IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-420

MATTHEW MARSHALL,

Petitioner,

v.

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

Respondent,

PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION AND PRELIMINARY STATEMENT

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

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

References to other documents and pleadings will be self-explanatory.

JURISDICTION

A writ of habeas corpus is an original proceeding in this Court governed by Fla. R. App. P. 9.100. This Court has original jurisdiction under Fla. R. App. P. 9.030(a)(3) and Article V, § 3(b)(9), Fla. Const. The Constitution of the State of Florida guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." Art. I, § 13, Fla. Const.

REQUEST FOR ORAL ARGUMENT

Mr. Marshall requests oral argument on this petition.

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PROCEDURAL HISTORY

Mr. Marshall was charged by indictment dated February 16, 1989 with first degree murder. Petitioner's trial was held in November and December of 1989. A jury returned a verdict of guilty on first degree murder.

Following the conclusion of the penalty phase, the jury recommended a life sentence without possibility of parole for 25 years. On December 12, 1989, the trial court overrode the jury's life recommendation and sentenced Mr. Marshall to death.

On direct appeal, the Florida Supreme Court affirmed the conviction and sentence. Marshall v. State, 604 So. 2d 799 (Fla.

1992), cert. denied, 113 U.S. 2355 (1993). On January 29, 1999, Mr. Marshall filed his final amended 3.850 motion. On March 29, 1999, the State filed its response. After the circuit court held a Huff[1] hearing on April 14, 1999, the court ordered an evidentiary hearing on three of Mr. Marshall's claims. The evidentiary hearing occurred in August of 1999 over a three day period.

After both the State and Mr. Marshall submitted post-hearing memorandum, the Circuit Court issued an order on April 18, 2000 denying Petitioner's Rule 3.850 motion. Briefs were filed on appeal from the Mr. Marshall and the State and on January 7, 2002, this Court heard oral arguments regarding the 3.850 appeal.

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[1]. Huff v. State, 622 So.2d 982 (Fla. 1993)

CLIAMS FOR RELIEF

INTRODUCTION.

Mr. Marshall had the constitutional right to the effective assistance of counsel for purposes of presenting his direct appeals to this Court. Strickland v. Washington, 466 U.S. 668 (1984). "A first appeal as of right [] is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." Evitts v. Lucey, 469 U.S. 387, 396 (1985). The Strickland test applies equally to ineffectiveness allegations of trial counsel and appellate counsel. See Orazio v. Dugger, 876 F. 2d 1508 (11th Cir. 1989). Because the constitutional violations which occurred during Mr. Marshall's retrial and resentencing were "obvious on the record" and "leaped out upon even a casual reading of transcript," it cannot be said that the "adversarial testing process worked in [Mr. Marshall's] direct appeal[s]." Matire v. Wainwright, 811 F. 2d 1430, 1438 (11th Cir. 1987). The lack of appellate advocacy on Mr. Marshall's behalf is identical to the lack of advocacy present in other cases in which this Court has granted habeas corpus relief. Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985). Appellate counsel's failure to present

the meritorious issues discussed in this petition demonstrates that counsel's representation of Mr. Marshall involved "serious and substantial deficiencies." Fitzpatrick v. Wainwright, 490 So.2d 938, 940 (Fla. 1986). Individually and "cumulatively," Barclay v. Wainwright, 444 So. 2d 956, 959 (Fla. 1984), the claims omitted by appellate counsel establish that "confidence in the correctness and fairness of the result has been undermined." Wilson, 474 So.2d at 1165 (emphasis in original). In light of the serious reversible errors that appellate counsel never raised, there is more than a reasonable probability that the outcome of the appeal would have been different.

I. APPELLATE COUNSEL FAILED TO RAISE ON DIRECT APPEAL THE TRIAL COURT'S ERROR OF DENYING TRIAL COUNSEL'S MOTION FOR AN ADDITIONAL MENTAL HEALTH EXPERT.

In Mr. Marshall's case, the trial court failed to provide Mr. Marshall with "a competent psychiatrist . . . [to] conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." Ake, 105 S. Ct. at 1096 (1985). The relationship between Mr. Marshall's trial attorney and the mental health expert had deteriorated to such degree that the defense filed a motion for an additional mental health expert:

> COMES NOW the Defendant, by and through his undersigned attorney, and hereby moves this Honorable Court to appoint an additional Mental Health Expert, in particular Dr. Robert Berland, to conduct a psychological evaluation of the Defendant, including the issues of competency and to stand trial, sanity at the time of the offense, and the identification and evaluation of any factors relating to the present or past mental health of the Defendant which may be relevant for use as mitigation.
>
> As grounds therefore, the Defendant states:
>
> 1) The Defendant is charged with First Degree Murder and the State has indicated its intent to seek the death penalty for the Defendant if convicted.
>
> 2) Dr. Joel Klass of Hollywood was previously appointed to conduct an examination of MATTHEW MARSHALL.

