IN THE SUPREME COURT OF FLORIDA

NO. SC04-2244

MANUEL PARDO, JR.

Petitioner,

v.

JAMES V. CROSBY, Secretary,
Department of Corrections, State of Florida,

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. Pardo 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.

Significant errors which occurred at Mr. Pardo's capital sentencing and trial were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel. Citations to the Record on Direct Appeal shall be designated as (R. #). 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. 9.130 (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.

Its constitutional guarantee imbues habeas corpus with

special status, which this Court has long recognized:

> The writ of habeas corpus is a high prerogative writ of ancient origin designed to obtain immediate relief from unlawful imprisonment without sufficient legal reason . . . The writ is venerated by all free and liberty loving people and recognized as a fundamental guaranty and protection of their right of liberty.

Allison v. Baker, 11 So. 2d 578, 579 (1943). In fact, habeas corpus is a centuries-old right, deserving of more protection than even a constitutional right. A lower court has written:

> The great writ has its origins in antiquity and its parameters have been shaped by suffering and deprivation. It is more than a privilege with which free men are endowed by constitutional mandate; it is a writ of ancient right.

Jamason v. State, 447 So. 2d 892, 894 (Fla. 4th DCA 1983), approved, 455 So. 2d 380 (Fla. 1984), cert. denied, 469 U.S. 1100 (1985). Regarding the application of procedural rules to petitions seeking the writ, this Court has explained:

> [H]istorically, habeas corpus is a high prerogative writ. It is as old as the common law itself and is an integral part of our own democratic process. The procedure for the granting of this particular writ **is not to be circumscribed by hard and fast rules or technicalities which often accompany our consideration of other processes.** If is appears to a court of competent jurisdiction that a man is being illegally restrained of his liberty, it is the responsibility of the court to brush

> aside formal technicalities and issue such appropriate orders as will do justice. **In habeas corpus the niceties of the procedure are not anywhere near as important as the determination of the ultimate question as to the legality of the restraint.**

Anglin v. State, 88 So. 2d 918, 919-20 (Fla. 1956)(emphasis added). This Court has written:

> The fundamental guarantees enumerated in Florida's Declaration of Rights should be available to all through simple and direct means, without needless complication or impediment, and should be fairly administered in favor of justice and not bound by technicality.

Haag v. State, 591 So. 2d 614, 616 (Fla. 1992).

REQUEST FOR ORAL ARGUMENT

Mr. Pardo requests oral argument on this petition.

PROCEDURAL HISTORY

The Circuit Court of the Eleventh Judicial Circuit, Dade County, entered the judgments of conviction and sentence under consideration. Mr. Pardo and co-defendant Rolando Garcia were charged with various offenses set forth in a nineteen (19) count indictment in Case Number 86-12910 (R. 1-15a). An amended indictment raising the charges to twenty-four (24) counts was filed thereafter, charging Mr. Pardo and Mr. Garcia with: first-degree murder of Mario Amador (Count I); first-degree murder of Roberto Alonso (Count II); robbery of cocaine from Mario Amador (Count III); unlawful possession of a firearm while

engaged in the felony of first-degree murder and/or armed robbery (Count IV); first-degree murder of Luis Robledo (Count V); first-degree murder of Ulpiano Ledo (Count VI); armed robbery of a wallet and its contents from Luis Robledo (Count VII); unlawful possession of a firearm during a felony of murder and/or armed robbery (Count VIII); first-degree murder of Sara Musa (Count IX); first-degree murder of Fara Quintero (Count X); armed robbery of Sara Musa (Count XI); armed robbery of Fara Quintero (Count XII); unlawful display of a firearm while committing a felony (Count XIII); first-degree murder of Ramon Alvero (Count XIV); first-degree murder of Daisy Ricard (Count XV); unlawful possession of a firearm during a felony (Count XVI). (R. 16-34a). Counts XVII through XVIV name only Garcia (R. 25).

Various pre-trial motions were filed, including a motion to sever Defendants on October 30, 1986 (R. 191-93). After several conflicting rulings on whether the Garcia and Pardo cases would be severed from each other, and a mistrial, the trials of Mr. Pardo and Mr. Garcia were eventually severed from each other.[1]

After a jury trial, Mr. Pardo was found guilty on April 15,

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[1]Garcia was eventually tried on all counts, and convicted and sentenced to death. His convictions were overturned by the Florida Supreme Court due to the error in failing to sever the counts. Garcia v. State, 568 So. 2d 896 (Fla. 1990).

