IN THE SUPREME COURT OF FLORIDA

NO. SC04-1366

ASKARI ABDULLAH MUHAMMAD,
(F/K/A THOMAS KNIGHT),

Petitioner,

v.

JAMES V. CROSBY,

Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

This is Askari Abdullah Muhammad's first habeas corpus petition in this Court from his 1996 re-sentencing. Article 1, Section 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is being filed to address substantial claims of error, under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and corresponding provisions of the Florida Constitution, that demonstrate Mr. Muhammad was deprived of his right to a fair, reliable, and individualized sentencing proceeding and that the proceedings which resulted in his death sentence violated fundamental constitutional imperatives.

Citations shall be as follows:

> The record on appeal from Mr. Muhammad's original trial is referred to as "OT." followed by the appropriate page number.
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> The record on appeal from the re-sentencing proceedings is referred to as “R.” followed by page number.
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> Mr. Muhammad's record on appeal from the circuit court’s denial of his motion to vacate is referred to as "PCR." followed by the appropriate page number.
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> All other references will be self-explanatory or otherwise explained herein.

INTRODUCTION

This petition presents significant errors which occurred at Mr. Muhammad's re-sentencing proceeding but that were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel. For example, appellate counsel failed to raise the issue that the State failed to follow the mandate of the Eleventh Circuit Court of Appeals requiring that re-sentencing occur “within a reasonable amount of time”, failed to ensure that the record on appeal was complete and failed to raise the issue of the impact of pretrial publicity on jurors and the failure to conduct individual voir dire which amounted to fundamental error.

Appellate counsel's failure to present the meritorious issues discussed in this petition demonstrates that his representation of Mr. Muhammad involved "serious and substantial" deficiencies. Fitzgerald v. Wainwright, 490 So. 2d 938, 940 (Fla. 1986). The issues which appellate counsel neglected to raise demonstrate that his performance was deficient and the deficiencies prejudiced Mr. Muhammad. "[E]xtant legal principle[s] . . . provided a clear basis for . . . compelling appellate argument[s]," which should have been raised in Mr. Muhammad's appeal. Fitzpatrick, 490 So. 2d

at 940.

Neglecting to raise such issues, as those discussed herein, "is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome." Wilson v. Wainwright, 474 So. 2d 1162, 1164 (Fla. 1985). Had counsel presented these issues, Mr. Muhammad would have received a new a new penalty phase. Individually and "cumulatively," Barclay v. Wainwright, 444 So. 2d 956, 969 (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). Furthermore, fundamental error occurred that mandates relief. As this petition demonstrates, Mr. Muhammad is entitled to habeas relief.

REQUEST FOR ORAL ARGUMENT

Due to the seriousness of the issues involved, Mr. Muhammad respectfully requests oral argument.

PROCEDURAL HISTORY[1]

The Circuit Court in and for the Eleventh Judicial Circuit, Dade County Florida entered the judgments and sentences under consideration. On August 28, 1974, the grand

[1]The procedural history cited herein is essentially the same as that recited in Mr. Muhammad's Initial Brief, Case No.: SC03-631.

jury indicted Mr. Muhammad for the first degree murders of Lillian and Sidney Gans (OT. 3700-3702). Mr. Muhammad's trial was held April 2, 1975. He entered pleas of Not Guilty and Not Guilty by Reason of Insanity (OT. 3761-3162).

On April 19, 1975, the jury returned a verdict of guilty on the charges of first degree murder (OT. 3799-3800) and the jury recommended a sentence of death. The trial court sentenced Mr. Muhammad accordingly on April 21, 1975 (O.T. 3803-3806).

On direct appeal, this Court affirmed Mr. Muhammad's convictions and sentences. Knight v. State, 338 So. 2d 201 (Fla. 1976).

