IN THE SUPREME COURT OF FLORIDA

CASE NUMBER SC05-1739
Lower Tribunal Case No. 93-1684-CF

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CONNIE RAY ISRAEL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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ON APPEAL FROM THE CIRCUIT COURT FOR THE SEVENTH JUDICIAL CIRCUIT IN AND FOR PUTNAM COUNTY, FLORIDA

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# INITIAL BRIEF OF APPELLANT

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## PRELIMINARY STATEMENT

This is the appeal of the circuit court's denial of Connie Ray Israel's motion for post-conviction relief which was brought pursuant to Fla. R.Crim.P. 3.851.

Citations shall be as follows: The record on appeal concerning the trial proceedings shall be referred to as R. ___ followed by the appropriate volume and page numbers. The post-conviction record on appeal will be referred to as PCR. ____ followed by the appropriate volume and page numbers. All other references will be self-explanatory or otherwise explained.

This appeal 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 and corresponding provisions of the Florida constitution. These claims demonstrate that Mr. Israel was deprived of his right to a fair and reliable trial and that the proceedings resulting in his conviction and death sentence violated fundamental constitutional imperatives. Furthermore, as to the denial of Mr. Israel's motion for post-conviction relief, there has been an abuse of discretion and a lack of competent evidence to support certain of the trial judge's conclusions.

## REQUEST FOR ORAL ARGUMENT

Because of the seriousness of the claims at issue and the stakes involved, Connie Ray Israel, a death-sentenced inmate on Death Row at Union Correctional Institution, urges this Court to permit oral argument on the issues raised in his appeal.

## STATEMENT OF THE CASE

The Circuit Court for the Seventh Judicial Circuit, in and for Putnam County, Florida, tried the appellant and entered the judgment of conviction and death sentence at issue.

Mr. Israel was indicted on December 16, 1993, and charged with burglary of a dwelling with battery; kidnaping; sexual battery with great force; and the first degree murder of Esther Hagans that occurred on December 27, 1991. (R. Vol. I, 14-15). A number of factors contributed to the length of time between indictment and trial. During a pretrial hearing on March 15, 1994, appellant was found in contempt of court for inappropriate courtroom behavior and sentenced to 179 days in the County Jail. (R. Vol. I, 60). The trial court initially granted the Public Defender's first motion to withdraw but subsequently rendered a written order denying the motion. (R. Vol. I, 47). Subsequently, another order was rendered on May 12, 1994, that allowed appellant to represent himself with the public defender appointed as stand-by counsel. (R. Vol. I, 68).

An additional motion to withdraw was filed by the public defender on November 7, 1994, (R. Vol. I, 113); it was denied on December 1, 1994. (R. Vol. I, 124). On January 6, 1995, counsel for the appellant filed a motion to rehear the previous motion to withdraw. (R. Vol. I, 178). The ruling on this motion was postponed by the court. (R. Vol. I, 185). After the State of Florida requested that the Governor appoint another state attorney, (R. Vol. II, 342), the presiding judge issued

an order of recusal on December 13, 1995. (R. Vol. II, 343). The governor appointed the state attorney for the Tenth Judicial Circuit on January 17, 1996. (R. Vol. III, 539, referencing the extension of executive order 96-20).

The unresolved issue of trial counsel was taken up by the successor judge who relieved the public defender of his responsibilities and appointed private counsel for the appellant on March 25, 1996. (R. Vol. III, 491). After the appellant rejected a plea offer of second degree murder with a sentence concurrent to existing prison sentences[1] (R. Vol. IV, 666), the first substitute counsel was granted leave to withdraw on July 27, 1997. (R. Vol. IV, 644). On July 29, 1997, private attorney Clyde Wolfe was appointed as stand-by counsel for appellate. (R. Vol. IV, 706). The court later removed the stand-by status and appointed Mr. Wolfe as counsel on October 20, 1997. (R. Vol. V, 959).