3) On or about May 26, 1989, Dr. Klass conducted some type of interview and/or testing with MATTHEW MARSHALL.

4) Personnel at Martin Correctional have advised that Dr. Klass spent no more than one hour with MATTHEW MARSHALL.

5) Since that visit, counsel has received two short letters containing Dr. Klass's ultimate conclusions. Neither letter describes the history given by MATTHEW MARSHALL, what tests, if any, were conducted, nor any discussion of what, if any, evidence might be gathered for mitigation.

6) Since Dr. Klass's visit, counsel has tried to reach Dr. Klass several times by phone, to no avail, and Dr. Klass has not returned any of counsel's phone calls. Other than two short letters, the only communication from Dr. Klass are his bills.

7) It is counsel's sincere belief that because of the brevity of MATTHEW MARSHALL'S interview, the apparent lack of extensive testing, and the total failure of Dr. Klass to confer and cooperate with counsel, MATTHEW MARSHALL has not received the minimum testing required to insure due process in both phases of the trial. State v. Sireci, 536 So. 2d 231 (Fla. 1988).

8) Forcing the Defendant to proceed to trial without an adequate mental health examination would violate the Defendant's rights to due process, a fair trial, and against Cruel and Unusual Punishment, contrary to Article I, Section 9, Section 16, and Section 17 of the Florida Constitution, and the 5th, 6th, 8th, and 14th Amendments to the United States Constitution.

(R. 3735-36).

Mr. Marshall's defense counsel further elaborates concerning

the difficulty he was having with Dr. Klass, the defense health expert:

> [DEFENSE COUNSEL] Your Honor, the other Motion is for an additional Mental Health expert and the Court has my Motion. I won't read it into the record, I mean, basically what it says is that Dr. Class (phonetic) was appointed. I didn't choose Dr. Class, another lawyer in our office had heard that he was good or had worked with him before and was impressed with him. But, I can tell you what, he -- I called out to the jail to find out how long he spent with Mathew [sic] Marshall, keep in mind this is a death penalty case, and he was at the jail an hour and ten minutes which means he could not possible [sic] have spent any more than an hour with Mathew Marshall. Since that time I have gotten two short letters with just ultimate conclusions. He has not returned my calls. I don't feel that he, based on what I have seen from his letters, is aware of the issues regarding mitigation, etcetera, that are just as important in the second phase as whether or not the person was insane is in the first phase. And, all I have gotten from this man are bills every month. He won't return my calls. He hasn't sent me any letters addressing any of these areas and, you know, most of the adequate examinations I see list a history, they spend several hours with the Defendant getting history of his life, they list the techniques that they use to test his sanity and his competency. Then they tell you the results of those tests whether they were MMPI or ink blot tests or drawing tests or whatever they are. And then they list their conclusions, five, six, seven, eight, nine, ten pages worth of information. All I have gotten out of this man are some ultimate conclusions and two very short letters and the time is now, you know, drawing close to the trial and we don't -- we are certainly at this stage aren't going to ask for a continuance but what I would like is to get an adequate examination of this

> defendant and I don't think that less than one hour is -- I don't think the Supreme Court of Florida will allow this man to be executed having an hour long examination and that indicates that it is just a violation of due process, I think, to force him to prepare for trial with that short of an examination with no consultation.
>
> I can't get this fellow to consult with me so he is useless for my purposes.

(R. 113-116).

The State argued that the appointment of another mental health expert would unnecessarily waste "both the Court's time and the County's money" (R. 120). The trial court denied the defense Motion for Additional Mental Health Expert (R. 3744-45).[2] Although the law supported Mr. Marshall's right to have a competent mental health expert, appellate counsel failed to raise this issue on direct appeal.

