IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-2472

EDDIE WAYNE DAVIS,

Petitioner,

v.

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

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

OTHER AUTHORITIES CITED

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 being filed in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. These claims demonstrate that Mr. Davis was deprived of the right to a fair, reliable trial and individualized sentencing proceeding and that the proceedings resulting in his conviction and death sentence violated fundamental constitutional imperatives.

Citations shall be as follows: The record on appeal concerning the original court proceedings shall be referred to as "R. ___" followed by the appropriate page numbers. The Appellant's Initial Brief on direct appeal will be referred to as "IB. ___" followed by the appropriate page numbers. The postconviction record on appeal will be referred to as "PC-R. ___" followed by the appropriate page numbers. All other references will be self-explanatory or otherwise explained herein.

REQUEST FOR ORAL ARGUMENT

The resolution of the issues in this action will determine whether Mr. Davis lives or dies. This Court has allowed oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims involved and the fact that a life is at stake. Mr. Davis accordingly requests that this Court permit oral argument.

INTRODUCTION

Significant errors which occurred at Mr. Davis' 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. Davis. "[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. Wainwright, 474 So.2d 1162, 1164 (Fla. 1985). 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).

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

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla.R.App.P. 9.100(a). *See* Art. I, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Fla.R.App.P. 9.030(a)(3) and Art. V, Sec. 3(b)(9), *Fla. Const.* The Petition presents constitutional issues which directly concern the judgment of this Court during the appellate process and the legality of Mr. Davis' sentence of death.

Jurisdiction in this action lies in this Court, *see*, *e.g.*, Smith v. State, 400 So.2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied

Mr. Davis' direct appeal. *See Wilson*, 474 So.2d at 1163 (Fla. 1985); ***Baggett v. Wainwright***, 392 So.2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Davis to raise the claims presented herein. *See*, *e.g.*, Way v. Dugger, 568 So.2d 1263 (Fla. 1990); Downs v. Dugger, 514 So.2d 1069 (Fla. 1987); Riley 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 would be more than proper on the basis of Mr. Davis' claims.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Davis 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 as guaranteed by the Fourth,

Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

PROCEDURAL HISTORY

Eddie Wayne Davis, the defendant, was charged by way of Indictment on April 7, 1994 with one count of burglary with assault, one count of kidnapping of a child under 13, one count of sexual battery on a child under 12 and first degree murder of Kimberly Waters. (R. Vol. I-3) The case proceeded to a jury trial in the Polk County Circuit Court before the Honorable Daniel True Andrews, Judge presiding. The defendant was tried beginning on May 22, 1995 and ending on June 1, 1995. The jury returned unanimous verdicts of guilty on all counts (R. Vol. XVIII-2157).

On June 6, 1995, the case proceeded to penalty phase before the same jury. After hearing matters in aggravation and mitigation, the jury advised and recommended by a vote of 12 to 0 that defendant be sentenced to death. (R. Vol. IV-590).

On June 30, 1995, the Court sentenced defendant to death. The Court sentenced the defendant to a life sentence with a minimum mandatory of twenty five years without parole for sexual battery on a child under 12, a 19 year prison term for burglary with assault, and a 19 year prison term for kidnapping of a

child under 13. (R. Vol. XVIII-2157).

On June 5, 1997, the Supreme Court of Florida affirmed defendant's sentence and conviction in Davis v. State, 698 So. 2d 1182 (Fla. 1997).

On February 23, 1998, the United States Supreme Court denied defendant's Petition for Writ of Certiorari in Davis v. Florida, 522 U.S. 1127, 118 S.Ct. 1076, 140 L.Ed.2d 134 (1998).

On or about May 27, 1998, Defendant filed a Motion to Vacate Judgments of Conviction and Sentence.

Mr. Davis' Request for Production of public Records has been pending since September 9, 1998. Mr. Davis' Pro Se Motion to dismiss Counsel was filed January 27, 1999. Hearing was set for May 21, 1999. An Order to set post conviction relief deadline was filed on June 4, 1999. A deadline was set for March 31, 2000, to file final motion. On January 4, 2000, this deadline was set for March 31, 2000, to file final motion. On January 4, 2000, this deadline was extended to May 31, 2000. The deadline was subsequently extended until June 23, 2000.

On June 23, 2000, Mr. Davis' First Amended Motion to Vacate Judgment of Conviction and Sentences With Special Request For Leave To Amend And For Evidentiary Hearing was filed with the trial court.

On January 25, 2001, a Huff hearing was held at the Polk

County Courthouse, Courtroom 8A, before the Honorable Randall G. McDonald, Judge of the above styled cause.

On January 30, 2001, the court entered an order styled: Order Granting In Part And Denying In Part Defendant's Request For An Evidentiary Hearing On His First Amended Motion To Vacate Judgements And Sentences.

Mr. Davis was granted an evidentiary hearing on claims IB, IC, IE, IIA (as orally amended), IIB, IIC (to the extent the defendant will be permitted to present testimony by his expert on post traumatic stress disorder), IIE, IIF, IIG, III, V, and VII

(based on cumulative errors derived from the matters the Court has permitted a hearing on).

On October 8 and 9, 2001, an evidentiary hearing was held before the Honorable Randall McDonald in the Circuit Court of the Tenth Judicial Circuit.

On June 11, 2002, Judge McDonald entered an order denying Mr. Davis' First Amended Motion To Vacate Judgment Of Convictions and Sentences.

ARGUMENT I

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE ON DIRECT APPEAL THE DENIAL OF MR. DAVIS' FUNDAMENTAL RIGHT TO TESTIFY AT THE PENALTY PHASE OF THE TRIAL.