On January 22, 1980, Mr. Muhammad filed a Petition for Writ of Habeas Corpus which was dismissed by the trial court. This Court rejected Mr. Muhammad's habeas claims. Knight v. State, 394 So. 2d 997 (Fla. 1981).[2]

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[2]In a separate case, Mr. Muhammad was convicted and sentenced to death for murder of a prison guard. On direct appeal, this Court affirmed. Muhammad v. State, 494 So. 2d 969 (Fla. 1986). Mr. Muhammad filed a Motion for Postconviction Relief which the trial court summarily denied. On appeal from the summary denial, this Court reversed and remanded the matter to the trial court for an evidentiary hearing regarding Mr. Muhammad's Brady v. Maryland, 373 U.S. 83 (1963) claim. Muhammad v. State, 603 So. 2d 488 (Fla. 1992). In May, 2001, the Bradford County circuit court granted Mr. Muhammad relief in the form of new penalty phase. The State and Mr. Muhammad both filed appeals. This Court reversed the relief granted to Mr. Muhammad by the trial court

On January 29, 1981, the Governor signed a death warrant in the instant case. Mr. Muhammad filed a Petition for Writ of Habeas Corpus and Stay of Execution in the United States District Court, Southern District of Florida, Miami Division. The district court granted Mr. Muhammad's motion, retained jurisdiction and ordered Mr. Muhammad to exhaust his remaining state law claims. Mr. Muhammad filed a Post Conviction Motion pursuant to Fla. Rule Crim. P. 3.850. The trial court summarily denied the motion and this Court affirmed the denial. Muhammad v. State, 426 So. 2d 533 (Fla. 1982).

The federal proceedings resumed in District Court where Mr. Muhammad's petition was dismissed. The Eleventh Circuit Court of Appeals however, reversed the district court's order and remanded Mr. Muhammad's case for a re-sentencing due to error based upon Hitchcock v. Dugger, 863 F.2d 705 (11th Cir. 1988).

Mr. Muhammad's re-sentencing began January 23, 1996. On February 8, 1996, the re-sentencing jury recommended sentences of death by a vote of 9-3 (R. 3935-3935) which the trial court imposed on February 20, 1996 (R. 5-43).

This Court denied Mr. Muhammad's direct appeal from the

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and denied rehearing. A petition for Writ of Certiorari was filed in the United States Supreme Court and denied.

re-sentencing. Knight v. State,746 So.2d 43 (1998).[3]

A timely Petition for a Writ of Certiorari to the United States Supreme Court was filed and subsequently denied on November 8, 1999. Knight v. Florida, 528 U.S. 990, 120 S. Ct. 459 (1999).

On November 7, 2000, Mr. Muhammad filed his initial post-conviction motion relative to his re-sentencing and Mr.

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[3]The following issues were raised: 1) trial court erred in allowing Det. Smith's hearsay testimony(procedurally barred); 2) error to allow Det. Smith to remain in courtroom throughout proceedings (no abuse of discretion, exception to the rule of sequestration appropriate under facts of case); 3) prosecutor's reliance on future dangerousness (procedurally barred, did not rise to fundamental error); 4) trial court failure to instruct jury that life sentences would run consecutively(no abuse of discretion); 5) trial court error in instructing jury that Mr. Muhammad's absence was caused by his misconduct (no abuse of discretion); 6) the trial court erred in allowing Dr. Miller's testimony (sub-claims regarding confidentiality and Fifth and Sixth Amendment issues procedurally barred, defense opened door to remainder); 7) error in denying defense peremptory challenge to juror Rivero-Saiz (procedurally barred); 8) error in excluding jurors Weldon, Zaribaf, and Cunningham (no abuse of discretion); 9) improper prosecutorial argument; 10) trial court failure to instruct the jury on merged aggravators; 11)error to instruct on prior violent felony aggravator; 12) error to instruct on the cold, calculated, premeditated aggravator; 13) error in instructing on heinous, atrocious, or cruel (without merit); 14) error in failing to instruct on defense requested instruction on statutory mental mitigators (standard instructions repeatedly upheld); 15) error in sentencing Mr. Muhammad to death (sentencing judge considered relevant aggravators and mitigators, harmless error in finding HAC; 16) Florida death penalty statute is unconstitutional,(consistently rejected by the Court); and 17) executing Mr. Muhammad after long incarceration on death row amounts to cruel and unusual punishment lacks merit).

Muhammad filed his Amended Post Conviction Motion on March 23, 2002 (See PCR 170-324). On June 28, 2002, he filed a Notice of Supplemental Authority in light of Ring v. Arizona. On December 13, 2002, the lower court held a hearing pursuant to Huff v. State, 622 So. 2d 982 (Fla. 1993). On January 16, 2003, the court entered an order summarily denying Mr. Muhammad's Amended Motion To Vacate (PCR 435-474). On February 13, 2003, Mr. Muhammad filed his Motion for Rehearing which was denied on February 25, 2003. Mr. Muhammad timely filed his Notice of Appeal and Initial Brief and this Petition for Writ of Habeas Corpus.

