IN THE SUPREME COURT OF FLORIDA

CASE NO.SC05-1612

DAVID WYATT JONES,

Petitioner,

v.

JAMES CROSBY,

Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

This is Petitioner's first habeas corpus petition in this Court. Art. 1, Sec. 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 Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, claims demonstrating that Petitioner was deprived of the right to a fair, reliable, and individualized sentencing proceeding and that the proceedings resulting in his convictions and death sentence violated fundamental constitutional imperatives.

Citations shall be as follows:

"R. ___." The record on direct appeal.

"TT. ___." The trial transcript.

"PC-R. ___." The post-conviction record on appeal.

All other references will be self-explanatory or otherwise explained herein.

INTRODUCTION

Significant errors occurred at Mr. Jones' capital trial and sentencing. The state presented evidence of an uncharged, unsubstantiated sexual battery and also argued in favor of the

phantom charge to the jury. Evidence of the bogus sexual battery was presented and argued at both guilt and penalty phases. Also, the state presented alleged evidence that the homicide committed in this case was the result of a stabbing, something for which there was absolutely no proof of. Presentation of the phantom sexual battery and stabbing were inappropriate and prejudicial. Further, the lead detective in Petitioner's case testified numerous times as to his opinion that Petitioner is untruthful. These issues were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel. As this petition will demonstrate, Petitioner is entitled to habeas relief.

REQUEST FOR ORAL ARGUMENT

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

PROCEDURAL HISTORY

On February 16, 1995, Petitioner was indicted by a Duval County grand jury for one count each of first-degree murder, kidnapping, and robbery. (R. 3-4) On March 21, 1997, a jury found Petitioner guilty of all charges. (R. 1516-17) On April 10, 1997, that same jury recommended

death by a vote of 9-3. (R. 2120) Subsequent to the jury's recommendation, the trial court sentenced Petitioner to death. (R. 2390)

Petitioner timely sought direct appeal to this Court. This Court affirmed Petitioner's convictions and sentences. Jones v. State, 748 So.2d 1012 (Fla. 2000). A Petition for a Writ of Certiorari to the United States Supreme Court was denied July 12, 2000. Jones v. Florida, 120 S.Ct. 2666 (2000).

Petitioner filed his initial post-conviction motion on June 12, 2001. (PC-R. 1-28) On April 28, 2003, Petitioner filed an Amended post-conviction motion. (PC-R. 110-217) A Huff[1] hearing was held in the matter on August 11, 2003. (PC-R. 242) On September 10, 2003, the lower court entered an order granting an evidentiary hearing only as to claims I, II, V, and XII of Petitioner's amended motion. (PC-R. 242-43) An evidentiary hearing was held in this matter on December 11, 2003. The lower court denied all relief on October 20, 2004. (PC-R. 387-445) A timely appeal of that order to this Court was made and the Initial Brief in that appeal is filed simultaneously with this Petition.

[1]Huff v. State, 622 So.2d 982 (Fla. 1993).

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla. R. App. P. 9.100(a). See Art. 1, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article 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 Petitioner's convictions and sentences of death.

Jurisdiction in this action lies in this Court. See, e.g., Smith v. State, 400 So.2d 956, 960 (Fla. 1981). The fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Petitioner's direct appeal. See Wilson, 474 So.2d at 1163; cf. Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Petitioner 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 proper.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Petitioner asserts that his capital convictions and sentence of death were obtained in violation of his rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

ARGUMENT I

AT PETITIONER'S CAPITAL TRIAL, THE STATE IMPROPERLY PRESENTED EVIDENCE AND ARGUED TO THE JURY THAT PETITIONER COMMITTED A SEXUAL BATTERY AGAINST THE VICTIM DESPITE THE FACT THAT PETITIONER WAS NOT CHARGED WITH SEXUAL BATTERY NOR WAS THERE ANY EVIDENCE THAT THE VICTIM HAD BEEN SEXUALLY BATTERED. APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO PRESENT THIS ISSUE IN PETITIONER'S DIRECT APPEAL TO THIS COURT.

As stated, Petitioner was charged by indictment with one count each of first-degree murder, kidnapping, and robbery. (R. 3-4) Petitioner ***was not*** charged with sexual battery or any other sex crime. Despite the lack of indictment or evidence, the state vigorously attempted to suggest, through testimony and argument, that Petitioner sexually battered the victim. This was a blatant attempt to further inflame the jury against Petitioner, especially concerning their sentencing recommendation.

In his opening argument, the prosecutor stated:

> ***Now, she was wearing clothing at the time in a manner of speaking. She had no shoes on. She did have black socks on. Her ankles were bound by rope.*** This rope is made out of a fiber called sisal, S-I-S-A-L.
>
> ***She was wearing jeans. These jeans were not buttoned and not zipped and they were pulled***

> ***partially down off her waist exposing her pubic area.***
>
> ***She was wearing a bra which was more or less in place.*** She was wearing what used to be a white blouse at the time she was wearing it when alive it was, because of what happened to it later it was not entirely white any more, it was mostly looking brown by the time she was found. ***There were two buttons of five approximately remaining on the blouse. The top two buttons were still there, the rest of them had been torn off.***

(TT. 527-28) (emphasis added) Later in opening argument, the prosecutor argued:

> Of course at the time she drove off from work she's wearing that white blouse, but the buttons are still intact. ***They had yet to be ripped off as she struggled desperately to survive.***

(TT. 529-30) (emphasis added) The prosecutor went on to state:

> But the evidence is absolutely crystal clear that there in that parking lot in Duval County, Florida, on Blanding Boulevard that he kidnapped Lori McRae, that he abducted her, that he drove off with her in her own vehicle, and that at the time he did that he did it for the purpose of, ***among other things***, robbing her so he could get money to buy more crack. . . We do not know exactly how long he kept her alive, ***and we don't know exactly what he did to her***. . .