The United States Supreme Court in Rock v. Arkansas, 483 U.S. 44, 107 S.Ct. 2704, 2708-10 (1987) held that criminal defendants have a right to testify in their own behalf under the Due Process Clause of the Fourteenth Amendment, the Compulsory Process Clause of the Sixth Amendment, and the Fifth Amendment's privilege against self-incrimination. This right to testify is a personal and fundamental constitutional right. United States v. Teague, 953 F.2d 1525 (1992), Galowski v. Murphy, 891 F.2d 629, 636 (1989), United States v. Martinez, 883 F.2d 750, 756 (1989). Any waiver of this right must be knowing, voluntary, and intelligent. The defendant must voluntarily exercise his own free will and must knowingly and intelligently relinquish the right. Faretta v. California, 422 U.S. 806, 835 (1975).

Eddie Davis was denied the fundamental right to testify in his own behalf in the penalty phase of his trial. Mr. Davis did not testify in the penalty phase of his trial and his failure to testify was not based upon a knowing, voluntary, and intelligent waiver of that fundamental right. At the close of the case in penalty phase, trial counsel failed to request the Court to inquire of Mr. Davis as to whether he wanted to testify.

> THE COURT: Does anybody see the need for me to inquire if the defendant wanted to say anything in the penalty phase?

> MR. NORGARD: No, sir,
>
> MR. AGUERO: No, sir, I don't think that's necessary like it is in the guilt phase.
>
> THE COURT: Just wanted to make sure.
>
> MR. AGUERO: Okay.
>
> MR. NORGARD: Okay.
>
> (Bench conference concluded.)

(R. Vol. XXIII-2966). The record is devoid of any indication that Mr. Davis' waiver to take the stand in his own behalf in the penalty phase of his trial was knowingly, voluntarily, and intelligently made. Appellate counsel failed to raise on direct appeal the denial of Mr. Davis' fundamental right to testify at his trial.

Article I, section 16 of the Florida Constitution provides that in all criminal prosecutions the defendant shall have the right to be heard in person, by counsel, or both. In Deaton v. Dugger, 635 So.2d 4 (Fla. 1993) the trial court set aside the death sentence and ordered a new sentencing proceeding. The trial court's order stated:

> Based on the totality of the circumstances presented at the evidentiary hearing, this Court is not convinced by a preponderance of the evidence that the defendant knowingly, freely, and voluntarily waived his right to testify or to call witnesses at the penalty phase. While the court does not find that the
> evidence presented by the defendant at the

> evidentiary hearing would necessarily have been beneficial to his cause at the sentencing phase, the court finds that the defendant was not given the opportunity to knowingly and intelligently make the decision as to whether or not to testify or to call these witnesses.

In upholding the trial courts ruling the Florida Supreme Court stated:

> In this case, the trial judge found that Deaton had waived the right to testify and the right to call witnesses to present evidence in mitigation, but concluded that, because his counsel failed to adequately investigate mitigation, Deaton's waiver of those rights was not knowingly, voluntarily, and intelligent. The rights to testify and to call witnesses are fundamental rights under our state and federal constitutions. Although we have held that a trial court need not necessarily conduct a *Faretta* type inquiry in
> determining the validity of any waiver of those rights to present mitigating evidence, clearly, the record must support a finding that such a waiver was knowingly, voluntarily,
> and intelligently made.

Mr. Davis was denied his rights under Article I, section 16 of the Florida Constitution and Deaton when he was prevented from testifying and when no knowing, voluntary, and intelligent waiver was made. The record did not support any waiver as required by Deaton.

Mr. Davis' right to testify was especially crucial to him in the penalty phase of his trial. Affording Mr. Davis an

opportunity to present to the advisory jury and the sentencing judge his true remorse for the death of Kimberly Waters would have enhanced the strength of the mitigating evidence presented. Mr. Davis could have benefitted from testifying in the penalty phase if for no other reason than a chance to plead for his life. Mr. Davis was denied this opportunity when he was denied his fundamental rights to testify on his own behalf. Had Mr. Davis not been denied his fundamental rights, there is a reasonable probability that his testimony as to his state of mind at the time of the killing and his true remorse would have changed the outcome of the proceedings and resulted in a sentence of life, not death.

A defendant's right to testify is fundamental and personal to the defendant and as such it may not be effectively waived by counsel against the defendant's will. United States v. Teague, 908 F.2d at 757. A defendant's right to testify is among the inherently personal rights of fundamental importance that only the defendant may waive. It is a right that cannot be forfeited by counsel, but only by a knowing, voluntary, and intelligent waiver by the defendant himself. United States v. Scott, 909 F.2d 488 (11th Cir. 1990). In Mr. Davis' case, the trial court asked defense counsel and the prosecutor if anybody saw the need for the court to inquire if the defendant wanted to say anything

in the penalty phase. When defense counsel answered no, he effectively waived Mr. Davis' right to testify. This waiver could only be made by the defendant as it is his, and only his right to waive.

Failure of Mr. Davis to testify in his own behalf at the penalty phase of his trial was not a strategic decision by defense counsel. The trial record does not support any strategic considerations by counsel. Even if there were a strategy to remain silent in the penalty phase, such strategy would not vitiate Mr. Davis' fundamental constitutional rights to testify at his trial. The Court held in United States v. Teague, 908 F.2d at 761 that when, despite any efforts by defense counsel to convince the defendant that the best strategy is to remain silent, the defendant does not personally waive the right to testify and defense counsel fails to allow the defendant to take the stand, the defendant's right to testify has been violated. If the Court provides protection to defendants where there is a trial strategy to remain silent, surely even greater protection is afforded where there is no ostensible trial strategy. Mr. Davis is entitled to this full protection under Teague.

In the event that counsel actively and forcefully prevents the defendant from testifying or threatens to withdraw from representation should the defendant insist on testifying, the

defendant must make a constitutionally unacceptable choice. Such was the case in Nichols v. Butler, 917 F.2d 518 (11th Cir. 1990) where the Court, relying on holdings in *Teague* and *Scott*, concluded that the defendant's right to testify was violated by his attorney's threat to withdraw and that the violation was not harmless. In Mr. Davis' case, there was no evidence of conflict between counsel and Mr. Davis. To the contrary, the record is silent as to the decision whether Mr. Davis would testify. A defendant who may not have been informed nor was independently aware that he could override the decision of his attorney should not be denied the same protection as a defendant who has a dispute, on the record, with his attorney regarding the decision to testify.