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla. R. App. P. 9.100(a). See Art. 1, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Fla. R. App. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents constitutional issues which directly concern the constitutionality of Mr. Muhammad's sentence of death.

Jurisdiction in this action lies in the Court, see, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Muhammad's direct appeal. See Wilson, 474 So. 2d at

1163; Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); cf. Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Muhammad to raise the claims presented herein. See, e.g., Way v. Dugger, 568 So. 2d 1263 (Fla. 1990); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); Wilson v. Wainwright, 474 So. 2d 1162, 1163 (Fla. 1985).

This Court has the inherent power to do justice. The ends of justice call on the Court to grant the relief sought in this case as the Court has done in similar cases in the past. This petition pleads claims involving fundamental constitutional error See Dallas v. Wainwright, 175 So. 2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So. 2d 362 (Fla. 1984)and ineffective assistance of appellate counsel. The Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those pled, is warranted in this action. As this petition and the claims within show, habeas corpus relief would be more than proper.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Muhammad asserts that his sentence of death was obtained and then affirmed, by this Court, in violation of his rights guaranteed

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

CLAIM I

THE STATE'S EIGHT YEAR DELAY IN RE-SENTENCING MR. MUHAMMAD AND SEEKING THE DEATH PENALTY VIOLATED MR. MUHAMMAD'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS. THE STATE'S DELAY AND VIOLATION OF MR. MUHAMMAD'S DUE PROCESS RIGHTS DIS-ENTITLED THE STATE FROM SEEKING A SENTENCE OF DEATH AND CONSTITUTES FUNDAMENTAL ERROR. ADDITIONALLY, APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO SPECIFICALLY ADDRESS THE STATE'S FAILURE TO FOLLOW THE MANDATE OF THE ELEVENTH CIRCUIT COURT OF APPEALS REQUIRING THAT RE-SENTENCING OCCUR WITHIN "A REASONABLE AMOUNT OF TIME".

This Claim is presented in this Petition alternatively to the claim presented in Mr. Muhammad's Initial Brief on appeal in this case. This is because either trial counsel was ineffective for failing to raise it (therefore, appropriate claim in post conviction motion and appeal thereof), or appellate counsel was ineffective for failing to raise the issue as raised herein (therefore, claim appropriate for habeas petition), either way there was a breakdown in the process and Mr. Muhammad was denied due process and effective assistance of counsel.

In denying an evidentiary hearing on this claim in Mr. Muhammad's post conviction motion, the lower court found that

the claim was procedurally barred because of the issue was raised on direct appeal in Knight v. State, 746 So. 2d 437 (Fla. 1998). (See PC-R. 439). The issue raised on direct appeal however is a distinct issue, *i.e.,* that it was cruel and unusual punishment to execute an individual who had simply been on death row for 20 years. See Knight v. State, 746 So. 2d at 437 ("Knight claims that to execute him after he has already endured more than two decades on death row is unconstitutionally cruel and unusual punishment. He also argues that Florida has forfeited its right to execute Knight under binding norms of international law.")(emphasis added). Here, Mr. Muhammad asserts that the State violated Mr. Muhammad's constitutional rights to due process and the mandate of the Eleventh Circuit Court of Appeals which ordered:

> We therefore remand this case to the district court with instructions to enter an order granting the application for writ of habeas corpus, unless the State within a reasonable period of time either resentences Muhammad in a proceeding that comports with Lockett or vacates the death sentences and imposes a lesser sentence consistent with law.

Knight v. Dugger, 863 F.2d 705, 710 (11th Cir. 1989).

Mr. Muhammad's argument is that the State's delay in prosecuting Mr. Muhammad caused eight years to pass before Mr.

Muhammad's re-sentencing proceeding was conducted. The State's delay violated the federal court's mandate, Mr. Muhammad's due process rights - amounting to fundamental error, and Mr. Muhammad suffered immeasurable prejudice due to the State's delay.

