IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC06-866
Lower Tribunal No.: 16-1999-CF-1156-AXXX

JAMES BELCHER,

Petitioner,

v.

JAMES R. McDONOUGH,
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

Christopher J. Anderson, Esquire
Florida Bar No.: 0976385
645 Mayport Road, Suite 4-G
Atlantic Beach, FL 32233
(904) 246-4448
Court-Appointed
Attorney for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

COURT RULES

CONSTITUTIONS

JURY INSTRUCTIONS

LEGAL TREATISES

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla. R. App. P. 9.100(a). 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 James Belcher's capital conviction and sentence of death. As reflected in this Court's precedents, the merits of the claims presented are properly before the Court at this juncture. Mr. Belcher was sentenced to death and direct appeal was taken to this reviewing court. The trial court's judgment and sentence were affirmed. Belcher v. State, 851 So.2d 678 (Fla. 2003).

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 involved the appellate review process. *See* Wilson v. Wainwright, 474 So.2d. 1163 (Fla. 1985), Baggett v. Wainwright, 229 So.2d. 239, 243 (Fla. 1969), *see also* Johnson v. Wainwright, 392 So.2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Belcher to raise the claims presented herein. *See, e.g.* Downs v. Dugger, 514 So.2d 1069 (Fla. 1987), Riley v. Wainwright, 517 So.2d 656 (Fla. 1987); Wilson, supra.

This Court has consistently maintained an especially vigilant control over capital cases, exercising a special scope of review. *See* Elledge v. State, 346 So. 998, 1002 (Fla. 1977), Wilson v. Wainwright, supra, and has not hesitated to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital case trial and sentencing proceedings. Wilson, Johnson, Downs, Riley, supra. This petition presents substantial constitutional questions which go to the heart of the fundamental fairness and reliability of Petitioner James Belcher's capital conviction and sentence of death, and merit the attention of this Court pursuant to its habeas corpus jurisdiction.

This honorable Court has the inherent power to do justice where individuals are confined within its jurisdiction. As shown below, the needs of justice call on this Court to grant the relief sought in this petition, as the Court has done in similar cases in the past. *See*, Wilson, Johnson, Downs, Riley, supra. This Petition pleads claims involving fundamental constitutional error. *See* Dallas v. Wainwright, 175 So.2d 785 (Fla. 1965), Palms v. Wainwright, 460 So.2d 362 (Fla. 1984). This Petition includes claims predicated on significant, fundamental and retroactive changes in constitutional law. *See, e.g.* Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989), Thompson v. Dugger, 515 So.2d 173 (Fla. 1987), Tafero v. Wainwright, 459 So.2d 1034, 1035 (Fla. 1984); Edward v. State, 393 So.2d 597, 600, n. 4 (Fla.

3d DCA 1981). The petition also involves claims of ineffective assistance of counsel on appeal. *See* Knight v. State, 394 So. 2d 997, 999 (Fla. 1981), Wilson v. Wainwright, supra., Johnson v. Wainwright, supra. These cases demonstrate that 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. Belcher's claims.

REFERENCES TO THE RECORD OF JURY TRIAL PROCEEDINGS

In this Petition, references to re record of jury trial proceedings which were forwarded to this Florida Supreme Court in connection with death penalty direct Appeal No. SC01-1414 shall be by the letters "TR" followed by the applicable record Volume number, followed by the applicable record page numbers.

CLAIM I

THE FLORIDA SUPREME COURT'S DECISION IN *STATE v. STEELE*, SC04-802 (Fla. 10-12-05) SUGGESTS THAT PETITIONER'S DEATH SENTENCE, WHICH WAS IMPOSED PURSUANT TO A NON-UNANIMOUS JURY RECOMMENDATION, IS NO LONGER LEGAL

The Florida Supreme Court issued its decision in Petitioner's initial appeal of his judgment and sentence on July 10, 2003. Belcher v. State, 851 So.2d 678 (Fla. 2003) In that decision, this Florida Supreme Court noted that "the jury voted

nine to three in favor of a death sentence." Nonetheless, at that time, this Florida Supreme Court upheld the Petitioner's death sentence against challenges that it was imposed in violation of the rules of Apprendi v. New Jersey, 530 U.S. 466 (2000) and Ring v. Arizona, 536 U.S. 584 (2002). However, since then, this Florida Supreme Court has issued its opinion in State v. Steele, SC04-802 (Fla. 10-12-2005), wherein it stated, "Finally, we express our considered view, as the court of last resort charged with implementing Florida's capital sentencing scheme, that in light of developments in other states and at the federal level, the Legislature should revisit the statute to require some unanimity in the jury's recommendations."

