial. The transcript filed with the Titusville Clerk of the Court contains the following exchange:

> Q: You want to talk to Mr. Bardwell?
>
> A: Yes, sir. In Count 1, it's in my best interest.

(Mr. Porter's exhibit "P", certified January 18, 1988 by Denise Clark; filed with the Clerk of the Court in Titusville on January 20, 1988 in Titusville).

The record on appeal provided to this Court for review, however, contained the following:

> Q: Do you want to talk to Mr. Bardwell?
>
> A: Yes, sir.
>
> (Whereupon , a discussion was held off the record between Mr. Bardwell and Mr. Porter.)
>
> MR. PORTER: In Count 1 it's in my best interest.

(R. 1499-1500).

According to the Titusville transcript, Mr. Porter wanted to discuss his plea to

count 1 with standby counsel but did not have the opportunity to do so, rendering his guilty plea involuntary and unknowing and violating his right to assistance of counsel. Boykin v. Alabama, 395 U.S. 238, 243 (1969); Gideon v. Wainwright, 372 U.S. 335 (1963). Had appellate counsel ensured that this Court reviewed an accurate transcript of the record on appeal, his conviction and sentence for count 1 would have been reversed.

Florida recognizes the right of a defendant who has been convicted of first degree murder and sentenced to death to a complete review of his conviction and sentence. Delap v. State, 350 So. 2d 462 (Fla. 1977). In addition, Article V, Section 3(b)(1) of the Florida Constitution, Section 921.141, and Rule 9.030(a)(1)(A)(i) also ensure this right. In order to ensure Mr. Porter's right to a complete review, a complete and reliable record was required. Florida Rule of Appellate Procedure 9.140(b)(6)(A) requires, in death penalty cases, that "...the chief justice will direct the appropriate chief judge of the circuit court to monitor the preparation of the complete record for timely filing in the supreme court."

The United States Supreme Court recognized the due process constitutional right to receive trial transcripts for use at the appellate level 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 (1964), Justice Goldberg's concurring opinion emphasized the need for a complete record:

> It cannot seriously be suggested that a retained and experienced appellate lawyer would limit himself to the portion of the transcript designated by his client or even by the trial attorney, especially where the Courts of Appeals may, and not infrequently do, reverse convictions for "plain errors" not raised at trial.

Id. at 287. In Entsminger v. Iowa, 386 U.S. 748 (1967), the United States Supreme Court held that appellants are entitled to a complete and accurate record. In Evitts v. Lucey, 105 S. Ct. 830 (1985), the United States Supreme Court reiterated that effective appellate review begins with giving an appellant an advocate, and the tools necessary to do an effective job. Cf. Gardner v. Florida, 430 U.S. 349, 361 (1977).

In failing to ensure that Mr. Porter's review by the Florida Supreme Court was based on a complete and reliable record, appellate counsel did not act as Mr. Porter's advocate. Justice Goldberg, in his concurring opinion in Hardy, described the appellate counsel's role as an advocate:

> If this requirement is to be more than a hollow platitude then appointed counsel must be provided with the tools of an advocate. As any effective appellate advocate will attest, the most basic and fundamental tool of his profession is the complete trial transcript, through which his trained fingers may leaf and his trained eyes may roam in search of an error, a lead to an error, or even a basis upon which to

> urge a change in an established and hitherto accepted principle of law.
> Anything short of a complete transcript is incompatible with effective appellate advocacy.

Id. at 288 (emphasis added).

Appellate counsel had a duty to ensure a complete and reliable transcript for review. Mr. Porter's appellate attorney failed to discharge this duty by failing to ensure that this Court had a complete record. Failure to raise omissions in the record as an appeal issue and failure to ensure a complete record constituted a serious error by appellate counsel. The record used in the direct appeal of this case was incomplete, inaccurate, and unreliable. Mr. Porter was denied due process, a reliable appellate process, effective assistance of counsel on appeal, and a meaningful and trustworthy review of his conviction and sentence of death. Confidence in the outcome is undermined.

7. **Conclusion**.

Several meritorious arguments were apparent on the record and available for direct appeal, yet appellate counsel unreasonably failed to raise them. These errors, singularly or cumulatively, demonstrate that confidence in the outcome of the direct appeal is undermined and that Mr. Porter was denied effective assistance of appellate counsel. Strickland, 466 U.S. at 688.

## CLAIM IV

**THE FLORIDA DEATH SENTENCING STATUTE AS APPLIED IS UNCONSTITUTIONAL UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.**

In Mills v. Moore, this Court held that because Apprendi v. New Jersey, 120 S.Ct. 2348, (2000), did not overrule Walton v. Arizona, the Florida death penalty scheme was not overruled. Mills v. Moore, 2001 WL 360893 *3-4 (Fla.2001). Therefore, Mr. Porter raises these issues now to preserve the claims for federal court.

