IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-227

ROBERT MORRIS

Petitioner,

v.

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

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

RICHARD KILEY
FLORIDA BAR NO. 0558893

JAMES VIGGIANO, JR.
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

Cases

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. Morris 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. Morris 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. Morris accordingly requests that this Court permit oral argument.

INTRODUCTION

Significant errors which occurred at Mr. Morris= 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. Morris. 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. Morris 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. Morris' 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. Morris' 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. Morris 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. Morris= claims.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Morris 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

Robert Morris was charged by indictment on September 29, 1994 in Polk County with the first degree murder of Violet Livingston, burglary, armed robbery, and sexual battery. Mr. Morris= motion to sever the sexual battery was granted. The state unsuccessfully sought certiorari review in the Second District Court of Appeal of the order granting a severance. The state then elected to try the sexual battery count first, and that case went to trial in November, 1998, resulting in a hung jury. The trial court

then granted a judgment of acquittal, on the ground that the evidence did not exclude the reasonable hypothesis that the victim died prior to the commencement of the sexual battery, pursuant to Jones v. State, 569 So.2d 1234, 1237 (Fla. 1990).

The defense moved in limine to exclude evidence of sexual activity from the upcoming murder trial. The trial court ruled that the state could introduce evidence that biological materials and fluids recovered from Violet Livingston=s body during the autopsy were submitted for DNA testing, and could introduce the results of the DNA tests, but that the state would not be permitted to introduce evidence inferring sexual activity. The case proceeded to trial on counts one, two, and four from February 15-March 11 1999, before Circuit Judge Robert A. Young and a jury. On the Friday before jury selection, the state offered an eleventh hour plea deal of a sentence of life imprisonment in exchange for a guilty plea. Mr. Morris did not accept the offer. The jury found Mr. Morris guilty as charged on each count, and after the penalty phase, recommended a death sentence by a vote of 8-4.

Mr. Morris received a concurrent sentence of life imprisonment for the burglary and robbery convictions. On April 30, 1999, Judge young imposed the death penalty for the murder conviction. Notice of Appeal was filed on April 30,1999. The Supreme Court of Florida affirmed the conviction and sentence on February 21, 2002. Morris v. State, 811 So.2d 661 (Fla. 2002). The mandate affirming the judgment and sentence of death on direct appeal was issued by the Supreme Court of Florida on March 14, 2002. The

order appointing the office of the Capital Collateral Regional Counsel, Middle district, was issued on the same day.

Mr. Morris filed a 3.851 motion on May 30, 2003. An evidentiary hearing was held on May 19, 2004 before the Honorable J. Michael McCarthy. The 3.851 motion was denied on July 12, 2004. A timely Notice of Appeal was filed and this petition follows.

CLAIM I

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, 786 So.2d 532 (Fla. 2001). Therefore, Mr. Morris 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. Morris 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. Morris 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. Morris was eligible for based solely upon the jury=s guilty verdict. Under Florida law, the effect of finding an aggravator exposed Mr. Morris 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. Morris= case. Thus, the Florida death penalty scheme was unconstitutional as applied.

Mr. Morris= 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. Morris= 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. Morris= 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).

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.

[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.

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. Morris 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. Morris= 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. Morris= case the trial court found the following four aggravators: (1) the crime was committed while Morris was on parole from a previous felony; (2) Morris was previously convicted of a felony involving the use or threat of violence; (3) the crime was committed for pecuniary gain; and (4) the crime was especially heinous, atrocious, or cruel. 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 eight to four recommendation of death. To the extent that appellate counsel failed to raise this issue on direct appeal, counsel was ineffective.

CLAIM II

> **THE TRIAL COURT ERRED IN DENYING DEFENDANT=S REQUESTED SPECIAL JURY INSTRUCTION Re: MITIGATING CIRCUMSTANCES. THE ERROR WAS NOT HARMLESS PURSUANT TO EXISTING CASE LAW. TO THE EXTENT THAT APPELLATE COUNSEL FAILED TO FULLY LITIGATE THIS ISSUE ON DIRECT APPEAL, APPELLATE COUNSEL WAS INEFFECTIVE.**

On March 8, 1999, trial counsel filed a pleading titled ADefendant=s Requested Special Jury Instruction Re: Mitigating circumstances. In the pleading, trial counsel listed the following mitigating circumstances:

(1) The defendant was born to a teenaged, unmarried mother.

(2) The defendant is borderline mentally retarded (also called low/borderline IQ or borderline intellectual functioning).

(3) The defendant had learning disabilities as a child (he was in educable mentally retarded and special education classes and was possibly suffering from attention deficit hyperactivity disorder undiagnosed).