1988 (R. 4124-28). On April 19, 1988, the jury recommended death sentences for the first degree murder convictions (R. 4272-74). The jury voted 8-4 to impose the death penalty for the murder of Mario Amador, 9-3 for Roberto Alonso, 9-3 for Luis Robledo, 9-3 for Ulpiano Ledo, 8-4 for Sara Musa, 10-2 for Fara Quintero, 10-2 for Ramon Alvero, 10-2 for Daisy Ricard, and 8-4 for Michael Millot (R. 4251-53).

On April 21, 1988, after a penalty phase, the trial court imposed sentences of death (R. 4138-44). On direct appeal, this Court affirmed Mr. Pardo's convictions and sentences. Pardo v. State, 563 So. 2d 77 (Fla. 1990). The United States Supreme Court denied certiorari on May 13, 1991. Pardo v. Florida, 111 S. Ct. 2043 (1991).

Mr. Pardo filed his initial Motion for Postconviction Relief pursuant to Rule 3.850 on May, 26, 1992. (PCR 32-137). After public records litigation lasting throughout the 1990s, Mr. Pardo filed his Amended Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend on June 25, 2001. After a Huff[2] hearing, and an evidentiary hearing on limited issues, the circuit court denied Mr. Pardo's motion for post-conviction relief. Mr. Pardo now files the instant petition for writ of habeas corpus contemporaneously with his

[2] 622 So 2d. 982 (Fla. 1993).

appeal from the denial.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Pardo asserts that his capital conviction and sentence of death were obtained and then affirmed during the Court's appellate review process in violation of his rights as guaranteed by the fifth, sixth, eighth, and fourteenth amendments to the United States Constitution, and the corresponding provisions of the Florida Constitution, for each of the reasons set forth herein.

CLAIM I

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

I. INTRODUCTION

Mr. Pardo 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. Pardo's trial were "obvious on the record" and "leaped out upon even a casual reading of transcript," it cannot be said that the "adversarial testing process worked in [Mr. Pardo's] direct appeal." Matire v. Wainwright, 811 F. 2d 1430, 1438 (11th Cir. 1987). The lack of appellate advocacy on Mr. Pardo'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 her representation of Mr. Pardo involved "serious and substantial deficiencies." Fitzpatrick v. Wainwright, 490 So. 2d 938, 940 (Fla. 1986). Individually and "cumulatively," Barclay v. Wainwright, 444 So. 2d 956, 959 (Fla. 1984), the claims omitted by appellate counsel establish that "confidence in the correctness and fairness of the result has been undermined." Wilson, 474 So. 2d at 1165 (emphasis in original). In light of the serious reversible errors that

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

This Court has articulated the standard for evaluation of appellate ineffective assistance of counsel:

> With regard to evidentiary objections which trial counsel made during the trial and which appellate counsel did not raise on direct appeal, this court evaluates the prejudice or second prong of the Strickland test first. In doing so, we begin our review of the prejudice prong by examining the specific objection made by trial counsel for harmful error. A successful petition must demonstrate that the erroneous ruling prejudiced the petitioner. If we conclude that the trial court's ruling was not erroneous, then it naturally follows that habeas petitioner was not prejudiced on account of appellate counsel's failure to raise that issue. If we do conclude that the trial court's evidentiary ruling was erroneous, we then consider whether such error is harmful error. If that error was harmless, the petitioner likewise would not have been prejudiced.

Jones v. Moore, 794 So 2d 570 (Fla. 2001).

a. LIMITATION OF THE CROSS-EXAMINATION OF A KEY STATE WITNESS.

Prior to the testimony of the State's first witness, Carlo Ribera, the trial judge granted the State's motion to disallow cross examination on prior crimes Carlo Ribera admitted to but was not charged with by the State (R. 2148-2154). The granting

of the State's motion violated Mr. Pardo's constitutional right to confront his accusers.