(TT. 533-34) (emphasis added)

Next, during the testimony of the medical examiner, the prosecutor brought out the following testimony:

> Q: Would you tell us about what you saw on external examination?
>
> A: Yes, sir. As I said earlier, the body was decomposed. She was clothed, ***she was wearing a shirt, long sleeve shirt that was open and pulled or rode up into the upper part of her body. She was wearing a brassiere which was in place except the left strap was pulled down.***
>
> ***She was wearing black pants that was pulled down, the zipper was open and the bottom was unbuttoned, it was pulled down all the way to the pubic area exposing her pubis and the buttock area.***

(TT. 609-10) (emphasis added)

Further, during the testimony of the medical examiner, the prosecutor elicited the following testimony:

> Q: ***Now, were you able to tell us anything meaningful about the condition of her genitalia?***
>
> A: ***Well, I don't know if it's meaningful in what sense but there was no genitalia present. In other words, the maggots inside the body had eaten everything from the neck all the way inside, all the organs were practically gone including the genitalia.***

(TT. 614) (emphasis added)

Officer Grant testified to his arrest of Appellant on February 1, 1995. During Grant's testimony, the prosecutor brought out the following exchange:

> Q: Did you notice anything about the defendant's appearance at that time?
>
> A: Yes, sir, I did. He had slightly glassy eyes, he was slow to respond to my commands.
>
> Q: And did you notice anything about the condition of his face?
>
> A: ***On his face he had, what I characterized as, rape marks from fingernails***. When I first saw that's just what it looked like to me was like scratch marks down his one side of his face with dried blood.

(TT. 651-52) (emphasis added)

During the testimony of FDLE serologist Diane Hanson, in the context of explaining mixed DNA stains, the prosecutor asked the following question:

> Q: For example, if – ***and I'm not suggesting that this applies to this case necessarily*** but just for example in a rape case when you have semen came (sic) from a rape kit submitted is it common that the material would contain a mixture of DNA from the donor of the semen and from the female?

(TT. 1090) (emphasis added) The context of the question, a rape scenario, was completely unnecessary to explain mixed DNA stains. The only purpose was to suggest to the jurors that a rape occurred in this case, a fact that is devoid of any proof.

Mr. Jones' trial attorney later felt compelled to respond to this bogus rape theory when he asked Hanson the following questions:

> Q: ***And there's a presumptive test for the presence of semen called the acid phosphatase test, am I pronouncing it right?*** If I'm not please tell them.
>
> A: Yes, that's correct, it's acid phosphatase.
>
> Q: And you, in fact, applied that presumptive testing to some stains on the blue jeans identified as belonging to David Jones, right?
>
> A: Yes, to the one area on the blue jeans I did.
>
> Q: ***And that test did not test positive for the possible presence of semen, is that right?***
>
> A: ***That's correct, it was negative.***

(TT. 1099-1100) (emphasis added) Obviously, Petitioner's attorney was forced by the prosecutor into making a reasonable doubt argument as to a phantom charge of sexual battery.

In closing argument, the prosecutor further argued:

> ***Well, why would you want to cut the shoes off of somebody who was already dead? You know there were only a couple of reasonable explanations for that and none of them are good for the defendant.*** You know, one explanation is that you want to make it more difficult for that person to run away from you. ***Another explanation is because you want to get the person's pants off.*** Is

> there any explanation that makes any sense that is good for the defendant? No. Why bind the feet of a person who is already dead? Could it be that he wants to make it more difficult for her to get away?

(TT. 1453) (emphasis added) Later, the prosecutor continued to suggest a rape scenario:

> Another reason, while I'm standing here, on the struggle, this is the blouse we found her in (indicating). ***You can see from the close-up picture of this blouse that there are buttons missing.*** The top two are still there, but the rest of them, from there down (indicating), torn off. Okay. That just didn't – all those bruises on her legs, bruises on her arms, scratches on her face, scratches on his neck, scratches on his back, getting blood all over everything, that just didn't happen in ten seconds. ***And you can see from this picture where the buttons were found in the blazer underneath – in the cargo area, underneath all the luggage that had been removed before they found the buttons where they had been ripped off the blouse. Gee, I wonder how or why those buttons were ripped off and her shirt opened up?***
>
> ***And another interesting thing about the ultimate scene. There's another thing I guess we don't know, is why her pants are unbuttoned.***

(TT. 1459-60) At that point, trial counsel for Mr. Jones objected and moved for a mistrial:

> MR. BUZZELL: ***Your Honor, I object to this. They're trying to make a clear inference that there was a sexual battery here involved and it's not charged, there's no evidence of it, and***

> ***I move for a mistrial on that basis. It's clearly improper argument. There's no other reason to be arguing this.***
>
> THE COURT: Overruled.
>
> MR. BUZZELL: Your Honor, I would respectfully ask the Court to instruct the State to move on.