This Court has recognized that a defendant's due process rights may be impacted by delay. Jones v. State, 740 So. 2d 520, 524 (Fla. 1999); see also Peede v. State, 748 So. 2d 253 (Fla. 1999)(recognizing the need for timely proceedings and stressing that "the State is the party especially charged with the burden to see that [capital] cases are disposed of in a timely manner. . . "); Scott v. State, 581 So. 2d 887 (Fla. 1991); Bogue v. Fennelly, 705 So. 2d 575 (Fla. 4th DCA 1997)(holding that the defendant is entitled to raise whether the delay in sentencing violated his constitutional rights and/or due process of law).

In Jones, this Court addressed a twelve year delay in holding a competency hearing. 740 So. 2d 520 (Fla. 1999). The Court held: "[the defendant's] due process rights were impacted by the twelve year delay in holding the competency measured from this Court's remand order for [the competency] hearing." Id. at 523. The Court noted that: 1) the defendant was entitled to a timely competency proceeding; 2) the State was unable to explain the delay; and 3) the defendant was prejudiced by the delay. Id. at 524. The Court vacated Mr. Jones's conviction and sentence. Id. at 525. Similarly, Mr.

Muhammad was entitled to a timely re-sentencing proceeding.

In Scott, this Court characterized delay in a criminal proceeding as "a due process claim under the fourteenth amendment". 581 So. 2d 887, 891 (1991). In that case, the State caused a seven year and seven month delay in prosecuting the defendant. Likewise, in waiting eight years to hold a re-sentencing proceeding in Mr. Muhammad's case, the State's actions unduly prejudiced Mr. Muhammad and violate due process.

Because of the delay, that Dr. Corwin's notes were destroyed (R. 2680). Notes that would have been useful in assessing proper punishment. This action prevented Mr. Muhammad's counsel from effectively challenging the State's case for death. These circumstances were not due to the actions of Mr. Muhammad. (See e.g., defense opposition to motion to continue 11/1/91 hearing (R. 1675). Additionally, in sentencing Mr. Muhammad to death, the re-sentencing court relied upon the fact that Mr. Muhammad's experts had not seen or evaluated Mr. Muhammad on or near the date of the offense (July 17, 1974) and thus their opinions were rejected. The trial court stated:

> **The court begins its analysis of the defendant's experts' testimony by acknowledging the enormous challenge presented to a mental health professional when he or she is retained to evaluate a person's state of mind on a particular, distant, day in his life.** In the present case Dr. Wells evaluated the defendant in 1971, three (3) years before the murders,

and was asked to express his opinion about the defendant's state of mind on July 17, 1974 during a court proceeding that took place in 1996. Dr. Fisher saw the defendant for the first time in 1979, five (5) years after the murders, and then again in 1989. Dr. McClaine examined the defendant in October of 1991, seventeen (17) years after the murders. Dr. Carbonell evaluated the defendant in 1989, fifteen (15) years after the murders. Dr. Toomer evaluated the defendant in October 1994, twenty (20) years after the murders.

* * *

. . . **the court notes not only the passage of time between the day of the crimes and the day of the evaluations, but also the effect that time must have had on the defendant's state of mind.** When Dr. Fisher first saw the defendant in 1979 the defendant had been in the relative isolation of death row for five (5) years. It is difficult to imagine what living under such circumstances must be like. But it would be unreasonable to believe that such austere conditions as exist there would not have a significant impact on a man's mind. By the time Dr. Fisher and Dr. Carbonell saw him in 1989 the defendant had been in what has been referred to as "Q-Wing", i.e. punitive solitary confinement, for nine (9) years. By the time Dr. McClaine examined him, he had been in "Q-Wing" for eleven (11) years, and by the time Dr. Toomer saw him he had been there for sixteen (16) years. The impact on the human mind that nine (9) to sixteen (16) years in solitary confinement, in a is (6) by nine (8) foot cell, without any companionship but for the occasional check by a corrections officer, must be devastating. **The court considers the passage of time in assessing the reliability of the opinions of the doctors who examined the defendant.**

(R. 28-31)(emphasis added). The forgoing ruling by the re-sentencing

court demonstrates prejudice.

