IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-250

LENARD JAMES PHILMORE

Petitioner,

v.

JAMES V. CROSBY,

Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

RICHARD KILEY
ASSISTANT CCRC
FLORIDA BAR NO. 0558893

JAMES VIGGIANO, JR.
STAFF ATTORNEY
FLORIDA BAR NO. 0715336

CAPITAL COLLATERAL REGIONAL
COUNSEL - MIDDLE
3801 CORPOREX PARK DRIVE
SUITE 210
TAMPA, FL 33619-1136
(813) 740-3544

COUNSELS FOR PETITIONER

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Other Authorities Cited

PRELMINARY STATEMENT

Article l, 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 in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. These claims demonstrate that Mr. Philmore was deprived of the right to a fair, reliable trial and individualized sentencing proceeding and that the proceedings resulting in his conviction and death sentence violated fundamental constitutional imperatives.

Citations shall be as follows: The record on appeal concerning the original court proceedings shall be referred to as "R. ___" followed by the appropriate page numbers. The Appellant:s Initial Brief on direct appeal will be referred to as AIB. ___@ followed by the appropriate page numbers. The postconviction record on appeal will be referred to as APCR. ___@ followed by the appropriate page numbers. All other references will be self-explanatory or otherwise explained herein.

REQUEST FOR ORAL ARGUMENT

The resolution of the issues in this action will determine whether Mr. Philmore lives or dies. This Court has allowed oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims involved and the fact that a life is at stake. Mr. Philmore accordingly requests that this Court permit oral argument.

INTRODUCTION

Significant errors which occurred at Mr. Philmore=s capital trial and sentencing were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel.

The issues, which appellate counsel neglected, demonstrate that counsel=s performance was deficient and that the deficiencies prejudiced Mr. Philmore. A[E]xtant legal principles . . . provided a clear basis for . . . compelling appellate argument[s].@ Fitzpatrick v. Wainwright, 490 So.2d 938, 940 (Fla. 1986). Neglecting to raise fundamental issues such as those discussed herein Ais 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). Individually and Acumulatively,@ Barclay v. Wainwright, 444 So.2d 956, 959 (Fla.

1984), the claims omitted by appellate counsel establish that A*confidence* in the correctness and fairness of the result has been undermined.@ *Wilson*, 474 So.2d at 1165 (emphasis in original).

Additionally, this petition presents questions that were ruled on at trial or on direct appeal but should now be revisited in light of subsequent case law or in order to correct error in the appeal process that denied fundamental constitutional rights. As this petition will demonstrate, Mr. Philmore is entitled to habeas relief.

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla.R.App.P. 9.100(a). *See* Art. I, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Fla.R.App.P. 9.030(a)(3) and Art. V, Sec. 3(b)(9), *Fla. Const.* The Petition presents constitutional issues which directly concern the judgment of this Court during the appellate process and the legality of Mr. Philmore=s sentence of death.

Jurisdiction in this action lies in this 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. Philmore=s direct appeal. *See Wilson*, 474 So.2d at 1163 (Fla. 1985); Baggett v. Wainwright, 392 So.2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Philmore 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*, 474 So.2d at 1162.

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. The 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). The Court=s exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action. As the petition shows, habeas corpus relief would be more than proper on the basis of Mr. Philmore=s claims.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Philmore asserts that his capital conviction and sentence of death were obtained and then affirmed during this Court=s appellate review process in violation of his rights as guaranteed by the Fourth,

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

PROCEDURAL HISTORY

Lenard J. Philmore was charged by way of indictment with the offenses of first degree murder (count I); conspiracy to commit robbery with a deadly weapon (count II); carjacking with a deadly weapon (count III); kidnaping (count IV); robbery with a deadly weapon (count V); and grand theft (count VI). Codefendant, Anthony A. Spann, was charged in the same accusatory instrument with the same offenses but his were set forth in counts VII through XII. The defendants were tried separately.

Various pretrial motions were filed and heard by the trial court, including Lenard Philmore=s Amotion to suppress statements of defendant and admission of evidence obtained from statement@. This motion was denied and Lenard Philmore=s statements were admitted at trial over objection.

Trial proceedings culminated in verdicts of guilty as charged as to all offenses set forth in the indictment. Penalty phase proceedings were subsequently conducted and by a vote of twelve to zero, the jury recommended a sentence of death.

A *Spencer* hearing was held thereafter and memorandum from

counsel reviewed by the trial court. In addition, a presentence investigation report was ordered and received by the trial judge. At sentencing, Lenard Philmore received the death penalty for his conviction of first degree murder and prison sentences for his non-capital felony convictions. Lenard Philmore=s judgments, convictions and sentences including the sentence of death were affirmed in Philmore v. State, 820 So.2d 919 (Fla. 2002).

On March 30-April 1 2004, an evidentiary hearing was conducted in regards to Mr. Philmore=s 3.851 motion for post conviction relief. At the evidentiary hearing, the trial court heard testimony relating to Claims I, II, III, and V of the Defendant=s motions. The trial court denied relief in a written order dated May 12, 2004. This petition follows.

CLAIM I

MR. PHILMORE=S SENTENCE OF DEATH UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION IS INVALID BECAUSE THE SENTENCING COURT IGNORED THE TESTIMONY OF AN EXPERT WITNESS WHICH, IF CONSIDERED, WOULD HAVE ESTABLISHED STATUTORY MITIGATION

Dr. Frank Wood testified in the penalty phase of Mr. Philmore=s trial. (R. Vol. XXII-1939-205). Dr. Frank Wood was qualified as an expert in the area of PET scans and

neuropsychology. (R. Vol. XXII-1952-53).

Dr. Wood had examined the school records of Mr. Philmore and had found no problems before the age of eight. Then at age eight extremely serious problems in behavior was reported and continued forward to the present time. This fact in and of itself was evidence of brain damage. (R. Vol. XXII-1953-54).

Dr. Wood reported that at the age of nine, Mr. Philmore was referred to the school psychologist for testing due to there having been 15 separate disciplinary incidents in his record. (R. Vol. XXII-1955). Dr. Wood reported several incidents observed by the school psychologist where Mr. Philmore was having conversations with people who were not there and did not know his left hand from his right. (R. Vol. XXII-1958).

Dr. Wood opined that this evidence of Mr. Philmore=s school behavior would in and of itself, indicate brain injury and Mr. Philmore should have been referred for appropriate remedial services in the school system. (R. Vol. XXII-1969).