A jury was seated on November 16, 1998, (R. Vol. X, 1938), a trial was conducted but a mistrial was declared on November 20, 1998, after the jury failed to reach a verdict. (R. Vol. X, 1938). The retrial began on February 2, 1999. (R. Vol. XIV, 2540). The appellant was found guilty as charged on all four counts. (R. Vol. XX, 3828). The jury recommended a sentence of death by a vote of 11 to 1. (R.

[1]Appellant was serving life prison sentences for 1993 Putnam County convictions that included burglary of a dwelling with battery; kidnaping; robbery; and two counts of sexual battery and was under prison sentences for 1994 Putnam County convictions for battery on a law enforcement officer and resisting arrest with violence. (PCR. Vol. XIII, 2439).

Vol. XX, 3963). After finding that four aggravating factors[2] outweighed two statutory mitigating factors[3], the court sentenced appellant to death on May 28, 1999. (R. Vol. XX, 3562). This court affirmed the appellant's conviction and death sentence on direct appeal. Israel v. State, 837 So.2d 381 (Fla. 2002); *cert. denied*, 539 U.S. 931, 123 S.Ct. 2582, 156 L.Ed.2d 611 (2003).

Pursuant to Fla.R.Crim.P. 3.851, the appellant filed a Motion to Vacate Judgments of Conviction and Sentences with Special Leave to Amend on December 1, 2003. (PCR. Vol. I, 97). An amended motion was subsequently filed and accepted by the court on February 11, 2004. (PCR. Vol. I, 156). The State of Florida filed its answer on or about April 8, 2004. (PCR. Vol. II, 219). Under Fla.R.Crim.P. 3.851(f)(5)(A), the court held a Case Management Conference on July 16, 2004.

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[2]The aggravating factors were (1) the appellant was previously convicted of another capital felony or of a felony involving the use or threat of use of violence to a person; (2) the crime was especially heinous, atrocious or cruel; (3) the crime was committed while the appellant was engaged in the commission of a sexual battery, burglary, and kidnaping; and (4) the capital felony was committed for pecuniary gain. (R. Vol. XIII, 2438-41).

[3]The mitigating factors were (1) the appellant was under the influence of an extreme mental or emotional disturbance at the time the crime occurred (some credence); and (2) the capacity of the appellant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired (some credence). The court further addressed non-statutory mitigating circumstances as follows: "Other evidence the Court has considered in mitigation are aspects of the [*sic*] Mr. Israel's character, his record and other circumstances of the surrounding offense. In the Court's opinion nothing about this catch-all mitigating factor applies to Mr. Israel. His record is bad, his character worse, and the offense itself is horrible. The Court assigns no weight to this mitigating factor." (R. Vol. XIII, 2442).

(PCR. Vol. II, 243; 382-406). The evidentiary hearing was conducted on January 20, 2005. (PCR. Vol. IV, 597-778). By reason of an agreement between the parties and the Court, written closing arguments were filed for the claims heard at the evidentiary hearing and those claims not otherwise covered by the hearing. (PCR. Vol. III, 577-95; Vol. V, 801-19). The court's Order Denying Motion for Post Conviction Relief was rendered on August 12, 2005. (PCR. Vol. V, 847-93). This appeal (PCR. Vol. V, 905) is properly before this Court.

## STATEMENT OF FACTS

## TRIAL

In the opinion regarding the direct appeal of appellant's convictions and sentences, this Court summarized the facts of the trial as follows:

> Connie Ray Israel was charged with burglary of a dwelling with a battery, kidnaping, sexual battery with great force, and first-degree murder arising out of the December 27, 1991, murder of Esther Hagans in her home in Putnam County. At Israel's first trial, the jury was unable to reach a verdict and a mistrial was declared. On February 2, 1999, Israel's second trial began and the evidence revealed the following facts. Neighbors and friends indicated that Esther Hagans was known to carry large amounts of money on occasion. They indicated she rarely missed work unless she was very ill. On the morning of December 27, 1991, when she did not report for work, a fellow employee went to Hagans' neighbor's house to ask about her. The neighbor noticed that Hagans' car was in the carport and called her house. When Hagans did not respond to the telephone call, the neighbor called the police.
>
> The police found Hagans' front door ajar and discovered her body in the bedroom. Hagans was lying naked on the bed with her legs spread apart and her hands tied behind her back. The medical examiner identified trauma to the left side of Hagans' head, determined that her right eye was full of blood, and described cuts to the left eyebrow and temple, as well