**1. The Florida death penalty scheme is unconstitutional as applied in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United states Constitution and Florida law.**

In Jones v. United States, the United States Supreme Court held, "under the Due Process Clause of the Fifth Amendment and the notice and jury guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Jones v. United States, 526 U.S. 227, 243, n.6 (1999). Subsequently, in Apprendi v. New Jersey, the Court held that the Fourteenth Amendment affords citizens the same protections under state law. Apprendi v. New Jersey, 120 S.Ct. 2348, 2355 (2000).

In Apprendi, the issue was whether a New Jersey hate crime sentencing enhancement, which increased the punishment beyond the statutory maximum, operated as an element of an offense so as to require a jury determination beyond a reasonable doubt. Apprendi 120 S.Ct. at 2365. "[T]he relevant inquiry here is not one of form, but of effect–does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" Apprendi 120 S.Ct. at 2365. Applying this test, it is clear that aggravators under the Florida death penalty sentencing scheme are elements of the offense which must be noticed, submitted to a jury, and proven beyond a reasonable doubt.

At the time of George Porter's penalty phase, Florida Statute 775.082 provided:

> 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 proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death, and in the latter event such person shall be punished by death.

§ 775.082 Fla. Stat. (1987)(emphasis added). Under this statute, the state must prove at least one aggravating factor in the separate penalty phase proceeding before a person convicted of first degree murder is eligible for the death penalty.

> The aggravating circumstances of Fla.Stat. S 921.414(6), F.S.A., actually define those crimes–when read in

> conjunction with Fla. Stat. Ss 782.04(1) and 794.01(1), F.S.A.–to which the death penalty is applicable in the absence of mitigating circumstances.

State v. Dixon, 283 So.2d 1, 9 (Fla. 1973); Fla. Stat. § 775.082 (1989); § 921.141(2)(a), (3)(a) Fla. Stat. (1989). Thus, Florida capital defendants are not eligible for the death sentence simply upon conviction of first-degree murder. If a court sentenced a defendant immediately after conviction, the court could only impose a life sentence. § 775.082 Fla. Stat. (1989). Dixon, 283 So.2d at 9. Therefore, under Florida law, the death sentence is not within the statutory maximum sentence, as analyzed in Apprendi, because it increases the penalty for first degree murder beyond the life sentence a defendant is eligible for based solely upon the jury's guilty verdict.

The Florida Legislature's plain language in Florida Statute 775.082, and this Court's interpretation of the statute in Dixon, clearly make aggravating circumstances elements of death penalty eligible first degree murder rather than sentencing considerations. Dixon, 283 So.2d at 9. Because, under Florida law, the effect of finding an aggravator exposes the defendant to a greater punishment than that authorized by the jury's guilty verdict alone, the aggravator is an element of the death penalty eligible offense which requires notice, submission to a jury, and proof beyond a reasonable doubt. Apprendi, at 2365. This did not occur in George Porter's case. Thus, the Florida death penalty scheme was unconstitutional as applied.

George Porter's indictment violated the Sixth and Fourteenth Amendments because it failed to charge the aggravating circumstances as elements of the offense for which the death penalty was a possible punishment. Under the principles of common law, aggravators must be noticed.

> Where a statute annexes a higher degree of punishment to a common-law felony, if committed under particular circumstances, an indictment for the offence, in order to bring the defendant within that higher degree of punishment, must expressly charge it to have been committed under those circumstances, and must state the circumstances with certainty and precision. [2 M. Hale, Pleas of the Crown *170].

Apprendi v. New Jersey, 120 S.Ct. 2348, 2355 (2000) quoting Archbold, Pleading and Evidence in Criminal Cases, at 51. Because aggravators are circumstances of the crime and the defendant's mental state, they are essential elements of a crime for which the death penalty may be imposed, and they must be noticed.

Because aggravators are elements of the crime for which the death penalty can be imposed, George Porter's death recommendation violates Florida law because it is impossible to determine whether a unanimous jury found any one aggravating circumstance. Florida Rule of Criminal Procedure 3.440 requires unanimous jury verdicts on criminal charges. "It is therefore settled that '[i]n this state, the verdict of the jury must be unanimous' and that any interference with this right denies the

defendant a fair trial." Flanning v. State, 597 So. 2d 864, 867 (Fla. 3d DCA 1992), quoting Jones v. State, 92 So. 2d 261 (Fla. 1956). However, in capital cases, Florida permits jury recommendations of death based upon a simple majority vote, and does not require jury unanimity as to the existence of specific aggravating factors. See, e.g., Thompson v. State, 648 So. 2d 692, 698 (Fla. 1994). Jones v. State, 569 So. 2d 1234, 1238 (Fla. 1990). In light of the fact that aggravators are elements of a death penalty offense, the procedure followed in the sentencing phase must receive the protections required under Florida law and require a unanimous verdict. § 921.141(1),(2) Fla. Stat. (1999).