Dr. Wood also conducted an examination on Mr. Philmore himself. (R. Vol. XXII-1970). Based on the physical examination, Dr. Wood was able to diagnose not only a brain injury, but a left posterior brain injury. (R. Vol. XXII-1971-73). Dr. Wood also was present when a PET scan was conducted on Mr. Philmore. (R. Vol. XXII-1973). The PET scan revealed an

abnormality which was unmistakable and was entirely consistent with a head injury in childhood. (R. Vol. XXII-1981).

Dr. Wood opined that this documented brain injury was one of the causes of Mr. Philmore=s abnormal behavior. (R. Vol. XXII-1995). Dr Wood=s diagnosis of traumatic brain injury was a diagnosis that he would have made standing alone with the school records irrespective of the PET scan, the PET scan only corroborates that diagnosis, it does not itself establish that diagnosis. (R. Vol. XXII-2036).

Mr. Philmore contends that Dr. Woods opinion that Mr. Philmore suffered from a severe brain injury, established by the greater weight of the evidence that Lenard Philmore suffered from an extreme mental or emotional disturbance at the time of the offense. Mr. Philmore was prejudiced because the penalty phase jury was not allowed to consider statutory mitigation although the mitigation was established by the greater weight of the evidence.

The trial court, in it=s sentencing order, makes no mention of Dr. Wood=s testing, diagnosis, or testimony about Mr. Philmore=s brain injury. (R. Vol. VII-1228-1230). The trial court held that Dr. Berland=s testimony was strongly rebutted on cross examination, but in no way suggests that Dr. Wood=s testimony was rebutted. Mr. Philmore contends that by ignoring

the testimony of Dr. Wood and by refusing to allow the statutory mitigation instruction to be considered by the jury Mr. Philmore was deprived of a fair sentencing process in violation of his sixth, eighth, and fourteenth amendment rights under the United States Constitution and the corresponding provisions of the Florida Constitution. A new penalty phase is the remedy. To the extent that appellate counsel failed to litigate this issue on direct appeal, appellate counsel was ineffective.

LEGAL ARGUMENT

In Eddings v. Oklahoma, 455 U.S. 104, 114-15, 102 S.Ct. 869, 876-77, 71 L. Ed.2d 1 (1982) the Supreme Court of the United States held:

> Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law,* any relevant mitigating evidence. In this instance, it was as if the trial judge had instructed a jury to disregard the mitigating evidence Eddings proffered on his behalf. The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration. Id. at 114-115 *876-77.

In Mr. Philmore=s case that is exactly what the trial court and the Florida Supreme Court on review did. No mention was made of the extensive testimony of Dr. Frank Wood in the trial court=s

sentencing order. Consequently, the Florida Supreme Court affirmed the rejection of the application of the statutory mitigator based on the trial court=s sentencing order. The trial court in its sentencing order, merely detailed the impeachment of Dr. Berland by the State=s expert. The trial court ignored the mountain of evidence in support of the mitigator presented by Dr. Wood. The review of school records, the physical examination, even the Pet scan results placed into evidence was ignored by the trial court. Contrary to ***Eddings,*** this evidence was excluded from consideration. Relief is proper.

In Nibert v. State, 574 So.2d 1059 (Fla. 1990), the Florida Supreme Court held:

> Where uncontroverted evidence of a mitigating circumstance has been presented, a reasonable quantum of competent proof is required before the circumstance can be said to have been established. ***See Campbell.*** Thus, when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved. Id. at 1062.

Mr. Philmore contends that the evidence presented by Dr. Frank Wood was uncontroverted yet was ignored. Relief is proper.

In Crook v. State, 813 So.2d 68 (Fla. 2002), the Supreme Court of Florida stated:

> The trial court apparently rejected the uncontroverted evidence of brain damage in

> assessing the statutory mitigator because Athere was no actual proof of any brain damage.@ Yet, all three medical experts testified to their objective testing that substantiated the existence of brain damage, specifically to the frontal lobe, which significantly impaired Crook=s ability to control his impulses. Id. at 75

The trial court=s dismissal of Mr. Philmore=s brain injury as Athe defendant has experienced some difficulties in his life@ is in fact ignoring the testimony of Dr. Frank Wood. The Florida Supreme Court further held:

> [T]he expert testimony in this case pertaining to Crook=s brain damage was uncontroverted, and the experts reached this conclusion after performing a series of neuropsychological and personality tests, conducting clinical evaluations of Crook, interviewing his mother, reviewing Crook=s school and medical records, and examining the evidence in the case. Thus, given the unrefuted expert testimony in this case, we conclude that the trial court erred in failing to find and weigh the evidence of Crook=s brain damage in its assessment of statutory mental mitigation. Id. at 76.

Mr. Philmore contends that the examination of Dr. Frank Wood was comprehensive in that school records were reviewed, a clinical examination was done as was a PET scan, the evidence of brain damage was unrebutted by the state expert. The penalty phase jury should have been instructed on the statutory mitigation requested by the defense. Mr. Philmore contends that had this statutory mitigator been given, the recommendation

would have been life not death.

The 3.851 court in its order denying post conviction relief, held that this issue should have been raised on direct appeal. Mr. Philmore contends that since the issue was not raised in his direct appeal, appellate counsel was ineffective. The above styled pleading is the more appropriate vehicle with which to seek review. In Toney v. Franzen, 687 F.2d 1016,1022 (7th Cir. 1982), the court held:

> A state court that ignores an issue, enters an order that falls short of the relief requested, or leaves room for future litigation over the meaning of its order, will not thereby bar an unsatisfied prisoner from seeking habeas corpus relief in the federal court. Id. at 1022.

Mr. Philmore contends that *Toney* applies to his case and the matter has been properly preserved for possible federal habeas corpus relief.

CLAIM II

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE ON DIRECT APPEAL THAT THE FLORIDA DEATH SENTENCING STATUTE AS APPLIED IS UNCONSTITUTIONAL UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION UNDER *APPRENDI* AND *RING*

In Mills v. Moore, the Florida Supreme Court held that because Apprendi v. New Jersey, 120 S.Ct. 2348, (2000), did not overrule Walton v. Arizona, the Florida death penalty scheme was

not overruled. Mills v. Moore, 2001 WL 360893 * 3-4 (Fla. 2001). Therefore, Mr. Philmore raises these issues now to preserve the claims for possible federal review.

1. The Florida death penalty scheme is unconstitutional as applied in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and Florida law.

In Jones v. United States, the United States Supreme Court held, Aunder the Due Process Clause of the Fifth Amendment and the notice and jury guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.@ Jones v. United States, 526 U.S. 227, 243, n.6 (1999). Subsequently, in Apprendi v. New Jersey, the Court held that the Fourteenth Amendment affords citizens the same protections under state law. Apprendi v. New Jersey, 120 S.Ct. 2348, 2355 (2000).

