IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-467

MICHAEL GEORGE BRUNO, SR.,

Petitioner,

v.

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

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

This petition for habeas corpus relief is being filed in order to address substantial claims of error under the fourth, fifth, sixth, eighth and fourteenth amendments to the United States Constitution, claims demonstrating that Mr. Bruno 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. Citations to the Record on the Direct Appeal shall be as follows:

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

"Supp. R" -- supplemental record on direct appeal;

"PC-R." -- record on post-conviction appeal;

all other citations shall be self-explanatory.

JURISDICTION

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

REQUEST FOR ORAL ARGUMENT

Mr. Bruno requests oral argument on this petition.

PROCEDURAL HISTORY

Mr. Bruno was indicted on September 11, 1986, on one count of first degree murder and one count of armed robbery with a firearm (R. 960). The guilt phase was held August 5, 1987

through August 11, 1987 (R. 125-783). After a two day deliberation, the jury returned a guilty verdict on both counts (R. 777-780). After a sentencing hearing (R. 783-917), the jury entered a death recommendation by a vote of eight to four (R. 913). Mr. Bruno was sentenced to death by Circuit Judge Thomas M. Coker, Jr., on September 25, 1987 (R. 931-955, 1102-1103). This Court affirmed Mr. Bruno's conviction for first-degree murder and his sentence of death, but vacated the robbery sentence. Bruno v. State, 574 So. 2d 76 (Fla. 1991), cert. denied, 112 S. Ct. 112 (1991). The trial court's robbery sentence on remand was appealed to the Fourth District Court of Appeal, which ordered resentencing on the robbery charge. Bruno v. State, 596 So. 2d 1205 (Fla. 4th DCA 1992).

Mr. Bruno filed a Rule 3.850 motion on July 26, 1993, raising, *inter alia*, substantial instances of ineffective assistance of counsel. Following an evidentiary hearing, the trial court entered an order on December 9, 1997, denying relief (PC-R. 174-203). In a sharply divided opinion, this Court affirmed. Bruno v. State, 26 FLa. L. Weekly S803 (Fla. Dec. 6, 2001).

CLAIM I

THIS COURT FAILED TO CONDUCT A CONSTITUTIONALLY ADEQUATE HARMLESS ERROR ANALYSIS ON DIRECT APPEAL, THEREBY RENDERING THE DIRECT APPEAL PROCESS UNRELIABLE AND A RESENTENCING MUST BE ORDERED.

On direct appeal, this Court noted that the trial court in Mr. Bruno's case found the following aggravating circumstances pursuant to 921.141(5) Fla.Stat. (1985):

> (a) Prior conviction of a prior violent felony;
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> (b) Murder committed while defendant was engaged in the crime of robbery;
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> (c) Murder committed for the purpose of avoiding or preventing lawful arrest;
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> (d) Murder committed for pecuniary gain;
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> (e) Murder was especially heinous, atrocious, or cruel;
>
> (f) Murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

Bruno v. State, 574 So. 2d 76, 81 (Fla. 1991). This Court then held that the evidence was insufficient to support the avoiding arrest aggravator, and that the prior violent felony aggravator was inapplicable because the prior violent felony in question was the contemporaneous conviction of Mr. Bruno for the robbery of Merlano. Id. This Court also merged the felony murder and pecuniary gain aggravators into a single aggravating factor based on a finding that "[t]hese two circumstances are based on the same aspect of the criminal episode and should properly be considered as a single aggravating factor." Id. So the ultimate

holding of this Court, based on its *sua sponte* reformulation of the aggravating factors, was that the murder of Merlano was aggravated by three factors: (i) that the murder was committed during a robbery and for pecuniary gain; (ii) that the murder was heinous, atrocious, or cruel; and (iii) that the murder was cold, calculated, and premeditated. Id. at 82. Despite striking aggravating circumstances and finding that the jury was permitted to consider additional aggravating circumstances, the Court conducted no harmless error analysis. All the Court said was: "In light of three statutory aggravating circumstances and no statutory mitigating circumstances, we find no error in the judge's sentence of death." Id. at 83.

This Court's failure to undertake harmless error analysis was error on numerous levels. Mr. Bruno had a right to meaningful direct appellate review by this Court of his conviction and sentence of death. Parker v. Dugger, 498 U.S. 308 (1992). This Court has an obligation to conduct constitutionally-mandated harmless error review when finding error, yet such an analysis is absent from the opinion in Mr. Bruno's direct appeal. This alone warrants habeas relief at this time.

Moreover, Mr. Bruno submits that the statement "In light of three aggravating circumstances and no statutory mitigating circumstances, we find no error in the judge's sentence of death" is not a harmless error analysis. Rather, it is as if this Court, after reformulating the aggravating circumstances on its

own, simply sentenced Mr. Bruno to death, putting itself in the shoes of the trial judge. This is error:

> It is not the function of this court to cull through what has been listed as aggravating and mitigating circumstances in the trial court's order, determine which are proper for consideration and which are not, and then impose the proper sentence. In accordance with the statute, the culling process must be done by the trial court.

Mikenas v. State, 367 So. 2d 606, 610 (Fla. 1979). If what this Court did was a harmless error analysis, as the State presumably will argue, it is a flatly unconstitutional harmless error analysis. In Elledge v. State, 346 So. 2d 998 (Fla. 1977), the Court remanded for a jury resentencing where the trial court and jury had erroneously considered invalid aggravating circumstances. The Court reasoned:

> Would the result of the weighing process by both the judge and jury have been different had the impermissible aggravating factor not been present? We cannot know. Since we cannot know and since a man's life is at stake, we are compelled to return this case to the trial court for a new sentencing trial at which the [invalid] factor shall not be considered. See Miller v. State, 332 So. 2d 65 (Fla. 1976); Messer v. State, 330 So. 2d 137 (Fla. 1976). This result is dictated because, in order to satisfy the requirements of Furman v. Georgia, 408 U.S. 238, the sentencing authority's discretion must be `guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.'