(4) The defendant was physically and emotionally abused as a child.

(5) The defendant suffered neglect and deprivation as a child.

(6) The defendant=s mother was a drug and alcohol abuser when he was a child.

(7) The defendant grew up in extreme poverty.

(8) The defendant witnessed the physical and sexual abuse of his mother and sisters.

(9) The defendant=s father was absent for most of his life.

(10) The defendant=s mother was arrested and had a criminal record while he was growing up.

(11) The defendant developed bleeding ulcers at a young age.

(12) The defendant began using alcohol and drugs at an early age, and developed a lifelong addiction problem.

(13) The defendant obtained a high school diploma, in spite of limited intellectual abilities and being raised in a dysfunctional family.

(14) The defendant has loving, protective relationships with his family members, including his child and maternal grandmother.

(15) The defendant adapts well to prison life/incarceration.

(16) The defendant can continue to support, encourage, and nurture his family, and others, while incarcerated in prison.

Trial counsel did not request a jury instruction on any statutory mitigators. Counsel asked for only an instruction on non-statutory mitigators.

The motion regarding specific non-statutory instructions was denied and counsel renewed the motion at trial. (TR Vol. XXXV-p. 4575).

Regarding mitigation, the Court read the following instructions to the jury:

> Mitigating factors include any aspect of the defendant's character, record, or background, and any other circumstance of the offense that would mitigate against the imposition of the death penalty.
>
> If one or more aggravating circumstances which is sufficient to justify the imposition of the death penalty is proved beyond a reasonable doubt, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to what sentence should be imposed.
>
> The weighing of aggravating and mitigating circumstances is not just a counting process. You are free to assign whatever weight you feel is appropriate to the aggravating and the mitigating circumstances.
>
> A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it established.

> The sentence that you recommend to the court must be based upon facts that you find from the evidence and on the law I have given you in these instructions. You should weigh the aggravating circumstances against the mitigating circumstances, and our advisory sentence must be based on these considerations. (R. Vol. XXXV-4581).

Legal argument

The instruction given by the court was a Acatchall@ instruction and was insufficient to guide the jury in its consideration of nonstatutory mitigating circumstances. When contrasted with the clear and specific instructions on aggravating factors, this instruction had a denigrating effect. Mr. Morris had to rely on the arguments of his counsel to insure that the non-statutory mitigation was presented to the penalty phase jury.

In Mellins v. State, 395 So.2d 1207 (Fla. 4th DCA 1981)the court held:

> The law is very clear that the court, if timely requested, as here, must give instructions on legal issues for which there exists a foundation in the evidence. Laythe v. State, 330 So.2d 113 (Fla. 3rd DCA 1976).
> It is not a sufficient refutation of appellant=s argument to suggest that her counsel=s summation sufficiently apprised the jury of the effect of intoxication on the scienter required to support the charge to relieve the Court of its duty to give an appropriate instruction. The jury is admonished to take the law from the court=s instructions, not from argument of counsel. It must be assumed that this admonition is generally followed. For this reason the error may not be considered harmless. Id. at 1209.

In Mr. Morris= case, every non-statutory mitigating factor detailed in trial counsel=s requested jury instruction had been established during the penalty phase. However, the jury was given no guide as to what was and what was not to be considered by them.

The issue of harmlessness is addressed in Booker v. Dugger, 922 F.2d 633,635 (11th Cir. 1991). The Booker court held:

> From these decisions, a *Hitchcock* error will not be found harmless if the evidence excluded from the jury=s sentencing deliberations by a limiting instruction could have had any effect on the jury=s recommendation. *See Skipper v. South Carolina,* 476 U.S. 1, 8, 106 S.Ct. 1669,1673 90 L.Ed.2d 1 (1986) (*Lockett* violation not harmless because Court could not Aconfidently conclude@ that the excluded evidence Awould have had no effect upon the jury=s deliberations@). In situations where counsel has made a strategic choice not to introduce any mitigating evidence, it is clear that *Hitchcock* violations are harmless: AHaving failed to produce evidence of any nonstatutory mitigating factors, [petitioner] can hardly complain that the trial court restricted the jury=s ability to consider them.@ *Clark*, 834 F.2d at 1570. Likewise, where no true mitigating evidence exists, *Hitchcock* is not implicated. *See, e.g., Demps,* 874 F.2d at 1396 (Clark, J., specially concurring) (AWhere there is no nonstatutory mitigating evidence there can be no *Hitchcock* error and harmlessness need not be considered.@)Id. At 635.