(TT. 1460) (emphasis added) After the mistrial was denied, defense counsel felt compelled to respond in some way to the rape suggestion in his closing argument:

> If one or two people are disposing of a body out in the woods in the night, it makes – ***I hate to say this***, but it makes sense that you'd have to drag them through the bushes. It makes sense that things like clothes would be brought up. In fact, the Medical Examiner even said it looked like she had been dragged through the bushes there. ***It's not some great nefarious thing, it's horrible and it's sad and it's tragic, but it's just the way that she was put out there. You can consider it for that, but that's all.***

(TT. 1485) (emphasis added)

Later, during the penalty phase portion of the case, Mr. Jones' trial attorney felt compelled to rebut the state's rape suggestion via the testimony of his wife:

> Q (by Mr. Chipperfield): Did he – was he ever romantically interested in you at any time during this period when he was focused on crack cocaine? By that

> I mean sexual interest, did he have any?
>
> A: Not while he was high on cocaine, no.

(TT. 1701)

In his closing argument at penalty phase, the prosecutor continued his improper argument as to a non-existent sexual battery:

> In this state if you kill somebody during the commission of a felony it's an aggravating circumstance and it should be. *We have that to deter people from robbing and **raping** and kidnapping people and doing other dangerous felonies*. . . The murder happened during the course of the robbery, and to that extent the circumstances surrounding the entire criminal episode established that he acted for financial gain. And that would overlap with the concept of the fact that he did it during a robbery. But we don't just have a robbery here, we have kidnapping as well. He did not have to abduct her from the parking lot, that was unnecessary to the robbery, he could have taken her purse and called it a day right there, but, no, ***he had to abduct her and take her out in the middle of nowhere and do God knows what to her later.***

(TT. 2042-43) (emphasis added) Later, the prosecutor continued:

> That would be a problem because Mr. Chou might hold me up long enough to get caught or maybe even if I get away he could identify me later. ***But see, then out in the parking lot, oh boy, there's nobody else around, and look at that pretty little girl who's not going to be a problem for me with that big***

> ***old purse and that shiny red Blazer. This is a gold mine for me. It's show time.***

(TT. 2053) (emphasis added) Mr. Jones' trial attorney objected to the comment as inflammatory. The objection was overruled. (Id.) Clearly, the prosecutor was not suggesting that Mr. Jones targeted the victim for robbery or kidnapping because she was "pretty." The only reason for the comment was to suggest that Mr. Jones targeted the victim for the purpose of raping her.

Further, the prosecutor argued as follows:

> ***Now, another thing they brought up, and I'm not really too sure why, is asking the experts do crack addicts have any interest in sex? And his answer was well, no, not while they're high on cocaine. Well, why bring that up? What's mitigating about that? I mean, first of all, there's no evidence that he was high on cocaine when he kidnapped Lori, you know. So I don't know where that would be mitigating anyway. The evidence is to the opposite, that he wasn't high and that's why he tried to get her money in the first place, but you know, why bring that up? Oh, well, maybe he's not interested in sex. Well, you know, why did he make her take her shoes off? Why are her pants unzipped and unbuttoned?***

(TT. 2059) (emphasis added) This statement was not only inappropriate and inflammatory, but completely disingenuous as

well.[1] The prosecutor's continuous suggesting of an uncharged, factually unsupported, sexual battery compelled Petitioner's counsel not only to object, but to attempt to rebut the suggestion through witnesses. At this point, counsel for Mr. Jones objected again:

> MR. CHIPPERFIELD: ***You honor, I'm going to object, it's an issue that came up during trial, trying to be a suggestion there's some kind of a crime that is not charged for which he is not convicted and I don't think it's proper rebuttal of anything we presented during penalty phase.***
>
> THE COURT: Overruled.
>
> MR. PHILLIPS***: Why he made her take her shoes off, there is (sic) only two reasonable explanations, one is to keep her from running away, and the other one is so her pants could come off.***
>
> MR. CHIPPERFIELD: Same objection, Your Honor.
>
> THE COURT: Overruled.
>
> MR. CHIPPERFIELD: In addition it's inflammatory.

[1] The prosecutor's specific argument here is also a complete mischaracterization of expert witness Drew Edwards' testimony. The testimony in question involved Edwards explanation that an addicts' normal cravings for food, water, sexual gratification, etc., i.e. basic human biological needs, are interpreted by the addict's affected brain as a craving for cocaine. (TT. 1911-14) The questioning and answers could not reasonably be interpreted as asserting lack of interest in sex as a defense or even mitigation, as the prosecutor suggested.