as abrasions on the right side of her face. The medical examiner also identified a tear on the right side of Hagans' head that resulted from blunt trauma, which caused major hemorrhage to the brain. The medical examiner stated there were external vaginal injuries consistent with sexual assault. As to the cause of death, the medical examiner explained that Hagans had a weak heart which gave out due to the stress and shock of the beating and sexual assault she had endured.

At the crime scene, the police found footprints on the front porch steps and in a drainage ditch that ran along the front of the house. A screwdriver was found outside a window. Based on these factors it was determined that the point of entry was a window leading into Hagans' bedroom. Sperm and semen stains were discovered on a pillowcase in the Hagans' bedroom. Semen was also found on a slip and a bedspread recovered from the bedroom. The semen on both the slip and the bedspread was consistent with the semen recovered from the pillowcase. Likewise, semen found on vaginal swabs taken from the victim was consistent with the semen from the other items in the bedroom. Human blood was also found on a towel at the scene. The evidence showed that Israel registered at the Palatka Holiday Inn on December 28, 1991, and paid for two nights in cash. Maryann Pittman testified that she was a prostitute working in Palatka and knew Israel. [FN1] Pittman stated that in December of 1991 she went with Israel to the Holiday Inn where they used crack cocaine. Pittman took a shower in the hotel room. She indicated that she saw a pair of pants and a shirt in the bathtub and that the water in the bathtub was red. Pittman also saw a black purse under the bed in the hotel room. She testified that Israel had money in his wallet when she looked through it. Israel told her he received the money from the Florida Lottery.

Israel's friend, Melvin Shorter, testified that he saw Israel and Pittman at the Holiday Inn where they were using crack cocaine. Shorter testified that he sold crack cocaine to Israel three or four times that day. Israel paid cash for the crack cocaine with money he retrieved from a wallet under the bed in the hotel room. Israel told Shorter he had "hit the lottery."

Israel also registered at the William Penn Motel on December 30, 1991, and paid for one week in cash. Israel stayed only one night and was given a cash refund, for which he signed a receipt.

> Israel and three other individuals were developed as suspects in Hagans' murder. Eventually, the Florida Department of Law Enforcement was solicited to help with the investigation and after more interviews a blood sample was taken from Israel. After DNA testing comparing Israel's blood sample to the semen stains found on the pillowcase and the slip, Israel was identified as the source of the semen stains in Hagans' bedroom and was arrested in 1993.
>
> Arthur McComb, a prisoner who was a legal clerk and who was housed in the same cell with Israel, testified that Israel asked for help with his case. During their discussions, Israel stated he was charged with first-degree murder and that he tried to knock the victim's head off because she tried to "gum him." Additionally Israel indicated that he sexually assaulted the victim and had gone to the victim's house to steal church money and had taken $7,000 to $10,000. Israel testified in his own defense, stating he was told by law enforcement officers that when the first officers arrived on the scene and found Hagans dead, they made it appear Hagans was beaten to death in order to keep $5,000 discovered in a dresser drawer. Israel testified he had nothing to do with breaking into Hagans' house. Israel also insisted his semen was not found at the crime scene and that his blood was planted on objects found at the crime scene. He stated that he had only allowed McComb to read the accusations against him but had never confessed.
>
> On March 1, 1999, the jury found Israel guilty as charged. After penalty proceedings, the jury returned a recommendation of death by a vote of eleven to one. Following the *Spencer* [FN2] hearing on May 14, 1999, the trial court sentenced Israel to death on May 28, 1999, finding four aggravating circumstances [FN3] and two statutory mitigating circumstances.
>
> Israel v. State, 837 So.2d 381, 383-385 (Fla. 2002)(footnotes omitted).

