IN THE SUPREME COURT OF FLORIDA

LOWER TRIBUNAL NO. 76-1942
SC04-1286

JAMES E. HITCHCOCK,
Petitioner,
v.
JAMES V. CROSBY,
Secretary,
Florida Department of Corrections,
Respondent,
and
CHARLIE CHRIST,
Attorney General,
Additional Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

Article 1, Section 13 of the Florida Constitution provides: “The writ of habeas corpus shall be grantable of right, freely and without costs.” This petition for habeas corpus is filed to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the Unites States Constitution and the corresponding provisions of the Florida Constitution. This petition will show that Mr. Hitchcock was denied a fair and reliable trial, sentencing hearing and effective appeal of the errors that occurred during trial and sentencing.[1]

References made to the record prepared in the direct appeal of Mr. Hitchcock's 1977 conviction and sentence and are in the form 1977 Vol. X R. 123. References to the record of Appellant’s fourth penalty trial are of the form 1996 Vol. X R. 123. References to the record of the post conviction proceeding on appeal contemporaneously with this Petition are in the form Vol. X PCR. 123.

[1]The guilt phase was the subject of appeal number 51108 in this Court, and the fourth penalty phase was appealed in case number SC92717.

REQUEST FOR ORAL ARGUMENT

Mr. Hitchcock has been sentenced to death. The resolution of the issues involved in this action will determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument is appropriate in this case because of the seriousness of the claims at issue and the penalty that the State seeks to impose on Mr. Hitchcock.

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INTRODUCTION

On Mr. Hitchcock's direct appeals from the adjudication of guilt and the most recent imposition of the death sentence, appellate counsel failed to raise and argue significant errors. Moreover, some of the issues raised on the direct appeals were ineffectively presented to this Court for appellate review.

Appellate counsel's failure to raise and argue certain issues and failure to present effectively other issues, was clearly deficient and actually prejudiced Mr. Hitchcock to the extent that the fairness and the correctness of the outcome were undermined.

This petition also presents questions that were raised on direct appeal, but should be reheard under subsequent case law or legal argument to correct errors in the appellate process that denied Mr. Hitchcock fundamental constitutional rights. This petition will demonstrate that Mr. Hitchcock is entitled to habeas relief.

PROCEDURAL HISTORY

In 1976 Mr. Hitchcock was arrested and indicted for first degree murder Cynthia Driggers. Mr. Hitchcock was not charged with any other offense in the indictment. Mr. Hitchcock was tried, convicted and sentenced to death in 1977. *Hitchcock v. State*, 413 So.2d 741 (Fla.1982), *cert denied*, 459 U.S. 960 (1982).

During the pendency of a death warrant the circuit court denied post-conviction relief which was affirmed by this Court. *Hitchcock v. State*, 432 So.2d 42 (Fla. 1983). Mr. Hitchcock sought relief in federal court which, following appeals to the Eleventh Circuit Court of Appeals, culminated with the United States Supreme Court granting relief in *Hitchcock v. Dugger*, 481 U.S.1168 (1987).

After a second penalty phase, Mr. Hitchcock was again sentenced to death. This Court affirmed the lower court. *Hitchcock v. State*, 578 So. 2d 685 (Fla. 1990). Certiorari was denied by the United States Supreme Court, *Hitchcock v. Florida*, 502 U.S. 912 (1991), which later granted rehearing and granted relief, *Hitchcock v. Florida*, 505 U.S. 1215 (1992).

After a third penalty phase, Mr. Hitchcock was again sentenced to death. This Court, however, reversed the trial

court and remanded the case for a new penalty phase. *Hitchcock v. State*, 614 So. 2d 483 (Fla. 1993).

After a fourth penalty phase, Mr. Hitchcock was again sentenced to death, which this Court affirmed. *Hitchcock v. State*, 755 So. 2d 638 (Fla. 2000), *cert. denied,* 121 S.Ct 633, 148 L.Ed. 542 (2000). It was only at this point that Mr. Hitchcock was in a post-conviction posture. However, before the appeal was final prior counsel for Mr. Hitchcock filed a "post-conviction" motion on which a hearing was held after a successor judge limited Mr. Hitchcock's presentation of evidence.

Mr. Hitchcock filed his Second Amended Motion to Vacate Judgement of Conviction and Sentence with Special Request for Leave to Amend on November 30, 2001. On December 13, 2002, the lower court granted Mr. Hitchcock's Motion to Amend Section D and his Motion to Amend Section E.

Mr. Hitchcock was granted a hearing on all claims for which he asked for a hearing. During the status conference the State agreed that Mr. Hitchcock was entitled to a hearing. The evidentiary hearing began on April 7, 2003 and continued for further testimony on May 2003. The State and Mr. Hitchcock filed written closing arguments. The lower court entered a written order on October 27, 2003, denying each claim of the Second Motion to Vacate Judgment of Conviction

and Sentence with Special Request for Leave to Amend. Vol. XII PCR. 1131.

On December 19, 2001, Mr. Hitchcock filed a Motion for Post Conviction DNA Testing. The lower court denied the motion which this Court affirmed following oral argument. *Hitchcock v. State*, 866 So. 2d 23 (Fla. 2004).

Contemporaneously with this Petition, Mr. Hitchcock has filed an appeal from the lower court's denial of all post-conviction claims.

GROUNDS FOR HABEAS CORPUS

This is Mr. Hitchcock's first petition for habeas corpus in this Court. Mr. Hitchcock asserts in this petition for writ of habeas corpus that his capital conviction and death sentence were obtained in the trial court and then affirmed by this Court in violation of Mr. Hitchcock's rights guaranteed by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

GROUND I

PETITIONER WAS DEPRIVED OF ADEQUATE NOTICE OF FELONY MURDER AND DEPRIVED OF A UNANIMOUS VERDICT WITH REGARD TO BOTH THE DETERMINATION OF GUILT/INNOCENCE AND THE SENTENCE BY VIRTUE OF THE TRIAL COURT'S INSTRUCTIONS AND THE VERDICT FORMS WHICH ALLOWED THE JURY TO ARRIVE AT A NON-UNANIMOUS VERDICT AS TO THE COUNT OF MURDER ON WHICH THE CONVICTION WAS BASED IN VIOLATION OF THE 5th, 6th, 8TH, AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION. APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE THIS ISSUE IN THE DIRECT APPEAL.

PRECLUSION OF FELONY MURDER THEORY DURING TRIAL

Mr. Hitchcock was charged by indictment solely with the crime of premeditated murder: "JAMES ERNEST Hitchcock did . . . in violation of Florida Statute 782.04, from a premeditated design to effect the death of CYNTHIA ANN DRIGGERS, a human being, kill and murder the said CYNTHIA ANN DRIGGERS . . . by strangling her with his hands." 1996 Vol. IV R 630.

The indictment did not allege that the death occurred during the perpetration or attempt to perpetrate any of the enumerated felonies constituting felony murder. The state had only expressly charged premeditated murder pursuant to section 782.04(1)(a)(1), the premeditated murder statute. The felony murder statute, 782.04(1)(a)(2), was not expressly named in the indictment, although the entire homicide statute, section 782.04, was generally alleged. Further, no facts were alleged in the indictment which would support a felony murder conviction, i.e. no allegation was made that the death

occurred during the commission or the attempted commission of a felony, and none of the felonies which serve as an element of felony murder were listed.