A criminal defendant is entitled to expert psychiatric assistance when the state makes his or her mental state relevant to the proceeding. Ake v. Oklahoma, 105 S. Ct. 1087 (1985). What is required is an "adequate psychiatric evaluation of [the defendant's] state of mind." Blake v. Kemp, 758 F.2d 523, 529 (11th Cir. 1985). In this regard, there exists a "particularly critical interrelation between expert psychiatric assistance and minimally effective

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[2]. Ultimately, trial counsel did not present the mental health expert at the penalty phase.

representation of counsel." United States v. Fessel, 531 F.2d 1278, 1279 (5th Cir. 1979). When mental health is at issue, counsel has a duty to conduct proper investigation into his or her client's mental health background, see O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984), and to assure that the client is not denied a professional and professionally conducted mental health evaluation. See Fessel; Cowley v. Stricklin, 929 F.2d 640 (11th Cir. 1991); Mason v. State, 489 So. 2d 734 (Fla. 1986); Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984).

The mental health expert must also protect the client's rights, and the expert violates these rights when he or she fails to provide adequate assistance. State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987); Mason v. State. The expert also has the responsibility to obtain and properly evaluate and consider the client's mental health background. Mason, 489 So. 2d at 736-37. The United States Supreme Court has recognized the pivotal role that the mental health expert plays in criminal cases:

> [W]hen the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense. In this role, psychiatrists gather facts, through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the

> effects of any disorder on behavior; and they offer opinions about how the defendant's mental condition might have affected his behavior at the time in question. They know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers. Unlike lay witnesses, who can merely describe symptoms they might believe might be relevant to the defendant's mental state, psychiatrists can identify the "elusive and often deceptive" symptoms of insanity, and tell the jury why their observations are relevant.

Ake, 105 S. Ct. at 1095 (citation omitted).

Generally accepted mental health principles require that an accurate medical and social history be obtained "because it is often only from the details in the history" that organic disease or major mental illness may be differentiated from a personality disorder. R. Strub & F. Black, Organic Brain Syndrome, 42 (1981). This historical data must be obtained not only from the patient but from sources independent of the patient. Patients are frequently unreliable sources of their own history, particularly when they have suffered from head injury, drug addiction, and/or alcoholism. Consequently, a patient's knowledge may be distorted by knowledge obtained from family and their own organic or mental disturbance, and a patient's self-report is thus suspect:

> [I]t is impossible to base a reliable constructive or predictive opinion solely on an interview with the subject. The thorough forensic clinician seeks out additional information on the alleged offense and data on the subject's previous antisocial behavior, together with general "historical" information

> in the defendant, relevant medical and psychiatric history, and pertinent information in the clinical and criminological literature. To verify what the defendant tells him about these subjects and to obtain information unknown to the defendant, the clinician must consult, and rely upon, sources other than the defendant.

Bonnie & Slobogin, The Role of Mental Health Professionals in the Criminal Process: The Case of Informed Speculation, 66 Va. L. Rev. 727 (1980) (cited in Mason, 489 So. 2d at 737).

Florida law made Mr. Marshall's mental condition relevant to guilt/innocence and sentencing in many ways: (a) specific intent to commit first degree murder; (b) diminished capacity; (c) statutory mitigating factors; (d) aggravating factors; and (3) myriad nonstatutory mitigating factors. Mr. Marshall was entitled to professionally competent mental health assistance on these issues.

Both the expert and trial counsel have a duty to perform an adequate background investigation. When such an investigation is not conducted, due process is violated. The judge is deprived of the facts which are necessary to make a reasoned finding. Information which was needed in order to render a professionally competent evaluation was not investigated. Mr. Marshall was provided a mental health expert who failed to provide competent expert assistance that comports with reasonable professional standards for the purposes of consulting, and developing a mental health defense at trial. Ake, 105 S. Ct. 1096. What the law requires is competent performance, thus,

the failure of a court-appointed expert to order neuro-psychological testing of a defendant with clear signs of organic brain damage "deprived that defendant of due process by denying him the opportunity through an appropriate psychiatric examination to develop factors in mitigation of the imposition of the death penalty. State v. Sireci, 536 So.2d 231 (Fla. 1988). Without the assistance of a competent mental health expert, Mr. Marshall's judge was unable to "make a sensible and educated determination about the mental condition of the defendant at the time of the offense." Ake, 105 S. Ct. at 1095.

Based on the foregoing, the trial court erred in refusing to grant trial counsel's motion for a new mental health expert. This issue was preserved at trial and available for appeal. Appellate counsel was ineffective in failing to raise the issue.