In Apprendi, the issue was whether a New Jersey hate crime sentencing enhancement, which increased the punishment beyond the statutory maximum, operated as an element of an offense so as to require a jury determination beyond a reasonable doubt. Apprendi 120 S.Ct. at 2365. A[T]he relevant inquiry here is not one of form, but of effect-does the required finding expose the defendant to a greater punishment than that authorized by the jury=s guilty verdict?@ Apprendi 120 S.Ct. at 2365. Applying

this test, it is clear that aggravators under the Florida death penalty sentencing scheme are elements of the offense which must be noticed, submitted to a jury, and proven beyond a reasonable doubt. The state was obligated to prove at least one aggravating factor in the separate penalty phase proceeding before Mr. Philmore was eligible for the death penalty. ' 775.082 Fla. Stat. (1995).

> The aggravating circumstances of Fla. Stat. ' 921.414(6), F.S.A., actually define those crimes-when read in conjunction with Fla. Stat. ' 782.04(1) and 794.01(1), F.S.A.-to which the death penalty is applicable in the absence of mitigating circumstances.

State v. Dixon, 283 So.2d 1, 9 (Fla. 1973); Fla. Stat. ' 775.082 (1995); ' 921.141 (2)(a), (3)(a) Fla. Stat. (1995). Clearly, Florida capital defendants are not eligible for the death sentence simply upon conviction of first-degree murder. If the court sentenced Mr. Philmore immediately after conviction, the court could only have imposed a life sentence. ' 775.082 Fla. Stat. (1995). Dixon, 283 So.2d at 9. Therefore, under Florida law, the death sentence is not within the statutory maximum sentence, as analyzed in Apprendi, because it increased the penalty for first degree murder beyond the life sentence Mr. Philmore was eligible for based solely upon the jury=s guilty verdict. Under Florida law, the effect of finding an aggravator

exposed Mr. Philmore to a greater punishment than that authorized by the jury=s guilty verdict alone, the aggravator was an element of the death penalty eligible offense which required notice, submission to a jury, and proof beyond a reasonable doubt. Apprendi, at 2365. This did not occur in Mr. Philmore=s case. Thus, the Florida death penalty scheme was unconstitutional as applied.

Mr. Philmore=s indictment violated the Sixth and Fourteenth Amendments because it failed to charge the aggravating circumstances as elements of the offense for which the death penalty was a possible punishment. Under the principles of common law, aggravators must be noticed.

> Where a statute annexes a higher degree of punishment to a common-law felony, if committed under particular circumstances, an indictment for the offence, in order to bring the defendant within that higher degree of punishment, must expressly charge it to have been committed under those circumstances, and must state the circumstances with certainty and precision.[2M. Hale, Pleas of the Crown * 170]. Apprendi v. New Jersey, 120 S.Ct. 2348,2355 (2000) quoting Archbold, Pleading and Evidence in Criminal Cases, at 51.

Because aggravators are circumstances of the crime and the defendant=s mental state, they are essential elements of a crime for which the death penalty may be imposed, and they must be noticed.

As well, Mr.Philmore=s death recommendation violates Florida law because it is impossible to determine whether a unanimous jury found any one aggravating circumstance. Florida Rule of Criminal Procedure 3.440 requires unanimous jury verdicts on criminal charges. AIt is therefore settled that ›[i]n this state, the verdict of the jury must be unanimous= and that any interference with this right denies the defendant a fair trial.@ Flanning v. State, 597 So.2d 864, 867 (Fla. 3d DCA 1992), quoting Jones v. State, 92 So.2d 261 (Fla. 1956). However, in capital cases, Florida permits jury recommendations of death based upon a simple majority vote, and does not require jury unanimity as to the existence of specific aggravating factors. See, e.g., Thompson v. State, 648 So.2d 692, 698 (Fla. 1994). Jones v. State, 569 So.2d 1234, 1238 (Fla. 1990). In light of the fact that aggravators are elements of a death penalty offense, the procedure followed in the sentencing phase must receive the protections required under Florida law and require a unanimous verdict. ' 912.141(1),(2) Fla. Stat. (1999).

Mr. Philmore=s death recommendation violated the minimum standards of constitutional common law jurisprudence because it is impossible to know whether the jurors unanimously found any one aggravating circumstance. Each of the thirty-eight states that use the death penalty require unanimous twelve person jury

convictions.[1] AWe think this near-uniform judgement of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not.@ Burch v. Louisiana, 441 U.S. 130, 138 (1979) (reversing a non-unanimous six person jury verdict in a non-capital case). The federal government requires unanimous twelve person jury verdicts. A[T]he jury=s decision upon both guilt and whether the punishment of death should be imposed must be unanimous. This construction is more consonant with the general humanitarian purpose of the Anglo-American jury system.@ Andres v. United States, 333 U.S. 740, 749 (1948).

[1]Ala.R.Cr.P 18.1; Ariz. Const. Art 2, s.23; Ark. Code Ann. ' 16-32-202; Cal. Const. Art. 1, ' 16; Colo. Const. Art 2, '23; Conn. St. 54-82(c), Conn.R. Super. Ct. C. R. '42-29; Del. Const. Art. 1, '4; Fla. Stat. Ann ' 913.10(1); Ga. Const. Art. 1 ' 1, P XI; Idaho. Const. Art. 1, ' 7; Ill. Const. Art. 1, ' 13; Ind. Const. Art. 1, ' 13; Kan. Const. Bill of Rights ' 5; Ky. Const. ' 7, Admin. Pro. Ct. Jus. A.P. 11 ' 27; La. C.Cr.P. Art. 782; Md. Const. Declaration Of Rights, Art. 5; Miss. Const. Art. 3, ' 31; Mo. Const. Art. 1, '22a; Mont. Const. Art. 2, '26; Neb. Rev. St. Const. Art. 1, '3; N.H. Const. PH, Art. 16; N.J. Stat. Ann. Const. Art. 1, p. 9; N.M. Const. Art. 1 ' 12; N.Y. Const. Art. 1, ' 2; N. C. Gen. Stat. Ann. ' 15A-1201; Ohio Const. Art. 1, ' 5; Okla. Const. Art. 2, ' 19; Or. Const. Art. 1, ' 11, Or. Rev. Stat. ' 136.210; Pa. Stat. Ann. 42 Pa. C.S.A. ' 5104: S.C. Const. Art. V, ' 22; S.D. ST ' 23A-267; Tenn. Const. Art. 1, ' 6; Tex. Const. Art. 1, ' 5; Utah Const. Art. 1 ' 10; Va. Const. Art. 1, ' 8; Wash. Const. Art. 1, ' 21; Wyo. Const. Art. 1, ' 9.