The trial court could have taken further steps to ensure that any waiver by Mr. Davis was done knowingly, voluntarily, and intelligently. The court could have conducted a colloquy with the defendant to determine whether the defendant voluntarily relinquished his right to testify. By not conducting a colloquy, there is no way to confirm that the waiver meets the constitutional standard. In Mr. Davis' case, we are left only with defense counsel's waiver and an assertion by the prosecutor that he believes an inquiry is not necessary in second phase.

The Court in *Deaton*, although not requiring a *Faretta* type inquiry in determining the validity of any waiver of fundamental rights to testify, does require that the record support a finding that such waiver was knowingly, voluntarily, and intelligently made. A *Faretta* hearing offers a court an opportunity to assure that a defendant understands and accepts the consequences of his decision to waive his right to counsel and to proceed pro se. *Faretta* requires that a hearing be held and an extensive and detailed inquiry be made of the defendant regarding the numerous pitfalls of self representation. A record finding that a waiver of the fundamental right to testify at trial is knowing, voluntary, and intelligent can be made by conducting a colloquy.

The Supreme Court in Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938) has crafted the basic procedure for relinquishing a personal right. That procedure is to have the trial court engage the defendant in an on-the-record dialogue to confirm that any proposed waiver meets the constitutional standard. In order to minimize the risk of an unintentional relinquishment, the Supreme Court has required a clear and unequivocal record showing that the trial judge informed the defendant of the nature of his rights and that the defendant volitionally waived these rights in open court.

Absent such a colloquy, the defendant has not legally abandoned his personal rights. United States v. Martinez, 883 F.2d 750 (9th Cir. 1989)(Reinhardt, J., dissenting). This basic procedure could have been employed in Mr. Davis' case so as to ensure his fundamental rights.

Appellate counsel on direct appeal failed to raise the denial of Mr. Davis' fundamental right to testify on his own behalf at the penalty phase of his trial. This omission was of such a magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, secondly, the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. Groover v. Singletary, 656 So.2d 424, 425 (Fla. 1995). Habeas relief should therefore be granted.

ARGUMENT II

UNDER *APPRENDI AND RING* THE FLORIDA DEATH SENTENCING STATUTES AS APPLIED ARE UNCONSTITUTI0NAL UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

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*, 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 charged in an indictment, submitted to a jury during guilt phase, and proven beyond a reasonable doubt by a unanimous verdict.

At the time of Mr. Davis' sentencing, Fla. Stat. § 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 §. 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.**

Fla. Stat. § 775.082 (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. State v. Dixon, 283 So.2d 1, 9 (Fla. 1973); Fla. Stat. § 775.082 (1994), § 921.141(2)(a), and § 921.141(3)(a)(1994). 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. Fla. Stat. § 775.082 (1994). Therefore, under Florida law, the death sentence is not within the statutory maximum sentence, as analyzed in *Apprendi*, because it increased the penalty for first degree murder beyond the life sentence a defendant is eligible for based solely upon the jury's guilty verdict.

Under the Florida death penalty scheme there are essentially two levels of first degree murder. The first, conviction for

first degree premeditated murder or felony murder permits a life sentence. The second, if aggravating circumstances are proved beyond a reasonable doubt, the person so convicted can be sentenced to death. Thus, the Florida death penalty system divides murders into two categories, analogous to felony battery and aggravated battery. Felony battery, which is punished as a third degree felony, becomes aggravated battery, punished as a second degree felony, upon proof of certain aggravating circumstances. Fla. Stat. §§ 784.041, 784.045 (1999). These circumstances which increase felony battery from a third degree felony to a second degree felony of aggravated battery are elements of the crime which must be charged in the indictment, submitted to the jury, and must be proved beyond a reasonable doubt by a unanimous verdict.

Likewise, the Florida death penalty aggravating circumstances, which elevate a murder punishable by a life sentence to a murder punishable by death, must be charged in the indictment, submitted to the jury, and must be proved beyond a reasonable doubt. No other crimes in Florida allow increased punishments based on additional findings (other than prior conviction) made by a judge; *Apprendi* disallows this practice.

In *Apprendi*, the hate crime sentencing enhancement was applied after the defendant was found guilty and increased the

statutory maximum penalty by up to ten years. *Apprendi*, 120 S.Ct. at 2351. The *Apprendi* court clearly dispensed with the fiction that such an enhancement was not an element which received Sixth Amendment protections. The Court wrote "[b]ut it can hardly be said that the potential doubling of one's sentence from 10 years to 20 has no more that a nominal effect. Both in terms of absolute years behind bars, and because of the severe stigma attached, the differential here is unquestionably of constitutional significance." *Apprendi*, 120 S.Ct. at 2365. As in *Apprendi*, in Mr. Davis' case, the aggravators were applied only after he was found guilty. The aggravators increased the statutory maximum penalty based on the guilty verdict from life imprisonment to death. Certainly, the difference between life and death has more than nominal effect and is of constitutional significance. "[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." Woodson v. North Carolina, 428 U.S. 280, 305 (1975). *See* Gardner v. Florida, 430 U.S. 349, 357 (1976).

Though *Apprendi* involved two separate statutes and the Florida death penalty involves only one, the issue is substance over form. *Apprendi* 120 S.Ct. at 2350, 2365; Fla. Stat. §

921.141 (1999). The effect of the Florida death penalty statute is similar to the effect of the federal car jacking statute the United States Supreme Court addressed in Jones v. United States, 526 U.S. 227, 243, n.6 (1999). Three subsections of the *Jones* statute appeared, superficially, to be sentencing factors. However, the superficial impression lost clarity when the Court examined the effects of the sentencing factors.

> But the superficial impression loses clarity when one looks at the penalty subsections (2) and (3). These not only provide for steeply higher penalties, but they condition them on further acts (injury, death) that seem quite as important as the elements in the principle paragraph (e.g. force and violence, intimidation). It is at best questionable whether the specification of facts sufficient to increase a penalty range from 15 years to life, was meant to carry none of the process safeguards that elements of the offense bring with them for a defendant's benefit.