II. APPRENDI'S APPLICATION TO FLORIDA'S OVERRIDE SCHEME

In Apprendi v. New Jersey, 120 S. Ct. 2348 (2000), the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury, and proved beyond a

reasonable doubt." Id. at 2362-63.[3] The constitutional underpinning of the Apprendi Court's holding is the Sixth Amendment right to trial

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[3]. Apprendi involved a trial judge's application of a New Jersey "hate crime" statute. A grand jury returned a 23-count indictment charging Apprendi with shootings on four different dates, as well as the unlawful possession of various weapons. Apprendi, 120 S.Ct. at 2352. None of the counts referred to the New Jersey hate crime statute, and none alleged that Apprendi acted with a racially biased purpose. Id. Apprendi pleaded guilty to two counts of second-degree possession of a firearm for an unlawful purpose, and one count of the third-degree offense of unlawful possession of an antipersonnel bomb. Id. Under New Jersey law, a second-degree offense carries a penalty range of 5 to 10 years; a third-degree offense carries a penalty range of between 3 and 5 years. Id. If the judge found no basis for the biased purpose enhancement, the maximum consecutive sentences on those counts would amount to 20 years in aggregate. Id. If, however, the judge enhanced the sentence based on a finding of biased purpose, the maximum on one count alone would be 20 years and the maximum for the two counts in aggregate would be 30 years, with a 15-year period of parole ineligibility. Id. After holding an evidentiary hearing on the issue of Apprendi's "purpose" for the shooting, the judge concluded that, by a preponderance of the evidence, Apprendi's actions were taken "with a purpose to intimidate" as provided by the statute. Id. Finding that the hate crime enhancement applied, the judge sentenced Apprendi to a 12-year term of imprisonment on the enhanced count, and to shorter concurrent sentences on the other two counts. Id.

Apprendi appealed, arguing, *inter alia*, that the Due Process Clause of the United States Constitution requires that the finding of bias upon which his hate crime sentence was based must be proved to a jury beyond a reasonable doubt. See In re Winship, 397 U.S. 358 (1970). Apprendi, 120 S.Ct. at 1452. Over dissent, the Appellate Division of the Superior Court of New Jersey upheld the enhanced sentence; relying on McMillan v. Pennsylvania, 477 U.S. 79 (1986), the appeals court found that the state legislature decided to make the hate crime enhancement a "sentencing factor," rather than an element of an underlying offense--and that decision was within the State's established power to define the elements of its crimes. Apprendi, 120 S.Ct. at 2353. A divided New Jersey Supreme Court affirmed. Id.

by jury, as well as the Fourteenth Amendment right to due process. Id. at 2355 ("At stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without `due process of law,' Amdt. 14, and the guarantee that `[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury,' Amdt. 6"). "Taken together, these rights indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.'" Id. (quotation omitted).[4] Mr. Marshall submits that the override provisions under which Mr. Marshall was sentenced violates Apprendi and the Sixth and Fourteenth Amendments.[5]w Jersey statutory mechanism found unconstitutional in Apprendi is remarkably similar to the capital sentencing scheme under which Mr. Marshall was charged and convicted. Apprendi concerned the interplay of four statutes.

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[4]. Apprendi's holding was "foreshadowed" by the Supreme Court's decision in Jones v. United States, 526 U.S. 227 (1999). Apprendi, 120 S.Ct. at 2355. In Jones, the Court, addressing a Fifth and Sixth Amendment challenge to a federal carjacking statute, held: "under the Due Process Clause of the Fifth Amendment and the notice and jury trial 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, 526 U.S. at 243.

[5]. The United States Supreme Court will hear oral arguments regarding the application of Apprendi to capital cases. na, 122 SCt. 865 (2002), case below Ring v. Arizona, 200 Ariz. 267, 25 P. 3d 1139 (Ariz.2001).h

The first statute, N.J. Stat. Ann. § 2C:39-4(a) (West 1995), defined the elements of the underlying offense of possession of a firearm for an unlawful purpose. The second statute, N.J. Stat. Ann. § 2C:43-6(a)(2) (West 1995), established that the offense is punishable by imprisonment for "between five years and 10 years." The third statute, N.J. Stat. Ann. § 2C:44-3(e) (West Supp. 2000), defined additional elements required for punishment of possession of a firearm for an unlawful purpose when committed as a "hate crime." The fourth statute, N.J. Stat. Ann. § 2C:43-7(a)(3) (West Supp. 2000), extended the authorized additional punishment for offenses to which the hate crime statute applied. See Apprendi, 120 S.Ct. at 2351. Each statute is independent, yet the statutes must operate together to authorize Apprendi's punishment. The Court in Apprendi held that under the due process clause, all essential findings separately required by *both* the underlying offense statute and the statute defining the elements of punishment had to be charged, tried, and proved to the jury beyond a reasonable doubt.