Defense counsel moved at the close of the state's guilt phase case for judgment of acquittal on the homicide charges. The defense argued that the indictment only charged premeditated murder. Acquittal for felony murder was therefore mandated because of the absence of a charge. The defense also argued that even if felony murder was encompassed in the indictment, there was insufficient evidence of any underlying felony. The only possible felony was sexual battery and the evidence failed to establish a sexual battery. The defense also attacked the statutory language of the relevant statutes, arguing that while the felony murder statute required proof of "involuntary sexual battery," the sexual battery statutes defines no such offense. Finally, the defense argued that there was insufficient evidence of premeditation to sustain conviction on the premeditation charge. 1977 Vol. IV R. 711-19. The trial court denied the motion as to the premeditation charge but reserved ruling on the felony murder charge. Ultimately, the trial judge denied the motion after the close of the evidentiary phase. 1977 Vol. V R. 841.

On direct appeal, the defense argued that the evidence of felony murder was insufficient and the prejudice was compounded by the lack of evidence of premeditation. 1977 Appellant's Initial Brief at 21-24. Appellate counsel also challenged the reservation of ruling on the felony murder issue until the close of evidence. *Id*. at 24-27. Appellate counsel did not challenge the fundamental constitutional flaw of allowing a felony murder theory to go to the jury when only premeditated murder was charged. Trial counsel had made the claim in his motion for judgment of acquittal when he challenged proceeding on a felony murder theory because the indictment only charged premeditated murder. Appellate counsel was, therefore, deficient in failing to mount a challenge on this ground. Subsequent case law also compels relief on this issue, as argued infra.

The Sixth and Fourteenth Amendments of the United States Constitution require a charging document enumerate the elements sufficiently to apprise the defendant of what he must defend against. ***Russell v. United States***, 369 U.S. 749 (1962). ***See also*** Art. I, § 16, Fla. Const. (same protection offered in state constitution). Due process requires specification of the theory of prosecution to prevent the jury from being instructed on an uncharged offense. ***Tarpley v. Estelle***, 703 F.2d 157 (5th Cir. 1983). Due process also

prevents the state and courts from relying on one theory at trial and another on appeal. *See Cole v. Arkansas*, 333 U.S. 196 (1948).

The Constitution requires the state to allege all the elements of the specific type of first degree murder with which it is charging the defendant, and failure to allege the specific elements fails to adequately apprise the defendant and will not permit a verdict for the unalleged theory. *Givens v. Housewright*, 786 F.2d 1378 (9th Cir. 1986) (charge of "willful" murder insufficient to allow prosecution or conviction for alternative method of murder by torture). Felony murder, even though it is included within a single statutory section, is a separate offense defined in a separate subsection from premeditated murder. A defendant can be charged with both offenses separately and convicted and sentenced on each charge separately. *State v. Ferguson* 195 N.E.2d 794 (Ohio 1964) (Ohio statute, in a single section, defined two offenses: "No person shall purposely, and either of deliberate and premeditated malice, or by means of poison, or in perpetrating or attempting to perpetrate rape, arson, robbery, or burglary, kill another." *Id*. At 796). The Ohio courts concluded two offenses were defined through application

of the *Blockburger*[2] test. *State v. McCullough*, 605 N.E.2d 962 (Ohio Ct. App. 1992).

While this Court has rejected applying the *Blockburger* test in the context of various homicide statutes, *see, e.g. Houser v. State,* 474 So.2d 1193, 1196 (Fla.1985) (vehicular homicide and DUI manslaughter), there does not appear to be a case where this Court has squarely rejected application of the *Blockburger* test to prevent separate convictions and sentences for premeditated and felony murder under the separate statutory provisions of sections 782.04(1)(a)(1) and 782.04(1)(a)(2). *See, e.g., Gordon v. State*, 780 So.2d 17 (Fla. 2001):

> In a similar argument, Gordon highlights the principle that convictions for both premeditated murder and felony murder are impermissible when only one death occurred. *See Goss v. State,* 398 So.2d 998, 999 (Fla. 5th DCA 1981). We have held repeatedly that section 775.021 did not abrogate our previous pronouncements concerning punishments for singular homicides. *See Goodwin v. State,* 634 So.2d at 157-58 (Grimes, J. concurring) ("I believe that the Legislature could not have intended that a defendant could be convicted of two crimes of homicide for killing a single person."); *State v. Chapman,* 625 So.2d 838, 839 (Fla.1993); *Houser v. State,* 474 So.2d 1193, 1196 (Fla.1985) (noting that "only one homicide conviction and sentence may be imposed for a single death"); *Campbell-Eley,* 718 So.2d at 329; *Laines v. State,* 662 So.2d at 1250; *Goss v. State,* 398 So.2d at 999. **Indeed, this principle is based on notions of fundamental fairness which recognize the inequity that inheres**

[2]*Blockburger v. United States,* 284 U.S. 299 (1932).

> **in multiple punishments for a singular killing.** As Justice Shaw noted in his *Carawan* dissent, "physical injury and physical injury causing death, merge into one and it is rationally defensible to conclude that **the legislature did not intend to impose cumulative punishments**." *Carawan,* 515 So.2d at 173 (Shaw, J., dissenting).

780 So.2d at 25 (emphasis added).

Goss v. State, 398 So.2d 998 (Fla. 5th DCA 1981), cited in the quote from *Gordon*, above, reversed a felony murder conviction on two grounds – the defendant already was subject to both a premeditated murder conviction for the same victim and a conviction for the underlying felony which supported the felony murder conviction. No underlying felony conviction exists in this case. And, of course, *Goss* was a Fifth District decision, not a decision from this Court.

It is undeniable that premeditated and felony murder meet the requirements of *Blockburger* - the mutually exclusive elements are, for premeditated murder a requirement of premeditation, for felony murder a requirement of commission of one of the underlying felonies. To date, however, even when the two homicide statutes are separate offenses under the *Blockburger* test, the “one death/one sentence” principle has overridden the *Blockburger* test, even after the statutory *Blockburger* rule, section 775.021(4), was amended to limit application of the rule of lenity in *Blockburger* analysis. *State v. Chapman*, 625 So.2d 838 (Fla. 1993) (reaffirming

Houser and “one death/one sentence” principle after 1988 amendment).

Ironically, the reason for adhering to the “one death/one sentence” principle has always been to ensure the defendant was treated fairly – in other words, this Court has always applied judicial lenity to the homicide statutes to guarantee the defendant a fair and equitable outcome. *Gordon*.

Thus, this Court recognizes that a policy reason exists to prohibit dual homicide convictions – fundamental fairness to protect against the inequity of “cumulative punishments,” *Gordon*, for a singular killing. Unfortunately, the inequity is prevented only when the defendant is convicted of noncapital homicide offenses such as attempted first degree murder, i.e. when the defendant is not subject to a sentence of life without parole or death,. A defendant would suffer “cumulative punishments” if the court stacked the sentences in a noncapital homicide case.

However, when a defendant is convicted for a capital homicide, the need for protection from cumulative punishments simply does not exist. The defendant will be sentenced either to life without parole or death. In such a case, the legislature could define a dozen capital offenses, the defendant could be sentenced to a dozen life sentences, or a dozen deaths, and he would suffer absolutely no inequity, no

unfair multiple punishments, because he has only one life to serve, one life to be taken.