Jones, 526 U.S. at 233. Because the car jacking sentencing factors increased the maximum penalty for the crime from 15 years to 25 years or life imprisonment, the Court interpreted them as elements of the crime which receive Sixth Amendment protection. *Jones*, 526 U.S. at 230, 242-43.

Although the majority of the Court stated in dicta that *Apprendi* did not overrule Walton v. Arizona, 497 U.S. 639 (1990), the *Apprendi* court was not addressing a death case in

which constitutional protections are more rigorously applied, and *Apprendi* did not specifically address the Florida sentencing scheme. *Apprendi*, 120 S.Ct. at 2366. Moreover, the majority dicta did not carry the force of an opinion of the full court. See *Apprendi*, 120 S.Ct. at 2380 (Thomas J., concurring) ("Whether this distinction between capital crimes and all others, or some other distinction, is sufficient to put the former outside the rule that I have stated is a question for another day."); *Apprendi*, 120 S.Ct. at 2387-88 (O'Connor, J., dissenting) ("If the Court does not intend to overrule *Walton*, one would be hard pressed to tell from the opinion it issues today.") *Apprendi*, 120 S.Ct. 2388.

Because the effect of finding an aggravator exposes the defendant to a greater punishment than that authorized by the jury's guilty verdict, the aggravator must be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt. *Apprendi*, at 2365. This did not occur in Mr. Davis' case. Thus, the Florida death penalty scheme is unconstitutional as applied.

Mr. Davis recognizes that this Court has consistently rejected similar claims within the past year. *See* King v. State, 27 Fla.L.Weekly S65 (Fla. Jan. 16, 2002), *stay granted*, No. 01-7804 (U.S. Jan. 23, 2002); Mills v. Moore, 786 So.2d 532,

536-537 (Fla. 2001), *cert. denied* 121 S.Ct. 1752 (2001); Brown v. Moore, 26 Fla.L.Weekly S742 (Fla. Nov. 1, 2001); and Mann v. State, 794 So.2d 596, 599 (Fla. 2001). On January 31, 2002, this Court denied the petitioner *Apprendi* relief in Bottoson v. Moore, ___ So.2d ___ (Fla. Jan. 31, 2002), in accordance with the ruling in *King*.

However, on June 24, 2002, the United States Supreme Court decided Ring v. Arizona, 122 S.Ct. 2428, ----, 2002 WL 1357257.

In *Ring*, the United States Supreme Court held that the Arizona statute violates the Sixth Amendment right to a jury trial in capital prosecutions because the trial judge, sitting alone and following a jury adjudication of a defendant's guilt of first-degree murder, determines the presence or absence of the aggravating factors required by Arizona law for imposition of the death penalty; receding from Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511. If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact--no matter how the State labels it--must be found by a jury beyond a reasonable doubt. A defendant may not be exposed to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone. The court noted that the "right to trial by jury guaranteed by the Sixth Amendment would be

senselessly diminished" if it encompassed the fact-finding necessary to increase a noncapital defendant's sentence by a term of years, as was the case in *Apprendi*, but not the fact-finding necessary to put him to death. Ring v. Arizona, 2002 WL 1357257 *10.

Florida's death penalty statutory scheme facially violates the federal Constitution. In Florida, death is not within the maximum penalty for a conviction of first degree murder:

> 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.

Fla. Stat. § 775.082 (1984). The statutory scheme does not permit a sentence greater than life predicated on the jury verdict alone. A penalty phase must then be conducted under § 921.141. While the jury gives a recommendation, it is the judge who makes the findings and imposes the sentence.

In Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), the United States Supreme Court recognized that for purposes of the Sixth Amendment, Florida's death penalty statute is indistinguishable from the statute

invalidated in *Ring*:

> We repeatedly have rejected constitutional challenges to Florida's death sentencing scheme, which provides for sentencing by the judge, not the jury. *Hildwin v. Florida,* 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989) (*per curiam*); *Spaziano v. Florida,* 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984); *Proffitt v. Florida,* 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). In *Hildwin,* for example, we stated that "[t]his case presents us once again with the question whether the Sixth Amendment requires a jury to specify the aggravating factors that permit the imposition of capital punishment in Florida," 490 U.S., at 638, 109 S.Ct., at 2056, and we ultimately concluded that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." *Id.,* at 640-641, 109 S.Ct., at 2057.
>
> The distinctions Walton attempts to draw between the Florida and Arizona statutory schemes are not persuasive. It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona.

Id. 647-48. The Court reiterated this Sixth Amendment link between the Florida and Arizona capital sentencing schemes in *Ring*:

> In *Walton v. Arizona*, 497 U.S. 639 (1990), we upheld Arizona’s scheme against a charge

> that it violated the Sixth Amendment. The Court had previously denied a Sixth Amendment challenge to Florida's capital sentencing system, in which the jury recommends a sentence but makes no explicit findings on aggravating circumstances; we so ruled, *Walton* noted, on the ground that 'the Sixth Amendment does not require that specific findings authorizing the imposition of the sentence of death be made by the jury' *Id.* at 648 (quoting *Hildwin v. Florida*, 490 U.S. 638, 640-641 (1989)(*per curium*). *Walton* found unavailing attempts by the defendant-petitioner in that case to distinguish Florida's capital sentencing system from Arizona's. In neither State, according to *Walton*, were the aggravating factors 'elements of the offense'; in both States, they ranked as 'sentencing considerations' guiding the choice between life and death. 497 U.S. at 648 (internal quotation marks omitted).

Ring v. Arizona, 2002 WL 1357257 *9 (U.S.). The parallelism between the Arizona statute and the Florida statute was the major *Walton* theme. *Walton, supra*, 497 U.S. at 640-641, 647.

In *Ring,* the State and its *amici* agreed that overruling *Walton* necessarily meant Florida's statute falls. *See* Brief of Respondent in *Ring* at 31, Tr. of Oral Arg. at 36, and Brief *Amicus Curiae* of Criminal Justice Legal Foundation at 21-22.