Initially, the Petitioner acknowledges that in matters which should be addressed by the legislature, the Courts wisely defer to the legislature. Such judicial deference has been demonstrated by this Court in Steele. However, it is also true that "death is different" in its finality, and require more legislative and judicial vigilance than other cases. Furman v. Georgia, 408 U.S. 238 (1972).

In Florida's capital sentencing scheme, the jury renders an *advisory* sentence of death or life based on a two-step process. First, the jury considers "Whether *sufficient* aggravating *circumstances* exist." Second, the jury considers "Whether

sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist." F.S. Section 921.141 (formerly Section 919.23).

Florida capital cases require a unanimous verdict by a jury of twelve. *See* Rule 3.270 and Rule 3.440, Fla. R. Crim. P. In Ring v. Arizona, 536 U.S. 584 (2002), the United States Supreme Court held that "Because ... enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense' . . . the Sixth Amendment requires that they be found by a jury. The Petitioner's death sentence fails in the wake of Ring for a number of reasons. First, the jury recommended death by a margin of 9 to 3. Second, Ring requires that the jury, not the judge, make the findings needed to impose the death penalty. Those findings have not been made in the Petitioner's case. Third, Ring and Rules 3.270 3.440 of the Florida Rules of Criminal Procedure require that the jury findings in a capital case be unanimous.

Florida law requires that capital crimes be charged by presentment or indictment of a grand jury. Fla. Const. Art. I, Section 15 (a)(1980). This Court has held that indictments need not state the aggravating circumstances upon which the State may rely to establish that a crime qualifies a defendant for the death penalty. State v. Sireci, 399 So.2d 964, 970 (Fla. 1981).

Early in the history of the its post-1972 death penalty law, the Florida Supreme Court, in State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), explained what constitutes a capital crime, and where the definition of "capital crime" comes from:

> The aggravating circumstances of Fla. Stat. Section 921.141 (6) actually defines those crimes – when read in conjunction with Fla. Stat. Section 782.04(1) and 794.01(1), F.S.A.– to which the death penalty is applicable in the absence of mitigating circumstances.

The sentence for first-degree murder is specified in Section775.082, Florida Statutes as follows:

> A person who has been convicted of a capital felony *shall be punished by life imprisonment* and shall be required to serve no less than 25 years before becoming *eligible for parole unless the proceedings held to determine sentence* according to the procedure set forth in Section 921.141 *result in a finding by the court that such person shall be punished by death*, and in the latter event such person shall be punished by death.
>
> (F.S. Section 775.082 (1979); emphasis Petitioner's)

The jury's advisory recommendation does not specify what, if any, aggravating circumstances the present Petitioner's jurors found to have been proved. Neither the consideration of an aggravating circumstance nor the return of the jury's advisory recommendation requires a unanimous vote of the jurors.

The Florida death-sentencing scheme violates the principles recognized as applicable to the States in Apprendi v. New Jersey, 530 U.S. 466 (2000). As a result, the Florida death penalty proceedings under which the petitioner was sentenced violate the Sixth and Fourteenth and Eighth Amendments of the United States Constitution. Florida's death penalty scheme also violates the Sixth Amendment of the United States Constitution because the maximum sentence allowed upon the jury's finding of guilt is life imprisonment. A death sentence is only authorized upon the finding of additional facts. Since, under Florida law, there is no requirement of a jury trial to determine the existence of those necessary facts, the Sixth Amendment is violated.

In Ring, the court commented:

> We repeatedly have rejected constitutional challenges to Florida's death sentencing scheme, which provides for sentencing by the judge, not the jury. [Citations to Hildwin v. Florida, 490 U.S. 638 (1989) and

> Spaziano v. Florida, 468 U.S. 447 (1984), Proffitt v. Florida, 429 U.S. 242 (1976)] In Hildwin, for example, we stated that this case presents us once again with the question of whether the Sixth Amendment requires a jury to specify the aggravating factors that permit the imposition of capital punishment in Florida (citation) and we ultimately concluded that the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." . . . . A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona.

Unanimous, twelve-person verdicts are required to impose the death penalty under common law principles. *See, e.g. Burch v. Louisiana*, 441 U.S. 130, 138 (1979) and Andres v. United States, 333 U.S. 740, 749 (1948). The notion that a unanimous jury is needed to impose the death penalty is based on the long-established principle that the death penalty is different than other punishments and carries with it safeguards and fail-safe protections found nowhere else. *See* Woodson v. North Carolina, 428 U.S. 280, 304 (1976). The non-specific death recommendation in Petitioner's case violated the petitioner's rights under the Sixth, Eighth, and Fourteenth Amendments of the United State's Constitution.