## POST-CONVICTION PROCEEDING AND 2005 EVIDENTIARY HEARING

As noted above, Mr. Israel filed a Motion to Vacate Judgments of Conviction and Sentences with Special Leave to Amend on December 1, 2003. (PCR. Vol. I, 97). An amended motion was subsequently filed and accepted by the court on

February 11, 2004. (PCR. Vol. I, 156).[4] The State of Florida filed its answer on April 12, 2004, (PCR. Vol. II, 219), and the court held the Case Management Conference on July 16, 2004. (PCR. Vol. II, 243, 382-406). The court's Order on Capital Post-Conviction Case Management Conference was rendered on July 30, 2004. The order reflected the parties' agreement that an evidentiary hearing should be held on claim numbers VIII, IX, X, XIII and XIV of the motion.[5] (PCR. Vol. II, 262).

The evidentiary hearing was conducted on January 20, 2005.[6] Clyde Wolfe was called and testified as the appellant's trial attorney. He was a solo practitioner at the time he represented Israel. Wolfe was first appointed as a conflict stand-by attorney and later was appointed as lead attorney on the case. (PCR. Vol. IV, 645-46). His experience included work as an assistant public defender. A five year period after law school in that position was interrupted by several months in private practice before establishing his own practice in 1985. (PCR. Vol. IV, 644-45). That solo practice continued until 2003. (PCR. Vol. IV, 644).

Mr. Wolfe's experience in criminal law comprised at least 50 to 75 percent of

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[4]The amended motion contained 15 claims and inadvertently omitted a claim number VI. (PCR. Vol. I, 166-68; Vol. II, 229).

[5]While the body of the order inadvertently omitted a reference to claim number X, the court heard and considered evidence and testimony for claim number X at the evidentiary hearing. (PCR. Vol. V, 851-54).

[6]At the hearing, evidence and testimony was received and considered by the court on claim numbers X, XII, and XIII . (PCR. Vol. IV, 597-778).

his work. (PCR. Vol. IV, 646). By the time of his appointment to the appellant's case, his experience included three capital murder trials. (PCR. Vol. IV, 648). Wolfe had the assistance of an investigator in the case as he re-worked the materials from previous counsel. (PCR. Vol. IV, 652-55). Ultimately, he obtained Dr. Harry Krop as a mental health expert to continue the expert's assistance in the case. (PCR. Vol. IV, 658).

As to the relevant matters involving the issues and claims argued here, Wolfe testified that he could not recall whether he had anyone else besides Dr. Krop testify at the penalty phase. (PCR. Vol. IV, 663). His focus with Dr. Krop was with the statutory mental health mitigators eventually accepted by the court. (PCR. Vol. IV, 667). Mr. Wolfe could not recall the basis for not arguing to the jury, at closing, about his client's diagnosed paranoia, polysubstance abuse, and brain damage. (PCR. Vol. IV, 674-75; 678-79). He felt that he did not need to "re-testify so to speak" to the mitigation testimony of Dr. Krop. (PCR. Vol. IV, 676). Mr. Wolfe recognized that drug abuse and brain damage could be presented and argued as non-statutory mitigation (PCR. Vol. IV, 682-86). He did not know whey he did not file a memorandum at the sentencing hearing. (PCR. Vol. IV, 696).

The post-conviction hearing also included testimony from Dr. Brad Fisher and Dr. Jonathan Lipman for the defense and Harry A. McClaren for the State of Florida. (PCR. Vol. IV, 13 *et seq*. 155 *et seq*.; 152 *et seq*., respectively). As referenced in the order denying post-conviction relief (PCR. Vol. V, 853), Dr. Fisher testified that

he agreed with Dr. Krop's diagnosis (PCR. Vol. IV, 621) and Dr. Lipman testified that the appellant was "not very forthcoming" in the interviews with the expert. (PCR. Vol. IV, 747). The court did not address Dr. McClaren's testimony in the order. (PCR. Vol. IV, 851-54).

## SUMMARY OF ARGUMENT

1. The appellant was denied the effective assistance of counsel during the closing argument of the penalty phase, and thereby prejudiced, because trial counsel merely made a few cursory remarks to the jury in which he appeared to be distancing himself from his client.