See also Hill v. State, 549 So. 2d 179, 183 (Fla. 1989) ("We agree with appellant that the state did not show beyond a reasonable doubt that the murder was committed for pecuniary gain. . . . On this record, we cannot tell with certainty that

the result of the weighing process would be the same absent the invalid aggravating factor").

In Sochor v. Florida, 112 S.Ct. 2114 (1992), the United States Supreme Court held that Eighth Amendment error occurring before either the trial court or the jury requires application of the harmless-beyond-a-reasonable doubt standard. Specifically, the Supreme Court held:

> In a weighing State like Florida, there is Eighth Amendment error when the sentencer weighs an "invalid" aggravating circumstance in reaching the ultimate decision to impose a sentence. See Clemons v. Mississippi, 494 U.S. 738, 752 (1990). Employing an invalid aggravating factor in the weighing process "creates the possibility . . . of randomness," Stringer v. Black, 503 U.S. ___, ____, 112 S.Ct. 1130, 1139, 117 L.Ed.2d 367 (1992), by placing a "thumb [on] death's side of the scale," id., thus "creat[ing] the risk of treat[ing] the defendant as more deserving of the death penalty." Id. Even when other valid aggravating factors exist as well, merely affirming a death sentence reached by weighing an invalid aggravating factor deprives a defendant of "the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances." Clemons, 494 U.S. at 752 (citing Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982)); see Parker v. Dugger, 498 U.S. ___, 111 S.Ct. 731, 739, 112 L.Ed.2d 812 (1991). While federal law does not require the state appellate court to remand for resentencing, it must, short of remand, either itself reweigh without the invalid aggravating factor or determine that weighing the invalid factor was harmless error. Id. at ___, 111 S.Ct. at 738.

Sochor, 112 S.Ct. at 2119. Sochor further held that the harmless error analysis must comport with constitutional standards. Id. at 2123.

Moreover, in Stringer v. Black, 112 S. Ct. 1130 (1992), the Supreme Court held that the "use of a vague or imprecise aggravating factor in the weighing process invalidates the sentence and at the very least requires constitutional harmless-error analysis or reweighing in the state judicial system." Id. at 1140. In Stringer, the Supreme Court also set forth the correct standard to be employed by state appellate courts when conducting the harmless-error analysis, a standard not utilized by this Court in affirming Mr. Bruno's death sentence.

Sochor established that when a reviewing court strikes an aggravating factor on direct appeal, the striking of the aggravating factor means that the sentencer considered an invalid aggravating factor and that eighth amendment error therefore occurred. When an aggravating factor is "invalid in the sense that the Supreme Court of Florida had found [it] to be unsupported by the evidence[,] . . . . [i]t follows that Eighth Amendment error did occur when the trial judge weighed the . . . factor." Sochor, 112 S.Ct. at 2122. When this kind of Eighth Amendment error occurs before a Florida capital sentencer, this Court must conduct a constitutionally adequate harmless error analysis. Id.

This principle was reaffirmed by the United States Supreme Court in Richmond v. Lewis, 113 S. Ct. 528 (1992). In Richmond, the Supreme Court reiterated its Sochor holding that only "constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant

received an individualized sentence." Richmond, 113 S. Ct. at 535. The Court went on to conclude that "[w]here the death sentence has been infected by a vague or otherwise constitutionally invalid aggravating factor, the state appellate court or some other state sentencer must actually perform a new sentencing calculus, if the sentence is to stand." Id. In Mr. Bruno's case, this Court "did not purport to perform such a calculus, or even mention the evidence in mitigation." Id. remand for resentencing.

Under Sochor, the appropriate harmless error analysis is that of Chapman v. California, 386 U.S. 18 (1967). Sochor, 112 S. Ct. at 2123. Under Sochor, this Court's application of the Chapman standard to Eighth Amendment error does not comport with constitutional requirements. When discussing this Court's failure to conduct harmless error analysis in Sochor, the United States Supreme Court cited to Yates v. Evatt, 111 S. Ct. 1884 (1991). In Yates, the jury had been given two unconstitutional instructions which created mandatory presumptions. Yates, 111 S. Ct. at 1891. In denying relief, the South Carolina Supreme Court "described its enquiry as one to determine 'whether it is beyond a reasonable doubt that the jury would have found it unnecessary to rely on the erroneous mandatory presumption,'" Id. at 1890, and then "held 'beyond a reasonable doubt . . . the jury would have found it unnecessary to rely on either erroneous mandatory presumption.'" Id. at 1891. The United States Supreme Court found the lower court's analysis constitutionally inadequate

because the lower court "did not undertake any explicit analysis to support its view of the scope of the record to be considered in applying Chapman" and because "the state court did not apply the test that Chapman formulated." Id. at 1894. In Yates, the Supreme Court explained that the "Chapman test is whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" Id. at 1892 (quoting Chapman, 386 U.S. at 24). The Supreme Court elaborated, "To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question." Yates, 111 S. Ct. at 1893.

In Sochor, the Supreme Court found this Court's analysis deficient for the same reasons the lower court's analysis was found deficient in Yates: "Since the Supreme Court of Florida did not explain or even 'declare a belief that' this error "was harmless beyond a reasonable doubt" in that "it did not contribute to the [sentence] obtained,' Chapman, supra, at 24, the error cannot be taken as cured by the State Supreme Court's consideration of the case." Sochor, 112 S.Ct. at 2123. Thus, in Sochor, relying upon Yates, the Supreme Court established that this Court has not been properly applying Chapman in the context of Eighth Amendment error.