A literal reading of Florida's death penalty sentencing scheme (F.S.

Section 921.141, formerly F.S. Section 919.23) indicates that the jury must, *before considering mitigating circumstances*, determine whether the aggravating circumstances are of sufficient magnitude to warrant the imposition of the death penalty. In view of Apprendi and Ring, supra, the Petitioner's death sentence cannot stand because his jury did not unanimously recommend death and because it is impossible to know whether the jurors would have unanimously found any specific aggravating circumstances. In the present Petitioner's case, the jury recommended death by a vote of nine to three, not unanimously. Accordingly, there is a high probability that the jury did not unanimously agree on the existence of any particular aggravating circumstance. Given that this Florida Supreme Court has already acknowledged in Steele that Florida's death sentencing statute *should* be revisited to require *some unanimity* in the jury's recommendation, and given that the Florida Supreme Court has deferred to the legislature as best it can, and given the lack of action in this matter by any other branches of Florida's government, the undersigned Court-appointed attorney for Petitioner respectfully petitions this the judiciary to grant habeas corpus relief based on a continuing lack of a unanimity requirement in Florida's death sentencing statute.

CLAIM 2

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL IN FAILING TO RAISE THE ISSUE OF IMPROPER, GRUESOME PHOTOGRAPHS ON APPEAL

As Petitioner's trial attorney candidly admitted to Petitioner's jury during his guilt-phase opening argument, "Obviously and tragically, Ms. Embry is dead. There's no dispute about that." TR13, p. 565. Despite this, and over trial counsel's vigorous objections, the trial Court admitted and permitted publication to the jury of the many gruesome photographs of the victim's body, including photographs her body lying in the bathtub, in a strangled condition, as her brother first discovered it. *See, e.g.* TR13, p. 584, State's Exhibit 1, TR14, p. 615-616, 629-630, 649-652. Petitioner's appellate counsel failed to raise this issue on direct appeal. *See* Belcher v. State, 851 So.2d 678 (Fla. 2003).

Admitting such emotion-provoking, gruesome photographs cannot be considered harmless error. Chapman v. California, 386 U.S. 18 (1967), State v. DiGuillo, 491 So.2d 1129 (Fla. 1986). Photographs must be excluded when they demonstrate something so shocking that the risk of prejudice outweighs relevancy.

Zack v. State, 911 So.2d 1190 (Fla. 2005), Provenzano v. Dugger, 561 So.2d 541, 549 (Fla. 1990), Pope v. State, 679 So.2d 710 (Fla. 1996).

By failing to raise the issue of improper, inflammatory photographs on appeal, and by failing to protect Petitioner's interests and rights in this area, the Petitioner's appellate lawyer provided ineffective assistance of appellate counsel. Counsel is deemed ineffective when the deficiencies of the representation undermine confidence in the outcome of the trial. This requires both a showing of deficient performance of counsel and a showing of prejudice to the Petitioner. Strickland v. Washington, 466 U.S. 668 (1984). The preceding indicates that both criteria for finding ineffective assistance of appellate counsel have been met.

Appellate counsel's failure to raise the issue of improper, inflammatory photographic evidence denied Petitioner his rights to due process assured by the 5th and 14th Amendments to the U.S. Constitution as well as by Article 1, §9 of the Florida Constitution. It also denied Petitioner his rights to a fair trial, as protected the 6th and 14th Amendments to the U.S. Constitution as well as by Article 1, § 16 of the Florida Constitution. It also denied Petitioner his right to effective assistance of appellate counsel guaranteed by the 6th and 14th Amendments to the

U.S. Constitution and by Article 1, §16 of the Florida Constitution.

CLAIM 3

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL IN FAILING TO RAISE THE ISSUES OF THE TRIAL COURT'S ERROR IN DENYING PETITIONER'S MOTIONS FOR A JUDGMENT OF ACQUITTAL AND FOR JURY INSTRUCTIONS BASED ON THE CIRCUMSTANTIAL EVIDENCE RULE

In the subject case, the Petitioner was indicted for first degree murder and sexual battery. TR1, p. 14. Dr. Bonifacio Floro was the State Medical Examiner who performed the autopsy of the victim's body. He was called by the prosecution to testify at Petitioner's trial. He examined the victim's vagina and observed a hymen bruise at the 10:00 position and a laceration on the labia minora. He e opined that the victim's vaginal injuries "most probably" indicate that the victim was "raped or a sexual battery (victim) prior to her death." TR14, p. 666.