The version of Florida's capital override statute in place at the time of Mr. Marshalls' trial also required the interplay of several statutes which operate independently but must be considered together to authorize Mr. Marshalls' punishment. Mr. Marshall was sentenced in 1989 under the provisions of §775.082 (1), Fla. Stat., which 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 finding by the court that such person shall be punished by death, and in the latter event such person shall be punished by death.

Fla. Stat. §921.141 (1979), entitled "Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence" provided:

> Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s.775.082.

Fla. Stat. §921.141(3) further provided in pertinent part:

> Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death . . .
> If the court does not make the finding requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with §775.082.

§ 775.082, the statute which applies in this case,[6] clearly sets

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[6]. The statute was rewritten in 1994, and now provides:

> A person who has been convicted of a capital felony shall be punishable by death if the proceedings 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 punishable by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole.

§ 775.082 (1), Florida Statutes (1994 Supp.). See 1994 Fla. Sess. Law Serv. Ch. 94-228 (S.B. 158). Although the newer statute also

out a scheme whereby the statutory maximum penalty for capital crimes is life imprisonment *unless* the court, after holding a separate and distinct proceeding under §921.141, makes findings of fact that establish the defendant is death-eligible. Mr. Marshall was not eligible for the death penalty simply upon his conviction of first-degree murder; if the court were to sentence Mr. Marshall after the conviction, the court would only be able to impose life because Florida's scheme required the State to prove at least one aggravating factor beyond a reasonable doubt *before* the defendant is eligible for the death penalty. Moreover, the aggravating circumstance(s) must be sufficiently weighty to call for the death penalty, State v. Dixon, 283 So. 2d 1, 9 (FLa. 1973), and, because this case involved a jury recommendation of life, the facts had to have been so clear and convincing that no reasonable person could differ as to the penalty. Tedder v. State, 322 So. 2d 908 (Fla. 1975).

Thus, Florida's statute unambiguously "describe[s] an increase beyond the maximum authorized statutory sentence," Apprendi, 120 S.Ct. at 2365 n.19. It cannot be seriously debated that the "differential" between a sentence of life imprisonment with the possibility of parole after 25 years and a sentence of death "is unquestionably of constitutional significance." Id. at 2365. See

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poses constitutional problems under Apprendi, that statute is not at issue in these proceedings.

also Woodson v. North Carolina, 428 U.S. 280, 305 (1976) ("Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of the qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case"). Under Apprendi aApprendi and consistent with due process and the Sixth Amendment right to trial by jury, the elements relied on by the State to enhance Mr. Marshall's punishment under § 775.082 had to be charged and found beyond a reasonable doubt by the jury. This was not done, and the result is that Mr. Marshall's death sentence is unconstitutional under both the United States and Florida Constitutions.

The Apprendi Court addressed whether its decision impacted "state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death." Apprendi, 120 S.Ct. at 2366 (citing Walton v. Arizona, 497 U.S. 639 (1990)). The Apprendi majority held that the capital cases falling under the Walton-type of scheme (*i.e.* judge sentencing states), "are not controlling," citing Justice Scalia's dissent in Almendarez-Torres v. United States, 523 U.S. 224 (1998):

> Neither the cases cited, nor any other case, permits a judge to determine the existence of a factor which makes a

> crime a capital offense. What the cases cited hold is that, once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether the maximum penalty, rather than a lesser one, ought to be imposed . . . The person who is charged with actions that expose him to the death penalty has an absolute entitlement to jury trial on all the elements of the charge."

Apprendi, 120 S.Ct. at 2366 (citing Almendarez-Torres, 523 U.S. at 257 n.2 (Scalia, J., dissenting). While the majority decision in Apprendi suggested that Walton was distinguishable, four justices strongly suggested that Walton had in fact been overruled, Apprendi, 120 S.Ct. at 2387-89 (O'Connor, J., dissenting, joined by Rehnquist, C.J., Breyer and Kennedy, J.J.), and a fifth justice explicitly left the door open to reexamining the continuing validity of Walton for another day. Id. at 2380 (Thomas, J., concurring). The Apprendi majority's distinction of Walton, as the dissenters suggested, is illogical and at odds with the new rule of law announced by the Apprendi majority. Be that as it may, however, Mr. Marshall submits that Walton's applicability to Florida's override sentencing scheme, particularly in light of the unique circumstances of his case, is dubious.