"[M]erely affirming a sentence reached by weighing an invalid aggravating factor deprives a defendant of `the individualized treatment that would result from actual reweighing

of the mix of mitigating factors and aggravating circumstances.'" Sochor, 112 S.Ct. at 2119 (citing Clemons v. Mississippi, 494 U.S. 738, 725; Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982); Parker v. Dugger, 498 U.S. 308 (1991)). Moreover, "[e]mploying an invalid aggravating factor in the weighing process `creates the possibility . . . of randomness.'" Sochor, 112 S.Ct. at 2119.

The failure to reverse and remand for resentencing is in direct conflict with Eighth and Fourteenth Amendment requirements. As the Court held in Elledge, 346 So. 2d 998, 1003 (Fla. 1977), if improper aggravating circumstances are found, "then regardless of the existence of other authorized aggravating factors we must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death." Elledge, 346 So. 2d at 1003. Accordingly, reversal is required when mitigation may be present and an aggravating factor is struck, and even when it is not. See Schaefer v. State, 537 So. 2d 988 (Fla. 1989); Nibert v. State, 508 So. 2d 1 (Fla. 1987). That is a fundamental protection afforded to a capital defendant. That protection was denied to Mr. Bruno.

This Court's analysis on direct appeal, if it is to be labeled a harmless error analysis, is further flawed when it found "no error" in the trial judge's sentence of death because there were three statutory aggravating circumstances and "no statutory mitigating circumstances." Bruno, 574 So. 2d at 83.

This analysis patently violates Hitchcock v. Dugger, 481 U.S. 393 (1987). For this Court to restrict its analysis to statutory mitigating circumstances only is itself Eighth Amendment error under Hitchcock. Thus, even if the Court could be said to have conducted a "harmless error" analysis, the analysis still is unconstitutional under Hitchcock for failing to contemplate anything but statutory mitigation in assessing the propriety of the death sentence in Mr. Bruno's case.

The error in restricting its analysis to only statutory mitigation is particularly prejudicial in light of the nonstatutory mitigation that was presented to the jury. For example, even this Court acknowledged on direct appeal that "it is undisputed that Bruno had a long history of drug abuse." Bruno, 574 So. 2d at 82. At the penalty phase, the jury knew that Mr. Bruno, in his early years, was a good boy, active in sports, taking music lessons, and participating in youth organizations (R. 787-89; 795-97). He never caused his parents any trouble, he was peace loving, and his mother described him as "happy-go-lucky" (R. 791). He suffered from the knowledge of his father's incapacitating disease which left him helpless for much of his youth (R. 787; 795). While his father was incapacitated, Mr. Bruno's mother raised her children as best she could (R. 787). When Mr. Bruno left home after high school, his personality changed and he "started running wild" (R. 787). He got married and had children; but there were problems, and his wife left him (R. 789). It was during this time that Mr. Bruno

succumbed to heavy drug usage (R. 838).[1] In the weeks leading up to the killing, Mr. Bruno was abusing copious amounts of cocaine on a daily basis, either smoking it or freebasing it (R. 880). Mr. Bruno's jury was also presented with the testimony of Dr. Stillman, who also provided a wealth of mitigation for the jury's consideration. Thus, this Court's restrictive view of mitigation violated Hitchcock and cannot formulate the basis of a constitutionally adequate harmless error analysis.

In Mr. Bruno's penalty phase, the State argued that to the jury that all six enumerated aggravating factors applied to Mr. Bruno's case. Four of the jurors must have found sufficient mitigation to outweigh or neutralize any aggravating factors they found since they voted for life. Obvious prejudice accrued to Mr. Bruno where the eight jurors who recommended death weighed the two factors struck on appeal by this Court, prior conviction of a prior violent felony aggravator and that the murder was committed for the purpose of avoiding or preventing a lawful arrest, to his detriment. If only two of the eight had voted for

[1]This Court upheld the trial court's failure to find any statutory mitigation despite undisputed evidence from psychiatrist Dr. Stillman regarding Mr. Bruno's brain damage and "long history of drug abuse." Bruno, 574 So. 2d at 82. In doing so this Court noted that "[Mr. Bruno's] only reference [in his testimony at the penalty phase] to using drugs or intoxicants on the night of the murder was the statement that he drank a beer before going to Merlano's apartment." Id. at 83. This finding by this Court is factually incorrect, for it ignores Mr. Bruno's record testimony that he was "smoking cocaine everyday," "continuously using drugs," and that at the time of the offense was using drugs, including freebase cocaine, and combinations of drugs and that the victim, with whom he testified he had used cocaine and "pot" with, was "high" at the time of the offense (R. 840, 841, 843, 847, 880).

life where two of the aggravators were eliminated from death's side of the scale, the jury recommendation would have been six to six. Because this Court failed to conduct a harmless error analysis, or, if it did, it performed a constitutionally inadequate analysis, Mr. Bruno is entitled to habeas relief at this time.

CLAIM II

APPELLATE COUNSEL FAILED TO RAISE ON APPEAL NUMEROUS ISSUES WHICH WARRANT REVERSAL THAT WERE PRESERVED BY OBJECTIONS ENTERED BY COUNSEL AT THE 1987 TRIAL PROCEEDINGS.

Mr. Bruno had the constitutional right to the effective assistance of counsel for purposes of presenting his direct appeal to this Court. Strickland v. Washington, 466 U.S. 668 (1984). "A first appeal as of right [] is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." Evitts v. Lucey, 469 U.S. 387, 396 (1985). The Strickland test applies equally to ineffectiveness allegations of trial counsel and appellate counsel. See Orazio v. Dugger, 876 F. 2d 1508 (11th Cir. 1989). Further, this Court has held that "[h]abeas petitions are the proper vehicle to advance claims of ineffective assistance of appellate counsel." Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000).