2. The appellant received ineffective assistance of counsel, and was prejudiced, when his trial attorney failed to file a memorandum of law and failed to address mitigation in full at the sentencing hearing.

3. Trial counsel was ineffective and prejudiced appellant's case in failing to present mitigating evidence and failing to prepare his expert witness.

4. Cumulatively, the combination of procedural and substantive errors deprived appellant of a fundamentally fair trial.

5. Under *Apprendi* and *Ring* the Florida death sentencing statutes, as applied, are unconstitutional.

## ARGUMENT I

### THE APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE CLOSING ARGUMENT OF THE PENALTY PHASE BECAUSE TRIAL COUNSEL MERELY MADE

**A FEW CURSORY REMARKS TO THE JURY IN WHICH HE APPEARED TO BE DISTANCING HIMSELF FROM HIS CLIENT.**

> "A review of the record in this case demonstrates that Israel failed to identify the areas of drug abuse, brain damage, and low intellectual functioning as specific nonstatutory mitigation for the trial court to consider."
>
> Israel v. State, 837 So.2d 381, 392 (Fla. 2002).
>
> "...this Court [has] noted ... "[T]he defense must share the burden and identify for the court the specific nonstatutory mitigating circumstances it is attempting to establish (quoting from Lucas v. State, 568 So.2d 18 (Fla. 1990). Unlike statutory mitigation that has been clearly defined by the legislature, nonstatutory mitigation may consist of any factor that could reasonably bear on the sentence. The parameters of nonstatutory mitigation are largely undefined. This is one of the reasons that we impose some burden on a party to identify the nonstatutory mitigation relied upon."
>
> Israel v. State, 837 So.2d at 391-92, quoting from Nelson v. State,748 So.2d 237, 243-44 (Fla. 1999).

Presented in the 3.851 motion as Claim 13, the issue was whether the appellant was denied the effective assistance of counsel during the closing argument of the penalty phase, and thereby prejudiced, because trial counsel merely made a few cursory remarks to the jury in which he appeared to be distancing himself from his client.

In deciding ineffective assistance of counsel claims, this Court reviews legal questions *de novo* and gives deference to the lower court's findings of fact. Reichmann v. State, 777 So.2d 342, 350 (Fla. 2000)(citations omitted). The court below denied the claim as follows:

> The issue in Count XIII is whether the defendant was denied the effective assistance of counsel during the closing argument of the penalty phase. Mr. Israel complains of the length and intensity of the closing argument, inter alia. The record shows Mr. Wolfe addressed Mr. Israel's impaired ability due to drug use and longstanding mental and psychological problems. R. at page 3954 and EH at page 102. Mr. Wolfe, in essence, told the jury that a life sentence would guarantee Mr. Israel would die in jail – they did not need to sentence him to death, "he will be incarcerated for the rest of his life." R. at pages 3952-54. He sought a life sentence, advising the jury this human being's life is in the balance and in your hands. R. at pages 3954-55. After review of the closing statement, this Court cannot say that counsel was deficient in his performance, or that Mr. Israel was prejudiced.
>
> (PCR. Vol. V, 855).

The closing argument of counsel after the penalty phase is the last best chance for the defense to convince the jury to recommend life over death in their sentencing decision. During his closing argument a reasonably effective defense attorney should forcefully and passionately review in great detail each and every mitigating factor which was introduced in his client's behalf as well as diminish the arguments made by the prosecution as to why the client should be put to death. Nothing remotely close to that was done in this case.

The closing statement by the defense attorney began by thanking the jurors for their attention during the trial and telling them that they have to decide the appropriate sentence for this offense by taking into consideration the matters presented to them in mitigation. He then told them that Dr. Krop had just testified that Mr. Israel was under the influence of extreme mental or emotional disturbance and was substantially impaired. He did not elaborate. "Not only through testimony from the State's

witnesses during the main part of the case of cocaine use that impaired his ability, but also the longstanding mental problems and psychological problems that have been testified to today." (R. Vol. XX, 3954)

He then concluded these few cursory remarks (one would be hard pressed to characterize them as "arguments.") by neutralizing whatever positive sway Dr. Krop's testimony may have had on the jury by telling them that [the mitigation evidence] "are not excuses" and that the jury does not have to decide whether this case involved an excusable or justifiable homicide. "Those [defenses] that are excusable and justifiable are more in self-defense areas." (R. Vol. XX, 3954). He concluded his remarks by reminding the jury that the defendant standing before them is a human being too; and that his life is in their hands. (R. Vol. XX, 3954). The closing argument took up only three pages of the record (see R. Vol. XX, 3952-55).