(TT. 2059-60) (emphasis added)

In his own closing, defense counsel was compelled to address the bogus rape scenario:

> ***So why was it important to ask a question about sex? Why? To prove that David Jones was a crack addict. And then that single mention of that subject to prove the chemical imbalance in the brain is taken by the prosecutor to suggest to you something that has never been proven about which there is absolutely no evidence and make you mad at him so you will vote for death. That's wrong.***

(TT. 2092) (emphasis added)

The prosecutor in Petitioner's case clearly attempted to suggest to the jury, and thereby persuade them, that the victim was raped by Mr. Jones. This is despite the fact that no such crime was charged in the indictment and there was, at best, nebulous evidence of it as fact. In the end, the suggestion and argument that a rape occurred in this case became a feature of the trial. As demonstrated by the above-quoted excerpts, the bogus rape scenario prevailed from alpha to omega, poisoning both the guilt and penalty portions of the trial.

This court has previously held that

> [g]enerally, the test for the admissibility of evidence is relevance. Relevant evidence is defined as 'evidence tending to prove or disprove a material fact.' 'Relevant evidence is inadmissible if its probative value

> is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or needless presentation of cumulative evidence.

Griffin v. State, 639 So.2d 966, 968 (Fla. 1994) (citations omitted). Further, this Court, in Griffin, expounded on the admissibility of uncharged crimes:

> [E]vidence of uncharged crimes which are inseparable from the crime charged, or evidence which is inextricably intertwined with the crime charged, is not Williams[2] rule evidence. It is admissible under section 90.402 because 'it is a relevant and inseparable part of the act which is in issue. . . [I]t is necessary to admit the evidence to adequately describe the deed.'

Id (quoting Charles W. Erhardt, Florida Evidence Section 404.17 (1993 ed.) (footnote added).

This Court and other appellate courts have found evidence of uncharged crimes admissible on the above-quoted basis. See Griffin v. State 639 So.2d 966 (Fla. 1994); Smith v. State, 365 So.2d 704 (1978); Austin v. State, 500 So.2d 262 (Fla.1st DCA 1987); Tumulty v. State, 489 So.2d 150 (Fla.4th DCA), review denied, 496 So.2d 144 (Fla. 1986). In Griffin, for example, this Court upheld the introduction of the defendant's theft of

[2] Williams v. State, 110 So.2d 654 (Fla.), cert. denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959).

car keys as “inextricably intertwined” with an automobile theft charge that was before the jury. Griffin at 969. In Smith, this Court, in a capital case, upheld the introduction of a second uncharged murder. There, this Court’s reasoning was that evidence of the second murder was relevant to illustrate the criminal context of the first murder and to place the defendant at the scene of the first murder. Smith at 707.

In Austin and Tumulty, the courts there similarly upheld “inseparable crime” evidence as “inextricably intertwined” with the charged crime(s). In Tumulty, evidence of drug sales precedent to a charged murder and in Austin, evidence of an armed robbery and shooting to prove motive for a subsequent charged robbery and attempted murder. Tumulty at 153. Austin at 265.

Petitioner’s case is thoroughly distinguishable from the above cases. The alleged rape scenario asserted by the prosecutor in the instant case was in no way necessary to prove the charged crimes of kidnapping, robbery, and murder. The prosecutor’s more consistent theory at Petitioner’s trial was that the kidnapping was committed to effectuate the robbery and the murder was committed to prevent detection of the robbery. The bogus sexual battery was simply thrown in the middle of the evidence for pure, unadulterated prejudice. The instant case is

more akin to that of Chapman v. State, 417 So.2d 1028 (Fla.3rd DCA 1982). There, the defendant was charged with robbery and escape involving the robbery of a female victim inside her home. Id at 1029. The state, in Chapman, introduced testimony as to an uncharged sexual battery committed during the robbery. Id at 1029-31.[3] In reversing, the district court in Chapman found that

> There is no evidence in the trial record nor here on appeal that fact evidence of another crime was relevant to prove any material fact in issue. References to another crime along with the testimony that defendant had just been released from jail were relevant solely to prove bad character or propensity.

Id at 1032. As in Chapman, the suggestion of rape in Petitioner's trial was not in any way relevant to prove kidnapping, robbery, or murder. It was not relevant to any material fact. It was introduced, clearly, to inflame the jurors' passions as the alleged rape of an innocent woman naturally would. The prosecutor was almost certainly successful in this endeavor. Prejudice to Petitioner was the result.

Another point which must be made in order to distinguish Petitioner's case is that in the cases cited above, there was significant proof of the uncharged crimes. Eyewitnesses in those cases testified to witnessing the commission of the

[3] It should be noted that in Chapman, the references to the alleged rape with much more vague than the clear, overt arguments made in the instant matter.

crimes. In Petitioner's case, the "evidence" of sexual battery was scant at best. More accurately, the evidence was non-existent. The prosecutor's primary "evidence" of rape here was that the victim's pants were around her hips, exposing the pubic area. However, the record makes clear that the victim was almost certainly dragged to the area where she was found and this is how her pants were pulled down.[4] The pants certainly were not taken off so as to effectuate a rape. As the evidence demonstrates, the victim's pants were not "off." The prosecutor's other "evidence" of rape was that the victim's blouse was unbuttoned. Again, given that the state's theory was that the victim engaged in a physical struggle with Petitioner over the ATM cards, it is not surprising that the buttons on her blouse were torn. The factual evidence here falls far short of rape. It is almost too obvious to point out that had there been minimally arguable, actual proof of rape, the state would have charged Petitioner with the crime. Not one witness testified to the occurrence of a sexual battery in this case. That is because it simply did not happen.