Because the constitutional violations which occurred during Mr. Bruno's 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. Bruno's] direct appeal." Matire v. Wainwright, 811 F. 2d 1430, 1438 (11th Cir. 1987). The lack of appellate advocacy on Mr. Bruno's behalf is identical to the lack of advocacy present in other cases in which this Court has granted habeas corpus relief. Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985). Appellate counsel's failure to present the meritorious issues discussed in this

petition demonstrates that his representation of Mr. Bruno 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 error that appellate counsel never raised, there is more than a reasonable probability that the outcome of the appeal would have been different, and a new direct appeal must be ordered.

A. The trial court erred in failing to order competency evaluations pursuant to Fla. R. Crim. P. 3.210 and in failing to order a competency hearing both prior to trial and prior to sentencing.

Trial counsel filed a September 16, 1986, pre-trial defense motion for appointment of three competency and sanity experts, specifically Dr. Arthur T. Stillman, M.D., Merry Sue Haber, Ph.D., and Michael E. Rappaport, Ph.D., all, according to the motion's caption, pursuant to Fla. R. Crim. P. 3.216(a) (R. 975-977).[2] A hearing was held on October 30, 1986, during which the State noted that Mr. Bruno was entitled to only one

[2]"When in any criminal case counsel for a defendant...shall have reason to believe that the defendant may be incompetent to proceed or that the defendant may have been insane at the time of the offense...counsel may so inform the court who shall appoint 1 expert to examine the defendant in order to assist counsel in the preparation of the defense. The expert shall report only to the attorney for the defendant and matters related to the expert shall be deemed to fall under the lawyer-client privilege." Fla. R. Crim. P. 3.216(a).

"confidential" expert, in spite of the defense motion asking for three experts and oral request for at least two experts during the hearing (3rd Supp. R. 1-9). It is evident from both the motion that trial counsel filed and the argument at the motions hearing that defense counsel had confused Fla. R. Crim. P. 3.216(a), which provides for a confidential defense expert, and Fla. R. Crim. P. 3.210, which provides a system of appointing court experts for the purpose of determining the competency of a person during any material stage of a criminal proceeding.[3] Due in part to this confusion, there was never a formal competency evaluation of Mr. Bruno or a competency hearing pursuant to Fla. R. Crim. P. 3.210. It was clear, however, that defense counsel was requesting the appointment of court experts to evaluate Mr. Bruno's competency to stand trial.

At the hearing, trial counsel affirmed to the court that he had reason to believe that Mr. Bruno had psychological and/or psychiatric problems, and that his earlier motion had so indicated (3rd Supp. R. 4).[4] Ultimately the lower court required

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[3]"If, at any material stage of a criminal proceeding, the court of its own motion, or on motion of counsel for the defendant or for the state, has reasonable ground to believe that the defendant is not mentally competent to proceed, the court shall immediately enter its order setting a time for a hearing to determine the defendant's mental condition...and shall order the defendant to be examined by no more than 3, nor fewer than 2, experts prior to the date of the hearing. Attorneys for the state and the defendant may be present at the examination." Fla. R. Crim. P. 3.210(b).

[4]The motion states that counsel "has reason to believe that [Mr. Bruno] does not have a reasonable degree of rational understanding of the facts and circumstances surrounding his case" and that he was "deteriorating mentally and having

defense counsel to "pick one" of the three experts that he had asked for in his earlier motion, and counsel chose Dr. Stillman as a confidential expert (3rd Supp. R. 5). This same psychiatrist, Dr. Stillman, later testified for the defense, only at the penalty phase, that Mr. Bruno was insane at the time of the offense and that he suffered from brain damage (R. 975-77).

The trial court entered an order appointing Dr. Stillman pursuant to Fla. R. Crim.P. 3.216(a) on October 30, 1986 (R. 1004). Then, on November 3, 1986, the court entered another written order that under its own terms limited the evaluation by Dr. Stillman to competency and sanity while simultaneously stating "that the expert shall report to the attorney for the Defendant only and matters related to the expert shall be deemed to fall under the lawyer/client privilege" (2nd Supp. R. 83-84).

Trial counsel filed a motion to continue on November 26, 1986, which alleged that as of the date of the motion, "Dr. Arthur Stillman, M.D., who was appointed by this Honorable Court to psychologically examine the Defendant, has yet to perform the examination or send a confidential report of the aforementioned examination to the undersigned" (2nd Supp. R. 92).[5] No

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difficulty in aiding {trial counsel] to prepare a defense in this case." The motion also states that counsel "has reason to believe that [Mr. Bruno]may be incompetent to stand trial or that he may have been insane at the time of the offense" (R. 975).

[5]Two "reports" in the form of letters from Dr. Stillman apparently addressed to trial counsel, dated December 8, 1986, and June 19, 1987, following his examinations of Mr. Bruno were apparently later sent to defense counsel, and although he refers to them on the record, neither letter was ever made part of the court record (R. 864-65, 917-18).

competency hearing was ever held, and no other experts were ever appointed to assist in determining Mr. Bruno's competency. Dr. Stillman never was called pre-trial or at the guilt phase to testify as to Mr. Bruno's competency to proceed or for any other purpose.

The issue of Mr. Bruno's competency arose again following the penalty phase and after the testimony of Dr. Stillman at the penalty phase on August 12, 1987 (R. 799-835). Following the jury's recommendation, defense counsel filed another motion requesting a competency evaluation before sentencing, and a renewed Motion for Judgment of Acquittal (R. 1093-1096, 1088-1092).[6] The competency motion was renewed at the judge sentencing, where trial counsel stated the motion was filed "addressing specifically the issues of whether or not the defendant was competent under the law to undergo sentencing today" (R. 932). Counsel advised the court that Mr. Bruno's family was willing to pay for a competency evaluation if the court was concerned about costs (R. 933). The motion was again denied over objection (R. 935).