Implicit in the state and federal government=s requirements that a capital conviction must be obtained through a unanimous twelve person jury, is the idea that Adeath is qualitatively different from a sentence of imprisonment, however long.@ Woodson v. North Carolina, 428 U.S. 280, 304 (1976). The Sixth, Fourteenth, and Eighth Amendments require more protection as the seriousness of the crime and severity of the sentence increase. See Johnson v. Louisiana, 406 U.S. 354, 364 (1972).

Because the jury=s death recommendation verdict did not list the aggravators found, it is impossible to know whether the jurors unanimously found any one aggravator proved beyond a reasonable doubt. The finding of an aggravator exposed Mr. Philmore to a greater punishment than the life sentence authorized by the jury=s guilty verdict, therefore, the aggravator must have been charged in the indictment, submitted to a jury, and proved beyond a reasonable doubt to a unanimous jury.

The Florida death penalty sentencing statute was unconstitutional as applied in Mr. Philmore=s case. The constitutional errors were not harmless. The denial of a jury verdict beyond a reasonable doubt has unquantifiable consequences and is a Astructural defect in the constitution of the trial mechanism, which defies analysis by >harmless error=

standards:. Sullivan v. Louisiana, 508 U.S. 275, 2081-83 (1993) *quoting* Arizona v. Fulminante, 499 U.S. 279, 308-312 (1991). A new penalty phase trial is the remedy. Additional recent authority to support the above contention is Ring v. Arizona, 536 U.S. 584, 122S.Ct. 2428, 153 L.Ed. 2d 556 (2002)

The Supreme Court of the United States held in Ring v. Arizona, 122 S.Ct. 2428, 2431 (2002):

> If a legislature responded to such a decision by adding the element the Court held constitutionally required, surely the Sixth Amendment guarantee would apply to that element. There is no reason to differentiate capital crimes from all others in this regard. Arizona=s suggestion that judicial authority over the finding of aggravating factors may be a better way to guarantee against the arbitrary imposition of the death penalty is unpersuasive. Id. at 2431

In Mr. Philmore=s case the trial court found the following five aggravators: (1) defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person; (2) the capital felony was committed while the defendant was engaged in the commission of a kidnapping; (3) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest; (4) the capital felony was committed for pecuniary gain; and (5) the capital felony was committed in a cold, calculated, and premeditated

manner without and pretense of moral or legal justification (ACCP@). A new penalty phase is the remedy because it is impossible to know whether the jurors unanimously found any one aggravating circumstance in support for the recommendation of death. To the extent that appellate counsel failed to raise this issue on direct appeal, counsel was ineffective.

CLAIM III

COUNSEL WAS INEFFECTIVE FOR FAILURE TO OBJECT TO PROSECUTORIAL MISCONDUCT DURING MR. PHILMORE=S TRIAL. THIS RENDERED MR. PHILMORE=S CONVICTION AND DEATH SENTENCE FUNDAMENTALLY UNFAIR AND UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. TO THE EXTENT THAT APPELLATE COUNSEL FAILED TO LITIGATE THE CUMULATIVE EFFECT OF THE MISCONDUCT, APPELLATE COUNSEL WAS INEFFECTIVE.

At trial, the prosecutor distorted Mr. Philmore=s capital trial with improper commentary and remarks. The prosecutor personalized the prosecution of the case and instilled emotional fear in the jurors. In the penalty phase of the trial, the prosecutor denigrated the defense mental health testimony and psychologist himself with questions that were opinionated, sarcastic and rude. The comments by the prosecutor were designed and intended only to inflame the jury. The remarks were of the type that the Florida Supreme Court has found to provoke Aan unguided emotion response,@ a clear violation of Mr. Philmore=s

constitutional rights. To the extent counsel failed to object, he was ineffective. Relief is proper as the sentence of death is the prejudice.

The prosecutor=s acts of misconduct, both individually and cumulatively, deprived Mr. Philmore of his rights under the Sixth, Eighth, and Fourteenth Amendments.

During the course of the trial proceedings the prosecutor made references to Ahow lucky@ an unknown woman was when she walked away from her automobile prior to the defendants entering into the parking lot with a design to steal her vehicle and kill her. (TR Vol. XIV 913-914; Vol. XVIII 1551-1552;Vol. XXVII 2503-2504) The prosecutor referred to the personal opinions of the investigating detectives whom he said Adidn=t believe what he [Lenard Philmore] was saying.@ (TR Vol. XIV-928, Vol. XV-1040) Defendant was stereotyped by the prosecutor as an arrogant criminal in Ahis white tank top and his gold necklaces@ carrying Athe great equalizer@, a firearm. (TR Vol. XVIII-1553) The prosecutor attempted to personalize the prosecution as a joint effort between law enforcement and the community with references such as Aluckily for us@, Officer Thomas was there; Awe determined@ what evidence existed against defendant; AI=m not running from the law@; Awe know he=s [defendant] lying to us=; and Awe can accept it ... when an accident occurs.@ (TR Vol. XVIII-

1556-1558, 1569, 1573, 1577) The state insisted on letting the jury know that the prosecution was presented by Atheir state attorney.@ (TR Vol. XVIII-1579)

During the penalty phase the prosecutor asked if defendant=s brain damage was in Athe murder center of the brain ... or the kidnapping center of the brain.@ (TR Vol. XXIV-2256) The prosecutor elicited improper testimony regarding polygraph examinations to which defense counsel did not object. In direct response to a question of the prosecutor as to what documents were utilized, the state=s expert psychologist, Dr. Gregory Landrum, testified he reviewed defendant=s Ataped statement of polygraph examinations@ of which Athere were two.@ (TR Vol. XXV-2285, 2289) Absent a written stipulation, polygraph test results or testimony to the effect that a test was taken are inadmissible. See Kaminski v. State, 63 So.2d 339 (Fla. 1952); Codie v. State, 313 So.2d 754 (Fla. 1975); Davis v. State, 520 So.2d 572 (Fla. 1988) The statements regarding the polygraph were the subject matter of a pretrial motion to suppress. (R Vol. II- 243-245) The Court excluded from use as evidence any of Philmore=s statements made to law enforcement while in the polygraph room.