Also demonstrating the prejudice to Mr. Muhammad, is the fact that the State used the passage of time against Mr. Muhammad to its advantage during cross examination of the defense experts and during its case in chief as well in argument (See e.g., R. 2573; 2780; 2902; 3063; 3071; 3242; 3814; 3824; 3839). Additionally the sentencing order states:

> . . . Arthur Wells [defense expert], who I can only describe as the crown jewel of the presentation.
>
> He has a skill, an ability that mere mortals don't have. He can meet with a person in group therapy for 60 minutes in 1971 and predict exactly how he is going to be feeling on Wednesday in the afternoon of July 17th 1974.
>
> He has missed his calling. He really has a good opportunity to answer one of those phone lines on the Psychic Friends Network. He can predict the future, and I'm sure there are a lot of people who are willing to pay for that skill. But that is not reality.
>
> * * *
>
> He made a guess and his guess is when he testified here today, that he seen patients in that same hospital for 26 years and that he remembers one guy that he saw for an hour 24 years ago.

(R. 3846). The prejudice is manifest.

The delay also prevented Mr. Muhammad from a reliable competency determination. The delay in Mr. Muhammad's case provided the State with a tactical advantage and violated Mr. Muhammad's due

process rights. See Scott, 581 So. 2d at 893.

The State violated Mr. Muhammad's due process rights in delaying his re-sentencing for eight years. The State did not "within a reasonable amount of time" re-sentence Mr. Muhammad as required by the Eleventh Circuit Court of Appeals. This claim was apparent from the record and appellate counsel was deficient for failing to raise it in this court. As a result, appellate counsel rendered ineffective assistance of counsel, depriving Mr. Muhammad of his sixth amendment rights. Strickland v. Washington, 466 U.S. 668 (1984). The State's failure to comport with the Eleventh Circuit mandate violated Mr. Muhammad's right to due process resulting in fundamental error. Habeas Relief is warranted.

CLAIM II

MR. MUHAMMAD'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BECAUSE NO RELIABLE TRANSCRIPT OF HIS CAPITAL TRIAL EXISTS, RELIABLE APPELLATE REVIEW WAS AND IS IMPOSSIBLE, THERE IS NO WAY TO ENSURE THAT WHICH OCCURRED IN THE TRIAL COURT WAS OR CAN BE REVIEWED ON APPEAL DUE TO OMISSIONS IN THE RECORD AND THE SENTENCE MUST BE VACATED. APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO ENSURE THE RECORD WAS COMPLETE.

The due process constitutional right to receive trial transcripts for use at the appellate level was acknowledged by the Supreme Court in Griffin v. Illinois, 351 U.S. 212 (1956). A death sentence cannot stand unless there has been complete, meaningful appellate review. Parker v. Dugger, 498 U.S. 398

(1991). An accurate trial transcript is crucial for adequate appellate review. The Sixth Amendment also mandates a complete transcript. In Hardy v. United States, 375 U.S. 277, 288 (1964), Justice Goldberg, in his concurring opinion, wrote that since the function of appellate counsel is to be an effective advocate for the client, counsel must be equipped with "the most basic and fundamental tool of his profession . . . the complete trial transcript . . . anything short of a complete transcript is incompatible with effective appellate advocacy."

Complete and effective appellate advocacy requires a complete trial record. A trial record should not have missing portions. In Mr. Muhammad's case, the re-sentencing record is missing pages 1200-1224, page 1249 pertaining to voir dire and pretrial publicity, and does not include many discussions at sidebar. With the record provided, it is impossible to know what actually occurred. This is especially significant given the issues raised below in Claim III in this petition.

Entsminger v. Iowa, 386 U.S. 748 (1967), held that appellants are entitled to a complete and accurate record. Lower courts rely upon Entsminger. The concurring opinion in Commonwealth v. Bricker, 487 A.2d 346 (Pa. 1985), citing Entsminger, condemned the trial court's failure to record and

transcribe the sidebar conferences so that appellate review could obtain an accurate picture of the trial proceedings. In Commonwealth v. Shields, 383 A.2d 844 (Pa. 1978), the Supreme Court of Pennsylvania reversed a second-degree murder and statutory rape conviction solely because a tape of the prosecutor's closing argument became lost in the mail. "[I]n order to assure that a defendant's right to appeal will not be an empty, illusory right . . . a full transcript must be furnished." The court went on to say that meaningful appellate review is otherwise impossible.

Entsminger was cited in Evitts v. Lucey, 105 S. Ct. 830 (1985), in which the Supreme Court reiterated that effective appellate review begins with giving an appellant an advocate, and the tools necessary to do an effective job.