The trial court erred in failing to appoint the requisite competency experts and to order a competency hearing resulting

[6]The August 21, 1987, motion included the allegation that Mr Bruno may not have been competent to testify because "the emotional and mental trauma suffered by [Mr. Bruno] upon waiting approximately forty-eight (48) hours for the jury's verdict and the jury returning with a verdict of guilty as charged was so disruptive to the mental and physical condition of [Mr. Bruno] that he was precluded from presenting in a coherent and emotionally stable manner his testimony in the penalty phase of these proceedings" (R. 1091).

from the pretrial motion. The trial court further erred in failing to grant the post-trial motion for a competency evaluation in order to properly determine Mr. Bruno's competency. Florida's rule of criminal procedure at the time of Mr. Bruno's trial established that once competency is an issue, a competency hearing is required to be held immediately. Fla. R. 3.210 (b). This Court has attached "prime significance to the words `shall' and 'immediately.'" Fowler v. State, 255 So. 2d 513, 514-15 (Fla. 1971). "The mandatory verb `shall' makes it obligatory on the court to fix a time for a hearing if there are reasonable grounds to believe that the defendant is insane. . . . Moreover, the mandatory `shall' is followed by the word `immediately,' which lends urgency and significance to the duty of the judge to conduct the required hearing." Id. at 515.

Because no hearing was held, Mr. Bruno was tried, convicted, and sentenced to death while incompetent, in violation of the constitutional guarantee of due process. Bishop v. United States, 350 U.S. 961 (1956); Dusky v. United States, 362 U.S. 402 (1960). If doubt exists as to a defendant's competency, the court must hold a hearing. Pate v. Robinson, 383 U.S. 375 (1966); James v. Singletary, 957 F.2d 1562 (11th Cir. 1992).

Appellate counsel never raised the issue of Mr. Bruno's competency or the failure of the trial court to hold a competency hearing during the trial or before sentencing or the trial court's failure to appoint court experts to determine Mr. Bruno's competency. This deficiency amounts to ineffective assistance of

appellate counsel, and relief should issue.

B. The trial court erred in admitting into evidence various photographs which were gruesome, unduly prejudicial, and irrelevant.

At Mr. Bruno's trial, the prosecution was permitted to introduce into evidence gruesome photographs that were inflammatory, cumulative, and prejudicial, and admitted solely to inflame the passion of the jurors based on impermissible factors. Eight (8) autopsy pictures of the victim, State Exhibits 17-24, were admitted by the trial court as not redundant or "[u]necessarily gory" over defense objection for use by medical examiner in testifying (R. 533). The admission of these photographs allowed the state free rein in inflaming the passions of the jury. The probative value of these photographs was not only outweighed by their prejudice. The prejudicial effect of the photographs undermined the reliability of Mr. Bruno's 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.

In addition to the gruesome autopsy photographs, another photograph, taken by law enforcement to identify the location of certain missing stereo equipment in the victim's apartment, was admitted as State Exhibit 3 over defense objection, even though the witness on the stand, the victim's sister, testified that she did not actually see that location in the apartment on the day

she saw her brother's body (R. 337).[7] The admission of this photograph was erroneous as well.

The trial court's error in admitting these photographs cannot be considered harmless beyond a reasonable doubt. Chapman v. California, 87 S. Ct. 824 (1967); State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Use of these gruesome, misleading and irrelevant photographs, which were cumulative, inflammatory, and appealed improperly to the jury's emotions, denied Mr. Bruno a fair trial in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and to corollary provisions within the Florida Constitution. However, appellate counsel inexplicably failed to raise the issue despite trial counsel's properly preserved objections. This failure constitutes ineffective assistance of counsel, and relief is warranted.

C. The trial court erred in failing to order the State to disclose information regarding prospective jurors.

On September 16, 1986, Mr. Bruno filed a Motion to Compel Prosecution to Disclose Information Concerning Prospective Jurors, including prior criminal records and voting records prior to trial (2nd Supp. R. 76). There is no indication in the record that the State supplied the criminal histories of any members of the jury pool or the members of the jury seated in Mr. Bruno's trial (R. 1014). The trial court's refusal to grant the defense motion was error. See Buenoano v. State , 708 So. 2d. 941, 952

[7]All denied motions were renewed after Mr. Bruno rested at the end of the guilt phase of the trial (R. 666-667).

(Fla. 1998); Brady v. Maryland, 373 U.S. 83 (1963). Appellate counsel's failure to raise this issue on appeal constitutes ineffective assistance of counsel, and relief should issue.

D. Appellate counsel failed to ensure that a complete record on appeal was available.

During the pendency of Mr. Bruno's direct appeal, appellate counsel filed a Motion to Supplement the Record on Appeal with this Court on March 11, 1988. The motion included a list of items necessary for supplementation, including item 3.(g), "All documentary evidence considered by the trial court in sentencing," including the PSI and "letters that were received from Miss Grunger" and item 3.(i), "Any and all psychiatric/psychological reports filed in the trial court." This Court entered an order on March 25, 1988 granting the motion.

Appellate counsel filed a second Motion to Supplement the Record on Appeal with this Court on May 17, 1988 (2nd Supp. R. 180-183). The motion notes that "[s]everal documents previously requested by appellant have been certified by the lower clerk as missing from the clerk's file and evidence. The missing documents are the subject of a separate motion filed herewith" (Id. at 183). That motion, the Motion for Order Requiring Lower Court To Locate or Reconstruct Missing Exhibits, was granted by this Courts order of May 31, 1988 (2nd Supp. R. 179).

At the relinquishment hearing about issues related to appellate counsel's attempt to obtain a complete record, trial counsel attempted to explain to Judge Coker his account as to the

disposition of the psychiatric reports:

> Mr. Stella: All of the psychological evaluations of the defendant were, in fact, confidential, and obviously pursuant to the rule were not entered into evidence, but as the Court may or may not recall -- Judge, do you remember when Dr. Stillman took the stand and he indicated he had evaluated the defendant, and that he found that the defendant may well, in fact, have been insane at the time of the crime, and had so advised me and then I moved side bar?
>
> THE COURT: No.
>
> Mr. Stella: Well, we moved side bar and I advised the Court that, in fact was not the case, and I showed the Court copies of the reports I had received. You asked me if I wanted them put into evidence and I indicated that I did not because then they would go to the jury.