George Porter's death recommendation may have violated the minimum standards of constitutional common law jurisprudence because it is impossible to know whether the jurors unanimously found any one aggravating circumstance. Each of the thirty-eight states that use the death penalty require unanimous twelve person jury convictions.[2] "We think this near-uniform judgement of the Nation provides a

[2]Ala.R.Cr.P 18.1; Ariz. Const. Art 2, s.23; Ark. Code Ann. §16-32-202; Cal. Const. Art. 1, §16; Colo. Const. Art 2, §23; Conn. St. 54-82(c), Conn.R.Super.Ct.C.R. §42-29; Del. Const. Art. 1, §4; Fla. Stat. Ann. § 913.10(1); Ga. Const. Art. 1, §1, P XI; Idaho. Const. Art. 1, §7; Ill. Const. Art. 1, §13; Ind. Const. Art. 1, §13; Kan. Const. Bill of Rights §5; Ky. Const. §7, Admin.Pro.Ct.Jus. A.P. 11 §27; La. C.Cr.P. Art. 782; Md. Const. Declaration Of Rights, Art. 5 ; Miss. Const. Art. 3, §31; Mo. Const. Art. 1, §22a; Mont. Const. Art. 2, §26; Neb. Rev. St. Const. Art. 1, §6; Nev. Rev. Stat. Const. Art. 1, §3; N.H. Const. PH, Art. 16; N.J. Stat. Ann. Const. Art. 1, p. 9; N.M. Const. Art. 1 §12; N.Y. Const. Art. 1, §2; N.C.

useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not." Burch v. Louisiana, 441 U.S. 130, 138 (1979)(reversing a non-unanimous six person jury verdict in a non-capital case). The federal government requires unanimous twelve person jury verdicts. "[T]he jury's decision upon both guilt and whether the punishment of death should be imposed must be unanimous. This construction is more consonant with the general humanitarian purpose of the Anglo-American jury system." Andres v. United States, 333 U.S. 740, 749 (1948).

Implicit in the states' and federal government's requirements that a capital conviction must be obtained through a unanimous twelve person jury, is the idea that "death is qualitatively different from a sentence of imprisonment, however long". Woodson v. North Carolina, 428 U.S. 280, 304 (1976). The Sixth, Fourteenth, and Eighth Amendments require more protection as the seriousness of the crime and severity of the sentence increase. See Johnson v. Louisiana, 406 U.S. 354, 364 (1972). Only a twelve juror unanimous verdict can support the imposition of the death penalty. "In capital cases, for example, it appears that no state provides for less

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Gen. Stat. Ann. §15A-1201; Ohio Const. Art. 1, §5; Okla. Const. Art. 2, §19; Or. Const. Art. 1, §11, Or. Rev. Stat. §136.210; Pa. Stat. Ann. 42 Pa.C.S.A. §5104; S.C. Const. Art. V, §22; S.D. ST §23A-267; Tenn. Const. Art.1, §6; Tex. Const. Art.1, §5; Utah Const. Art. 1 §10; Va. Const. Art. 1, §8; Wash. Const. Art. 1, §21; Wyo. Const. Art. 1, §9.

than 12 jurors–a fact that suggests implicit recognition of the value of the larger body as a means of legitimizing society's decision to impose the death penalty." Williams v. Florida, 399 U.S. 78, 103 (1970).

The death recommendation probably violated George Porter's Sixth, Eighth, and Fourteenth Amendment rights as well as his rights under Florida law because it is impossible to determine whether twelve jurors unanimously found any one aggravating circumstance. Because the effect of finding an aggravator exposed George Porter to a greater punishment than the life sentence authorized by the jury's guilty verdict, the aggravator must have been charged in the indictment, submitted to a jury, and proved beyond a reasonable doubt to a unanimous jury.

The Florida death penalty sentencing statute was unconstitutional as applied in George Porter's case. The constitutional errors were not harmless. The denial of a jury verdict beyond a reasonable doubt has unquantifiable consequences and is a "structural defect in the constitution of the trial mechanism, which defies analysis by 'harmless error' standards". Sullivan v. Louisiana, 508 U.S. 275, 2081-83 (1993) *quoting* Arizona v. Fulminante, 499 U.S. 279, 308-312 (1991).

## CLAIM V

## WHEN VIEWED AS A WHOLE, THE COMBINATION OF PROCEDURAL AND SUBSTANTIVE ERRORS DEPRIVED GEORGE

**PORTER OF A FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND THE TRIAL COURT ERRED IN DENYING AN EVIDENTIARY HEARING**.