As to a basis for and reasoning of trial counsel's decision to present such a short and limited closing argument to the jury, counsel was asked at the evidentiary hearing about his knowledge of the recognized nonstatutory mitigation factors not argued to the jury and as was cited in the Initial Brief of Appellant, dated September 28, 2000, that was filed in appellant's direct appeal. (PCR. Vol. IV, 688). The January, 2005, evidentiary hearing included many exchanges on direct examination in which Mr. Wolfe could not explain why he did not argue various factors (e.g., "I can't give you a reason right now" [for not telling the jury about the law on nonstatutory mitigation]; (PCR. Vol. IV, 676); "I'm not sure that I can answer that question" [as to whether he

felt Dr. Krop's testimony did not show much]; (PCR. Vol. IV, 678); "Sitting here now, you know, six years later, I couldn't tell you what my thought process was then" [in response to a request for his decision making process in not giving any detailed closing argument to the jury]; (PCR. Vol. IV, 678-79).

It is noted here, also, that the record on appeal from the trial shows that Mr. Wolfe failed to bring the following mitigation from Dr. Krop's penalty phase testimony to the attention of the jury and court: educational deficits and difficulties (R. Vol. XX, 3926 line 19-25)(re: School records); (R. Vol. XX, 3927 line 1)(school records - "head condition which hinders him"); (R. Vol. XX, 3927 line 22-25)(school records - "appears emotionally disturbed..."); (R. Vol. XX, 3928 line 1-10) (school records - "dazed at times"); emotional impairment (R. Vol. XX, 3921 line 25)(Dysthymia - serious depression); emotional distress even if not extreme (R. Vol. XX, 3930 line 9-12)(personality disorder with antisocial and paranoid features); (R. Vol. XX, 3932, line 1-2)(personality disorder throughout whole life"); (R. Vol. XX, 3936 line 2-4) (hypochondriac features in personality disorder); (R. Vol. XX, 3942 line 5-10)(likely he had deficits throughout lifetime; head injury can exacerbate or trigger a seizure disorder); mental impairments both cognitively and intellectually (R. Vol. XX, 3928 line 16-17)(IQ places him "in a low-average range"); (R. Vol. XX, 3928 line 18-19)(IQ in the "lower 15 to 20 % of overall population"); (R. Vol. XX, 3929 line 1-2) ("difficulty with various levels of memory"); (R. Vol. XX, 3929 line 7-8)("probably had organic or neurological impairment all his life"); (R. Vol. XX, 3929 line 11-

15)("problems with impulse control and judgement); (R. Vol. XX, 3933 line 1-5)(judgment impaired at time of offense); medical problems (R. Vol. XX, 3923 line 10-11)(head injury and seizures when young) and utilization of alcohol and drugs (R. Vol. XX, 3930 line 7-8)("history of substance abuse, probably cocaine") and (R. Vol. XX, 3932 line 6-16) (cocaine causes poor judgment under normal circumstances and can create further problems for a person with personality deficiencies - i.e. judgment and impulse control problems).