"There are few subjects, perhaps, on which [the Supreme] Court and other courts have been more nearly unanimous than in their expression of belief that the right of confrontation is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." Pointer v. Texas, 380 U.S. 400, 404-05 (1965). Accord Douglas v. Alabama, 380 U.S. 415, 418-19 (1965). The continuing vitality of this right was reaffirmed in Lilly v. Virginia, 527 U.S. 116 (1999).

The jury was presented with a propped up inflated version of Carlo Ribera instead of the true Calro Ribera, because they were not allowed to see him for the liar and criminal that he truly was. The court's erroneous restriction on Mr. Pardo's cross- examination of Ribera, denied Mr. Pardo his fundamental constitutional right to present a defense. See, Washington v. Texas, 388 U.S. 14 (1967); see, Story v. State, 589 So. 2d 939, 943 (Fla. 2d DCA 1991).

All relevant evidence is admissible, except as provided by law. §90.402, Fla. Stat. (1991). Relevant evidence is “evidence tending to prove or disprove a material fact.” §90.401, Fla. Stat. (1991). In Rivera v. State, 561 So 2d 536 (Fla. 1990), this Court emphasized that where relevant evidence **tends in any way,**

even indirectly, to establish a reasonable doubt of defendant's guilt, it is error to deny its admission." Story, 589 So.2d at 942(emphasis added); see also Palazzolo v. State, 754 so.2d 731 (Fla. 2d DCA 2000)(noting "the well-established policy requiring the introduction into evidence of all probative evidence tending to prove a defendant's innocence."); Moreno v. State, 418 So 2d 1223 (Fla. 3d DCA 1982). Here, the trial court excluded critical, relevant evidence relating to the issue of Mr. Ribera's credibility and motivation to testify against the defendant.

In Vannier v. State, 714 So. 2d 470, 471 (Fla. 4th DCA 1998), the court concluded that the lower court had erred by excluding evidence proffered by the defense which suggested that the alleged murder victim had been suicidal. The defense in that case was that the victim had in fact committed suicide. In concluding that the lower court had abused's its discretion, the District Court reasoned:

> While the defense is bound by the same rules of evidence as the state, [footnote omitted] **the question of what is relevant to show a reasonable doubt may present different considerations than the question of what is relevant to show the commission of the crime itself. If there is any possibility of a tendency of evidence to create a reasonable doubt, the rules of evidence are usually construed to allow for its admissibility.** [citations omitted] Because suicide was defendant's theory of defense . . . any evidence that tends 'in any way, even indirectly,' to show that the death did

> result from suicide is admissible, and it is error to exclude it.

Vannier, 714 So. 2d at 471 (emphasis added); see also Washington v. State, 737 So. 2d 1208 (Fla. 1st DCA 1999).

The test for relevancy in the context of establishing reasonable doubt is broad and favors admission over exclusion. Even evidence that may be viewed as "equivocal" as to whether or not it establishes the material fact at issue must be admitted. See Vannier at 471. When such equivocal evidence "**arguably tends to show a fact that might lead a jury to exonerate a defendant**, the trial judge's discretion is reduced and it is up to the jury to decide which inference is correct." Vannier at 471 (emphasis added); see also Moreno ("Where a defendant offers evidence which is of substantial probative value and such evidence tends not to confuse or prejudice, all doubts should be resolved in favor of admissibility."). Similarly, in Palazzolo, the court reasoned:

> We note, however, the well-established policy requiring the introduction into evidence of all probative evidence tending to prove a defendant's innocence. [citations omitted] Thus, although the test to determine the threshold issue of relevancy for Williams rule evidence and reverse Williams rule evidence is essentially the same, **we believe that a trial court has somewhat less discretion in deciding whether to exclude a defendant's reverse Williams rule evidence than in deciding whether to introduce the State's Williams rule evidence**.

Palazzolo. In a footnote, the court noted as significant this Court's recognition in State v. Savino, 567 So. 2d 892 (Fla. 1990) that reverse Williams rule evidence has a lower potential for prejudice to the state than standard Williams rule evidence has for the defendant. See Palazzolo, n.5. This lower risk of prejudice effectively reduces the trial court's discretion in deciding whether or not to allow a defendant to present such evidence in order to establish reasonable doubt. See id. As discussed infra, the trial court in the instant case limited the cross-examination of Carlo Ribera, because it was "immaterial and irrelevant" (R. 2154).