Finally, in Gardner v. Florida, 430 U.S. 349 (1977), where the defendant was not allowed to view a confidential presentence report, the Supreme Court held that even if it was proper to withhold the report at trial, it had to be part of the record for appeal. The record must disclose considerations which motivated the imposition of the death sentence. "Without full disclosure of the basis for the death sentence, the Florida capital sentencing procedure would be subject to defects under Furman v. Georgia, 408 U.S. at 361."

The issue is whether Mr. Muhammad should be made to suffer the ultimate sentence of death where he did not have the benefit of a constitutionally guaranteed review of a bona fide record of the trial proceedings. Fla. Const. art. V, sec. 3(b)(1). See Delap v. State, 350 So. 2d 462, 463 (Fla. 1977); Dobbs v. Zant, 113 S. Ct. 835 (1993).

This Court's death sentence review process involves at least two functions:

> First, we determine if the jury and judge acted with procedural rectitude in applying section 921.141 and our case law. This type of review is illustrated in Elledge v. State, 346 So. 2d 998 (Fla. 1977), where we remanded for resentencing because the procedure was flawed --- in that case a nonstatutory aggravating circumstance was considered.
>
> The second aspect of our review process is to ensure relative proportionality among death sentences which have been approved statewide. After we have concluded that the judge and the jury have acted with procedural regularity, we compare the case under review with all past cases to determine whether or not the punishment is too great. In those cases where we find death to be comparatively inappropriate, we have reduced the sentence to life imprisonment.

Brown v. Wainwright, 392 So. 2d 1327, 1331 (Fla. 1981). The Court has emphasized that "[t]o satisfactorily perform our responsibility we must be able to discern from the record that the trial judge fulfilled that responsibility" of acting with

procedural rectitude. Lucas v. State, 417 So. 2d 250 (Fla. 1982).

Confidence in the record is undermined. Mr. Muhammad was denied due process, a reliable appellate process, effective assistance of counsel on appeal, and a meaningful and trustworthy review of his sentence of death. Mr. Muhammad's statutory and constitutional rights to review his sentence by the highest court in the State upon a complete and accurate record, in violation of the Sixth, Eighth and Fourteenth Amendments.

The circuit court is required to certify the record on appeal in capital cases, Fla. Stat. Ann. sec. 921.141(4), Fla. Const. art. 5, sec. 3(b)(1). 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). Appellate counsel rendered ineffective assistance in failing to insure that a proper record was provided to the court. Habeas relief is proper.

CLAIM III

FUNDAMENTAL ERROR OCCURRED IN MR. MUHAMMAD'S RE-SENTENCING PROCEEDINGS BECAUSE THE JURY VENIRE AND JURY PANELS WERE TAINTED BY PRE-TRIAL PUBLICITY AND INADMISSIBLE EVIDENCE WHERE SOME OF THESE PANEL MEMBERS SERVED ON THE JURY. AS A RESULT, MR. MUHAMMAD WAS DENIED HIS SIXTH AMENDMENT RIGHT TO AN IMPARTIAL JURY AND FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS. ADDITIONALLY, APPELLATE

COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO RAISE THIS ISSUE.

Extensive publicity containing inadmissible factors existed at the time of Mr. Muhammad's re-sentencing to which jurors were exposed. Fundamental error occurred because Mr. Muhammad was denied his right to an impartial jury and due process as a result. In Cummings v. Dugger, 862 F.2d 1504 (11th Cir. 1989), the Eleventh Circuit wrote:

> The discretion afforded the trial judge to conduct voir dire as he sees fit must be bounded by protection of the defendant's constitutional rights, especially in a situation of extensive pretrial publicity.

Cummings v. Dugger, 862 F. 2d at 1507-1508.

The procedure employed in Mr. Muhammad's case was to ask the panel whether they had heard anything about the case. Those who answered affirmatively were then questioned about that information in a group of those who had heard something. Some of the information that jurors heard includes the following:

prospective juror Suarez read an article in the paper the night before that said Mr. Muhammad had been on death row for 22 years and that he had been coerced into giving a confession, that he had been shackled and chained and stated that she believed he was guilty, crazy, and would sentence him to death (R.393-400). Juror Collier was exposed to this

information and served on Mr. Muhammad's jury. Juror Collier also heard prospective juror Petersen who stated he viewed television coverage and stated his opinion was "burn him today" (R. 434-438). One prospective juror (Orlandi) saw something on the news the night before that showed Mr. Muhammad in the courtroom acting crazy and heard the judge say that Mr. Muhammad was not crazy and was competent (R. 496-5006). Another prospective juror (Chalfant) stated he remembered the case from 1974 and heard Mr. Muhammad screaming on the news the night before (R. 527-531). Juror Coachman heard these comments and ultimately served on Mr. Muhammad's jury.