Dr. Floro admitted, however, it is indeed possible for a woman to sustain such vaginal injuries in vigorous, consensual intercourse which she vocally agrees to, even though she is not physically ready for sexual intercourse. TR 14, p. 674.

Detective Hinson of the Jacksonville Sheriff's Office was called as a witness for the prosecution. He testified that, that as a result of interviewing "the usual suspects," he determined that the victim had been with a man named Michael Randall as recently as the Monday prior to her death. TR15, p. 937. This raised the possibility that the victim's vaginal injuries were sustained during consensual, "rough sex" with someone other than the Petitioner. TR15, p. 937. Petitioner's trial counsel also elicited Detective Hinson's admission that there was no blood at any of the 6 incident locations in which semen samples were found and collected. This further suggested that the victim's vaginal injuries were not caused by any forcible, sexual battery by the Petitioner. TR16, p. 1005.

Detective Hinson admitted that the only semen sample submitted for DNA testing was that which came from the victim's slippers. TR16, p. 1006. This gave the jurors reason to question the thoroughness of the police investigation and wonder if someone else caused the Plaintiff's injuries.

There was a semen stain on a sheet removed from the victim's bed. It had intact spermatozoa. TR16, p. 976-978 and 1005-1010. This suggested that there was consensual "bedroom" sex, not sexual battery. This semen sample had not been preserved for DNA testing (TR16, p. 977-978), raising doubts about whether

the Petitioner truly was the cause of the victim's injuries.

On cross-examination, Detective Hinson admitted seeing condoms, birth control pills and lubrication jelly in V's chest of drawers. Detective Hinson did not know whether such items had been collected as evidence. TR16, p. 933. This is further reason for jurors to wonder about the fairness of the investigation and wonder if the victim's vaginal injuries could have been incurred in some sort of consensual intercourse, possibly involving a condom and perhaps lubrication jelly.

State Medical Examiner Dr. Bonifacio Floro admitted that the sperm swabbed from the victim's vagina could have been deposited in the victim's body over a fairly large period of time, anywhere from 3 to 6 days prior to her death up to just six hours before her death. TR14, p. 675. The victim was last seen alive at 10:30 p.m. on January 8, 1996. The victim's brother discovered dead body six to seven hours later, between 8:00 and 9:00 a.m. on the following day, January 9, 1996. TR 13, p. 571. State Medical Examiner Bonifacio Floro performed the autopsy fourteen hours later, at 10:00 a.m. on January 10, 1996. TR 14, p. 643-667. Given Dr. Floro's testimony that the semen could have been deposited in the victim's body as early as six days before her death, there was plenty of time for

someone to have sex with the victim in a time, manner and place completely unconnected to any crime. Put differently, there was noting which positively confirmed that the semen and vaginal injuries found in the victim's body were placed there as a result of any criminal activity by the Petitioner. Furthermore, there was no evidence that the victim's death occurred as a consequence of and while Petitioner was committing or attempting to commit any crime, as required for a valid conviction of first degree felony murder. *See,* Fla. Stand Jury Instr. (Crim.) 7.3 Felony Murder – First Degree.

At the close of the State's penalty phase evidence, Petitioner's trial counsel brought a motion for judgment of acquittal as to both the sexual battery count and the first degree murder count. This motion was based on the "circumstantial evidence rule" as enunciated by the Court in Smolka v. State, 662 So. 2d 1255 (Fla. 5th DCA 1993) TR 17, p. 1231-1232. Under the circumstantial evidence rule as described in Smolka, a conviction based wholly on circumstantial evidence cannot stand unless the circumstantial evidence is both consistent with guilt and inconsistent with any reasonable hypothesis of innocence. Trial counsel analogized the facts of the present case to the situation in A.V.P v. State, 307 So.2d 468 (Fla. 1st DCA 1975) and Rhoden v. State, 227 So.2d 349 (Fla. 1st DCA 1969)

and Arant v. State, 256 So.2d 515 (Fla. 1st DCA 1972) and Seneca v. State, 760 So.2d 995 (Fla. 4th DCA 2000). In those cases, the appellate courts reversed convictions based on fingerprints which could have been placed in incriminating locations in innocent ways, or at times unrelated to the offense charged. The trial Court denied this motion for judgment of acquittal. TR 17, p. 1240-1241.

Similarly, the trial Court denied the Petitioner's trial counsel's request for a special jury instruction on the circumstantial evidence rule. TR18, p. 1285-1289. Petitioner's appellate failed to raise any "circumstantial evidence rule" issues on direct appeal. *See* Belcher v. State, 851 So.2d 678 (Fla. 2003).