Apprendi's reasoning is even more potent in Mr. Marshall's case, which involves an override of the jury's recommendation of life imprisonment. Under Apprendi, as applied to Florida's unique capital sentencing scheme, the jury **must** determine death eligibility in order

to not violate due process and the Sixth Amendment right to trial by jury. However, "[t]he Florida death penalty procedure is not based on a controlling jury recommendation concerning sentencing" but rather is "advisory only." Spaziano v. State, 433 So. 2d 508, 511-12 (Fla. 1983). See also Spaziano v. Florida, 468 U.S. 447 (1984). Contrary to the constitutional underpinnings of Apprendi, because Florida jury's sentencing decision is not binding on a court, a trial court's ability to override a jury's sentencing decision violates due process and the Sixth Amendment right to trial by jury. Once Mr. Marshall's jury returned its life recommendation, Mr. Marshall was acquitted of the death penalty under Apprendi and therefore must be sentenced to life at this time.

Mr. Marshall recognizes that the Supreme Court, in 1984, upheld the constitutionality of Florida's override scheme in Spaziano v. Florida, 468 U.S. 447 (1984). Spaziano addressed various constitutional attacks on Florida's override scheme, including an Eighth Amendment challenge, a Double Jeopardy challenge, and a Sixth Amendment trial by jury challenge. That decision, as well as this Court's holding in the underlying Spaziano litigation, see Spaziano v. State, 433 So. 2d 508 (Fla. 1983), must be revisited in light of Apprendi. The Supreme Court in Spaziano determined that while a capital sentencing proceeding is "like a trial" for Double Jeopardy purposes, this "does not mean that it is like a trial in respects

significant to the Sixth Amendment's guarantee of a fair trial." Id. at 459. Certainly, the Spaziano Court's conclusion that "[t]he Sixth Amendment never has been thought to guarantee a right to a jury determination of that issue" is in irreconcilable conflict with the Apprendi holding.[7] The issue put to the forefront in Apprendi is who

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[7]. In fact, the dissent in Spaziano suggested that because of the uniqueness of capital sentencing proceedings, the "normal presumption that a judge is the appropriate sentencing authority does not apply in the capital context." Spaziano, 468 U.S. at Stevens, J., concurring in part and dissenting in part). As Justice Stevens wrote:

> The same consideration that supports a constitutional entitlement to a trial by jury rather than a judge at the guilt or innocence stage--the right to have an authentic representative of the community apply its lay perspective to the determination that must precede a deprivation of liberty--applies with special force to the determination that must precede a deprivation of life. In many respects capital sentencing resembles a trial on the question of guilty, involving as it does a prescribed burden of proof of given elements through the adversarial process. But more important than its procedural aspects, the life-or-death decision in capital cases depends on its link to community values for its moral and constitutional legitimacy.

Id. at 482-83. Justice Stevens later dissented in Walton, labeling as "unfortunate" the Court's decision in Spaziano. Walton, 497 U.S. at 714. See also id. at 709 ("The Court holds ... that a person in not entitled to a jury determination of facts that must be established before the death penalty is imposed. I am convinced that the Sixth Amendment requires the opposite conclusion.") In Jones v. United States, 526 U.S. 227 (1999), Justice Stevens, concurring, wrote that the right to jury trial "encompasses facts that increase the minimum as well as the maximum permissible sentence, and also facts that must be established before a defendant may be put to death." Id. at 253 (Stevens, J., concurring). In so writing, Justice Stevens concluded that the Court in Walton "departed from that principle" and "should be reconsidered in due course." Id.

is constitutionally required to make the findings necessary to increase a punishment beyond the statutory maximum. Apprendi holds that it must be a jury that makes the death-eligibility determination beyond a reasonable doubt.

Apprendi's application to Mr. Marshall's case is even more clear because not only did the jury acquit Mr. Marshall of the death penalty, but the State then submitted additional evidence to support aggravating circumstances to the judge alone, not to the jury, and the judge discarded the jury's recommendation without undertaking the required determination of its reasonableness. See Tedder v. State, 322 So. 2d 908 (Fla. 1975); Keen v. State, 2000 WL 1424523 (Fla. Sept. 28, 2000). See Argument III, infra. While noting that it is permissible for judges "to exercise discretion--taking into consideration various factors relating both to the offense and offender--in imposing a judgment within the range prescribed by statute", Apprendi, 120 S.Ct. at 2358 (citing Williams v. New York, 337 U.S. 241, 246, 69 S.Ct. 1079)), the Apprendi majority nevertheless made clear that "nothing in Williams implies that a