George Porter did not receive the fundamentally fair penalty phase to which he was entitled under the Eighth and Fourteenth Amendments. See Heath v. Jones, 941 F.2d 1126 (11th Cir. 1991); Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991). The sheer number and types of errors in George Porter's penalty phase, when considered as a whole, virtually dictated the sentence of death. The errors have been revealed in this petition, George Porter's 3.850 motion, 3.850 appeal, and in his direct appeal. While there are means for addressing each individual error, addressing these errors on an individual basis will not afford adequate safeguards required by the Constitution against an improperly imposed death sentence. Repeated instances of ineffective assistance of counsel and the trial court's numerous errors significantly tainted George Porter's penalty phase. These errors cannot be harmless. Under Florida case law, the cumulative effect of these errors denied George Porter his fundamental rights under the Constitution of the United States and the Florida Constitution. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986); Ray v. State, 403 So. 2d 956 (Fla. 1981); Taylor v. State, 640 So. 2d 1127 (Fla. 1st DCA 1994); Stewart v. State, 622 So. 2d 51 (Fla. 5th DCA 1993); Landry v. State, 620 So. 2d 1099 (Fla. 4th DCA 1993).

## CLAIM VI

**MR. PORTER'S EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED AS MR. PORTER MAY BE INCOMPETENT AT THE TIME OF EXECUTION.**

In accordance with Florida Rules of Criminal Procedure 3.811 and 3.812, a prisoner cannot be executed if "the person lacks the mental capacity to understand the fact of the impending death and the reason for it." This rule was enacted in response to Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595 (1986).

George Porter acknowledges that under Florida law, a claim of incompetency to be executed cannot be asserted until a death warrant has been issued. Further, Mr. Porter acknowledges that before a judicial review may be held in Florida, the defendant must first submit his claim in accordance with Florida Statutes. The only time a prisoner can legally raise the issue of his sanity to be executed is after the Governor issues a death warrant. Until the death warrant is signed, the issue is not ripe. This is established under Florida law pursuant to Section 922.07, Florida Statutes (1985) and Martin v. Wainwright, 497 So.2d 872 (1986)("If Martin's counsel wish to pursue this claim, we direct them to initiate the sanity proceedings set out in section 922.07, Florida Statutes (1985).") The same holding exists under federal law. Poland v. Stewart, 41 F. Supp. 2d 1037 (D. Ariz 1999) (such claims truly are not ripe

unless a death warrant has been issued and an execution date is pending); Martinez-Villareal v. Stewart, 118 S. Ct. 1618, 523 U.S. 637, 140 L.Ed.2d 849 (1998)(respondent's Ford claim was dismissed as premature, not because he had not exhausted state remedies, but because his execution was not imminent and therefore his competency to be executed could not be determined at that time); Herrera v. Collins, 506 U.S. 390, 113 S. Ct. 853, 122 L.Ed.2d 203 (1993)(the issue of sanity [for Ford claim] is properly considered in proximity to the execution).

However, this claim is necessary at this stage because federal law requires that, in order to preserve a competency to be executed claim, the claim must be raised in the initial petition for habeas corpus, and federal law requires all issues raised in a federal habeas petition to be exhausted in state court. Hence, George Porter raises this claim now.

## CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Porter respectfully urges this Honorable Court to grant habeas relief.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Habeas Corpus has been has been furnished by United States Mail, first class postage prepaid, to all counsel of record on this _____ day of _____, 2001

_____

Kevin T. Beck
Florida Bar No. 0802719
Assistant CCC

_____

Leslie Anne Scalley
Florida Bar No. 0174981
Staff Attorney
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE
3801 Corporex Park Drive
Suite 210
Tampa, Florida 33619
813-740-3544
Counsel for Petitioner

## CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Petition for Writ of Habeas Corpus, was generated in a Times New Roman, 14 point font, pursuant to Fla. R. App. P. 9.210.


_____
Kevin T. Beck
Florida Bar No. 0802719
Assistant CCC

_____
Leslie Anne Scalley
Florida Bar No. 0174981
Staff Attorney
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE
3801 Corporex Park Drive
Suite 210
Tampa, Florida 33619
813-740-3544
Counsel for Petitioner


Copies furnished to:

The Honorable Edward J. Richardson
Circuit Court Judge
2825 Judge Fran Jamieson Way
Fourth Floor
Viera, FL 33940-8006

Christopher White
Assistant State Attorney
Office of the State Attorney
100 East First Street
Sanford, FL 32771

Kenneth S. Nunnelley
Assistant Attorney General
Office of the Attorney General
444 Seabreeze Boulevard, Fifth Floor
Daytona Beach, FL 32118-3951

George Porter
DOC# 110825; P6214S
Union Correctional Institution
Post Office Box 221
Raiford, Florida 32083