The evidence of prior criminal acts by Mr. Ribera was properly admissible under §90.608(1)(b) and (d), Fla. Stat. (1986). Florida Statutes, §90.608 in pertinent part reads:

> (1) Any party, including the party calling the witness, may attack the credibility of a witness by:. . .
> (b) Showing the witness is **biased**.
> . . . . .
> (d) Showing a **defect of capacity, ability, or opportunity in the witness to observe, remember, or recount the matters about which the witness testified**.

§90.608, Fla. Stat (1986)(emphasis added). Courts have recognized the importance of cross-examination by stating,

> All witnesses are subject to cross-examination for the purpose of discrediting them by showing bias or interest. Because liberty is at risk in a criminal case, a

> defendant is afforded wide latitude to develop the motive behind a witness' testimony, "to show that the witness has colored his testimony to suit a plea agreement or other considerations from the State."

Livingstone v. State, 678 So 2d 895*(Fla. 4th DCA 1996)(citations omitted).*

In the case at bar, the trial court limited the defendant's ability to cross-examine Carlo Ribera as to any of his prior bad acts, including his ongoing use of cocaine with co-defendant, Rolando Garcia.[3] This information was important to the jury to assess Mr. Ribera's credibility for two reasons:

First, Ribera's drug use, is important to show his bias. Ribera wanted to be a criminal and to associate with criminals. His loyalty was to the criminals[4], so why did he

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[3] Interestingly, the Court further during Ribera's cross-examination states,

> You won't be able to cross-examine him on his use of drugs, just those criminal activities on this event. (R. 2251).

How the trial court can define drug use as anything other than criminal activity is questionable. Moreover, since Mr. Pardo's motivation for the killings involved drugs, (whether as a "rip-off" as was the State's theory of the case or because he wanted to rid South Florida of drug dealers), all of Ribera's drug use are "criminal activities on this event."

[4] Ribera testified at trial that on at least two occasions he knew that someone would be killed by Pardo and Garcia, yet he did not go to the police. (R. 2254).

all of a sudden want to turn in the criminals if he wasn't offered anything by the State? The State argued at the hearing for it's Motion In Limine that the acts were uncharged, thus Ribera did not receive any benefit from the State for his testimony. However, the lack of prosecution for participation in a violent crime is a benefit derived from the State. The State's lead detective admitted on the stand that Ribera, himself, was a suspect in the murders until he could eliminate him. (R. 2296). Naturally, not being charged as accomplice/accessory to murder either before or after the fact is a benefit, which clearly, has the potential to affect the witness' bias or motivation for testifying against Mr. Pardo. As such, it was the proper subject of cross-examination. Appellate counsel failed to raise the improper limitation of Carlo Ribera on Mr, Pardo's direct appeal. Therefore, Mr. Pardo is entitled to a new trial because the limitation of the his ability to cross-examine a key State witness violated his Sixth Amendment right to confront his accusers.

Secondly, Rivera's drug use is important to ascertain the accuracy of what he witnessed, since Mr. Ribera was likely under the influence of drugs when he witnessed what he later told the police about. Moreover, since Carlo Ribera may have been under the influence when he first made statements to

police, it could have affected how he described events to the police[5]. Thus, Mr. Ribera's drug use was pertinent to the jury's determination of his credibility. Without knowing about Mr. Ribera's drug use, the jury was left to believe that Carlo Ribera was a respectable citizen, worth believing.

Lastly, assuming *arguendo* that the trial court's initial ruling regarding the scope of Ribera's cross-examination was proper, Mr. Pardo was denied his Sixth Amendment right to confront his accusers when the prosecution opened the door to the line of questioning by asking Ribera about his drug use on direct examination. In Diaz v. State, 747 So. 2d 1021 (Fla. 3rd DCA 1999) citing Steinhorst v. State 412 So 2d 332 (Fla. 1982) stated,

> The proper purposes of cross-examination are: (1) to weaken, test, or demonstrate the impossibility of the testimony of the witness on direct-examination and, (2) to impeach the credibility of the witness, which may involve, among other things, showing his possible interest in the outcome of the case. Therefore it is held that questions on cross-examination must either relate to credibility or be germane to the matters brought out on direct

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[5] In Mr. Pardo's Initial Brief on appeal, a Brady claim was raised regarding the State's suppression of a video taped statement made by Ribera to law enforcement. The video tape shows a coughing, sniffling, shifting, fitful Carlo Ribera. At the very least, had defense counsel been properly given the video taped statement, a question of Ribera's drug use at the time of his statement could have been raised. Because the tape was suppressed, defense counsel never had the opportunity to investigate whether Ribera was using cocaine at the time he initially spoke with police.

examination.