The prosecutor made improper comments by advising the jury that the only expert testimony that they should accept regarding

the brain imaging was from his witnesses who were participating Aon behalf of the people of the State of Florida@ with Ano interest other than an interest in making sure that the science ... is properly represented to the public.@ (TR Vol. XXVI-2458, Vol. XXVII -2510, 2513) This comment caused the Court to interrupt the prosecutor=s closing where, at a bench conference, he was told not to make such characterizations to the jury regarding the witnesses= testimony. (TR Vol. XXVII-2513-2514) See State v. Ramos, 579 So.2d 360, 362 (Fla. 4th DCA 1991) (the prosecutor improperly expressed his personal belief as to the witness=s credibility and the defendant=s guilt); Pacifico v. State, 642 So.2d 1178, 1183-1184 (Fla. 1st DCA 1994) (same); Sinclair v. State, 717 So.2d 99, 100 (Fla. 4th DCA 1998) (improper for prosecutor to attempt to bolster witness=s testimony by reference to matters outside the record); See also Spencer v. State, 645 So.2d 377, 383 (Fla. 1994) (same).

LEGAL ARGUMENT

The Florida Supreme Court has held that when improper conduct by a prosecutor Apermeates@ a case, as it has here, relief is proper. Nowitzke v. State, 572 So.2d 1346 (Fla. 1990). In Davis v. State, 648 So2d 1249 (Fla. 4th DCA 1995) the court held Athat trial counsel=s failure to object to reversible error, while waiving the point on direct appeal, does not bar a

subsequent, collateral challenge based on a claim of ineffective assistance of counsel.@ In Vento v. State, 621 So.2d 493, 495 (Fla. DCA 1993) the court held A [t]he question then becomes one of whether trial counsel=s failure to object on these three interrelated grounds was a deficiency from the professional norm which prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In our view appellant has established ineffectiveness on these three grounds.@ This claim concerns trial counsel=s failure to object. Pursuant to the case law cited above, Mr. Philmore contends that this claim is properly raised before this Court in this post conviction action.

The effect of this argument and behavior was to improperly appeal to the jury=s passions and prejudices. Such remarks prejudicially affect the substantial rights of the defendant when they so infect the trial with unfairness as to make the resulting conviction a denial of due process. In Bertolotti v. State, 476 So.2d 130 (Fla. 1985), the Supreme Court of Florida stated:

> The proper exercise of closing argument is to review the evidence and explicate those inferences which may reasonably be drawn from the evidence. Conversely, it must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the

> defendant rather than the logical analysis of the evidence in light of the applicable law. Id. at 134

The prosecutor, in closing argument, sought to prevent the jurors from making reasonable inferences from the evidence on their own when he asked the jurors to accept only expert testimony from the state=s experts. These comments were so blatant and egregious that the Court interrupted the prosecutor=s closing argument and instructed him not Ato give any inference to the jury with regards to the witness=s testimony.@ (TR Vol. XXVII-2513-2514) The prosecutor, through his improper comments, precluded the juror=s from making a logical analysis of the evidence.

In Brown v. State, 787 So.2d 229 (Fla. 2nd DCA 2001) the court addressed the issue of improper prosecutorial argument:

> The prosecutor=s closing argument in this case reached the level that requires reversal. During closing arguments, the prosecutor made a number of improper arguments, including improper vouching for the credibility of police officers, improper attacks on individual witnesses, commenting on and arguing facts not in evidence, improper personalizing of the prosecutor, blatant appeals to the jurors= emotions, improper attack on defense counsel, improper golden rule arguments, and an improper attack on witnesses and the defendant by arguing that anyone convicted of a felony is a liar. All of these improper arguments made a mockery of the Aneutral arena@ in which a trial should be held. Ruiz v. State, 743

> So.2d 1, 4 (Fla. 1999) (AA criminal trial is a neutral arena wherein both sides place evidence for the jury=s consideration; the role of counsel in closing argument is to assist the jury in analyzing the evidence, not to obscure the jury=s view with personal opinion, emotion, and nonrecord evidence.@). Id. at 230-31.

The prosecutor in Mr. Philmore=s case made numerous improper arguments to which defense counsel failed to object. The prosecutor vouched for the credibility of the investigating detectives when he said the detectives didn=t believe what Philmore was saying. (TR Vol. XIV-928, Vol. XV-1040) The prosecutor improperly personalized himself when he said AI=m not running from the law@ and that the prosecution was presented by Ayour state attorney.@ (TR Vol. XVIII-1558, 1579) The prosecutor blatantly appealed to the juror=s emotions by making such references as Aluckily for us@ and Ahow lucky@ an unknown woman was when she walked away from her car prior to the defendants entering into the parking lot with a design to steal her vehicle. (TR Vol. XIV-913-914; Vol. XVIII-1551-1552; Vol. XXVII-2503-2504) The numerous improper arguments by the prosecutor made a mockery of the Aneutral arena@ in which Mr. Philmore=s trial should have been held.

In Brooks v. State, 762 So.2d 879 (Fla. 2000), the Florida Supreme Court addressed the issue of denigration of mitigation

in the following manner:

> Further, the prosecutor=s characterization of the mitigating circumstances as Aflimsy,@ Aphantom,@ and repeatedly characterizing such circumstances as Aexcuses@ was clearly an improper denigration of the case offered by Brooks and Brown in mitigation. Id. at 904.

Justice Lewis, specially concurring stated:

> If the decisions of this Court are to have meaning, particularly in context of argument in connection with the imposition of capital punishment, we must have uniform application of the standards announced by this Court and not random application which, in my view, leads to confusion and destabilizes the law. I must respectfully but pointedly disagree with the dissenting view that *Urbin* should not be followed here. I concluded that we must either follow and give meaning to the standards announced in *Urbin*, or reject its pronouncements and articulate the standard we deem appropriate that should be applied on a uniform basis.
>
> In *Urbin*, after reversing the defendant=s death sentence on propotionality grounds, this Court proceeded to discuss the prosecutor=s penalty phase closing argument, stating that Awe would be remiss in our supervisory responsibility if we did not acknowledge and disapprove of a number of improprieties in the prosecutor=s closing penalty phase argument.@ Id. at 419. The Court then delineated the specific arguments it found to be improper, including, but not limited to, (1) the repeated use of the word Aexecuted@ or Aexecuting,@ *id* at 429 n. 9; (2) the repeated description of the defendant as a person of violence *id*.; [FN38] (3) urging the jury to afford the defendant the same mercy that the defendant displayed towards the victim, see *id*. at 421; (4) asserting that any juror=s vote for a life sentence

> would be irresponsible and a violation of the juror=s lawful duty, *see id.*; and (5) misstating the law regarding the jury=s obligation to recommend death. *See id.* at 421 n. 12. As throughly discussed in the majority opinion, many of the same arguments condemned in Urbin were repeated by the prosecutor in this case. Id. at 906-07.