Notably, this Court has previously held that, "[b]ecause *Apprendi* did not overrule *Walton*, the basic scheme in Florida is not overruled either." Mills v. Moore, 786 So.2d 532, 537 (Fla. 2001). *Ring* overruled *Walton* and the basic principle of Hildwin

v. Florida, 490 U.S. 638 (1989) (*per curiam*), which had upheld the capital sentencing scheme in Florida "on grounds that 'the Sixth Amendment does not require that the specific findings authorizing imposition of the sentence of death be made by the jury.'" *Ring*, slip op. at 11 (quoting *Walton*, 497 U.S. at 648, in turn quoting *Hildwin*, 490 U.S. at 640-641).

Additionally, *Ring* undermines the reasoning of this Court's decision in *Mills* by recognizing (a) that *Apprendi* applies to capital sentencing schemes,[1] *Ring*, slip op. at 2 ("Capital defendants, no less than non-capital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment"); *id.* at 23, (b) that States may not avoid the Sixth Amendment requirements of *Apprendi* by simply "specif[ying] 'death or life imprisonment' as the only sentencing options,"[2] *Ring*, slip op. at 17, and (c) that the relevant and dispositive question is whether under state law death is "authorized by a

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[1] In *Mills*, The Florida Supreme Court said that "the plain language of *Apprendi* indicates that the case is not intended to apply to capital [sentencing] schemes." *Mills*, 786 So.2d at 537. Such statements appear at least four times in *Mills*.

[2] *Mills* reasoned that because first-degree murder is a "capital felony," and the dictionary defines such a felony as "punishable by death," the finding of an aggravating circumstance did not expose the petitioner to punishment in excess of the statutory maximum. *Mills*, 786 So.2d at 538.

guilty verdict standing alone." *Ring*, slip op. at 19.

Under Florida law, the court conducts a separate sentencing proceeding after which the jury renders an advisory verdict. Fla. Stat. § 921.141. The ultimate decision to impose a sentence of death, however, is made by the court after finding at least one aggravating circumstance. The jury recommends a sentence but makes no explicit findings on aggravating circumstances. The statute is explicit that, without these required findings of fact by the trial judge, the defendant must be sentenced to life imprisonment: "If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose [a] sentence of life imprisonment."

Because the Florida death penalty statutory scheme thus requires fact-finding by the trial judge before a death sentence may be imposed, it is unconstitutional under the holding and rationale of *Ring*.

This Court has previously rejected the idea that a defendant convicted of first degree murder has the right "to have the existence and validity of aggravating circumstances determined as they were placed before his jury." Engle v. State, 438 So.2d 803, 813 (Fla. 1983), *explained in* Davis v. State, 703 So.2d 1055, 1061 (Fla. 1997). The statute specifically requires the

judge to "set forth . . . findings upon which the sentence of death is based as to the *facts*," but asks the jury generally to "render an advisory sentence . . . based upon the following *matters*" referring to the sufficiency of the aggravating and mitigating circumstances. Fla. Stat. §§ 921.141(2) & (3) (emphasis added). Because Florida law does not require that any number of jurors agree that the State has proven the existence of a given aggravating circumstance before it may be deemed "found," it is impossible to say that "the jury" found proof beyond a reasonable doubt of a particular aggravating circumstance. Thus, "the sentencing order is 'a statutorily required personal evaluation by the trial judge of the aggravating and mitigating factors' *that forms the basis of a sentence of life or death*." Morton v. State, 789 So.2d 324, 333 (Fla. 2001) [quoting Patton v. State, 784 So.2d 380 (Fla. 2000)].

As the Supreme Court said in *Walton*, "[a] Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona." *Walton*, 497 U.S. at 648. This Court has made the point even more strongly by repeatedly emphasizing that the trial judge's findings must be made independently of the jury's recommendation. *See* Grossman v. State, 525 So.2d 833, 840 (Fla.

1988) (collecting cases). Because the judge must find that "sufficient aggravating circumstances exist" "notwithstanding the recommendation of a majority of the jury," Fla. Stat. § 921.141(3), the judge may consider and rely upon evidence not submitted to the jury. Porter v. State, 400 So.2d 5 (Fla. 1981); Davis v. State, 703 So.2d 1055, 1061 (Fla. 1997). The judge is also permitted to consider and rely upon aggravating circumstances that were not submitted to the jury. *Davis*, 703 So.2d at 1061, citing Hoffman v. State, 474 So.2d 1178 (Fla. 1985) (court's finding of "heinous, atrocious, or cruel" aggravating circumstance proper though jury was not instructed on it); Fitzpatrick v. State, 437 So.2d 1072, 1078 (Fla. 1983) (finding of previous conviction of violent felony was proper even though jury was not instructed on it); *Engle*, *supra*, 438 So.2d at 813.

Although "[Florida's] enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,'" and therefore must be found by a jury like any other element of an offense, *Ring*, slip op. at 23 (quoting *Apprendi*, 530 U.S. at 494), Florida law does not require the jury to reach a verdict on any of the factual determinations required before a death sentence could be imposed. Section 921.141(2) does not call for a jury verdict, but rather an "advisory sentence."

This Court has made it clear that "'the jury's sentencing recommendation in a capital case is *only advisory*. The trial court is to conduct its own weighing of the aggravating and mitigating circumstances . . . .'" *Combs*, 525 So.2d at 858 (quoting Spaziano v. Florida, 468 U.S. 447, 451) (emphasis original in *Combs*). "The trial judge . . . is not bound by the jury's recommendation, and is given final authority to determine the appropriate sentence." *Engle*, 438 So.2d at 813.

Because Florida law does not require any two, much less twelve, jurors to agree that the government has proved an aggravating circumstance beyond a reasonable doubt, or to agree on the same aggravating circumstances when advising that "sufficient aggravating circumstances exist" to recommend a death sentence, there is no way to say that "the jury" rendered a verdict as to an aggravating circumstance or the sufficiency of them. As Justice Shaw observed in *Combs*, Florida law leaves these matters to speculation. *Combs*, 525 So.2d at 859 (Shaw, J., concurring).