This doctrine has been further defined in the Florida Statutes,

> The scope of cross-examination is limited to the subject matter of direct examination and matters affecting the credibility of the witness, §90.612(2), Fla, Stat (1986).

GRAHAM, MICHAEL H. ET AL., FLORIDA EVIDENTIARY FOUNDATIONS, p. 383 (2ed. 1997).

During the State's direct examination of Ribera the following ensued:

> PROSECUTOR: He used cocaine a lot?
> RIBERA: Yes.
> PROSECUTOR: At times, when Defendant Garcia was using cocaine, were you also using drugs?
> RIBERA: NO.

(R. 2197). Although defense counsel did not object immediately, during his cross examination of Ribera, defense counsel asked about drug usage, and attempted to impeach Ribera with a prior inconsistent statement from his sworn deposition. However, the State struck it down. The State went as far as to misrepresent the evidence in it's argument when it stated, "There's no indication that Mr. Ribera denied drug usage in any event". (R. 2246). During his argument defense counsel protested, "I would like to state that Sally Weintraub opened the door."(R. 2247), thus preserving the

issue for appeal. However appellate counsel failed to raise this issue in Mr. Pardo's direct appeal denying Mr. Pardo of his Sixth Amendment Right effective assistance of appellate counsel.

b. OTHER MISCELLANEOUS SUSTAINED OBJECTIONS WHICH PREVENTED MR. PARDO OF A TRUE ADVERSERAL PROCESS

Throughout Mr. Pardo's trial, his trial counsel objected to the introduction of evidence that was unduly prejudicial or somehow otherwise inadmissible under the Florida Evidence Code.

During Ribera's testimony, Ribera started testifying to things that he had heard Rolando Garcia say. For example, it was Garcia (not on trial in this case) who told Ribera that they (Mr. Pardo and Garcia) had killed Frenchy. (R. 2167). Again, he continues to talk about the things which "Rollie"a/k/a Rolando Garcia told him, such as that he told Manny Pardo that he (Ribera) "was okay". (R. 2175). The prosecutor was constantly trying to get Ribera to testify to matters that were hearsay.[6] The prosecutor also elicited false testimony from Ribera[7].

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[6] "Did Garcia Say anything?" (R. 2187).

[7]
Weinstein: He used cocaine a lot?
Ribera: Yes.
Weinstein: At times, when defendant Garcia was using cocaine, were you also using drugs?
Ribera: No.

Later on, when defense counsel wanted to show inconsistent statements under oath, the trial court denied his request, so instead, he had to proffer the evidence into the record. (R. 2309).

Defense counsel also objected to the testimony about Millot (a/k/a Frenchy) making silencers for guns. The trial court ruled it permissible because it was not a statement against interest because Millot was a federal agent. (R. 2541). Even as a federal agent, bragging about one's ability to make gun silencers can hardly be called a statement in favor of Millot's interest.

Moreover, throughout the trial the State was continuously attempting to introduce evidence of collateral crimes that Mr. Pardo had not been charged with. This had already produced one mistrial, though as mentioned in Issue II *infra*, the subject of this mistrial was never made a part of the record on appeal. However, the later references all speak of the State's introduction of collateral uncharged crimes.

The State attempted this practice again by introducing testimony through Joseph Benitez that he bought guns from Mr. Pardo and that the guns were purchased for drug transactions.(R. 2275). Later the State tried to introduce the items purchased from Pardo into evidence (R. 2781).

(R. 2197).

Defense counsel objected on the basis that the items had not been listed on the discovery list. Additionally, defense counsel moved for a mistrial, which the trial court denied. (R. 2781).