(2nd Supp. R. 29-30).[8]

The record on appeal also includes a subsequent June 23, 1988, letter from trial counsel to the Clerk of the Appeals Division about items missing from the record:

> Enclosed you will find the notes of Attorney Kay Doderer in regards to Michael Bruno. As far as the letters from Ms. Grunger, our office never received them, they supposedly were sent directly to Judge Coker.
>
> In regards to the psychiatric reports, they are confidential and cannot be submitted unless Mr. Barnard can get a written waiver from Mr. Bruno allowing our office to release them for the appeal. Additionally, they were not admitted into evidence.

(2nd Supp. R. 35). Trial counsel's letter was copied to Craig S.

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[8]Actually, the trial court had mentioned having the letters available for appellate purposes, not as evidence for the jury (R. 865).

Barnard, Chief Assistant Public Defender, then appellate counsel for Mr. Bruno.

On September 7, 1988, appellate counsel filed a Second Motion for Order Requesting Lower Court to Locate or Reconstruct Record Material and Request to Supplement Record. This Court then entered an order on September 15, 1988, granting the motion and directing the Clerk of the Circuit Court to supplement the record on appeal with the "letters that were received from Miss Granger" and the "transcript of the hearing held October 30, 1986", and then further ordered that if the documents cannot be located, it is directed that they be reconstructed under appropriate means or certified that the documents cannot be reconstructed" (3rd Supp. R. 10). No mention of the Dr. Stillman reports is found in the September 1988 motion or order.

The lower court, with the assistance of a judicial assistant, did eventually find two letters which were amended to the record on appeal in November 1988. One was a seven page hand-written letter from Jean M. Gruninger, postmarked September 14, 1987; the other a one page letter signed Marie Bauder (3rd Supp. R. 12-22).[9] At the hearing of June 7, 1988, trial counsel advised the court that "Miss Greninger" was then married to Mr. Bruno (2nd Supp. R. at 26).[10] Trial counsel also noted during

[9]Jean Gruninger was listed as a defense witness in an Amended Defense Witness List filed on July 21, 1987 (2nd Supp. R. 140). She did not testify at the 1987 trial.

[10]The Gruninger letter refers to Mr. Bruno as the writer's "fiance" and states that she met Mr. Bruno "while I was in charge of the Prison Health Services at the Broward Main Jail on the

the hearing that although he never placed the letters into evidence, Dr. Stillman had reviewed these letters prior to his testimony. Id. None of the other letters written by Ms. Gruninger were ever included in the record.

Appellate counsel next filed an Unopposed Motion to Supplement And/Or Remand to Reconstruct the Record on Appeal with this Court on April 26, 1989. It was denied pursuant to this Court's order of April 28, 1989.

Appellate counsel was clearly on notice as to the potential significance of the psychiatric reports that Dr. Stillman had prepared for trial counsel after examining Mr. Bruno, and made an attempt to have them added to the record on appeal. However, appellate counsel failed to ultimately ensure that these reports were made part of the record. As noted supra, trial counsel had placed on the record his impression of the content of the letters, but failed to either offer them as evidence or to have them sealed in the record for appellate purposes (R. 865, 918). Of course, at the penalty phase of Mr. Bruno's trial, Dr. Stillman testified that in his opinion Mr. Bruno was insane at the time of the offense (T. 449). Two "reports" in the form of letters dated December 8, 1986 and June 19, 1987 from Dr. Stillman following his examinations of Mr. Bruno were apparently sent to defense counsel, and although he refers to them on the

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evening shift." She also says that Mr. Bruno told her he had "a problem with cocaine which...he did almost daily." A copy of an envelope addressed to Judge Thomas Coker, Jr. with Ms Gruninger's return address is postmarked September 14, 1987 is in the record. (3rd Supp. R. 22).

record, neither letter was ever made part of the court record (R. 864-65, 917-18).[11] The only surviving copies of the letters were in defense counsel's file, which has since been destroyed during Hurricane Andrew.

It is clear that appellate counsel dropped the ball and never followed up and obtained copies of Dr. Stillman's psychiatric reports for the direct appeal. Mr. Bruno's initial brief included penalty phase claims, specifically B. 2. and B. 3., that directly involved Dr. Stillman's findings. The failure to obtain a complete record including the Stillman letters was deficient performance by appellate counsel that operated to the substantial prejudice of Mr. Bruno. If, as Dr. Stillman testified at the penalty phase, the reports confirm that he expressed doubts to trial counsel Stella about Mr. Bruno's mental status generally and at the time of the offense, appellate counsel's penalty phase arguments on direct appeal would have bolstered considerably. And of course the reports would have been in the record for postconviction purposes years later after

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[11]During the trial, defense counsel contended that Dr. Stillman had never indicated to him that Mr. Bruno was anything other than "completely competent, finding no indication of insanity or competency (sic.) at the time of the offense nor incompetency to stand trial nor at the time of the offense" until immediately prior to the penalty phase of Mr. Bruno's trial (R. 864). However, in direct contradiction to defense counsel's assertions, Dr. Stillman had testified that he had reported Mr. Bruno's psychological status to Mr. Stella following his examinations of Mr. Bruno in December 1986 and in June 1987 and Dr. Stillman indicated he had communicated significant doubts about Bruno's mental status to Mr. Stella and had indicated his need for corroboration from other sources before he rendered a final opinion (R. 820-22).

Mr. Stella's file was no longer in existence.