In Florida, additionally, the advisory verdict is not based on proof beyond a reasonable doubt. "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt."

Ring, slip op. at 16. One of the elements that had to be established for Mr. Davis to be sentenced to death was that "sufficient aggravating circumstances exist" to call for a death sentence. Fla. Stat. § 921.141(3).[3] The jury was not instructed that it had to find this element proved beyond a reasonable doubt. In fact, it was not instructed on *any* standard by which to make this essential determination.

Furthermore, a unanimous twelve member jury verdict is required in capital cases under United States Constitutional common law.[4]

Florida's capital sentencing statute is, therefore, unconstitutional on its face and as applied.[5]

"[T]o guard against a spirit of oppression and tyranny on

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[3] It is important to note that although Florida law requires the judge to find that sufficient aggravating circumstances exist to form the basis for a death sentence, Fla. Stat. § 921.141(3), it only asks the jury to say whether sufficient aggravating circumstances exist to "recommend" a death sentence. Fla. Stat. § 921.141(2).

[4] In Cabberiza v. Moore, 217 F.3d 1329 (C.A.11 Fla.,2000) the court noted that the United States Supreme Court "has not had occasion to decide how many jurors, and what degree of unanimity, the Sixth and Fourteenth Amendments require in capital cases." *Id*. n.15. Duncan v. Louisiana, 391 U.S. 145 (1968), and Apodaca v. Oregon, 406 U.S. 404 (1972) were noncapital cases. Both cases cite in their first footnotes the applicable state constitutional provisions, which require twelve person unanimous juries in capital cases.

[5] The sentencing recommendation in this case was 10 - 2 for death and was, therefore, not unanimous.

the part of rulers," and "as the great bulwark of [our] civil and political liberties," 2 J. Story, *Commentaries on the Constitution of the United States* 540-541 (4th ed. 1873), trial by jury has been understood to require that "*the truth of every accusation,* whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours...." 4 W. Blackstone, *Commentaries on the Laws of England* 343 (1769) (cited in Apprendi, by its terms a noncapital case).

It would be impermissible and unconstitutional to rely on the jury's advisory sentence as the basis for the fact-findings required for a death sentence because the statute requires only a majority vote of the jury in support of that advisory sentence. In Harris v. United States, 2002 WL 1357277, No. 00-10666 (U.S. June 24, 2002), rendered on the same day as *Ring*, the United States Supreme Court held that under the *Apprendi* test "those facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for the purposes of the constitutional analysis." *Id*. at *14. And in *Ring*, the Court held that the aggravating factors enumerated under Arizona law operated as "the functional

equivalent of an element of a greater offense" and thus had to be found by a jury. In other words, pursuant to the reasoning set forth in *Apprendi*, *Jones*, and *Ring*, aggravating factors are equivalent to elements of the capital crime itself and must be treated as such.

In Williams v. Florida, 399 U.S. 78, at 103 (1970), the United States Supreme Court noted that: "In capital cases, for example, it appears that no state provides for less 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." Each of the thirty-eight states that use the death penalty require unanimous twelve person jury convictions.[6] In its 1979 decision reversing a non-unanimous six

[6] 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. 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.

person jury verdict in a non-capital case, the United States Supreme Court held that "We think this near-uniform judgment of the Nation provides a 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). 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). See generally Richard A. Primus, *When Democracy Is Not Self-Government: Toward a Defense of The Unanimity Rule For Criminal Juries*, 18 Cardozo L. Rev. 1417 (1997).

Ring also held that the existence of at least one statutory aggravating circumstance must be proven to a jury beyond a reasonable doubt. In essence, the aggravating circumstance is an essential element of a new crime that might be called "aggravated" or "death-eligible" first degree murder. The death recommendation in this case was not unanimous.

Florida requires that verdicts be unanimous.[7] Although

[7] At least absent a waiver initiated by the defendant. Flanning v. State, 597 So.2d 864 (Fla. 3d DCA 1992). See

Florida's constitutional guarantee of a jury trial [Art. I, §§ 16, 22, Fla. Const.] has never been interpreted to require a unanimous jury verdict, it has long been the legal practice of this state to require such unanimity in all criminal jury trials; Fla.R.Crim.P. 3.440 memorializes this long-standing practice: "[n]o [jury] verdict may be rendered unless all of the trial jurors concur in it." 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. Jones v. State, 92 So.2d 261 (Fla. 1956).

Another point from ***Ring*** is that the harmless error doctrine cannot be applied to deny relief. As Justice Scalia explained in Sullivan v. Louisiana, 508 U.S. 275 (1993): "[T]he jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt." *Sullivan*, 508 U.S. at 278. Where the jury has not been instructed on the reasonable doubt standard,

> [t]here has been no jury verdict within the meaning of the Sixth Amendment, [and] the entire premise of *Chapman*[8] review is simply absent. There being no jury verdict of guilty-beyond-a-reasonable-doubt, the

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Nobles v. State, 786 So.2d 56, (Fla. 4th DCA 2001) certifying question. *Flanning* is flatly inconsistent with *Jones*.

[8] Chapman v. California, 386 U.S. 18 (1967).

> question whether the *same* verdict of guilty-beyond-a-reasonable-doubt would been rendered absent the constitutional error is utterly meaningless. There is no *object*, so to speak, upon which harmless-error scrutiny can operate.

Sullivan, 508 U.S. at 280. The same reasoning applies to lack of unanimity, failure to instruct the jury properly, and importantly, the lack of an actual verdict.