The prosecutor improperly denigrated Mr. Philmore=s expert witnesses when he asked if defendant=s brain damage was in Athe murder center of the brain ... or the kidnapping center of the brain.@ (TR Vol. XXIV-2256) Such comments by the prosecutor were facetious and served only to improperly denigrate the expert in front of the jury. Such denigration precluded Mr. Philmore a fair trial and counsel was ineffective for failing to object. Had the prosecutor not resorted to denigration the defense expert witness, the jury would have been receptive to the scientific expert testimony presented by the defense. The jury would have been able to make a logical analysis of the scientific and technical testimony instead of being subjected to the infantile jocularity of the prosecutor.

In United States v. Garza, 608 F.2d 659, 662, 663 (5th Cir. 1979). The court discusses the issue of bolstering in the following manner:

> The role of the attorney in closing argument is Ato assist the jury in analyzing, evaluating and applying the evidence. It is not for the purpose of permitting counsel to

> testify: as an >expert witness.: The assistance permitted includes counsel=s right to state his contention as to the conclusions that the jury should draw from the evidence.@ United States v. Morris, 568 F.2d 396, 401 (5th Cir. 1978). (emphasis in original) To the extent an attorney=s closing argument ranges beyond these boundaries it is improper. Except to the extent he bases any opinion on the evidence in the case, he may not express his personal opinion on the merits of the case or the credibility of witnesses. Id. at 662, 633.

The prosecutor in Mr. Philmore=s case engaged in bolstering the state=s expert witnesses when he advised the jury that the only expert testimony that they should accept regarding the brain imaging was from his witnesses who were participating Aon behalf of the people of the State of Florida@ with Ano interest other than an interest in making sure that the science ... is properly represented to the public.@ (TR Vol.XXVI-2458, Vol.XXV-2510, 2513) The argument by the prosecutor went beyond the boundaries for proper closing argument. The prosecutor stated his contention as to what conclusion the jury should draw from the evidence when he bolstered the State=s expert witnesses.

In Garron v. State, 528 So.2d 353 (Fla. 1988), the State, in its closing argument at penalty phase, invited the jury to imagine the pain and anguish of the victim. Id. at 358-59. The Court in Garron stated:

> When comments in closing argument are

> intended to and do inject elements of emotion and fear into the jury=s deliberations, a prosecutor has ventured far outside the scope of proper argument. These statements when taken as a whole and fully considered demonstrate the classic case of an attorney who has overstepped the bounds of zealous advocacy and entered into the forbidden zone of prosecutorial misconduct. In his determination to assure that appellant was sentenced to death, this prosecutor acted in such a way as to render the whole proceeding meaningless. While it is true that instructions to disregard the comments were given, it cannot be said that they had any impact in curbing the unfairly prejudicial effect of the prosecutorial misconduct. Id. at 359.

In the case at bar, trial counsel did not object, thus these improper arguments were not preserved for appellate review. Due to counsel=s failure to object, Mr. Philmore never received a fair adversarial testing during the penalty phase and the sentence of death is the resulting prejudice.

The Garron Court also discussed the proper remedy for such prosecutorial misconduct:

> The Court in *Bertolotti* noted that under those circumstances, disciplinary proceedings, not mistrial, was the proper sanction for the prosecutorial misconduct. Nevertheless, it appears that the admonitions in *Bertolotti* went unheeded and that the misconduct in this case far outdistances the misconduct in *Bertolotti*. Thus, we believe a mistrial is the appropriate remedy here in addition to the possible penalties that disciplinary proceedings could impose upon the

prosecutor. Id. at 360

The Court in Garron ordered that a mistrial should be granted and remanded the case on direct appeal. Had trial counsel objected to these improper prosecutorial arguments, a mistrial would have been granted in the case at bar. Since trial counsel did not object, a new penalty phase is the remedy.

The Garron Court further addressed the issue of denigration in the following manner:

> We believe that once the legislature has made the policy decision to accept insanity as a complete defense to a crime, it is not the responsibility of the prosecutor to place that issue before the jury in the form of repeated criticism of the defense in general. Whether that criticism is in the form of cross-examination, closing argument, or any other remark to the jury, it is reversible error to place the issue of the validity of the insanity defense before the trier of fact. To do so could only helplessly confuse the jury.

The prosecutor=s arguments went beyond a review of the evidence and permissible inferences. He intended that Mr. Philmore=s jury consider factors outside the scope of the evidence.

It is a well settled principle of Florida law that a court must address the cumulative impact of all improper comments or actions by the prosecutor in determining the impact on the fairness of the trial. In Defreitas v. State, 701 So.2d 593, 600

(4th DCA 1997) the court stated:

> Measuring the prosecuting attorney=s conduct in the instant case by the aforementioned well settled standard, we are persuaded that appellant has been denied one of his most precious constitutional rights, the right to a fair criminal trial, by the **cumulative effect** of one prosecutorial impropriety after another one. Furthermore, we are equally persuaded that the **cumulative effect** of the numerous acts of prosecutorial misconduct herein were so prejudicial as to vitiate appellants entire trial. In addition, we are likewise persuaded beyond question that the **cumulative effect** of the numerous acts were of such a character that neither rebuke nor retraction could have or would have destroyed their sinister influence. The prosecutorial misconduct, taken in its entirety and viewed in its proper context, is of such a prejudicial magnitude that it enjoys no safe harbor anywhere in the criminal jurisprudence of this state. Accordingly, we find fundamental error. (Emphasis added)
>
> Other Florida cases also hold that the cumulative effect of the prosecutor=s comments or actions must be viewed in determining whether a defendant was denied a fair trial. See Kelly v. State, 761 So.2d 409 (Fla. 2nd DCA 2000) (holding that the **cumulative effect** of the prosecutor=s improper comments and questions deprived Kelly of a fair trial) (emphasis added); Ryan v. State, 509 So.2d 953 (Fla. 4th DCA 1984) (holding that prosecutorial misconduct amounts to fundamental error and is excepted from the contemporaneous objection/motion for mistrial rule, when the prosecutors remarks, **when taken as a whole** are of such character that its sinister influence could not be overcome or retracted) (emphasis added); Freeman v. State, 717 So.2d 105 (Fla. 5th DCA 1998); Pacifico v. State, 642

> So.2d 1178 (Fla. 5th DCA 1994) (holding that the **cumulative effect** of prosecutorial misconduct during closing argument amounted to fundamental error) (emphasis added); Taylor v. State, 640 So.2d 1127 (Fla. 1st DCA 1994); Carabella v. State, 762 So.2d 542 (Fla. 5th DCA 2000) (holding that the **cumulative effect** of improper prosecutorial comments during closing argument was so inflammatory as to amount to fundamental error) (emphasis added); Pollard v. State, 444 So.2d 561 (Fla. 2nd DCA 1984) (holding that the court may look to the Acumulative effect@ of non objected to errors in determining Awhether substantial rights have been affected@) (emphasis added).