Another prospective juror stated the following in the presence of jurors who served:

> [BY THE COURT:] Q. Do you have any religious, moral or conscientious scruples against the imposition fo the death penalty in a proper case?
>
> MR. PAINTER: Well, I can't understand why you trying this guy the second time. I thought he was already guilty.
>
> THE COURT: He is guilty, Mr. Painter. What we are here for is to determine what the sentence is going to be.
>
> MR. PAINTER: I thought it was already the death sentence. Why are we fooling around?
>
> THE COURT: No. We are not fooling around. There is no sentence right now. We are trying to determine what the sentence should be. That is why we are here. Do you understand that?

> MR. PAINTER: I thought premeditated murder, he was already a capital punishment supposed to be electrocuted.

(R. 639-640).

In that instance, re-sentencing counsel requested that the panel be stricken as it was tainted due to prospective Juror Painter's statements:

> First, I would like to move to strike the panel because of the outbursts of this last gentleman, white haired Hollywood hair, whatever his name is, had to get up and make a big speech in front of everybody. Fry him–
>
> THE COURT: Which one are you talking about
>
> MRS. WEISSENBORN: Mr. Painter
>
> MR. WEISSENBORN: Mr. Painter. This is why I asked for the individual voir dire, They don't need to hear all of that. He is entitled to all of his views[....]. We did not need this guy jumping up and quiet as bad – and if we had individual voir dire, this would not have happened.
>
> THE COURT: If we had individual voir dire, we would still be on number four and would be looking for a trial date I the early summer. It is just impossible what you are suggesting.

(R.690-691)

The lower court denied the request (R. 690). This was error. Bolin v. State, 736 So 2d 1160 (Fla. 1999)(reversing Bolin's conviction because trial court denied request for individual voir dire of prospective jurors who had been exposed to prejudicial pretrial publicity and who eventually

served on Bolin's jury); Boggs v. State, 667 So. 2d 765 (Fla. 1996); Reily v. State, 557 So. 2d. 1365 (Fla. 1990)(error to deny challenge to juror where pretrial publicity so prejudicial that even where exposed juror has no preformed opinion, juror should not serve).

Kessler v. State, 752 So. 2d 545 (Fla. 1999)(reversing conviction because trial court "failed to allow adequate screening of prospective jurors concerning pretrial publicity").

Regarding a request for individual sequestered voir dire, defense counsel stated in a "Supplemental and In Limine Omnibus Motion in [sic] Behalf of Defendant and Incorporated Memorandum of Law:

> the undersigned counsel object to any voir dire procedure to be followed by the Court, or to any refusal of the Court to grant a defense request by [sic] individual sequestered voir diring of the prospective jurors.

(R. 1229).

Appellate counsel rendered ineffective assistance of counsel for failing to raise the preserved issue. Even if the issue is deemed to not have been properly preserved, fundamental error occurred as discussed above. Consequently, Mr. Muhammad was denied his right to an impartial sentencing jury in violation of the Sixth, Eighth, and Fourteenth

Amendments to the United States Constitution and Article I, Sect. 2, 9, and 22 of the Florida Constitution. Either way, habeas relief is warranted.

CLAIM IV

MR. MUHAMMAD IS DENIED HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, BECAUSE EXECUTION BY ELECTROCUTION AND LETHAL INJECTION IS CRUEL AND/OR UNUSUAL PUNISHMENT.