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Ironically, Justice Stevens authored the Apprendi decision wherein he acknowledged the difficulty in reconciling Walton but simply wrote that the capital cases "are not controlling." Apprendi, 120 S.Ct. at 2366. It was this incongruence that the dissenters in Apprendi could not logically explain. See id. at 2388 (O'Connor, J., dissenting) ("Indeed, at the time Walton was decided, the author of the Court's opinion today understood well the issue at stake. . . If the Court does not intend to overrule Walton, one would be hard pressed to tell from the opinion it issues today").

judge may impose a more severe sentence than the maximum authorized by the facts found by the jury." Apprendi, 120 S.Ct. at 2358 n.9. In Mr. Marshall's case, the judge imposed a sentence of death over the jury's recommendation of life. The jury did not make any factual findings as to death eligibility. In fact, there is no way to know if the jury found that any aggravating circumstances had been proven beyond a reasonable doubt. All that is known is that a majority of the jury believed that a life sentence was appropriate. Apprendi's holding thus establishes that Mr. Marshall's sentence of death violates not only the Sixth, Eighth, and Fourteenth Amendments, but also the Florida Constitution. See Art. I, §§ 9, 17, 22, Fla. Const; Blair v. State, 698 So. 2d 1210, 1213 (Fla. 1997) ("the right to jury trial to be an indispensable component of our system of justice").

The vee by Mr. Marshall at trial and on direct appeal have now been found to be meritorious in Apprendi. Thus, it would be "unfair" to deprive Mr. Marshall of the benefit of Apprendi. James v. State, 615 So. 2d 668 (Fla. 1993). Habeas relief is warranted.

III. ARBITRARY APPLICATION OF TEDDER TO MR. MARSHALL'S CASE.

Keen v. State, 775 So. 2d 263 (Fla. 2000), conclusively establishes that the standard enunciated in Tedder v. State, 322 So. 2d 908 (Fla. 1975), was arbitrarily not applied to Mr. Marshall's case on direct appeal. The failure to consistently apply Tedder in this case results in a violation of due process. Fiore v. White, 121 S.Ct. 712 (2001). In light of Keen and Fiore, Mr. Marshall's case must be revisited at this time and the previous error corrected. Before addressing the specifics of Mr. Marshall's contentions at this time, a backdrop of the Court's Tedder jurisprudence is required in order to demonstrate how its application has varied over time, resulting in a narrow class of cases, such as Mr. Marshall's case, where Tedder was not properly applied at all.

A. An Overview of the Jury Override in Florida.

Since the State of Florida reinstated the death penalty, approximately 150 cases involving judicial overrides of jury recommendations of life imprisonment have reached this Court on direct appellate review.[8] As is seen from the discussion in this petition, it is clear that "appealing a `life override' under Florida's capital sentencing scheme is akin to Russian Roulette."

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[8]. Florida is one of only four states that allows a judge to override a capital sentencing jury's recommendation of life imprisonment.

Engle v. Florida, 102 S. Ct. 1094, 1098 (1988) (Marshall and Brennan, JJ., dissenting from the denial of petition for writ of certiorari).

In 1974, one override case was reviewed by this Court, and it was reversed,[9] resulting in a 100% reversal rate. In 1975, the year of the seminal decision in Tedder v. State, 322 So. 2d 908 (Fla. 1975), five override cases reached the Court; three were reversed[10] and two were affirmed,[11] resulting in a 60% reversal rate. In 1976, five capital override cases were reviewed; three were reversed[12] and two affirmed,[13] again a 60% reversal rate. In 1977, four cases were reviewed; two were reversed[14] and two affirmed,[15] a 50% reversal rate. In 1978, two cases reached the Court, and both were reversed[16] -- a

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[9]Taylor v. State, 294 So. 2d 648 (Fla. 1974).

[10]Swan v. State, 322 So. 2d 485 (Fla. 1975); Tedder v. State, 322 So. 2d 908 (Fla. 1975); Slater v. State, 316 So. 2d 539 (Fla. 1975).

[11]Gardner v. State, 313 So. 2d 675 (Fla. 1975); Sawyer v. State, 313 So. 2d 680 (Fla 1975).

[12]Chambers v. State, 339 So. 2d 204 (Fla. 1976); Provence v. State, 337 So. 2d 783 (Fla. 1976); Jones v. State, 332 So. 2d 615 (Fla. 1976).

[13]Dobbert v. State, 328 So. 2d 433 (Fla. 1976); Douglas v. State, 328 So. 2d 18 (Fla. 1976).

[14]McCaskill v. State/Williams v. State, 344 So. 2d 1276 (Fla. 1977); Burch v. State, 343 So. 2d 831 (Fla. 1977).

[15]Hoy v. State, 353 So. 2d 826 (Fla. 1977); Barclay v. State/Dougan v. State, 343 So. 2d 1266 (Fla. 1977).