No policy reason prohibits dual conviction for a capital murder – double life sentences without parole or double death sentences simply do not affect the defendant in any material manner. There is no need for application of the rule of lenity to capital homicide convictions to protect against "cumulative punishments."

Even if dual capital convictions and sentences are not permitted, there is no prohibition to dual indictment, prosecution, and verdicts. In fact, as this Court is well aware, the state often charges capital homicide in two counts, premeditated and felony murder, and frequently obtains specific verdicts finding defendant guilty of a dual finding of premeditated and felony murder, or by separate convictions for premeditated and felony murder, or both. The double jeopardy clause is not offended because the offenses truly are separate offenses under the ***Blockburger*** test. The legislature is not offended by cumulative punishments because only a single conviction and sentence is entered, regardless of how many homicide convictions are obtained for a single victim.

SEPARATE INDICTMENTS ARE REQUIRED TO CHARGE PREMEDITATED AND FELONY MURDER

Fundamental fairness and the avoidance of inequity have always guided this Court in its interpretation of the state's homicide statutes. *Gordon*. If *stare decisis* in the past allowed a single indictment for premeditated murder to open the door to prosecution for the second discrete crime of felony murder, the constitutional landscape has now changed. Fundamental fairness and avoidance of inequity now compel the state to separately charge and prove the two crimes of premeditated and felony murder.

The question before this Court is whether separate charges and convictions are required if the state pursues both theories, rather than to allow dual prosecutions at the mere discretion of the state attorney or the court upon a single indictment for premeditated murder. The answer is "yes," in light of the recent United States Supreme Court decisions in *Ring v. Arizona*, 536 U.S. 584 (2002), and *Apprendi v. New Jersey,* 530 U.S. 466 (2000). These landmark cases invigorate the fundamental principle that the jury find <u>every</u> element for which a defendant is convicted and sentenced.

The *Ring* Court noted that *Apprendi* essentially declares there is no distinction between an element of a crime and a sentence enhancer. A "sentence enhancer" is not a sentencing consideration, **it is the functional equivalent of an element**

of a crime. A sentence enhancer does not amplify on a lower level offense, it actually creates a greater offense which is defined by the elements of the underlying offense plus the additional elements which had been designated “enhancers” but which are in truth elements of the greater crime, or, as *Ring/Apprendi* call it, the “aggravated crime.”

> *Apprendi* repeatedly instructs . . . that the characterization of a fact or circumstance as an "element" or a "sentencing factor" is not determinative of the question "who decides," judge or jury. See, ***e.g.,*** 530 U.S., at 492, 120 S.Ct. 2348 (noting New Jersey's contention that "[t]he required finding of biased purpose is not an 'element' of a distinct hate crime offense, but rather the traditional 'sentencing factor' of motive," and calling this argument "nothing more than a disagreement with the rule we apply today"); *id.*, at 494, n. 19, 120 S.Ct. 2348 (**"[W]hen the term 'sentence enhancement' is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict.")**; *id.*, at 495, 120 S.Ct. 2348 ("[M]erely because the state legislature placed its hate crime sentence enhancer within the sentencing provisions of the criminal code does not mean that the finding of a biased purpose to intimidate is not an essential element of the offense." (internal quotation marks omitted)); see also *id.*, at 501, 120 S.Ct. 2348 (THOMAS, J., concurring) (**"[I]f the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact[,] ... the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime.**").

Ring, 536 U.S. at 605 (emphasis added).

Justice Scalia, in his concurrence in *Ring* (joined by Justice Thomas), states the principle even more firmly:

> **[A]ll facts essential to imposition of the level of punishment that the defendant receives--whether the statute calls them elements of the offense, sentencing factors, or Mary Jane--must be found by the jury beyond a reasonable doubt.**

Ring, 536 U.S. at 610 (emphasis added).

In the context of Florida's first degree murder statute, this Court has found essentially that the legislature has called the distinguishing elements of premeditated and felony murder "Mary Jane."

> Counsel for appellant contends that the evidence adduced by the State is legally insufficient to support a verdict and judgment of murder in the first degree because: (1) it fails to show premeditation; (2) or that the appellant shot Applebaum in the perpetration of the crime of robbery. The answer to the contention is that **the motive of the crime was robbery and evidence going to the point of premeditation is as a matter of law presumed.**

Leiby v. State, 50 So.2d 529, 531-32 (Fla. 1951) (emphasis added). In other words, by the *Leiby* reasoning, Florida has only a single crime, first degree premeditated murder, and the definition of felony murder merely creates a statutory presumption of premeditation. This analysis is antiquated and incorrect, for, as discussed above, premeditated murder and felony murder are unarguably separate offenses under the *Blockburger* test.

Further rationale for allowing the state to pursue a felony murder theory when only premeditated murder is charged is found in the seminal decision from this Court wherein it allowed a general charge of premeditated murder to include felony murder. After noting that Arkansas was at the time the only state requiring felony murder be plead with specificity (well before the Ohio decision in *State v. Ferguson* 195 N.E.2d 794, (Ohio 1964)), this Court looked to other states for the contrary view:

> In *State v. Meyers*, 99 Mo. 107, 12 S. W. 516, it is held that:
>
> > 'An indictment in the usual form, charging murder to have been done deliberately and premeditatedly, is sufficient under the statute to charge murder in the first degree, regardless of whether the murder was committed in the perpetration of a felony or otherwise. **The perpetration or attempt to perpetrate any of the felonies mentioned in the statute, * * * during which perpetration or attempt a homicide is committed, <u>stands in lieu of</u> and is the legal equivalent of that premeditation and deliberation which otherwise are the necessary attributes of murder in the first degree.** In such case it is only necessary to make the charge in the ordinary way for murder in the first degree, and show the facts in evidence, and, if they establish that the homicide was committed in the perpetration or attempt to perpetrate any of the felonies mentioned in the statute, this will be sufficient.'
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> In the case of *State v. McGinnis*, 158 Mo. 105, 59 S. W. 83, it was held that:
>
> > 'It is proper, in a trial under an indictment which only charges murder, to instruct the jury that, if the homicide was committed in an attempt to commit robbery,

> the defendant was guilty of murder in the first degree. * * * And it is not error to give such instruction because the indictment tendered no such issue as robbery.'
>
> In the case of *State v. Johnson*, 72 Iowa, 393, 34 N. W. 177, it is held that:
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> 'A defendant may be found guilty of murder in the first degree upon the finding that he killed the decedent in the perpetration of robbery, without the allegation of that fact in the indictment.' State v. Foster, 136 Mo. 653, 38 S. W. 721; Commonwealth v. Flanagan, 7 Watts & S. (Pa.) 415; State v. Weems, 96 Iowa, 426, 65 N. W. 387: Cox v. People, 80 N. Y. 500; People v. Giblin, 115 N. Y. 196, 21 N. E. 1062, 4 L. R. A. 757; People v. Flanigan, 174 N. Y. 356, 66 N. E. 988; Reyes v. State, 10 Tex. App. 1; Roach v. State, 8 Tex. App. 478.
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> See the authorities cited in the copious notes to the case of *People v. Sullivan*, 173 N. Y. 122, 65 N. E. 989, as reported in 63 L. R. A. 353, 93 Am. St. Rep. 582; Wharton on Homicide (3d Ed.) § 574, p. 875 et seq., and authorities cited.
>
> **We cannot agree with the Arkansas court upon this question, but are of the opinion that the better reasoning is on the side of the majority of the courts cited above that hold to the contrary. There was therefore no error in giving the charge complained of.**

Sloan v. State, 69 So. 871, 872 (Fla. 1915).