The above case law establishes that defense counsel was ineffective in failing to object to the prosecutor=s remarks, which when taken as a whole, had the cumulative effect of denying Philmore a fair trial. The defense counsel failed to object to the comments and failed to move for a mistrial. The cumulative effect of the comments amounted to fundamental error.

The courts have held that a prosecutor=s concern in a criminal prosecution is not that it shall win a case, but that justice shall be done. While a prosecutor may strike hard blows, he is not at liberty to strike fouls ones. See Russo v. State, 505 So.2d 611 (3rd DCA 1987) Argument, inappropriate and inflammatory behavior such as that by the prosecutor in Mr. Philmore=s case violate due process and the Eighth Amendment, and render a death sentence fundamentally unfair and unreliable.

Mr. Philmore suffered prejudice as he was sentenced to death. This Court should vacate Mr. Philmore=s unconstitutional conviction and sentence of death.

Appellate counsel focused on a very narrow instances of prosecutorial misconduct. The issues of personalization of the prosecution as a joint effort between law enforcement and the community and attempts by prosecutors to instill emotional fear in the jurors were addressed. To the extent that Appellate counsel failed to address instances of denigration of the defense, improper bolstering of state witnesses, and the cumulative effect of the combined prosecutorial misconduct, appellate counsel was ineffective. Relief is proper.

CLAIM IV

FLORIDA STATUTE 921.141 IS FACIALLY VAGUE AND OVERBROAD IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS, AND THE UNCONSTITUTIONALITY WAS NOT CURED BECAUSE THE JURY DID NOT RECEIVE ADEQUATE GUIDANCE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. MR. PHILMORE=S DEATH SENTENCE IS PREMISED ON FUNDAMENTAL ERROR WHICH MUST BE CORRECTED. TO THE EXTENT TRIAL COUNSEL FAILED TO LITIGATE THESE ISSUES, TRIAL COUNSEL WAS INEFFECTIVE.

A. THE TRIAL COURT'S INSTRUCTIONS TO THE JURY UNCONSTITUTIONALLY DILUTED ITS SENSE OF RESPONSIBILITY IN DETERMINING THE PROPER SENTENCE.

Mr. Philmore=s jury was unconstitutionally instructed by the court that its role was merely "advisory." (TR Vol. XXVII

2560) Because great weight is given the jury's recommendation, the jury is a sentencer in Florida. Here, however, the jury's sense of responsibility was diminished by the misleading comments and instructions regarding the jury's role. This diminution of the jury's sense of responsibility violated the Eighth Amendment. See Caldwell v. Mississippi, 472 U.S. 320 (1985) as applied to Ring v. Arizona, 122 S.Ct. 2468 (2002).

CLAIM V

MR. PHILMORE=S TRIAL COURT PROCEEDINGS WERE FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS, WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

Mr. Philmore did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments. See Ray v. State, 403 So.2d 956 (Fla. 1981); Heath v. Jones, 941 F.2d 1126 (11th Cir.1991). The process itself failed Mr. Philmore. It failed because the sheer number and types of errors involved in his trial, when considered as a whole, virtually dictated the sentence that he received.

The Supreme Court has consistently emphasized the uniqueness of death as a criminal punishment. Death is Aan unusually severe punishment, unusual in its pain, in its finality, and in its enormity.@ Furman, 408 U.S. at 287 (Brennan,

J., concurring). It differs from lesser sentences Anot in degree but in kind. It is unique in its total irrevocability.@ Id. at 306 (Stewart, J., concurring). The severity of the sentence Amandates careful scrutiny in the review of any colorable claim of error.@ Zant v. Stephens, 462 U.S. 862, 885 (1983). Accordingly, the cumulative effects of error must be carefully scrutinized in capital cases.

A series of errors may accumulate a very real, prejudicial effect. The burden remains on the State to prove beyond a reasonable doubt that the individual and cumulative errors did not affect the verdict and/or sentence.

The flaws in the system that sentenced Mr. Philmore to death are many and Mr. Philmore was prejudiced. They have been pointed out throughout this pleading, but also in Mr. Philmore=s direct appeal. Repeated instances of ineffective assistance of counsel and error by the trial court significantly tainted the process. These errors cannot be harmless. Relief is proper.

In Defreitas v. State, 701 So.2d 593, 600 (4th DCA 1997) the court stated:

> Measuring the prosecuting attorney=s conduct in the instant case by the aforementioned well settled standard, we are persuaded that appellant has been denied one of his most precious constitutional rights, the right to a fair criminal trial, by the **cumulative effect** of one prosecutorial impropriety

after another one. Furthermore, we are equally persuaded that the **cumulative effect** of the numerous acts of prosecutorial misconduct herein were so prejudicial as to vitiate appellants entire trial. In addition, we are likewise persuaded beyond question that the **cumulative effect** of the numerous acts were of such a character that neither rebuke nor retraction could have or would have destroyed their sinister influence. The prosecutorial misconduct, taken in its entirety and viewed in its proper context, is of such a prejudicial magnitude that it enjoys no safe harbor anywhere in the criminal jurisprudence of this state. Accordingly, we find fundamental error. (Emphasis added)

Other Florida cases also hold that the cumulative effect of the prosecutor=s comments or actions must be viewed in determining whether a defendant was denied a fair trial. See Kelly v. State, 761 So.2d 409 (Fla. 2nd DCA 2000) (holding that the **cumulative effect** of the prosecutor=s improper comments and questions deprived Kelly of a fair trial) (emphasis added); Ryan v. State, 509 So.2d 953 (Fla. 4th DCA 1984) (holding that prosecutorial misconduct amounts to fundamental error and is excepted from the contemporaneous objection/motion for mistrial rule, when the prosecutors remarks, **when taken as a whole** are of such character that its sinister influence could not be overcome or retracted) (emphasis added); Freeman v. State, 717 So.2d 105 (Fla. 5th DCA 1998); Pacifico v. State, 642 So.2d 1178 (Fla. 5th DCA 1994) (holding that the **cumulative effect** of prosecutorial misconduct during closing argument amounted to fundamental error) (emphasis added); Taylor v. State, 640 So.2d 1127 (Fla. 1st DCA 1994); Carabella v. State, 762 So.2d 542 (Fla. 5th DCA 2000) (holding that the **cumulative effect** of improper prosecutorial comments during closing argument was so

> inflammatory as to amount to fundamental error) (emphasis added); Pollard v. State, 444 So.2d 561 (Fla. 2nd DCA 1984) (holding that the court may look to the Acumulative effect@ of non objected to errors in determining Awhether substantial rights have been affected@) (emphasis added).