The practice of executing Florida's condemned by means of judicial electrocution unnecessarily exposes Mr. Muhammad to substantial risks of suffering and degradation through physical violence, disfigurement, and torment. These risks inhere in Florida's practice of judicial electrocution and have been repeatedly documented. Provenzano v. Moore, 744 So. 2d 413 (1999)(Shaw, J., dissenting, joined by Anstead, J.).[4]

The State of Florida has purportedly extended a “choice" to Mr. Muhammad, between dying in the electric chair or lethal injection. This choice is no choice at all and the legislation enacting the "choice" is unconstitutional. Should Mr. Muhammad be forced to make such a choice, he will be subjected to additional psychological torture. The waiver

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[4] See Buenoano v. State, 565 So. 2d 309 (Fla. 1990); Jones v. State, 701 So. 2d 70, 82 (Fla. 1997)(Shaw, J., dissenting, joined by Kogan & Anstead, JJ.)); id., at 71 (Anstead, J., dissenting, joined by Kogan & Shaw, JJ.).

provision (in place in the event no “choice” is made) is likewise unconstitutional. Further, Mr. Muhammad cannot be executed by lethal injection without violating the Eighth and Fourteenth Amendments to the U.S. Constitution and the Florida Constitution, as the law enacting lethal injection is an unconstitutional special criminal law and violates the prohibition against *ex post facto* laws.

CLAIM V

PROHIBITING MR. MUHAMMAD'S COUNSEL FROM INTERVIEWING JURORS VIOLATES THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. AS A RESULT OF THE RULE, MR. MUHAMMAD IS PREVENTED FROM FULLY PRESENTING IDENTIFIABLE AND VALID CLAIMS DURING THE POST CONVICTION PROCESS.

Florida Rule of Professional Conduct 4-3.5(d)(4) provides that a lawyer shall not initiate communications or cause another to initiate communication with any juror regarding the trial in which that juror participated. This prohibition restricts Mr. Muhammad's ability to allege and litigate constitutional claims that would show that his sentence of death violates the United States Constitution.

Florida has created a rule that denies due process to defendants such as Mr. Muhammad. "A trial by jury is fundamental to the American scheme of justice and is an essential element of due process." Scruggs v. Williams, 903 F.2d 1430, 1434-35 (11th Cir. 1990)(citing Duncan v. Louisiana, 391 U.S. 145 (1968)). Implicit in

the right to a jury trial is the right to an impartial and competent jury. Tanner v. United States, 483 U.S. 107, 126 (1987). However, a defendant who tries to prove members of his jury were incompetent or otherwise unqualified to serve has a difficult task.

An important exception to the general rule of incompetence allows juror testimony in situations in which an "extraneous influence" was alleged to have affected the jury. Tanner, 483 U.S. at 117 (citing Mattox v. United States, 146 U.S. 140, 149 (1892))(as occurred here in Mr. Muhammad's case). The competency of a juror's testimony hinges on whether it may be characterized as extraneous information or evidence of outside influence. Shillcutt v. Gagnon, 827 F.2d 1155, 1157 (7th Cir. 1987).

Such extraneous information that may be testified to by jurors includes evidence that jurors heard and read prejudicial information not in evidence, Mattox v. United States, 146 U.S. 140 (1892); that the jury was influenced by a bailiff's comments about the defendant, Parker v. Gladden, 385 U.S. 363, 365 (1966); or that a juror had been offered a bribe, Remmer v. United States, 347 U.S. 227, 228-30 (1954).

This Court has recognized that overt acts of misconduct by members of the jury violate a defendant's right to a fair and impartial jury and equal protection of the law, as guaranteed by the United States and Florida Constitutions. Powell v. Allstate

Insurance Co., 652 So. 2d 354 (Fla. 1995).

Florida's rule prohibiting Mr. Muhammad's counsel from contacting his jurors violates Mr. Muhammad's rights under the First, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. It also denies him access to the courts of this state in violation of Article I, § 21 of the Florida Constitution and the federal courts in violation of the due process clause and the equal protection clause of the Fourteenth Amendment to the United States Constitution.

Mr. Muhammad's rights to due process, access to the courts, equal protection and ineffective assistance of counsel as well as his rights under the Eighth and Fourteenth amendments to the United States Constitution have been violated.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Muhammad respectfully urges this Court to grant habeas corpus relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the forgoing has been furnished by United States Mail to Sandra Jaggard, Assistant Attorney General, Rivergate Plaza, Suite 950, 444 Brickell Avenue, Miami, Florida 33313, counsel of record this 12th day of July, 2004.

CERTIFICATE OF TYPE SIZE AND FONT

This is to certify that this Petition has been reproduced in 12 point Courier type, a font that is not proportionateley spaced.

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