The prosecutor's rape argument extended, as the quoted record excerpts demonstrate, into the penalty phase of

[4] The medical examiner testified that his examination of the victim's body and the clothing at the scene suggested that the victim's body had been dragged across the ground, the bushes, or both. (TT. 636)

Petitioner's trial. In Dragovich v. State, 492 So.2d 350 (Fla. 1986), this Court wrote

> We have previously held that the state may not use mere arrests or accusations as factors in aggravation, Provence v. State, 337 So.2d 783 (Fla. 1976), cert. denied, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977). Nor have we allowed pending charges, or mere arrests not resulting in convictions, to be used as aggravating factors. Odom v. State, 403 So.2d 936 (Fla. 1981), cert. denied, 456 U.S. 925, 102 S.Ct. 1970, 72 L.Ed.2d 440 (1082); Perry v. State, 395 So.2d 170 (Fla. 1981).

Dragovich at 355. See also Elledge v. State, 346 So.2d 998 (Fla. 1977); Delap v. State, 440 So.2d 1242 (Fla. 1983). This Court has long held that aggravating circumstances must be limited to those provided for by statute. See Wike v. State, 596 So.2d 1020 (Fla. 1992); McCambell v. State, 1072, 1075 (Fla. 1982); Miller v. State, 373 So.2d 882, 885 (Fla. 1979). As in Dragovich, the instant case involves mere uncharged accusation, with less actual proof. The state clearly asserted the alleged rape in this case as aggravation. The rape scenario was continuously referred to by the prosecutor as the record excerpts demonstrate. The rape scenario indeed became a feature of the trial. This is especially relevant to the jury's consideration of sentence where evidence that the victim, in addition to being kidnapped, robbed, and murdered, was also

allegedly raped. It cannot be reasonably argued that the bogus rape scenario did not prejudice the jury against Petitioner in a manner that affected the outcome of its sentencing recommendation.

The improper presentation of an uncharged, and completely unsubstantiated, rape was objected to at trial. (TT. 1460, 2059-60) As the foregoing argument demonstrates, Petitioner was prejudiced by the suggestion of an uncharged rape at his trial. Appellate counsel was ineffective in failing to raise this argument on direct appeal. Petitioner's claim of ineffective assistance of appellate counsel is properly raised in this petition. Freeman v. State, 761 So.2d 1055, 1069 (Fla. 2000). The standard for relief on a claim such as this is the same as Strickland v. Washington, 466 U.S. 668 (1984). Henyard v. State, 883 So.2d 753 (Fla. 2003). That is,

> whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.

Id at 764. see also Freeman; Pope v. Wainwright, 496 So.2d 798 (Fla. 1986); Thompson v. State, 759 So.2d 650 (Fla. 2000).

Given the prevailing nature of the issue raised herein, appellate counsel should have been acutely aware of it. Failing to raise the issue in Petitioner's direct appeal to this Court resulted in the prejudice thus demonstrated. A new trial and/or sentencing are warranted.

ARGUMENT II

AT PETITIONER'S CAPITAL TRIAL, THE STATE IMPROPERLY PRESENTED IRRELEVANT AND INFLAMMATORY EVIDENCE AND ARGUMENT TO THE JURY REGARDING A KNIFE AND UNSUBSTANTIATED STAB WOUNDS INFLICTED BY SAID KNIFE. APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO PRESENT THIS ISSUE IN PETITIONER'S DIRECT APPEAL TO THIS COURT.

At Petitioner's trial there was no evidence of any substance that a knife was used to commit the homicide in question or that the victim had been stabbed. Despite this, and that the prosecutors obviously knew there was no such evidence, they sought to impart such myth to the jury regardless.

In his opening argument, the prosecutor stated

> At that time the defendant has scratches on his face like he had been scratched by a woman in a struggle and he's in possession of the victim's car, the victim's ATM card, and he's moved right into Lori McRae's car. ***He's got his personal belongings in the car, he's loaded it up with everything he's got. There is a knife in the car that belongs to him or if it doesn't belong to him it certainly doesn't belong to Lori McRae or***

her husband, there is physical evidence in the car that's important.

(TT. 537)(emphasis added)

Next, during the medical examiner's direct testimony, the following exchange took place:

> Q: Did you notice any blood on her brassiere?
>
> A: ***There was no blood on her brassiere.***
>
> Q: Are you able to rule out that she was stabbed in this case?
>
> A: ***Well, there was no blood. If she was stabbed in the chest I would expect blood to come out, and spoil the brassiere or contaminate the brassiere with blood. So more or less I can rule out severe injury to the chest.***
>
> Q: Are you able to rule out her throat being cut?
>
> A: No, sir, I cannot rule that out.

(TT. 615-16) (emphasis added) The medical examiner testified further that his opinion is that the victim died of ligature strangulation. (TT. 618)

Later, the prosecutor continued to question the medical examiner:

> Q: Show you six in evidence, what is that a picture of?
>
> A: This Is the torso and the head of Lori McRae, Miss McRae decomposed, there is opening you can see the vertebra right

there, you can see the brassiere which is white and clean and the shirt on the side.