The due process constitutional right to receive trial transcripts for use at the appellate level was acknowledged by the Supreme Court in Griffin v. Illinois, 351 U.S. 212 (1956). An accurate trial transcript is crucial for adequate appellate review. Id. at 219. The Sixth Amendment also mandates a complete transcript. In Hardy v. United States, 375 U.S. 277, 288 (1964), Justice Goldberg, in his concurring opinion, wrote that, because the function of appellate counsel is to be an effective advocate for the client, counsel must be equipped with "the most basic and fundamental tool of his profession . . . the complete trial transcript . . . anything short of a complete transcript is incompatible with effective appellate advocacy."

As a result of these significant omissions in the record, this Court and any reviewing court in the future was and will be unable to determine whether Mr. Bruno's constitutional rights were violated. Appellate counsel had no way of knowing what happened during a critical phase of trial without a complete record, yet failed to ensure that the record was complete. Thus, Mr. Bruno received ineffective assistance of appellate counsel, and relief is warranted.

CLAIM III

THE CONSTITUTIONALITY OF THE FIRST-DEGREE MURDER INDICTMENT AND THE TRIAL COURT'S FINDINGS AND SENTENCE OF DEATH MUST BE REVISITED IN LIGHT OF APPRENDI V. NEW JERSEY.

Mr. Bruno was indicted for murder in the first degree on September 11, 1986 (R. 960-61). On September 16, 1986, counsel filed a separate Motion for Statement of Aggravating Circumstances (2nd Supp. R. 71-73). That motion sought an order that the State "provide the Defendant with the precise grounds on which the State seeks the death penalty in this case" (R. 71). The motion went on to lay out the rationale for such an order:

> 1. a. No notification of particular statutory aggravating circumstances which the State would seek to establish was contained in the Indictment charging the Defendant.
>
> b. No notice has been given as to what specific aggravating circumstances this Court or the State intends to consider.
>
> c. Absent the notification of aggravating circumstances, the use of these aggravating circumstances to sentence the Defendant to die, would violate the Accusation Clause of the 6th Amendment and the Due Process Clause of the 14th Amendment to the Constitution of the United States and Article 1, Section 15(a) of the Constitution of the State of Florida.
>
> 2. Utilization of aggravating circumstances not contained in the Indictment or in any subsequent for[m] of notice, deprives the Defendant of essential safeguards "designed to limit the unbridled exercise of judicial discretion in cases where the ultimate penalty is possible." Provence vs. State, 337 So. 2d 783 (Fla. 1976).
>
> 3. Failure to give timely and adequate notice of the precise grounds on which the

> State seeks the death penalty, or on which the Court would consider imposing the death penalty, deprive the Defendant of a fair sentencing hearing, with the Defendant being given a meaningful opportunity to rebut the aggravating circumstances. Thus the Defendant is faced with the posture of having his 6th Amendment Right to Effective Assistance of Counsel vitiated.
>
> Without notice, the Defendant or his counsel are unable to prepare and present any defensive evidence and arguments to meet the State's contentions as to what is an aggravated circumstance and the issues which the Court may regard as controlling on the question of life or death.
>
> 4. Florida Standard Jury Instructions in criminal cases deal with instructions in capital cases. The instructions contained in said Jury Instructions, instruct the jury to consider the evidence already presented at trial. Therefore, the only way to confront and rebut aggravating circumstances during the course of the guilt phase trial is to give the Defendant and his counsel notice thereof in advance.
>
> 5. Proper and advance notification of all aggravating circumstances is essential to permit Defendant through his counsel to effectively deal with the allegations during trial.

(R. 71-72).

Mr. Bruno also filed a Motion for Statement of Particulars on December 6, 1986, requesting that the State "be compelled to disclose whether they are proceeding under a felony murder or a premeditated murder theory, and if they insist upon seeking the death penalty...what, if any, aggravating circumstances they intend to produce" (2nd Supp. R. 97). Counsel for Mr. Bruno also filed a separate motion on July 31, 1987 to require the State to elect between felony murder and premeditated murder (R. 1040-

1043). Both motions was denied in an August 3, 1987 motions hearing, with the trial court ruling "let the jury decide." (R. 107-109, 114). A motion to have the State elect between felony murder and premeditated murder was again brought after Mr. Bruno was convicted of first degree murder and robbery and the same jury that convicted him had recommended death by an 8 to 4 vote. Trial counsel filed a Renewed Motion for Judgment of Acquittal and/or In the Alternative for a New Trial on August 21, 1987 (R. 1088-1092). It included an allegation of "error in this Court's failure to dismiss and/or sever Counts pursuant to Defense's Motion to Sever Counts I and II and/or Motion to have the State Elect Between Felony Murder and Premeditated Murder" (R. 1089). After an extended discussion of his motion at judge sentencing, the judge denied it, stating, "[t]his was a trial before a jury, and a jury has spoken" (R. 935-951).

This Court rejected without discussion Mr. Bruno's guilt phase claim that his first degree murder conviction on alternative theories must be reversed. Bruno v. State, 574 So. 2d 76, 81 (Fla. 1991). The Court also rejected without discussion Mr. Bruno's claim that the trial court erred by allowing the prosecution to pursue a felony murder theory as the indictment gave no notice of such a theory. Id. Finally, the Court rejected Mr. Bruno's arguments regarding his challenges to the capital sentencing statute. Id. at 83.

The Court's rejection of these arguments should be revisited in light of Apprendi v. New Jersey, 120 S.Ct. 2348 (2000). In

Apprendi, 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 a jury, and proved beyond a reasonable doubt." Id. at 2362-63. The constitutional underpinnings of the Court's holding are the Sixth Amendment right to trial 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). Mr. Bruno submits that the failure by the trial court in his case to require that the elements relied on by the State to enhance Mr. Bruno's punishment under Fla. Stat. § 775.082 be charged and found beyond a reasonable doubt by the jury. This was not done, and the result is that Mr. Bruno's death sentence is unconstitutional under both the United States and Florida Constitutions and violates Apprendi and the Sixth and Fourteenth Amendments.[12]

[12]The United States Supreme Court will hear oral arguments in April 2002 regarding the application of Apprendi to capital cases. Arizona v. Ring, 25 P. 3d 1139 (Ariz. 2001), *cert. granted*, 122 S. Ct. 865 (2002).