Mr. Davis' death sentence also violates the State and Federal Constitutions because the elements of the offense necessary to establish capital murder were not charged in the indictment. Jones v. United States, 526 U.S. 227 (1999), held that "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*, at 243, n.6. Apprendi v. New Jersey, 530 U.S. 466 (2000), held that the Fourteenth Amendment affords citizens the same protections when they are prosecuted under state law. *Apprendi*, 530 U.S. at 475-476.[9] *Ring* held that a death penalty statute's "aggravating factors operate as 'the functional equivalent of an element or

[9] The grand jury clause of the Fifth Amendment has not been held to apply to the States. *Apprendi*, 530 U.S. at 477, n.3.

a greater offense.'" *Ring*, quoting *Apprendi* at 494, n. 19. In *Jones*, the Supreme Court noted that "[m]uch turns on the determination that a fact is an element of an offense, rather than a sentencing consideration," because "elements must be charged in the indictment." *Jones,* 526 U.S. at 232.

Like the Fifth Amendment to the United States Constitution, Article I, section 15 of the Florida Constitution provides that "No person shall be tried for a capital crime without presentment or indictment by a grand jury." Florida law clearly requires every "element of the offense" to be alleged in the information or indictment. In State v. Dye, 346 So.2d 538, 541 (Fla. 1977), this Court said "[a]n information must allege each of the essential elements of a crime to be valid. No essential element should be left to inference." In State v. Gray, 435 So.2d 816, 818 (Fla. 1983), this Court said "[w]here an indictment or information wholly omits to allege one or more of the essential elements of the crime, it fails to charge a crime under the laws of the state." An indictment in violation of this rule cannot support a conviction; the conviction can be attacked at any stage, including "by habeas corpus." *Gray*, 435 So.2d at 818. Finally, in Chicone v. State, 684 So.2d 736, 744 (Fla. 1996), this Court said "[a]s a general rule, an information must allege each of the essential elements of a

crime to be valid."

The Sixth Amendment requires that "[i]n all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation . . . ." A conviction on a charge not made by the indictment is a denial of due process of law. State v. Gray, *supra, citing* Thornhill v. Alabama, 310 U.S. 88 (1940), and De Jonge v. Oregon, 299 U.S. 353 (1937).

Because the State did not submit to the grand jury, and the indictment did not state, the essential elements of the aggravated crime of capital murder, Mr. Davis' right under Article I, section 15 of the Florida Constitution, and the Sixth Amendment to the federal Constitution were violated. By wholly omitting any reference to the aggravating circumstances that would be relied upon by the State in seeking a death sentence, the indictment prejudicially hindered Mr. Davis "in the preparation of a defense" to a sentence of death. Fla.R.Crim.P. 3.140(o).

Lastly, the Petitioner, Mr. Davis, is entitled to the benefit of *Apprendi* and *Ring* under Witt v. State, 387 So.2d 922, 929-930 (Fla. 1980).

ARGUMENT III

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE ON DIRECT APPEAL THE ISSUE OF THE TRIAL COURT ALLOWING BEVERLY SCHULTZ,

THE MOTHER OF THE VICTIM TO REMAIN IN THE COURTROOM TO OBSERVE THE TRIAL AFTER SHE COMPLETED HER TESTIMONY

The mother of the victim, Beverly Schultz, testified for the state. Before Ms. Schultz testified, a discussion took place wherein the trial court inquired of the state and defense about invoking the rule of sequestration.(R. 1288) The court asked defense counsel if there was anything he wished to say about the mother of the deceased being allowed to stay in the courtroom.(R. 1292)

Trial counsel objected to allowing Ms. Schultz to remain in the courtroom during the trial.(R. 1293) The court overruled the objection and allowed Ms. Schultz to remain in the courtroom for the rest of the trial after her own testimony was completed. Ms. Schultz was the first witness called by the state so she was observed by the jury for nearly the entirety of the trial.

It was ineffective assistance of appellate counsel not to have raised this issue on appeal. The prejudicial impact of allowing the victim's mother to remain in the courtroom during the entire trial in full view of the jury, as they decided the defendant's culpability and punishment, deprived the defendant of his rights to a fair trial under the Fourteenth Amendment to the United States Constitution.

The trial court, in overruling defense counsel's objection

to allowing the victim's mother to remain in the courtroom, caused egregious damage to the fairness of Mr. Davis' trial. Ms. Schultz remained in the courtroom after she had testified to the same jury who had to perform its duties under her observation. Beverly Schultz, the mother of an eleven year old victim, would evoke even greater sympathy of the jury than if she were the mother of an adult victim. This jury unquestionably could feel nothing but undivided sympathy for Ms. Schultz. Her presence in the courtroom during the performance of their duties undermined the fairness of the trial.

Generally a trial judge may permit a witness to remain in the courtroom even though a rule of sequestration and exclusion has been invoked, but such discretion is subject to being abused and, if abused, it must be decided whether sufficient harm results to require a new trial. Thomas v. State, 372 So.2d 997 (Fla. 4th DCA 1979). A trial court should not, as a matter of course, permit witnesses to remain in the courtroom when they are not on the stand, unless it is shown that it is necessary for the witness to assist counsel in trial and that no prejudice will result to the accused and a hearing has been conducted particularly if the rule sequestering and excluding jurors has been invoked. Randolph v. State, 463 So.2d 186 (Fla. 1985). Fla. Stat. 90.616 provides that at the request of a party the court shall order, or upon its own

motion the court may order, witnesses excluded from a proceeding ...except...the parent or guardian of a minor child victim...unless, upon motion, the court determines such person's presence to be prejudicial.

Trial counsel stated to the court that having the surviving relative who is also a witness, present before the jury will be very emotional. The mother's presence will add to the emotional nature of the case, which will only be prejudicial to the defense. (R. 1294) Counsel also pointed out that his attention would be divided during bench conferences and other matters as he would have to watch the mother to determine if she was acting inappropriately in the view of the jury. The mother of the victim was a witness hostile to the defendant and was a potential witness in both the guilt and penalty phases. There was also the danger of the mother of the victim coloring her testimony from what she heard in court. Based on these reasons, counsel requested that all witnesses, including the mother of the victim, be sequestered. This was not done and the defendant was prejudiced as a result. Appellate counsel failed to raise this issue on direct appeal to the prejudice of the defendant.