Trial counsel's "circumstantial evidence" arguments were meritorious. However, a special standard of review applies when a case is based wholly on circumstantial evidence. Darling v. State, 808 So.2d 145, 155 (Fla. 2002). As noted by this Florida Supreme Court in Boyd v. State, 910 So.2d 167, 180 (Fla. 2005):

> [i]t is the trial judge's proper task to review the evidence to determine the presence or absence of competent evidence from which the jury could infer guilt to the exclusion of all other inferences.... The state is not required to "rebut conclusively every possible variation" of events which could be inferred from the evidence, but

> only to introduce competent evidence which is inconsistent with the defendant's theory of events. See Toole v. State, 472 So.2d 1174, 1176 (Fla.1985). Once that threshold burden is met, it becomes the jury's duty to determine whether the evidence is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt.

In the present case, after all guilt-phase evidence had been presented, and after the Court instructed the jury on the elements of "premeditated" first-degree murder, the Court instructed the jury on the elements of "felony" first degree murder occurring in connection with a sexual battery as follows:

> Before you can find the defendant guilty of first degree felony murder, the State must prove the following three elements beyond a reasonable doubt: First, that Jennifer Embry (the victim) is dead; second, that the death occurred as a consequence and while James Bernard Belcher (Petitioner) was engaged in the commission of a sexual battery with great force or a sexual battery with slight force or the death occurred as a consequence of and while James Bernard Belcher was attempting to commit a sexual battery with great force or a sexual battery with slight force and, three, James Bernard Belcher was the person who actually killed Jennifer Embry.
>
> (TR 18, p. 1376-1377)

The Petitioner's jury specifically indicated in its verdict form that it found the Petitioner guilty of *both* "premeditated" first-degree murder *and* "felony" first degree murder. TR3, p. 459. With respect to the "felony" first-degree murder, the jury checked the box indicating that it found that the killing was done during the commission or attempted commission of the felony of sexual battery. Id.

At the conclusion of the sentencing-phase evidence, the trial Court instructed the jury that the aggravating circumstances that they could consider were limited to (1) prior conviction of another capital offense or felony involving the use or threat of violence, (2) the subject capital crime occurred while the defendant was engaged in the commission of the crime of sexual battery, (3) the subject capital crime was especially heinous, atrocious or cruel. TR22, p. 1829-1830. Because the crime of sexual battery was both an element of Petitioner's first-degree felony murder charge *and* an aggravating circumstance upon which a death recommendation could be based, the trial Court's denial of Petitioner's motion for a judgment of acquittal and the trial Court's refusal to give the "circumstantial evidence rule" jury instruction was

doubly problematic: It caused Petitioner to be convicted and it caused Petitioner to be sentenced to death.

As the foregoing demonstrates, these "circumstantial evidence rule" issues were valid. Nevertheless, Petitioner's appellate counsel failed to raise them on direct appeal. *See* Belcher v. State, 851 So.2d 678 (Fla. 2003).

In failing to raise these "circumstantial evidence rule" issues on appeal, Petitioner's appellate lawyer's performance fell below the objective standard of reasonableness. Williamson v. Dugger, 6651 So.2d 84 (Fla. 1994). But for such unprofessional errors, there is a reasonable probability that the result of Petitioner's original direct appeal to the Florida Supreme Court would have been different. Hence, Petitioner is entitled to Habeas Corpus relief. Harvey v. Dugger, 650 So.2d 982 (Fla. 1995).

Petitioner was denied the effective representation of appellate counsel in violation of the 6th and 14th Amendments to the U.S. Constitution and in violation of the Article 1, Sections 16 and 22 0f the Florida Constitution and in violation of the principles enunciated in Strickland v. Washington, 466 U.S. 668 (1984). Habeas Corpus relief is warranted.

CLAIM 4: INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL IN FAILING TO RAISE THE ISSUE OF THE TRIAL COURT'S WRONGFUL DENIAL OF A MOTION FOR MISTRIAL BASED ON THE STATE'S COMMENT ON THE PETITIONER'S EXERCISE OF HIS RIGHT TO REMAIN SILENT

In his guilt-phase closing argument, the prosecutor made the following statement to Petitioner's jury:

> By killing his victim the defendant made sure that she could not come into this courtroom and identify him as being the person who raped her. . . (defense counsel) has gotten up here and told you now . . . . . hey, it was consensual. You know it was some other time. Just a coincidence.
>
> What evidence have you heard that it was consensual? What evidence have you heard that it was consensual? All the evidence indicates quite to the contrary.
>
> * * *
>
> What consent are we talking about? *What evidence did you hear come out of that witness stand saying that she consented to this?*
>
> (TR 18, p. 1320-1321; emphasis Petitioner's)