Reading this opinion, it is clear the *Sloan* Court conducted no independent analysis of what was fair and free from inequity – it merely adopted the majority position which, from reading the cases quoted in *Sloan*, was not based on any reasoned analysis of what was fair and free from inequity.

When the struggle for fairness and equity is brought to bear on the regulation of homicide, it prevents “cumulative

punishments" for a single death. *Gordon*. But this analysis fails to account for what is fair and equitable when the punishment is the ultimate - absolute life or death. Cumulative punishment is logically impossible in such a situation.

With the avoidance of cumulative punishment simply not a factor when the conviction is for capital homicide, the balancing which compelled rejection of the *Blockburger* distinction to prevent cumulative punishment is destroyed. This Court is free to look to other factors which affect the fairness and freedom from inequity of the process. In this light, it is clear that law grounded in the principles of *Ring* and *Apprendi* simply cannot abide a reading of Florida's homicide statute which relieves the state from proving an essential element of an offense, premeditation, whether it is relieved by presumption or by substitution.

Ring and *Apprendi* rejected attempts to avoid the requirement that a jury find all elements of an offense by labeling the aggravating elements as "sentencing factors." "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – **no matter how the State labels it** – must be found by a jury beyond a reasonable doubt." 536 U.S. at 602 (emphasis added).

NECESSITY OF SPECIFIC VERDICT DISTINGUISHING PREMEDITATED AND FELONY MURDER

Mr. Hitchcock had a fundamental constitutional right under the 5th, 6th, 8th, and 14th Amendments of the United States Constitution to require the jury to reach a unanimous verdict as to whether he committed premeditated murder. He had the additional fundamental right to not be convicted for felony murder, an offense which was not charged in the indictment. These violations of constitutional rights were clearly embodied and preserved in the record, and were not raised or addressed by appellate counsel.

Mr. Hitchcock was charged with a single count of first degree murder, killing with premeditation. The trial court instructed the jury on two theories, premeditated and felony murder. There was no unanimous verdict on either theory. The evidence for both theories was insubstantial. *Jackson v. Virginia*, 443 U.S. 307 (1979).

Mr. Hitchcock acknowledges the Supreme Court's pronouncement in *Schad v. Arizona*, 501 U.S. 624 (1991), held a similar nonunanimous verdict did not violate the Constitution. Even though it is true the Supreme Court has approved some species of alternate *mens rea* requirements, this case is an extreme example that is not covered by *Schad.*[3]

[3] The Court in *Schad* specifically stated that the considerations in *Schad* do not "exhaust the universe of those

Moreover, it is difficult to square nonunanimous verdicts with the Supreme Court's requirement of jury findings for all elements of a crime in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and even with the Court's long standing emphasis on proof beyond a reasonable doubt espoused in *In re Winship*, 397 U.S. 358 (1970).

Furthermore, the Arizona first degree murder statute is different from Florida's statute. The Arizona statute merely sets forth circumstances which constitute "murder in the first degree". *Schad,* 501 U.S. 629, 111 S.Ct. at 2495. There is no reference to "felony murder". However, the Florida statutes specifically set out first degree premeditated murder in section 782.04(1)(a)(1) and specifically sets out felony murder in section 782.04(1)(a)(2). In Florida, the statute provides for specific elements for each of these two types of murder. In other words, in Florida, as urged above, the statute creates separate crimes.

The criminal indictment filed in Mr. Hitchcock's case contained only one count, alleging premeditated murder. Mr. Hitchcock was not charged with any underlying felony. There is insufficient proof of sexual battery. Therefore, he would

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potentially relevant to judgments about the legitimacy of defining certain facts as mere means to the commission of one offense", but that the "jury's options *in this case* did not fall beyond the constitutional bounds of fundamental fairness and rationality." 501 U.S. at 645 (emphasis added).

have to be convicted of premeditated murder, and there is no proof that all twelve jurors found premeditation. It is entirely possible that no juror found premeditation or an underlying felony. If less than twelve jurors found premeditation, then all twelve jurors would have had to find the existence of sexual battery, which arguably would have been easier to prove if petitioner had actually been **charged** with sexual battery. No one knows what these jurors found.

First and foremost, there is no basis for believing the jury was unanimous as to either theory. With *Ring* and *Apprendi* now requiring the jury find every element of the crime of conviction, a general verdict cannot meet the requirement that the process be fair and free of inequity. There was no charge or verdict for the alleged rape, so there is no way to ascertain whether the jury unanimously agreed there had been a felony murder. Similarly, there is no indication the jury found premeditation.

If ever a case cried out for fundamental fairness and equity, surely one such as this is one of the most compelling situations that can exist in the capital homicide arena. This unjust, unfair, inequitable situation is apparent to at least one Florida appellate judge, even without the clear light of *Ring* and *Apprendi* illuminating yet one more embarrassing injustice in Florida's capital homicide house of cards.

HARRIS, J., concurring specially:

I concur because this case appears to be controlled by the plurality decision in *Schad v. Arizona,* 501 U.S. 624, 637, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991). However, I do so with some reservation and **suggest that our supreme court further consider the issue.** Admittedly **section 782.04, Florida Statutes, *may* establish first degree murder as a single crime which can be established if the jury finds that the unlawful killing occurs either as a result of premeditation or during the commission of a felony**, as did the Arizona statute at issue in *Schad.* And the *Schad* plurality unquestionably held that even though the jury must unanimously agree that first degree murder was committed, it is free to mix and match the bases justifying its determination. [FN1]

> FN1. Unfortunately, my suggestion to the contrary in a concurring/dissenting opinion in *State v. Reardon,* 763 So.2d 418 (Fla. 5th DCA 2000), was made in ignorance of *Schad* and **without contemplating that the Supreme Court would actually approve the mix and match concept when life is at stake.**

The reason given by the *Schad* court's plurality ruling was that since Arizona considered its first degree murder statute as creating a single offense subject to alternative proof, the United States Supreme Court should not second guess that decision. **But what if Florida considers premeditated murder and felony murder as separate and distinct crimes each constituting "first degree murder"? The further review I recommend relates to the conflict between reading the statute establishing the crime as creating a single offense subject to "either/or" proof and the jury instruction relating to first degree murder which sets forth "first degree premeditated murder" and "first degree felony murder" and establishes separate "elements" for each.**

In interpreting our first degree murder law, the Florida Supreme Court adopted a jury instruction which informs the jury that there are two ways in which the jury may convict for first degree murder, premeditated murder and felony murder. The instruction then informs the jury that to convict for "First Degree Premeditated Murder" *it must find*

the "element" of premeditation. The instruction further informs the jury that to convict for "First Degree Felony Murder" *it must find* ***the "element" that the death occurred as a consequence of the commission or attempted commission of a felony.*** In our case, the jury responded to an interrogatory verdict with the following finding: "We the jury unanimously found the defendant guilty of murder in the first degree but could not reach a unanimous agreement as to which, premeditated or felony murder, was proven." No specific vote was given and it is therefore possible that not even a majority of the jurors found either theory of guilt to have been proved. Nowhere in the instruction is the jury advised that even though it fails to find either first degree premeditated murder or first degree felony murder, a finding of guilt to a generic first degree murder offense may nevertheless result.