Q: And is that the way the brassiere was when you first saw the body?

A: Yes, sir.

Q: Now, what is this – these little holes up here in the upper chest?

A: ***There's a hole in the upper torso of Miss McRae, it could be from decomposition, it could be from instrumentation, I couldn't tell because of the decomposition.***

(TT. 632-33) (emphasis added)

During the testimony of FDLE agent Allen Miller, the state continued its assertion of the phantom stabbing theory:

Q: And with regards to State's exhibits 32 and 33, was there a reason that you went back into the center console and took those pictures?

A: Yes.

Q: And tell the jurors for what purpose you went back into the Chevy Blazer and took those two particular pictures.

A: Well, at the time of the original processing it was noted the items that were in the console, a pack of playing cards, some cigarettes, cassette tapes, cologne and a small paring knife was in there. ***And after the postmortem examination it was revealed that the victim had received some stab wounds.***

(TT. 792-93) (emphasis added) At that point in Miller's testimony, Petitioner's trial counsel objected, noting that there was

"absolutely no testimony to that effect." (TT. 793) After the jury was removed, the following discussion took place:

> MR. BUZZELL: Your honor, I move for a mistrial for several reasons. First of all, for this witness to conclude there was stab wounds based on some examination of a crime scene is a problem for several reasons; one for it's relying on some sort of hearsay; second of all, it's outside any possible expertise he would have in his field to demonstrate his qualifications so far; ***and third of all, there's no record evidence of that. That wasn't the Medical Examiner's opinion as to the cause of manner of death, he said from ligature strangulation.***

(TT. 794) (emphasis added) The trial court thereafter denied the motion for mistrial and instructed the jury that Miller had misspoken and that there was no evidence that the victim had been stabbed. (TT. 795-96)

Despite the court's admonishment and instruction, the state continued to press forward in its attempt to imply a stabbing death. The prosecutor, later in Agent Miller's testimony had him identify the knife he took from the console of the victim's vehicle. (TT. 815) When the prosecutor attempted to introduce the knife into evidence, Petitioner's trial counsel objected again:

> MR. BUZZELL: Your honor, before Miss Corey-Lee gets carried away with stickers we would want to interpose an objection to State's Exhibit triple V for identification just simply because

> of relevance, I don't see how they've linked up this particular.
>
> THE COURT: Is that the knife?
>
> MR. BUZZELL: Yes, pearing (sic) knife or whatever it is.

(TT. 819) The court then overruled counsel's objection. (TT. 820) Agent Miller then, at the prosecutor's request, displayed the knife to the jury. (TT. 822)

In closing argument, the prosecutor then speculated about Petitioner's alleged use of the knife:

> And there's another reason for this. See her shoes? These shoes had laces on them when she left for work. One of the laces is completely gone and you can see that the other one is unlaced and right there you can see that it looks like it's either been ripped asunder or cut. Okay.
>
> Now, do you suppose that might have anything to do with the knife in the car that doesn't belong to Doug or Lori? Well, why would you want to cut the shoes off of somebody who was already dead? You know there were only a couple of reasonable explanations for that and none of them are good for the defendant. You know, one explanation is that you want to make it more difficult for that person to run away from you. Another explanation is because you want to get the person's pants off. Is there any explanation that makes any sense that is good for the defendant? No. Why bind the feet of a person who is already dead? Could

> it be that he wants to make it more difficult for her to get away?

(TT. 1452-53) The prosecutor's speculation regarding the knife, much like that regarding sexual battery, is wholly unsubstantiated. There is no more evidence that the knife belonged to Petitioner than there is that it belonged to the victim or her husband. Further, there is zero evidence in this case that Petitioner stabbed the victim, something the prosecutors clearly implied to the jury. The knife evidence and argument presented by the state was irrelevant. Assuming some marginal relevance, perhaps as to the completeness of law enforcement's evidence collection, the presentation and argument vis-à-vis the knife were overly prejudicial by any standard.[5]

Generally, any fact relevant to prove a fact in issue is admissible into evidence unless its admissibility is precluded by some specific rule of exclusion. Boyd v. State, 2005 WL 318568 (2005); Butler v. State, 842 o.2d 817 (Fla. 2003). However, a corollary to that rule is that relevant evidence is inadmissible if its probative value is substantially outweighed

[5] It should be noted that during the penalty phase, the prosecutor continually emphasized, during the state's overarching presentation of Petitioner's prior murder conviction as an aggravating factor, that the victim of the prior homicide was stabbed. (TT. 1636-38, 1656-57, 1665, 1670) This was no doubt done in part to reemphasize the unsubstantiated suggestion that Lori McRae had likewise been stabbed with the knife found in the Blazer.

by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. Tafero v. State, 403 So.2d 355 (Fla. 1981). In the instant case, the knife evidence was plainly not relevant. As stated, the medical examiner testified that there was no evidence that the victim was stabbed, that her brassiere was white and not bloody, and that his opinion as to cause of death was strangulation, a manner of death which does not result in bleeding. (TT. 615-17) The knife was simply irrelevant to any material fact at issue.