Following this, Petitioner's trial counsel objected, stating, "Your honor, I think it's one thing to argue that there's medical evidence to show that there's a

lack of consent, but what Mr. De La Rionda has just done is made a direct comment on my client's exercise of his right not to testify and, therefore, I object and I move for a mistrial." TR18, p. 1321. The trial Court overruled the objection and denied the motion for mistrial. TR 18, p. 1322. Petitioner's appellate counsel failed to raise this issue on direct appeal. *See* Belcher v. State, 851 So.2d 678 (Fla. 2003).

A prosecutor may not comment on the silence of the defendant. A comment on the defendant's silence at trial is constitutionally impermissible under the guarantee against self-incrimination contained in the Fifth Amendment to the U.S. Constitution. Griffin v. California, 618 So.2d 157 (Fla. 1993). Indeed, Fla. R. Crim. P. Rule 3.250 expressly prohibits the prosecuting attorney from commenting to the Judge or jury about the failure of an accused to testify on his own behalf. The Florida Supreme Court has been even stronger in its condemnation of prosecutorial comments calling attention to a defendant's not testifying, as follows:

> In summary, our law prohibits any comment to be made, directly or indirectly, upon the failure of the defendant to testify. This is true without regard to the character of the comment or the motive or intent with which it is made, if

> such comment is subject to an interpretation which would bring it within the statutory prohibition and regardless of its susceptibility to a different construction.
>
> Trafficante v. State, 92 So.2d 811 (Fla. 1957)

Obviously, the prosecutorial comments that Petitioner's trial counsel objected to in the present case were *indirect* comments upon the defendant invoking his right to remain silent. Under the "fairly susceptible test" articulated by the Florida Supreme Court in David v. State, 369 So.2d 943 (Fla. 1979) such "indirect" insinuations about a defendant invoking his right to remain silent are deemed improper if they are "fairly susceptible" of being interpreted as a comment on the defendant's silence. As noted by Russell E. Crawford in Florida Criminal Practice and Procedure, West, 1994, Section 13.96, "Obviously, the Florida "susceptible" test is the more liberal, at least for a defendant. In general, this test is applied favorably to a defendant when a comment highlights the absence of his testimony, rather than when it only refers to the state of the evidence alone."

In Holloman v. State, 573 So.2d 134 (Fla. 2d DCA 1991) the Court held a comment that " . . . there is no evidence from the stand to say that it was anyone other than the defendant" *was* susceptible of being construed by the jurors as a comment on the defendant's silence and hence impermissible. In the present

case, the prosecutor's comment (quoted above) that there was "no evidence from the stand" that the victim's vaginal injuries was caused by someone other than the Petitioner was exactly the kind of improper comment on the accused's invoking his right to remain silent that was condemned by the Holloman Court.

Petitioner's appellate counsel was ineffective in failing to raise this very legitimate issue on direct appeal. *See* Belcher v. State, 851 So.2d 678 (Fla. 2003).

Petitioner's appellate lawyer's performance fell below the objective standard of reasonableness. Williamson v. Dugger, 651 So.2d 84 (Fla. 1994). But for such unprofessional errors, there is a reasonable probability that the result of Petitioner's original direct appeal to the Florida Supreme Court would have been different. Hence, Petitioner is entitled to Habeas Corpus relief. Harvey v. Dugger, 650 So.2d 982 (Fla. 1995).

Petitioner was denied the effective representation of appellate counsel in violation of the 6th and 14th Amendments to the U.S. Constitution and in violation of the Article 1, Sections 16 and 22 0f the Florida Constitution and in violation of the principles enunciated in Strickland v. Washington, 466 U.S. 668 (1984). Habeas Corpus relief is warranted.

CLAIM 5: INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL IN FAILING TO RAISE THE ISSUE OF VICTIM IMPACT EVIDENCE

During the guilt phase of Petitioner's trial, the prosecution elicited a great deal of victim impact evidence from the various witnesses. For example, the State had the victim's brother, Ricky Embry, testify that he was "very close" to the victim and played the part of a "big brother" who "looked out" for her. TR13, p. 571-573. He also testified that the victim was a hard worker who held two jobs and attended classes at Florida Technical College, all at the same time. TR 13, p. 574-576. He gave an emotion-evoking description of how, when he first discovered and touched his sister's dead, naked body, he could tell that rigor mortis had set in. TR13, p. 583.