This dichotomy between the statute if read as creating a single crime and the jury instruction takes on additional significance when you consider that portion of the *Schad* plurality which states:

> We do not, of course, suggest that jury instructions requiring increased verdict specificity are not desirable, and in fact the Supreme Court of Arizona has itself recognized that separate verdict forms are useful in cases submitted to a jury on alternative theories of premeditated and felony murder. [FN2]
>
> FN2. In *State v. Smith,* 160 Ariz. 507, 774 P.2d 811, 817 (1989), the court held: Thus, as a matter of sound administrative justice and efficiency in processing murder cases in the future, we urge trial courts, when a case is submitted to the jury on alternative theories of premeditated and felony murder, to give alternate forms of verdict so the jury may clearly indicate whether neither, one, or both theories apply.
>
> Why separate verdict forms to answer these questions unless it makes a difference? In our case, the jury was asked these exact questions and answered that neither theory applied.

> **It is troubling that in a situation in which the death penalty might be applicable that even though the jury determines that neither First Degree Premeditated Murder nor First Degree Felony murder was proved, the defendant can nevertheless be found guilty of the crime of First Degree Hybrid Murder, a possibility not included within the jury instructions, merely because all the jurors agreed that the killing occurred either by premeditation or during the commission of a felony.**
>
> **I suggest that the current jury instruction may suggest that, like Arizona, Florida wishes to require specificity when during a capital murder prosecution the jury is called upon to decide whether a killing occurred based on premeditation or during the commission of a felony. Obviously if mix and match proof is acceptable then the questions should not even be asked because specificity is irrelevant.**

St. Nattis v. State, 827 So.2d 320, 320-21 (Fla. 5th DCA 2002) (Harris, J., concurring specially) (bold and underlined emphasis added, italics in original).

Even without looking to the compulsion of *Ring* and *Apprendi*, Judge Harris recognized Florida's first degree murder scheme is fundamentally flawed. The ancient arbitrary dogma of *Sloan v. State*, 69 So. 871 (Fla. 1915), and its progeny befouls Florida's capital homicide law, committing defendants to death or life without parole without requiring a jury to find they committed any particular offense by unanimously finding all of the elements of at least one of Florida's capital homicide statutes.

GROUND II

1977 APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE CLAIM THAT MR. HITCHCOCK WAS NOT PRESENT AT BENCH CONFERENCES AT CRITICAL STAGES AND TRIAL COUNSEL FAILED TO MAKE AN ADEQUATE RECORD OF BENCH CONFERENCES.

In the post conviction motion which is on appeal contemporaneously with this Petition, Mr. Hitchcock challenged the validity of his 1977 trial (the guilt phase surviving to this juncture) because of errors arising from the fact he was not present for bench conferences, framing the claim thus:

> MR. HITCHCOCK WAS DENIED DUE PROCESS OF LAW AND HIS RIGHT TO EFFECTIVE COUNSEL UNDER THE UNITED STATES AND FLORIDA CONSTITUTIONS BECAUSE: HE WAS NOT PRESENT AT BENCH CONFERENCES DURING THE JURY SELECTION PROCESS WHERE PEREMPTORY CHALLENGES WERE EXERCISED BY BOTH THE STATE AND THE DEFENSE; THE TRIAL COURT BREACHED IT'S RESPONSIBILITY TO ENSURE A COMPLETE RECORD BY FAILING TO DIRECT THE COURT REPORTER TO RECORD AND TRANSCRIBE THE BENCH CONFERENCES WHERE PEREMPTORY CHALLENGES WERE EXERCISED BY BOTH THE STATE AND DEFENSE AND TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO ENSURE THAT MR. HITCHCOCK WAS PRESENT DURING CRITICAL STAGES OF THE PROCEEDINGS.

The trial court denied relief on this claim. Vol. XII PCR. 1130. The court found that the claim related solely to the 1977 guilt phase and therefore was procedurally barred. Vol. XII PCR. 1130.

This is the first opportunity Mr. Hitchcock has had to raise this claim of ineffective assistance of appellate counsel in state post conviction proceedings. If it was inappropriate in the post conviction examination of the

propriety of the fourth sentencing trial, it is certainly now appropriate in this habeas petition.

The matter was apparent in the record of the 1977 trial, wherein Mr. Hitchcock's presence is not indicated at the bench conferences and the bench conferences were not transcribed. This was easily ascertainable from the trial transcript, which shows the state and defense exercised peremptory challenges outside the presence of Mr. Hitchcock and the court reporter. 1977 Vol. I R. 99, 100, 161, 188, 198, 204.[4]

Due process rights under the United States and Florida Constitutions mandate that a defendant be present at all "critical stages" of the proceedings. The use of peremptory challenges during the jury selection process is recognized as a "critical stage" in a criminal proceeding. The record in this case clearly establishes that Mr. Hitchcock was not present at the bench conferences where the State and Defense exercised peremptory challenges. Mr. Hitchcock never waived his appearance at the bench conference or accepted the jury panel on the record. Therefore, Mr. Hitchcock is entitled to a

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[4]At the evidentiary hearing on post conviction motion on appeal contemporaneously with this Petition, Mr. Hitchcock's 1977 trial counsel could not recall whether Mr. Hitchcock was at the bench when peremptory strikes were made and the jury that falsely convicted Mr. Hitchcock was selected. Vol. V. PCR. 128. The record, however, speaks for itself and accurately reflected what occurred in court at Mr. Hitchcock's trial. The record required competent appellate counsel to raise the matters in the direct appeal.

new trial due to this fundamental breach in his right to due process of law.

The trial court violated its responsibility to ensure a complete record by failing to direct the court reporter to record and transcribe the bench conferences where peremptory challenges were exercised by the state and defense. The trial court judge was responsible for ensuring a complete record in a death penalty case. In this case, the trial court failed to ensure a complete record because the bench conferences where the peremptory challenges were exercised by the State and Defense were not transcribed by the Court Reporter. Due to this fundamental error by the trial court, it was impossible for Mr. Hitchcock to ascertain whether peremptory challenges were exercised in a constitutionally required manner. For example, due to the absence of transcripts, it is impossible for Mr. Hitchcock to know whether any African American jurors were improperly challenged by the state. Because there was no transcription of this critical stage of the proceedings against Mr. Hitchcock, no meaningful appellate and post-conviction review of his conviction can take place. Mr. Hitchcock is entitled to a new trial.

Trial counsel was ineffective for failing to ensure Mr. Hitchcock's presence at a critical stage of the proceedings. One of the responsibilities of trial counsel was to ensure

that his client was present at critical stages of the proceedings. One of the legally recognized “critical stages” of a criminal trial is the use of peremptory challenges in the jury selection process. Trial counsel performed below the professional standard of care by failing to ensure his client’s presence at bench conferences where peremptory challenges were exercised by the State and Defense. 1977 Vol. I R. 99, 100, 161, 188, Vol. II 198, 204. The constitutional violation is obvious on the face of the record of the 1977 trial, and appellate counsel should have raised the claim in the direct appeal.