The only conceivable relevance of the knife would be to demonstrate that law enforcement did at thorough job of investigating. This is, of course, offset by the fact that Petitioner in no way attempted to suggest that the knife went undiscovered or that it belonged to some other person who may have committed the murder. Further, given the marginal possible relevance of the knife, the prejudice of suggesting a stabbing death is not alleviated. Importantly, suggesting to the jury that Petitioner was armed with and used a knife to commit the murder further aggravates what was clearly a felony-murder case. Such a suggestion brings the case into the realm of a premeditated murder, which it clearly was not.

Appellate counsel was ineffective in failing to raise this argument on direct appeal. Petitioner's claim of ineffective assistance of appellate counsel is properly raised in this petition. Freeman v. State, 761 So.2d 1055, 1069 (Fla. 2000). The standard for relief on a claim such as this is the same as Strickland v. Washington, 466 U.S. 668 (1984). Henyard v. State, 883 So.2d 753 (Fla. 2003). That is,

> whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.

Id at 764. see also Freeman; Pope v. Wainwright, 496 So.2d 798 (Fla. 1986); Thompson v. State, 759 So.2d 650 (Fla. 2000).

Given the prevailing nature of the issue raised herein, appellate counsel should have been acutely aware of it. Failing to raise the issue in Petitioner's direct appeal to this Court resulted in the prejudice thus demonstrated. A new trial and/or sentencing are warranted.

ARGUMENT III

AT PETITIONER'S CAPITAL TRIAL, THE LEAD DETECTIVE IN THE CASE, DURING QUESTIONING BY THE PROSECUTION,INAPPROPRIATELY AND IMPROPERLY COMMENTED ON PETITIONER'S CREDIBILITY.

James Parker was the lead detective in the investigation of the instant case for the Jacksonville Sheriff's Office. Parker interviewed Petitioner as part of his responsibilities as lead detective. Parker testified at trial. (TT. 1275) During his testimony, Parker, directed by the prosecution's questions, improperly commented on Petitioner's credibility. The following testimony was taken when Parker was being questioned about his interviews of Petitioner:

> Q(by Ms. Corey): And what did he say about where that male led him or took him?
>
> A: Okay. He said that he got out of his car, meaning the defendant's car, and said that he walked around to a sports car with this unknown

male and advised the guy had driven up in this sports car.

Q: Now, did this defendant use the term sports car?

A: Yes.

Q: Yes.

A: He said – he told me that I then stopped or he said that he then stopped and opened up the door and got inside of the truck, referring to the red Blazer, and he said got inside of the truck that you caught me in.

Q: ***Now, what did you notice any discrepancies on the statement --***

(TT. 1295-96) (emphasis added) At that point, Petitioner's counsel objected, noting that it was the jury's province to determine whether discrepancies existed. (Id.) The trial court asked the prosecutor to restate the question after which the following transpired:

Q: ***Did you notice that he had said two different things to you during those statements?***

A: ***Yes.***

Q: All right. What did he say to you?

A: ***Well, he first mentioned the sports car and then went right in and mentioned getting in the red Blazer.***

MR. BUZZELL: I object, move for a mistrial. The state has just asked

this witness to comment on the evidence after I just made an objection to it.

THE COURT: Overruled.

(TT. 1296-97) (emphasis added) Later during Parker's direct testimony, the detective again commented on Petitioner's credibility:

Q: Now, did you again ask this defendant anything else about those scratches on his face?

A: Yes. I asked him, I said, "So, you were not scratched up until Moncrief?"

Q: And –

A: And he replied, "I had the scratches on my back before and these scratches," pointing to the ones on his face.

Q: Did the defendant actually point to the ones on his face that he said were fresh?

A: Yes.

Q: And what else did he tell you in that regard? Was that it?

A: ***Yeah, I just asked him – actually I said, "You're not being honest."***

MR. BUZZELL: I object, your honor. That's again a comment on the evidence.

Q: Well, is that what you actually said to him in the –

THE COURT: Overruled.

MR. BUZZELL: So what?

THE COURT: Overruled.

Q: ***Did you do that to challenge his statement?***

A: ***Well, yes.***

Q: ***Okay. What did the defendant say to you after that?***

A: ***He said, "I'm being straight."***

(TT. 1308-09) (emphasis added) Still later:

Q: All right. What did you say to him?

A: I asked him, "I'm not interested in the ATM machines" – correction, "I'm not interested in the ATM's. ***I'm just interested in you being honest and what happened in the parking lot."***

MR. BUZZELL: Your Honor, I object to his comment and conclusion on my client's credibility of the statement. It's for the jury to determine.

(TT. 1310-11) (emphasis added) The trial court denied the objection again. (TT. 1311) The detective's elicited comments continued:

Q: Did you ask the defendant what he had said to James about the Chevy Blazer?

A: ***Yes. He said, "I told him that I bought it," and then I asked him, "Well, why did you lie to him?"***

Q: Referring –

MR. BUZZELL: Objection, your honor.

MS. COREY-LEE: I'm sorry. I didn't hear the basis of the objection.