Another State witness, Ms. Pamela Lyle, was the victim's supervisor at Arlington Acute Care Center, where the victim worked as an X-ray technician. She testified that the victim attended school four to five days a week and was a very punctual employee of the Arlington Acute Care Center. TR 15, p. 744-746.

Just before the presentation of the State's penalty-phase evidence, the defense brought motions to exclude victim impact evidence and argument, all of

which the trial Court denied. TR 20, p. 1432- 1442. The trial Court ruled that it would give the same "victim impact" jury instruction given in Alston v. State, 723 So.2d 148 (Fla. 1998), which instruct the jury that although they are not to regard victim impact evidence as aggravation, they may nonetheless consider victim impact evidence in making their sentencing decision. TR 20, p. 1435.

The victim's father, Mr. Martin Embry, Sr., also testified during the penalty phase of Petitioner's trial. He explained that his daughter's death was a tragedy for her family and friends. TR20, p. 1545. He described his daughter as a loving person and a good student and a hard-working X-ray technician. TR 20, p. 1546. He talked of how his daughter wanted to enhance the quality of life of others (TR 20, p. 1546) and how she attended church regularly and sang in the choir. TR 20, p. 1547.

The State also called Carol Thomas, the victim's "best friend" and co-worker, to testify as a mitigation witness. TR 20, p. 1548. Ms. Thomas read a prepared victim impact statement. She told the jurors what a close friend the victim had been to Ms. Thomas and to Ms. Thomas' entire family. TR 20, p. 1548. Ms. Thomas stated that the victim's life " ended much too soon" and that Ms.

Thomas hoped that her special memories of the victim would help her cope with the pain of the victim's loss. TR20, p. 1549.

The State recalled the victim's older brother, Ricky Embry, to read his own victim impact statement to the jury. He testified about his sister Jennifer Embry's life from "when Jennifer was a little baby" . TR 20, p. 1550. He testified that his sister had perfect school attendance from first grade through twelfth, graduating high school and college with honors. TR 20, p. 1550-1551. He testified about how his sister's murder interrupted her plans to become an architect. TR 20, p. 1551. He explained how his sister would always come to his house after church and visit with him. TR20, p. 1551. He said that own his grief over his sister's murder caused him to perform poorly on a promotional examination and had other adverse affects upon his concentration and his career. TR 20, p. 1552. He described his shock at discovering his sister' s dead body in the bathtub. TR 20, p. 1552. He concluded by saying that he would never get over the loss of his sister. TR 20, p. 1552.

Petitioner's trial counsel renewed his objections to victim-impact argument at the close of the presentation of all of the penalty phase evidence, but to no avail. TR 21, p. 1766-1767. Thereafter, the State made victim impact the main feature

of its penalty phase closing argument as follows:

> So how do you make a decision in this case? How do you make a recommendation that carries great weight? How do you arrive at that?
>
> * * *
>
> First of all, number one, you look to determine whether there are any aggravating circumstances. Do they exist? Are there any? If so, then you look at number two. Are there mitigating circumstances that exist? If that is so, then you look to number three, do those mitigating circumstances outweigh the aggravating circumstances? And then, number four, you also, as you've been already told in terms of hearing victim impact evidence, and we'll briefly discuss why that is relevant. That is not to be considered as an aggravator nor as a mitigator, but that is relevant and you are allowed to consider it.
>
> So, how do you do that, I would submit to you those three steps and then the victim impact, how do you use that in arriving at your decision? Well, first of all it's a weighing process . It's not a counting process . . .
>
> (TR 21, p. 1771-1772)

Awhile later, at the end of his penalty phase closing argument, the prosecutor stated:

> Now what is victim impact? It's not an aggravating circumstance and you can't consider it as such, but you can consider it in this case. And you heard from the victim's father, from Carol Thomas, a good friend, best friend, and you heard again, like you did in the guilt part, from Ricky Embry, the brother. And I'll discuss in a little while why that evidence is admissible and why it's relevant. It kind of gives you an understanding of the victim's uniqueness in the community and the loss of her death to the family members and friends , what impact it had on them, *because that's what we're here about, aren't we? Aren't we here talking about what the defendant in this case did and aren't we talking about his character? Those are the two things that you should be focusing on, what he did in terms of the aggravation and his true character because you heard his true character today.*
>
> (TR 21, p. 1779-1780; emphasis Petitioner's).