The failure of trial counsel to ensure Mr. Hitchcock’s presence during the jury selection process is such a fundamental error and denial of right to adequate counsel, that no showing of prejudice under the *Strickland* standard need be established to warrant relief. Because the ineffective performance of counsel deprived Mr. Hitchcock of a fundamental right to be present at all “critical stages” of the proceedings, prejudice is presumed and a new trial is mandated by the United States and Florida Constitutions.

It was well settled law at the time of Mr. Hitchcock’s trial in 1977 that a defendant had a right to be present during critical stages of his trial, including all stages of jury selection. In *State v. Melendez*, 244 So.2d 137 (Fla.

1971), this Court stated: “It is settled law that trial begins when the selection to the jury to try the case commences. The defendant has the right to be, and is required to be, present during certain phases of his trial, including all stages of the jury selection.” *Id*. at 137. The Court went on to say that the defendant may affirmatively waive this right on the record after inquiry by the court to his acquiescence *Id*. at 137, 138.

The absence of Mr. Hitchcock during the exercising of peremptory challenges is a “trial error” reflecting a structural error in the constitution of the trial mechanism of the type contemplated by the Court in *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246 (U.S. 1991). As such, the harmless error doctrine does not apply because prejudice is presumed.

As to the failure of the trial court to ensure a complete record, Florida Law is clear that the circuit court is required to certify the record on appeal in capital cases. Art. 5 Section 3(b)(1), Fla. Const.; 921.141(4), Fla. Stat. In *Dobbs v. Zant*, 506 U.S. 357 (1993), the Supreme Court acknowledged the integral nature of a complete transcription of the record to a death sentenced individual’s right to review. The failure of the trial court to record the entire proceedings, including bench conferences where peremptory

challenges were exercised and at other legal arguments throughout the trial, violated Mr. Hitchcock's right to a full review on appeal, his right to equal access to the courts that would review his conviction, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Appellate counsel failed to confront the gross deprivation of Mr. Hitchcock's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution. This Court should reverse.

GROUND III

APPELLATE COUNSEL WAS INEFFECTIVE FOR NOT RAISING ON APPEAL THAT THE TRIAL COURT ERRONEOUSLY FOUND THAT THE AGGRAVATOR OF "DURING THE COURSE OF A FELONY" APPLIED IN MR. HITCHCOCK'S CASE.

Mr. Hitchcock was denied his right to the effective assistance of appellate counsel in the appeal of the penalty phase trial under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution because appellate counsel failed to raise the trial court's erroneous finding that the homicide was committed during the course of a felony. This claim involves the ineffective assistance of appellate counsel which is distinguishable from the claim of ineffective assistance of counsel appealed in the contemporaneous appeal of the denial of Rule 3.851 relief.

The 3.851 motion alleged, in sum, that the sexual battery, as seen by the State's own evidence, was complete by the time that the homicide in question began. Accordingly, the aggravating factor that the homicide occurred during the course of a felony (see section 921.141(5)(d)) did not apply to Mr. Hitchcock's case. Appellate counsel in the direct appeal of the penalty trial was ineffective for failing to address this issue.

Mr. Hitchcock was charged and convicted of murder under Section 782.04, Florida Statutes. The indictment in this case states in relevant part: "James Ernest Hitchcock did, on the 31st day of July, 1976, in Orange County, Florida, in violation of Florida Statute 782.04, from a premeditated design to effect the death of CYNTHIA ANN DRIGGERS, a human being, kill and murder the
said CYNTHIA ANN DRIGGERS, in said State and County, by strangling her with his hands." 1996 Vol. XIV R. 630. At the 1977 guilt phase the jury was instructed on premeditated murder and felony murder but did not return a verdict as to which theory applied to Mr. Hitchcock or whether both applied.

At the 1996 resentencing, the State argued for the aggravator that the murder took place during the commission of a sexual battery or "rape" as the State continually referred to it. The trial court found this aggravator existed. 1996

Vol. XVI R. 1051. The jury, however, never returned a specific finding that the murder in the instant case occurred during the commission of a felony.

At the 1996 resentencing, Dr. Ruiz the medical examiner testified in response to State questioning on direct as follows:

> Q. And you indicated in your opinion prior to that incident she was virginal, hadn't been -
> A. Yes.
> Q. Can you determine how close to the time of her death that the hymenal tear was caused?
> A. Well, a few hours before, because it was a recent one.
> Q. It would have been from a few hours to just before, or did there have to be a few hours in between, in other words, is it from the time of death to a few hours back, that's the range or that it had to have happened a few hours before death?
> A. No a few hours before the death of the victim.

1996 Vol. VI R. 118.

On cross examination Dr. Ruiz testified as follows in response to trial counsel's questioning:

> Q. Let me get this straight for my own edification. You say the sexual battery would have occurred a few hours before the actual death of Miss Driggers, is that correct?
> A. Well, this was a recent injury. Could be one hour or maybe half an hour or maybe two hours.
> Q. Or maybe - - give me a time frame, all I'm asking.
> A. Well, a recent injury is something that occurs within hours, but not 20 hours or 25 hours or something like that.
> Q. I understand, Doctor, listen to my question, from when to when, what are the outsides?
> A. I wasn't there.
> Q. Give me your opinion?

A. I would say between one and one hour. I could say that this is as recent laceration that took place a few hours before.
Q. Few hours before?
A. Few hours, within one hour, two-hour, three hours.
Q. One, two, three hours, is that what you're saying?
A. Yes, more or less.

1996 Vol. VI R. 118-19.

Based on this testimony, there was a reasonable doubt whether the murder was committed **during the course of** a sexual battery. Reasonable appellate counsel would have raised the erroneous finding by the resentencing court that this aggravator existed beyond and to the exclusion of every reasonable doubt.[5]

Section 921.141(5)(d), Florida Statutes provides in relevant part:

> The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit any. . . . sexual battery . . . .

[5] The contemporaneous 3.851 appeal addresses any failure by trial counsel. Apart from requesting the jury instruction, defense counsel at the resentencing was ineffective for not arguing that the State had not proved beyond a reasonable doubt that the murder occurred during the commission of a sexual battery. Reasonable counsel would have argued that the State did not prove this aggravator beyond a reasonable doubt and would have discussed the testimony of both Dr. Ruiz and the recorded statement that any sex act was complete before the murder took place. Based on the overwhelming mitigation, absent the jury's finding of this aggravator it is probable that the jury would have recommended life.

Evidence at the 1996 resentencing did not prove this aggravator beyond and to the exclusion of every reasonable doubt. The State's own expert, Dr. Ruiz, had the sexual battery occurring an hour or more before the death. 1996 Vol VI 118-19. Even Mr. Hitchcock's false confession showed that the sexual relations were complete before the homicide was committed. There was a complete failure of evidence to justify finding this aggravating factor.

In sentencing Mr. Hitchcock to death the resentencing court's consideration of an aggravator not established by the evidence violated Mr. Hitchcock's right to be free from cruel and unusual punishment under the Eighth Amendment of the United States Constitution. It also denied him due process under the Fourteenth Amendment of the United States Constitution.