In Mr. Morris= case, the court excluded from the jury=s sentencing deliberations by a limiting instruction a total of sixteen non-statutory mitigators. The Acatchall@ instruction restricted the jury=s ability to consider the sixteen non-statutory mitigators. In light of the eight to four recommendation for death, this restriction was not harmless. Relief is proper.

CLAIM III

FLORIDA STATUTE 921.141(5) 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. MORRIS= 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 JURY'S INSTRUCTION ON THE AGGRAVATOR, OF COMMISSION OF A MURDER DURING THE COURSE OF A ROBBERY, IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

The jury was given the following instruction regarding the murder during the course of a robbery aggravating circumstance:

> The crime for which the **B** -the crime for which the defendant is to be sentenced was committed while he is **B** - was engaged in the commission of the crime of robbery or burglary. R. Vol. XXXV-4578).

The jury's deliberation was tainted by the unconstitutional and vague instruction. See Sochor v. Florida, 112 S. Ct. 2114 (1992). The use of the underlying felony as an aggravating factor rendered the aggravator "illusory" in violation of Stringer v. Black, 112 S. Ct. 1130 (1992). The jury was instructed regarding an automatic statutory aggravating

circumstance, and Mr. Morris thus entered the penalty phase already eligible for the death penalty, whereas other similarly (or worse) situated petitioners would not.

The instruction was unconstitutionally vague. An aggravating circumstance that merely repeats an element of first-degree murder does not genuinely narrow nor does it provide the sentencer guidance in a weighing state as required.

The instructions violated Florida law and the Eighth and Fourteenth Amendments in two ways. First, the instructions shifted the burden of proof to Mr. Morris on the central sentencing issue of whether death was the appropriate sentence. Secondly, in being instructed that mitigating circumstances must outweigh aggravating circumstances before the jury could recommend life, the jury was effectively told that once aggravating circumstances were established, it need not consider mitigating circumstances unless those mitigating circumstances were sufficient to outweigh the aggravating circumstances. Thus, the jury was precluded from considering mitigating evidence, and from evaluating the "totality of the circumstances" in considering the appropriate penalty. According to the instructions, jurors would reasonably have understood that only mitigating evidence which rose to the level of "outweighing" aggravation need be considered. Therefore, Mr. Morris is entitled to a new sentencing hearing because his sentencing was tainted by improper instructions.

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

Mr. Morris= jury was unconstitutionally instructed by the court that its role was merely "advisory." (R Vol. XXXV- p.4576-77) 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 IV

MR. MORRIS= 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. Morris 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. Morris. 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. Morris to death are many and Mr. Morris was prejudiced. They have been pointed out throughout this brief, but also in Mr. Morris= 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 the errors when taken as a whole, had the cumulative effect of denying Mr. Morris a fair trial.

In Mr. Morris= case, the cumulative effect of the error, both in the direct appeal and the 3.851 proceedings affected the outcome of the trial. The failure of the trial counsel to prevent the questioning of the jurors, the failure to properly impeach Laventure by calling Barfield, the failure of trial counsel to ask for statutory mitigation when their special jury instruction was denied, 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. Morris of a fair adversarial testing. Mr. Morris 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 is applicable in reviewing the cumulative error effects in this case. Mr. Morris= 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 V

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. Hence, the filing of this petition.

The defendant has been incarcerated since [1994]. 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, Robert Morris respectfully urges this Honorable Court to grant habeas relief.

_____
Richard E. Kiley
Florida Bar No. 0558893

_____
James Viggiano, Jr.
Florida Bar No. 0715336

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

Counsels for Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Petition for Writ of Habeas Corpus was generated in Times New Roman, 14-point font pursuant to Fla. R. App. P. 9.210.

_____
Richard E. Kiley
Florida Bar No. 0558893

_____
James Viggiano, Jr.
Florida Bar No. 0715336

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

Counsels for Appellant

CERTIFICATE OF SERVICE

I 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

_____
James Viggiano, Jr.
Florida Bar No. 0715336

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

Counsels for Appellant

Copies furnished to:

Honorable J. Michael McCarthy
Circuit Court Judge
255 N. Broadway Avenue
P. O. Box 9000, Drawer J-136
Bartow, FL 33831

Scott A. Browne
Assistant Attorney General
Office of the Attorney General
Concourse Center 4
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607-7013
John Aguero

Assistant State Attorney
Office of the State Attorney
Post Office Box 9000, Drawer SA
Bartow, Florida 33831

Robert Morris
DOC #550026; P2115S
Union Correctional Institution
7819 NW 228th Street
Raiford, FL 32026