The prosecutor returned to the subject a third time, just before concluding his penalty phase closing argument, saying the following:

> That leaves me with, in conclusion, a few things I'd like to finish up with covering and one of thse is victim impact. You know, you heard from Martin Embry, Sr., the victim's father, and he read a prepared statement. And you heard from Carol Thomas, her best friend, and you heard from Mr. Embry, Richy Embry, her brother. And they described to you the impact that this death has caused each of them individually and family members and friends.

> They kind of give you a little bit of insight besides these two pictures of her alive, of what Ms. Embry was like, why her loss is a tragedy to the community, why she was unique in her own way and that's why that evidence was heard. That's why that evidence was presented.
>
> * * *
>
> Jennifer Embry's brother found her. He was the first witness you heard from in the guilt phase and he was the last witness you heard from in the penalty phase on behalf of the State, and he told you the impact that his sister's death caused him. He also described to you the condition she was in and you saw photographs of that. . .
>
> (TR 21, p. 1797-1299.

The United States Supreme Court ruled in Payne v. Tennessee, 501 U.S. 88 (1991) that the Eighth Amendment does not preclude a State from presenting victim impact evidence and statements. The State, however, does not have free rein to introduce anything or everything about the victim. For example, Payne suggests that the State can only present "a glimpse of the life" of the victim (Justice O'Connor's concurrence). In addition, the Court in Payne emphasized that the victim impact evidence "is not offered to encourage comparative judgments." In addition, Payne left undisturbed the prohibition of Booth v. Maryland, 482 U.S. 496 (1987) against the victim's family offering its opinion

about the crime, the defendant, and the appropriate punishment. Furthermore, as indicated by Justice O' Connor's and Justice Souter's concurrences in Payne, it is possible for victim impact statements or evidence to render a sentencing proceeding fundamentally unfair.

In the subject case, the victim impact evidence and the state's closing argument reduced the penalty phase portion of Petitioner's trial to a simple exercise in weighing the comparative worth of the victim's and the Petitioner's lives. This was not a situation in which victim impact evidence was an "aspect" of the sentencing phase. On the contrary, the weighing of mitigation and aggravation took the back seat while victim impact evidence drove Petitioner's sentencing proceeding. The deluge of victim impact evidence and argument was so great it can be assumed to have completely overwhelmed the reasoned, deliberative function of the Petitioner's jury and rendered nugatory the weighing of aggravating and mitigating circumstances. This prevented Petitioner's trial from functioning to narrow the classes of cases in which the ultimate penalty of death may be imposed. Proffit v. Florida, 428 U.S. 242 (1976).

In failing to raise this issue on appeal, Petitioner's appellate lawyer's performance fell below the objective standard of reasonableness. Williamson v.

Dugger, 651 So.2d 84 (Fla. 1994). But for such unprofessional errors, there is a reasonable probability that the results of Petitioner's original direct appeal to the Florida Supreme Court would have been different. Hence, Petitioner is entitled to Habeas Corpus relief. Harvey v. Dugger, 650 So.2d 982 (Fla. 1995).

Petitioner was denied the effective representation of appellate counsel in violation of the 6th and 14th Amendments to the U.S. Constitution and in violation of the Article 1, Sections 16 and 22 0f the Florida Constitution and in violation of the principles enunciated in Strickland v. Washington, 466 U.S. 668 (1984). Habeas Corpus relief is warranted.

CONCLUSION

Petitioner urges that the court grant him habeas corpus relief or, in the alternative, a new appeal for all of the reasons set forth herein, and that the court grant such other and further relief that the court deems just and proper under the circumstances.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing document described as Motion to Withdraw as Counsel for Appellant and Motion for Order Granting Appellant Leave to File Amended Initial Brief has been served by U.S. MAIL addressed as follows:

James Belcher, DC#86173
Union Correctional Institution
7819 Northwest 228th Street
Raiford, Florida 32026-4460

Department of Legal Affairs
Office of the Attorney General
Criminal Division

400 S. Monroe Street
PT-1, The Capitol
Tallahassee, Florida 32301
Attn.: Charmaine M. Millsaps, Esquire

on this ___day of _____, 2006.

Christopher J. Anderson, Esquire
Florida Bar No.: 0976385
645 Mayport Road, Suite 4-G
Atlantic Beach, FL 32233
(904) 246-4448
Court-appointed attorney for Petitioner

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

The undersigned hereby certifies, that this Petition for Writ of Habeas Corpus is prepared in Times New Roman 14 Font and complies with Rule 9.210(a)(2), Fla. R. Crim. P.

Christopher J. Anderson, Esquire
Florida Bar No.: 0976385
645 Mayport Road, Suite 4-G
Atlantic Beach, FL 32233

(904) 246-4448
Court-appointed attorney for Petitioner