By not raising this issue appellate counsel deprived Mr. Hitchcock of effective assistance of counsel and due process of law protected by the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution. *Douglas v. California*, 372 U.S. 353 (1963), "recognized that the principles of *Griffin*, required a State that afford[s] a right of appeal to make that appeal more than a 'meaningless ritual' by supplying an indigent appellant in a criminal case with an attorney." *Evitts v. Lucey*, 469 U.S. 387, 393-94(1985);

citing *Douglas*, 372 U.S. at 358. Thus, a "first appeal of right is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." *Lucey* at 396. As the United States Supreme Court stated in *Lucey*: "[T]he promise of *Douglas* that a criminal defendant has the right to counsel on appeal - - like the promise of *Gideon* that a criminal defendant has the **ri**ght to counsel at trial would be a futile gesture unless it comprehended the right to the effective assistance of counsel." *Id*. at 397.

"Generally, an ineffective assistance of appellate counsel claim is analyzed under the two-prong test enunciated in *Strickland v. Washington*." *Grubbs v. Singletary*, 120 F.3d 1174, 1175 (11th Cir. 1997). "The test requires a defendant to show that (1) appellate counsel's performance was deficient; and (2) the deficient performance prejudiced the defense." *Id*. at 1176-77.

The resentencing court justified the sentence of death it imposed on Mr. Hitchcock because of a very serious aggravator that was not established beyond a reasonable doubt. Counsel was deficient for not appealing the resentencing court's finding of this aggravator. The prejudice of counsel's failure was also overwhelming – in a case in which two members of this Court found that death was not warranted, Mr.

Hitchcock was denied relief and his death sentence was upheld through the improper consideration of an aggravator the State did not prove beyond a reasonable doubt because of appellate counsel's failure to raise the issue. Absent this aggravator, death was not proportional. This Court should grant relief.

GROUND IV

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE *CALDWELL* ISSUE APPARENT ON THE RECORD IN THE DIRECT APPEAL OF THE FOURTH SENTENCING TRIAL.

Appellate counsel was ineffective for failing to raise on appeal the *Caldwell*[6] violation that occurred in Mr. Hitchcock's 1996 resentencing. This issue was both preserved at trial and apparent in the record on appeal. The jury instruction violated Mr. Hitchcock's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.[7]

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[6]*Caldwell v. Mississippi*, 472 U.S. 320, 86 L.Ed.2d 231, 105 S.Ct. 2633 (1985)

[7]In the contemporaneous appeal from the 3.851 proceeding on the fourth sentencing proceeding, Mr. Hitchcock also claims counsel was ineffective for failing to object and demand that the jury which sentenced Mr. Hitchcock to death understand the importance of their decision. The claim is raised here because the *Caldwell* issue was well preserved in the original record and appellate counsel should have raised the issue on direct appeal. To the extent trial counsel could possibly be faulted for failing to do any act to preserve any aspect of the *Caldwell* claim, the matter is also raised in the 3.851 appeal.

Resentencing counsel filed a "MOTION TO STRIKE PORTIONS OF 'FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES' RE: CALDWELL v. MISSISSIPPI." 1996 Vol XIV R. 723-725. Counsel argued that "[i]t is not constitutionally permissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the Defendant's death sentence rests elsewhere. *Caldwell v. Mississippi*, 472 U.S. 320, 86 L.Ed.2d 231, 105 S.Ct. 2633 (1985)."

Defense counsel's motion also quoted the Florida Standard Jury Instruction in Criminal Cases:

> Final decision as to what punishment shall be imposed rests solely with the judge of this court; however, the law requires that you, the jury render to the court an advisory sentence as to what punishment should be imposed on the defendant.
>
> It is now your duty to advise the court as to what punishment should be imposed upon the defendant . . . . As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge; however, it is your duty to follow the law that will now be given to you and to render to the court [an] advisory sentence. . . .

1996 Vol XIV R. 723-725.

Defense counsel also noted "Additionally, these instructions often use the words 'advisory' and 'recommendation' when dealing with the jury's sentencing decision. 1996 Vol. XIV R. 724. The trial court denied the

motion by written order dated September 5, 1996. 1996 Vol. XV R. 939.

Even though the standard jury instruction itself violates *Caldwell*, the trial court compounded the constitutional violation when he minimized the jury's role in the sentencing process beyond the standard instruction by instructing the jury that:

> As you have been told, **your final decision** as to what punishment shall be imposed **is the responsibility of me as the judge**. However, it is your duty and responsibility to follow the law that I will now give you to render to me an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify imposition of death penalty and what is sufficient mitigating circumstances exist to outweigh any aggravating circumstances you may find to exist.

1996 Vol VII R. 363.(Emphasis added).

This instruction not only minimized the jury's function, it was also confusing to the jury because it inaccurately tracks the standard jury instruction. Based on a plain reading of the jury instruction as given in this case, not only was the jury's decision advisory, it was also the judge's responsibility. This informed the jury that it not only had no responsibility for determining whether Mr. Hitchcock received the death sentence, it also did not have any responsibility for its own decision as to what sentence should be imposed.

The result of the court's misreading of the jury instructions was that not only was the jury's role in what sentence Mr. Hitchcock received diminished, the jurors' role in what their own recommendation was to be was diminished. Counsel should have objected at the time that the Court misinformed the jurors of their role. This failure was both deficient and prejudicial under *Strickland* and is raised in the contemporaneous 3.851 appeal. However, the constitutional error is fundamental and apparent on the face of the record and the deficiency is also apparent on the face of the record. Appellate counsel should have raised both the *Caldwell* claim as preserved by trial counsel in the motion and as fundamental error apparent on the record, as well as the ineffective assistance of trial counsel claim as apparent on the face of the record if the failure to object to the instruction as given can in any way be deemed to lessen the *Caldwell* claim.

In *Caldwell v. Mississippi*, 472 U.S. 320 (1985), the United States Supreme Court held that

> it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere".

Id. at 328-29. If the jury's responsibility for its role in determining a death sentence has been diminished, the

sentencing determination is unreliable and may bias the jury to make a decision for death on the mistaken belief that the courts have the ultimate authority on all matters including fact finding and will correct any mistake the jury may have made. This would deprive a defendant of his constitutional right to an individualized sentencing proceeding because the jury feels that any lack of consideration will be appropriately decided by another authority. *Id.* at 330-331. The jury might be unconvinced that death is the appropriate punishment but still recommend a death sentence to express disapproval for the defendant's acts or "send a message to the community," believing the courts can and will cure the harshness *Id.* at 331. "A defendant might thus be executed, although no sentencer had ever made a determination that death was the appropriate sentence." *Id.* at 331-32.

Moreover, a jury "confronted with the truly awesome responsibility of decreeing death for a fellow human," *McGautha v. California*, 412 U.S. 183, 208 (1971), might find a diminution of its role and responsibility for sentencing attractive. *Caldwell*, 472 U.S. at 332-33. As the *Caldwell* Court explained:

> In evaluating the prejudicial effect of the prosecutor's argument, we must also recognize that the argument offers jurors a view of their role which might frequently be highly attractive. A

> capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument on the issue of whether another should die, and they are asked to decide that issue on behalf of the community. Moreover, they are given only factual guidance as to how their judgment should be exercised, leaving them with substantial discretion. **Given such a situation, the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize its role**. Indeed, one could easily imagine that in a case in which the jury is divided on the proper sentence, the presence of appellate review [or judge sentencing] could effectively be used as an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless give in.