The State was also able to introduce other prejudical evidence of little probative value. Mr. Guralnick, the defense attorney, also objected to the entire testimony of Regina Musa as irrelevant and prejudicial. The only thing he testified to was the fact that Sara and Fara were roommates and probably homosexual lovers. (R. 3070). When Guralnick asked the trial court if it would be okay to put on 53 witnesses to testify about their "gaiety", the trial court's response is "Yes." (R. 3070). The defense moved for a mistrial at the time, but it was denied. (R. 3070).

Defense counsel was also restricted from questioning William Ricard and Lourdes Aquilera whether Ramon Alvero was a convicted felon drug dealer. (R. 3167, 3177). Clearly, since drugs were a very important part of the motivation for these killings, and when Alvero was found dead, they asked if Daisy had also been found dead. Thus, they must have known or suspected that she was also in the drug trade. As such, it was a proper subject for cross-examination. However, appellate counsel failed to raise any of these issues on appeal. As such relief is warranted.

CLAIM II

MR. PARDO WAS DENIED A PROPER DIRECT APPEAL FROM HIS JUDGMENTS OF CONVICTION AND SENTENCES OF DEATH IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ART. 5, SEC. 3(b)(1) OF THE FLORIDA CONSTITUTION AND FLORIDA STATUES ANNOTATED, SEC. 921.141(4), DUE TO OMISSIONS IN THE RECORD. MR. PARDO IS BEING DENIED EFFECTIVE ASSISTANCE OF POST CONVICTION COUNSEL BECAUSE THE RECORD IS INCOMPLETE.

Appellate counsel for Mr. Pardo failed to ensure that a complete record of the lower court proceedings was compiled. Critical portions of Mr. Pardo's trial proceedings were omitted from Mr. Pardo's record on appeal, including a prior mistrial. Several of these omissions were material to Mr. Pardo's direct appeal.

The circuit court is required to certify the record on appeal in capital cases, Fla.Stat. Ann. § 921.141(4), Fla. Const. Art. 5 § 3(b)(1) and when errors or omissions appear, re-examination of the ***complete*** record in the lower tribunal is required. Delap v. State, 350 So.2d 462 (Fla. 1977). Mr. Pardo is guaranteed the effective assistance of counsel on appeal under Evitts v. Lucey, 469 U.S. 387 (1985).

In Delap, this Court reversed a conviction and sentence of death since the transcript of the full record was unavailable for review by the Court. Thus, this Court was unable to perform a full review of the case. Similarly, in this case, necessary portions of the record on appeal are

missing, including a prior mistrial. However, because appellate counsel failed to ensure that these portions were included on the record on appeal, this issue was not addressed.

For example, in the record between pages 1836 and 1840 something happens which is not a part of the record on appeal. The record jumps from March 28th to March 31st and the prospective jurors mentioned tentatively selected (listed at R. 1829) never appear again on the record. Furthermore, the jurors were actually ordered back by the trial court for March the 29th, yet there is no transcript of any proceeding on March 29th. All of the jurors finally selected came entirely from a new panel. Moreover, it is after this point in the record that mention of a prior mistrial ensues, yet the prior mistrial is not a part of the record. (R. 2117, 2773). Also, a severance of defendants occurs sometime during the trial which is not made part of the record. (R. 1857). Further in the record page 2992 is missing during the testimony of Joseph Ubeda, homicide investigator,(R. 2979).

Appellate counsel could not render effective assistance in the in the absence of a complete record. It was the duty of appellate counsel to ensure that the record on appeal was complete and accurate, yet without strategy or tactic this was not done Moreover this Court's review could not be

constitutionally complete. See Parker v. Dugger, 111 S. Ct. 731 (1991). Mr. Pardo was denied complete review of the record due to appellate counsel's failure to ensure a complete record.

Relief is warranted.

CONCLUSION

Based upon the claims of ineffective assistance of appellate counsel as detailed in this petition, Manuel Pardo, through counsel, respectfully urges that the Court issue its writ of habeas corpus and vacate his unconstitutional conviction and sentence of death.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing petition has been furnished by U.S. Mail, to Assistant Attorney General Sandra Jaggard, 444 Brickell Avenue, Suite 950, Miami, Fl 33131 on November , 2004.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this petition is typed in Courier New 12 point font in compliance with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

Respectfully Submitted,

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