[16]Shue v. State, 366 So. 2d 387 (Fla. 1978); Buckrem v. State, 355 So. 2d 111 (Fla. 1978).

100% reversal rate. In 1979, three cases were reviewed; two were reversed[17] and one affirmed,[18] a reversal rate of 66%.

In 1980, six override cases were reviewed; five were reversed[19] and one affirmed,[20] an 83% reversal rate. In 1981, fourteen override cases reached the Court; eleven were reversed,[21] and three were affirmed,[22] resulting in a 78% reversal rate. In 1982, seven cases reached the Court; four were reversed[23] and three were affirmed,[24] a

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[17]Malloy v. State, 382 So. 2d 1190 (Fla. 1979); Brown v. State, 367 So. 2d 616 (Fla. 1979).

[18]Dobbert v. State, 375 So. 2d 1069 (Fla. 1979).

[19]Williams v. State, 386 So. 2d 538 (Fla. 1980); McCrae v. State, 395 So. 2d 1145 (Fla. 1980); Phippen v. State, 389 So. 2d 991 (Fla. 1980); Neary v. State, 384 S0. 2d 881 (Fla. 1980); Hall v. State, 381 So. 2d 683 (Fla. 1980).

[20]Johnson v. State, 393 So. 2d 1069 (Fla. 1980).

[21]Goodwin v. State, 405 So. 2d 170 (Fla. 1981); Odom v. State, 403 So. 2d 936 (Fla. 1981); McKennon v. State, 403 So. 2d 389 (Fla. 1981); Stokes v. State, 403 So. 2d 377 (Fla. 1981); Smith v. State, 403 So. 2d 933 (Fla. 1981); Welty v. State, 402 So. 2d 1159 (Fla. 11981); Barfield v. State, 402 So. 2d 377 (Fla. 1981); Lewis v. State, 398 So. 2d 432 (Fla. 1981); Jacobs v. State, 396 So. 2d 713 (Fla. 1981). In two cases, the Court vacated and remanded for judge resentencings due to Gardner v. Florida error. Porter v. State, 400 So. 2d 5 (Fla. 1981); Spaziano v. State, 393 So. 2d 1119 (Fla. 1981).

[22]Burford v. State, 403 So. 2d 943 (Fla. 1981); Zeigler v. State, 402 So. 2d 365 (Fla. 1981); White v. State, 403 So. 2d 331 (Fla. 1981).

[23]McCampbell v. State, 421 So. 2d 1982); Walsh v. State, 418 So. 2d 1000 (Fla. 1982); Gilvin v. State, 418 So. 2d 996 (Fla. 1982); McCray v. State, 416 So. 2d 804 (Fla. 1982).

[24]Bolender v. State, 422 So. 2d 833 (Fla. 1982); Stevens v. State, 419 So. 2d 1058 (Fla. 1982); Miller v. State, 415 So. 2d 1262

57% reversal rate. In 1983, ten cases were appealed; seven were reversed[25], and three affirmed,[26] a 70% reversal rate. In 1984, nine cases reached the Court; two were reversed,[27] and seven were affirmed,[28](Fla. 1984).TDATE 4 (Fla. 1991); McCrae v. State, 582 So. 2d 613 (Fla. 1991); Cooper v. State, 581 So. 2d 49 (Fla. 1991); Dolinsky v. State, 576 So. 2d 271 (Fla. 1991); Downs v. State, 574 So. 2d 1095 (Fla. 1991); Hegwood v. State, 575 So. 2d 170 (Fla. 1991); Douglas v. State, 575 So. 2d 165 (Fla. 1991).+FIELD()

(Fla. 1982).

[25]Norris v. State, 429 So. 2d 688 (Fla. 1983); Herzog v. State, 439 So. 2d 1372 (Fla. 1983); Richardson v. State, 437 So. 2d 1091) (Fla. 1983); Hawkins v. State, 436 So. 2d 44 (Fla. 1983); Washington v. State, 432 S0. 2d 44 (Fla. 1983); Webb v. State, 433 So. 2d 496 (Fla. 1983); Cannady v. State, 427 So. 2d 1983).

[26]Routley v. State, 440 So. 2d 1257 (Fla. 1983); Spaziano v. State, 433 So. 2d 508 (Fla. 1983); Porter v. State, 429 So. 2d 293 (Fla. 1983).

[27]Rivers v. State, 458 So. 2d 762 (Fla. 1984); Thompson v. State, 456 So. 2d 444 (Fla. 1984).

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