Id. at 332-33 (emphasis added).

In *Mann v. Dugger*, 844 F.2d 1466 (11th Cir. 1988), the Eleventh Circuit Court of Appeals held that the *Caldwell* principles apply to Florida juries. Noting that the Florida legislature intended that the sentencing jury play a significant role in the Florida death penalty sentencing scheme and the Florida Supreme Court's severe limitations on a trial judge's ability to override the jury's recommendation, the Eleventh Circuit held that the jury and trial judge are essentially dual sentencers. *Id.* *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975)(The jury's sentencing verdict may be overturned by the judge only if the facts are "so clear and convincing that virtually no reasonable person could

differ.”). Thus, comments that mislead or confuse the jury as to the nature of its sentencing responsibility under Florida law result in an invalid death sentence which violates the Eighth Amendment. *Id*. at 1458.

In a capital case, the jurors are placed "in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice . . . Given such a situation, **the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role**." *Caldwell*, 472 U.S. at 332-33 (emphasis added).

In the most recent 3.851 hearing on the fourth sentencing trial, the trial court found that this *Caldwell* claim was procedurally barred because the claim could have been raised on direct appeal from the fourth sentencing trial and in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *citing Card v. State,* 803 So. 2d 613(Fla. 2001). Vol. XII PCR. 1127. Denying review because the issue should have been raised in the direct appeal squarely places the forum for relief in this habeas proceeding, where the failure of appellate counsel may be addressed.

Regarding the *Apprendi* argument, nothing in *Apprendi* justified the lower court's denial of the claim. Indeed, Apprendi recognizes the importance of a jury finding any fact that subjects an individual to an enhanced penalty. *See Apprendi*. The sentencing court's erroneous instruction assured that Mr. Hitchcock would be deprived of this important right. *Card*, as cited by the lower court, also provided no justification for the lower court's denial. In *Card*, this Court found that the standard jury instructions that refer to the jury as advisory and that refer to the jury's verdict as a recommendation did not violate *Caldwell v. Mississippi.* Beyond any constitutional infirmity in Florida's standard instruction, the point of this claim was that the instruction that the sentencing court gave was far worse than even the standard jury instruction. If the standard instruction meets constitutional muster, it is at the outer limit and the trial court's error clearly crossed the line.

To the extent that this Court finds that the sentencing court's jury instruction was preserved, appellate counsel was ineffective. Alternatively, if the issue is deemed unpreserved and unworthy of habeas relief, resentencing counsel was ineffective and the parallel claim raised in the contemporaneous appeal from the 3.851 should be granted.

Florida's death penalty scheme, at least so far as it survives *Ring v. Arizona*, does so because at least in theory, Florida juries determine the applicability of the death penalty. The jury instruction given in Mr. Hitchcock's case diminished the jury's role far beyond that of even the standard jury instruction and led to Mr. Hitchcock being sentenced by a jury which was told its responsibility was assumed by the sentencing court. Accordingly, this Court should grant relief and order a new sentencing.

GROUND V

THE FLORIDA DEATH SENTENCING STATUTE AS APPLIED IS UNCONSTITUTIONAL UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE IN THE DIRECT APPEAL.

Mr. Hitchcock is cognizant of this Court's decisions denying *Ring* relief. *See Bottoson v. Moore,* 833 So. 2d 693 (Fla.), *cert. denied*, 537 U.S. 1070 (2002), and *King v. Moore,* 831 So. 2d 143 (Fla. 2002). He is also cognizant that despite the United States Supreme Court precedent that supported the United States Supreme Court's decision in *Hitchcock v. Dugger*, a number of individuals were executed in Florida before the Supreme Court issued *Hitchcock v. Dugger*. Florida capital defendants were, therefore, executed in violation of constitutional protections only because their warrants issued before the United States Supreme Court corrected erroneous interpretations of the Constitution and the law. Accordingly, Mr. Hitchcock raises this issue to preserve it for further review.

Florida's death penalty scheme, under which Mr. Hitchcock was sentenced, is unconstitutional under the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. As *Apprendi v. New Jersey*, 120 S.Ct 2348, 2355 (2000), made clear any circumstance that subjects an individual to an

enhanced penalty must be charged in the indictment, submitted to the jury, and proven beyond a reasonable doubt. This did not occur in Mr. Hitchcock's case. Appellate counsel should have raised this issue on direct appeal from the sentencing trial.

In *Apprendi* the Court held that "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.* *Ring* extended *Apprendi*, thus, because the aggravators in Mr. Hitchcock's case were not each individually submitted to the jury for an individual verdict of whether the State had proved each one beyond a reasonable doubt, Mr. Hitchcock's death sentence was unconstitutional. In *Ring v. Arizona*, 536 U.S. 584 (2002), the Court held that "capital defendants, no less than noncapital defendants, . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Ring* at 587. The jury instructions in Mr. Hitchcock's case, in light of *Ring* also violated the principles of *Caldwell v. Mississippi*, 472 U.S. 320 (1985), in that they diminished the juror's true role in Mr. Hitchcock's death sentence.

Mr. Hitchcock also raised this issue in the 3.851 proceeding currently under review in this Court. In denying the 3.851 claim the lower court failed to consider the claim as amended. The court also erroneously stated that the United States Supreme Court rejected the argument that *Apprendi* requires aggravating circumstances to be charged in the indictment, submitted to a jury and proved beyond a reasonable doubt, and cited this Court's opinion in *Bottoson v. Moore.* Mr. Hitchcock respectfully submits that *Apprendi* holds directly to the contrary, and despite this Court's rulings, justifies relief in his case.

Accordingly, because relief is warranted under *Apprendi*, and to preserve this issue for federal review, Mr. Hitchcock raises this issue and asks this Court to grant relief from the unconstitutional sentencing scheme.

GROUND VI

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

In accordance with Florida Rules of Criminal Procedure 3.811 and 3.812, a prisoner cannot be executed if "the person lacks the mental capacity to understand the fact of the impending death and the reason for it." This rule was enacted

in response to *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595 (1986).

Mr. Hitchcock acknowledges that under Florida law, a claim of incompetency to be executed cannot be asserted until a death warrant has been issued. Further, Mr. Hitchcock acknowledges that before a judicial review may be held in Florida, the prisoner must first submit his claim in accordance with Florida Statutes. The only time a prisoner can legally raise the issue of his sanity to be executed is after the Governor issues a death warrant. Until the death warrant is signed, the issue is not ripe. This is established under Florida law pursuant to Section 922.07, Florida Statutes (1985) and *Martin v. Wainwright*, 497 So.2d 872 (1986)(If Martin's counsel wish to pursue this claim, we direct them to initiate the sanity proceedings set out in Section 922.07, *Florida Statutes* (1985)).

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

CONCLUSION

James Hitchcock remains on death row for a crime he did not commit and with a sentence he did not deserve. This Court should grant all relief requested in this petition for the reasons stated above. Moreover, this Court should grant any other relief that allows this Court to do justice.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Habeas Corpus has been furnished by United States mail to all counsel of record on this 24th day of June 2004.

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Post Office Box 221
Raiford, Florida 32083

CERTIFICATE OF COMPLIANCE

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

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