The above case law establishes that defense counsel was ineffective in failing to object to the prosecutor=s remarks, which when taken as a whole, had the cumulative effect of denying Philmore a fair trial. The defense counsel failed to object to the comments and failed to move for a mistrial. The cumulative effect of the comments amounted to fundamental error.

In Mr. Philmore=s case, the cumulative effect of the prosecutor=s closing arguments are compounded by the cumulative effect of the other errors in his trial. The failure of the trial counsel to ensure that a member of Philmore=s race was selected to make up a jury of his peers, the concession of guilt without consultation, the failure of trial counsel to call Dr. Maher when Dr. Berland had been impeached, the omission of Dr. Wood=s testimony by the sentencing court, the dilution of the jury=s sense of responsibility pursuant to Caldwell v. Mississippi, 472 U.S. 320 (1985), along with the direct appeal issues, should be considered by this Court in determining that the cumulative effect of the numerous errors committed by both appellate counsel and trial counsel, deprive Mr. Philmore of a

fair adversarial testing. Mr. Philmore contends that a jury is an extremely delicate entity. The collective mind of the jury was subtly worn down by the cumulative effect of the numerous substantive and procedural errors in this trial. The adversarial nature and the dynamics of a prizefight are applicable in reviewing the cumulative error effects in this case. Mr. Philmore=s champions both on appeal and in trial were hampered by the dehydrating effects of subtle cumulative error, much as dehydration will slowly overcome a fighter in the ring, undetected until it is too late. Relief is proper.

CLAIM VI

DEFENDANT=S EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED AS DEFENDANT MAY BE INCOMPETENT AT TIME OF EXECUTION.

In accordance with Florida Rules of Criminal Procedure 3.811 and 3.812, a prisoner cannot be executed if Athe 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).

The undersigned acknowledges that under Florida law, a claim of incompetency to be executed cannot be asserted until a death warrant has been issued. Further, the undersigned

acknowledges that before a judicial review may be held in Florida, the defendant 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).

The same holding exists under federal law. Poland v. Stewart, 41 F. Supp. 2d 1037 (D. Ariz 1999) (such claims truly are not ripe unless a death warrant has been issued and an execution date is pending); Martinez-Villareal v. Stewart, 118 S. Ct. 1618, 523 U.S. 637, 140 L.Ed.2d 849 (1998)(respondent=s Ford claim was dismissed as premature, not because he had not exhausted state remedies, but because his execution was not imminent and therefore his competency to be executed could not be determined at that time); Herrera v. Collins, 506 U.S. 390, 113 S. Ct. 853, 122 L.Ed.2d 203 (1993)(the issue of sanity [for Ford claim] is properly considered in proximity to the execution).

However, most recently, in In RE:Provenzano, No. 00-13193

(11th Cir. June 21, 2000), the 11th Circuit Court of Appeals has stated:

> Realizing that our decision in In Re: Medina, 109 F.3d 1556 (11th Cir. 1997), forecloses us from granting him authorization to file such a claim in a second or successive petition, Provenzano asks us to revisit that decision in light of the Supreme Court=s subsequent decision in Stewart v. Martinez-Villareal, 118 S.Ct. 1618 (1998). Under our prior panel precedent rule, See United States v. Steele, 147 F.3d 1316, 1317-18 (11th Cir. 1998)(en banc), we are bound to follow the Medina decision. We would, of course, not only be authorized but also required to depart from Medina if an intervening Supreme Court decision actually overruled or conflicted with it.[citations omitted]

Stewart v. Martinez-Villareal does not conflict with Medina=s holding that a competency to be executed claim not raised in the initial habeas petition is subject to the strictures of 28 U.S.C. Sec 2244(b)(2), and that such a claim cannot meet either of the exceptions set out in that provision. Id. at pages 2-3 of opinion

Given that 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 in order to raise an issue in a federal habeas petition, the issue must be raised and exhausted in state court.

The defendant has been incarcerated since [1997].

Statistics have shown that an individual incarcerated over a long period of time will diminish his mental capacity. Inasmuch as the defendant may well be incompetent at time of execution, his Eighth Amendment right against cruel and unusual punishment will be violated.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Lenard Philmore respectfully urges this Honorable Court to grant habeas relief.

Respectfully submitted,

_____
Richard E. Kiley
Florida Bar No. 0558893
Assistant CCC

_____
James Viggiano, Jr.
Staff Attorney

CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE
3801 Corporex Park Drive,
Suite 210
Tampa, Florida 33619
(813) 740-3544

Counsels for Appellant

CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that the foregoing Petition for Writ of Habeas Corpus was generated in Courier New 12-point font pursuant to Fla. R. App. P. 9.210.

_____

Richard E. Kiley
Florida Bar No. 0558893
Assistant CCC

_____

James Viggiano, Jr.
Staff Attorney

CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE
3801 Corporex Park Drive,
Suite 210
Tampa, Florida 33619
(813) 740-3544

Counsels for Appellant

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, first class postage prepaid, to all counsel of record on February _____, 2005.

_____
Richard E. Kiley
Florida Bar No. 0558893
Assistant CCC

_____
James Viggiano, Jr.
Staff Attorney

CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE
3801 Corporex Park Drive,
Suite 210
Tampa, Florida 33619
(813) 740-3544

Counsels for Appellant

Copies furnished to:

Honorable Cynthia G. Angelos
Circuit Court Judge
320 Courthouse Addition
218 South Second Street
Fort Pierce, FL 34950

Leslie Campbell
Assistant Attorney General
Office of the Attorney General
1515 N. Flagler Drive,
Suite 900
West Palm Beach, FL 33401

Lawrence Mirman
Assistant State Attorney
Office of the State Attorney
411 South Second Street
Fort Pierce, FL 34950

Lenard James Philmore
DOC #314648; P2119S
Union Correctional Institution
7819 NW 228th Street
Raiford, FL 32026