Florida's death penalty statute provides that the "narrowing" of death eligible persons occurs at the penalty phase. See Proffitt v. Florida, 428 U.S. 242 (1976). As this Court has explained, "[t]he aggravating circumstances of Fla. Stat. § 921.414(6), F.S.A., actually define those crimes-when read in conjunction with Fla. Stat. §§ 782.04(1) and 794.01(1), F.S.A. - to which the death penalty is applicable in the absence of mitigating circumstances." State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973). Thus Mr. Bruno was not eligible for the death penalty simply upon his conviction of first degree murder.

The version of Florida's capital punishment statute in place at the time of Mr. Bruno's 1987 trial also required the interplay of several statutes which operate independently but must be considered together to authorize Mr. Bruno's punishment. Mr. Bruno was sentenced in 1987 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,[13] clearly sets 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. 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 also Woodson v. North Carolina, 428 U.S. 280, 305 (1976)

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

("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 and consistent with due process and the Sixth Amendment right to trial by jury, the elements relied on by the State to enhance Mr. Bruno'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. Bruno'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.[14]

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[14]As Justice O'Connor observed in Apprendi, Walton

> [r]e[lied] in part on our decisions rejecting challenges to Florida's capital sentencing scheme, which also added that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." Walton, [497 U.S.] at 648 (quoting Hildwin v. Florida, 490 U.S. 638, 640-641 (1989) (per curiam)).

Apprendi v. New Jersey, 530 U.S. at 537 (O'Connor, J. dissenting). In Walton itself, the Court found that:

> The distinctions Walton attempts to draw between the Florida and Arizona statutory scheme 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

Mr. Bruno also submits that the Court's previous rejection of his challenge to the first degree murder indictment be revisited in light of Apprendi. This Court's jurisprudence has rejected of this argument is premised on the United States Supreme Court's decision in Schad v. Arizona, 501 U.S. 624 (1991). See Mendyk v. Dugger, 592 So. 2d 1076, 1081 (Fla. 1992). In Schad, the Court held that conviction premised on alternative theories of premeditated and felony murder was not violative of due process. However, Mr. Bruno submits that this matter is ripe for reconsideration in light of the rule discussed in Apprendi and the issues now taken on certiorari in Arizona v. Ring, 25 P. 3d 1139 (Ariz. 2001), *cert. granted*, 122 S. Ct. 865 (2002). If the Sixth and Fourteenth Amendments are violated under the New Jersey scheme in Apprendi, then Florida's failure to require the State to charge and prove the underlying elements of either premeditated or felony murder suffers from a similar constitutional flaw. Thus, this issue should be revisited at this time.

In Mr. Bruno's case, none of the Sixth Amendment and Due Process requirements identified in Apprendi and Jones were satisfied. The indictment did not give notice of the aggravating circumstances on which the State would rely to attempt to establish the death penalty. Indeed, the defense never received

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issues than does a trial judge in Arizona. Walton, 497 U.S. at 648.

notice of the aggravators despite repeated motions that were denied by the trial court. The judge, and not the jury, made the specific findings authorizing imposition of the death penalty, relying in part on a PSI that had not been prepared at the time of the jury's recommendation. It is impossible to know if there were any unanimous jury findings regarding the existence of any aggravating factor. The judge, and not the jury, was assigned and carried out the responsibility for determining whether any aggravating circumstance existed. Absent that finding, Mr. Bruno was ineligible for the death penalty, and the sentence provided under Florida law was life imprisonment.

Mr. Bruno acknowledges that this Court has held that Apprendi has not impacted Florida's sentencing scheme and has not overruled Walton. Mills v. Moore, 786 So. 2d 532, 537 (Fla. 2001) ("[b]ecause Apprendi did not overrule Walton, the basic scheme in Florida is not overruled either"). See also Brown v. Moore, 26 Fla. L. Weekly S742 (Fla. Nov. 1, 2001); Mann v. Moore, 794 So. 2d 595, 599 (Fla. 2001). However, on January 11, 2002, the Supreme Court granted *certiorari* review in Arizona v. Ring, 25 P.3d 1139 (Ariz. 2001), cert. granted, 122 S.Ct. 865 (2002). In Ring, the Court is going to decide whether Walton should be overruled in light of Apprendi. The Supreme Court has also granted a stay of execution to Florida death row inmates Amos King and Linroy Bottoson, who have presented to the Court the issue of Apprendi's impact on Florida. King v. State, 27 Fla. L. Weekly S65 (Fla. Jan. 16, 2002), stay granted, No. 01-7804 (U.S.

Jan. 23, 2002); Bottoson v. State, 2002 WL 122169 (Fla. Jan. 31, 2002), stay granted, 2002 WL 181142 (U.S. Feb. 5, 2002). Thus, Mr. Bruno presents this claim at this time for preservation purposes, and submits that relief is warranted.

CONCLUSION

It is clear that several meritorious arguments were available to be raised on direct appeal, yet appellate counsel unreasonably failed to assert them. Moreover, this Court's failure to conduct a harmless error analysis after striking aggravating circumstances warrants a resentencing. These errors, singularly or cumulatively, demonstrate that Mr. Bruno is entitled to habeas corpus relief at this time.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail, first-class postage prepaid, to Leslie Campbell, Office of Attorney General, 1515 N. Flagler Drive, 9th Floor, West Palm Beach, Florida, 33401-3432, on February 25, 2002.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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