ARGUMENT IV

APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO RAISE THE ISSUE OF THE TRIAL COURT ALLOWING, OVER DEFENSE OBJECTION, THE ADMISSION INTO EVIDENCE OF

CERTAIN PHOTOGRAPHS OF THE VICTIM

In the presentation of the state's case against petitioner, the assistant state attorney introduced a series of photographs of the victim into evidence. The nature of these photographs was graphic. Petitioner's defense attorney objected to these photographs being admitted. During the testimony of a state witness, Dr. Axexander Melamud, defense counsel again objected to an enlarged photograph of the victim's body, as it was discovered in a dumpster, to be displayed before the jury.(R. 1705) Trial counsel stated as follows:

> Your honor, I have an objection to the state attorney leaving the photographs on display in front of the jury. That's not proper as far as the publication of exhibits, particularly when we're dealing with the most graphic of all the photographs that we've dealt with in this case.
>
> Unless an exhibit is being used for a specific purpose at a specific point in time where the jury needs to see it, I would object to him just having it on the poster board where the jurors are going to be sitting there looking at it, independent of anything relative to this witness' testimony.

The prosecution was permitted to introduce into evidence numerous gruesome photographs that were inflammatory, cumulative, and prejudicial, and admitted solely to inflame the passion of the jurors based on impermissible factors.

The admission of these photographs permitted the state to elicit the passion of the jurors by shocking them with graphic pictures. The probative value of these photographs was not only outweighed by the prejudice to the petitioner, but these photographs were cumulative to each other. Their graphic content was further emphasized through the testimony of witnesses and stressed by the state in the penalty closing argument.

The prejudicial effect of the photographs undermined the reliability of Mr. Davis' conviction and death sentence. The photographs themselves did not independently establish any material part of the state's case nor were they necessary to corroborate a disputed fact. The trial court's error in admitting these photographs cannot be considered harmless beyond a reasonable doubt. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

The photographs of the victim should not have been admitted into evidence and served only to inflame the jury. In State v. Smith, 573 So.2d 306 (Fla. 1990), the trial court erred in a murder prosecution in allowing the prosecutor to show to a witness the victim's autopsy photograph. The witness became upset and sobbed out loud. The victim's body had already been identified. The Court held that the evidence was cumulative and

unfairly prejudicial.

In Mr. Davis' case, the photographs of the child victim were highly prejudicial. Any probative value of the photographs was outweighed by the prejudicial effect to Mr. Davis. The prejudice to Mr. Davis occurred as the jury viewed the victim's body laying lifelessly in the dumpster. The enlarged photograph no doubt permeated the jury's mind. It demonstrably affected the outcome of the case in two equally significant respects: the finding of guilt on the charge of first degree murder as opposed to a lesser included offense and; the ensuing unanimous recommendation of death.

Use of these gruesome photographs, which were cumulative, inflammatory, and appealed improperly to the jury's emotions, denied Mr. Davis a fair trial in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Relief is proper and should be granted. To the extent that trial or appellate counsel failed to raise this issue, Mr. Davis was denied effective assistance of counsel.

ARGUMENT V

WHEN VIEWED AS A WHOLE, THE COMBINATION OF PROCEDURAL AND SUBSTANTIVE ERRORS DEPRIVED EDDIE DAVIS OF A FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE FIFTH, SIXTH, EIGHTH,

AND FOURTEENTH AMENDMENTS

Eddie Davis 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 Eddie Davis' penalty phase, when considered as a whole, virtually dictated the sentence of death. The errors have been revealed in this petition, Eddie Davis' 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 Eddie Davis' penalty phase. These errors cannot be harmless. Under Florida case law, the cumulative effect of these errors denied Eddie Davis 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, 662 So.2d 51 (Fla. 5th DCA 1993); Landry v. State, 620 So.2d 1099 (Fla. 4th DCA 1993).

ARGUMENT VI

MR. DAVIS' EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED AS HE MAY BE INCOMPETENT AT 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).

The undersigned acknowledges that under Florida law a claim of incompetency to be executed cannot be asserted until a death warrant has been issued. Further, the undersigned 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 Fla. Stat. § 922.07 (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, most recently, in *In Re: Provenzano*, No. 00-13193 (11th Cir. June 21, 2000), the 11th Circuit Court of Appeals has stated:

> Realizing that our decision in *In Re: Medina*, 109 F.3d 1556 (11th Cir. 1997), forecloses us from granting him authorization to file such a claim in a second or successive petition, Provenzano asks us to revisit that decision in light of the Supreme Court's subsequent decision in *Stewart v. Martinez-Villareal*, 118 S.Ct. 1618 (1998). Under our prior panel precedent rule, *See United States v. Steele*, 147 F.3d 1316, 1317-18 (11th Cir. 1998) (en banc), we are bound to follow the *Medina* decision. We would, of course, not only be authorized but also required to depart from *Medina* if an intervening Supreme Court decision actually overruled or conflicted with it.[citations omitted].
>
> *Stewart v. Martinez-Villareal* does not conflict with *Medina*'s holding that a competency to be executed claim not raised

> in the initial habeas petition is subject to the strictures of 28 U.S.C. Sec 2244(b)(2), and that such a claim cannot meet either of the exceptions set out in that provision.
>
> *Id*. at pages 2-3 of opinion.

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. Hence, the filing of this petition. In order to exhaust state court remedies, the claim is being filed at this time.

Mr. Davis has been incarcerated since 1995. Statistics have shown that incarceration over a long period of time will diminish an individual's mental capacity. Inasmuch as Petitioner may well be incompetent at the time of execution, his Eighth Amendment right against cruel and unusual punishment will be violated.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Eddie Wayne Davis respectfully urges this Honorable Court to grant habeas relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Habeas Corpus has been furnished by United States Mail, first class postage prepaid, to all counsel of record on November 27th, 2002.

_____
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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Petition for Writ of Habeas Corpus was generated in Courier New 12-point font pursuant to Fla. R. App. P. 9.210.

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