THE COURT: Sir?

MR. BUZZELL: I continue to object to this witness' comments on the credibility of the statement.

THE COURT: Well see, I don't think you understand Mr. Buzzell, what he's saying.

MR. BUZZELL: No, sir, I think –

THE COURT: Otherwise, you wouldn't continue to make that objection. He's not commenting on the evidence. He's commenting on what he said to the defendant here. Listen carefully.

MR. BUZZELL: Your Honor, if that is going to be your ruling –

THE COURT: That is my ruling.

MR. BUZZELL: Yes, sir, I don't mean to quarrel with the Court. I want to make the record clear.

THE COURT: The record is clear.

MR. BUZZELL: Yes, sir, if you will allow me to have a standing objection to any further comments like that throughout this interview, I would appreciate it.

THE COURT: You got it. Now have a seat.

MR. BUZZELL: Thank you, Judge.

> Q: ***I'm sorry. I don't remember where we left off.***
>
> A: ***I had said why did you lie to him.***

(TT. 1312-13)[6] (emphasis added) Still later in Parker's direct testimony:

> Q: What did he tell you?
>
> A: He said, "No woman touched me." I then stated, "That's what it looked like," and he replied, "Look at some of the base heads and look at their nails," talking just about other dope dealers.
>
> Q: All right.
>
> A: ***I then said, "Those are fingernail gouges?" And he replied, "Yes." I said, "The truck belongs to a woman and she can't be found." And he replied, "So, I got it from a guy and he gave me the cards." I then said, "The missing woman is who you got the cards from and you got it to get money and you got scratched up and you were strung out on dope and you wouldn't know what you were doing."***

(TT. 1314-15) (emphasis added) After this exchange, Parker went on to testify to numerous instances of "challenging" Petitioner,

[6] The Court, in this exchange, clearly minimized the significance of Parker's testimony. Parker was, in part, testifying as to what he said to Mr. Jones. However, what Parker said to Mr. Jones was highly prejudicial and, further, inadmissible. That is, he continually testified to his opinion of Petitioner's veracity, thereby imparting to the jury his own belief as to Petitioner's credibility.

i.e. calling him a liar. (TT. 1317, 1318, 1320) In fact, Parker testified that he told Petitioner, "You have been lying." (TT. 1320)

The foregoing testimony was improper opinion from a law enforcement officer as to Petitioner's credibility. It is improper for one witness to testify as to his personal view on the credibility of another witness. Page v. State, 733 So.2d 1079 (Fla.4th DCA 1999) It is also true that inferences to be drawn from testimony are to made by the jury and not opined upon by a non-expert witness. Thorp v. State, 777 So.2d 385 (Fla. 2000). Further, it is axiomatic that the "jury [is] the sole arbiter of the credibility of the witnesses (except where contrary to demonstrable physical facts) including the reasonableness, probability and credibility of the testimony of the defendant." Barnes v. State, 93 So.2d 863, 864 (Fla. 1957)

In addition to these general principles, the law is quite settled on the notion that a police officer may not testify as to the credibility of other witnesses or the defendant. As Judge Hazouri wrote for the Fourth District, "It is especially harmful for a police witness to give his opinion of a witnesses' credibility because of the great weight afforded an officer's testimony." Page at 1081 citing Gianfrancisco v. State, 570 So.2d 337 (Fla.4th DCA 1990). See also Olsen v. State, 778 So.2d

422 (Fla.5th DCA 2001); Charlot v. State, 679 So.2d 844 (Fla.4th DCA 1996); Williams v. State, 619 So.2d 1044 (Fla.4th DCA 1993).

In the instant matter, it is clear that the state, through Detective Parker, was attempting to establish that Petitioner was a liar, especially as evidenced by Parker's opinion of the matter. Whether any or all of Petitioner's statements were to be believed was for the jury to decide. It was clear from Parker's testimony that Petitioner gave him more than one version of events over the course of all their conversations. The jury did not need Parker's continuous references to "challenging" Petitioner, and outright calling him a liar, to establish this point. Parker's opinion was irrelevant and inflammatory.

Appellate counsel was ineffective in failing to raise this argument on direct appeal. Petitioner's claim of ineffective assistance of appellate counsel is properly raised in this petition. Freeman v. State, 761 So.2d 1055, 1069 (Fla. 2000). The standard for relief on a claim such as this is the same as Strickland v. Washington, 466 U.S. 668 (1984). Henyard v. State, 883 So.2d 753 (Fla. 2003). That is,

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Given the prevailing nature of the issue raised herein, appellate counsel should have been acutely aware of it. Failing to raise the issue in Petitioner's direct appeal to this Court resulted in the prejudice thus demonstrated. A new trial and/or sentencing are warranted.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Petitioner, David Wyatt Jones, respectfully urges this Court to grant habeas corpus relief in the form of a new trial and/or penalty phase.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Habeas Corpus, has been furnished by first class mail, postage prepaid to Cassandra Dolgin, Assistant Attorney General, Office of the Attorney General, Department of Legal Affairs, PL-01, The Capitol, Tallahassee, FL 32317, on this ___ day of _____, 2005.

CERTIFICATION OF TYPE SIZE AND STYLE

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