In granting relief to a postconviction petitioner in Duncan v. State, 894 So.2d 817 (Fla. 2004), this Court addressed the matter of when a trial attorney is unable to provide the reason or basis for an act or omission during his handling of a trial:

> If the trial court's order was understood as holding that Duncan is entitled to relief *solely* because his former attorney was unable to provide the court with a reason for his failure to call Dr. Berland to testify, then such a holding would be in error, as it would constitute improper burden shifting. Ineffective assistance of counsel is not proven, per se, merely because the attorney whose acts are being questioned cannot provide a justification for his actions. The United States Supreme Court has held, and we have recognized, that the burden is on the moving party to demonstrate that the two components of Strickland, namely that the acts or omissions of the lawyer were outside the broad range of reasonably competent performance and that the substantial deficiency so affected the proceeding that confidence in the outcome is undermined, have been satisfied. See Strickland, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)] at 690, 104 S.Ct. 2052; Asay, 769 So.2d [974 (Fla. 2000)] at 984. Once the moving party has made the required showing, an objective basis for counsel's action's actions must be found, within the record, to justify counsel's performance, and thereby rebut the moving party's claim. If the record itself does not provide such justification, then the court has no choice but to require the State, and the attorney whose performance is in question, to answer the moving party's allegation.

Likewise, this court must also consider the standards for counsel's performance as reiterated in Wiggins v. Smith, 123 S.Ct. 2527 (2003). The ABA Standards for the Appointment and Performance of Counsel in Death Penalty Cases (1989) provide, among others:

> The objective in providing counsel in cases in which the death penalty is sought should be to ensure that quality legal representation is afforded to defendants eligible for the appointment of counsel during all stages of the case. [1.1, p. 2]
>
> [D]eath penalty cases have become so specialized that defense counsel has duties and functions definably different from those of counsel in ordinary criminal cases. [1.1, commentary, p. 21]
>
> In many capital cases, no credible argument for innocence exists, so that the life or death issue of punishment is the real focus of the entire case. The Constitution requires individualization of the capital sentencing process. A capital defendant has the right to present his or her sentencer with any mitigating evidence that might save his or her life. Counsel should be aware of methods to effectively advocate for the life of the client, and should strive for an effective defense presentation in every case... [1.1, commentary, p. 22 ]
>
> Counsel should ensure that all reasonably available mitigating and favorable information consistent with the defense sentencing theory is presented to the sentencing entity or entities in the most effective possible way. [11.8.2(D), p. 69].

As Professor Steven Lubet noted in Modern Trial Advocacy: Analysis and Practice:

> Final argument is the advocate's only opportunity to tell the story of the case in its entirety, without interruption, free from most constraining formalities. Unlike witness examinations, the final argument is delivered in counsel's own words and without the need intermittently to cede the stage to the opposition; unlike the opening statement, it is not bound by

strict rules governing proper and improper content. In other words, final argument is the moment for pure advocacy, when all of the lawyer's organizational, analytic, interpretive, and forensic skills are brought to bear on the task of persuading the trier of fact.

... [A]t final argument the attorney can [then] nail down the image [that counsel has created during the trial] by pointing out the crucial details, weaving together with witnesses' accounts, and explaining the significant connections. All three aspects of the trial – opening, witness examinations, and closing – should combine to evoke a single conception of events. [p. 443]

While final argument can and should be the capstone of a well-tried case, it is unlikely to be the saving grace of a poor one. [p. 444]

The knowledge of the individual witnesses, not to mention trial strategy and luck, may result in the scattering of such details throughout the trial. It is during final argument that the attorney can reassemble the details so that they lead to the desired result. [p. 454]

Final argument is the only time when the attorney may confront directly the character of witnesses and explain why some should be believed and others discounted. [p. 459]

Final argument provides the attorney an occasion to apply the law to the facts of the case. Discussion of law is extremely limited during the opening statement and all but forbidden during witness examinations, but it is the staple of the final argument. In most jurisdictions counsel may read from the jury instructions and explain exactly how the relevant law dictates a verdict for her client. [p. 463]

The structure of the final argument must be developed for maximum persuasive weight. The central thrust of the final argument must always be to provide reasons – logical, moral, legal, emotional – for the entry of a verdict in your client's favor. Every aspect of the final argument should contribute tin some way to the completion of the sentence, "We win because...." In the broadest sense, of course, the desired conclusion should simply follow from the facts and law of the case. [p. 471]

Final argument is the time for gathering details. Although the particulars may have occurred at widely different times and have been testified to

> by several witnesses, they can and should be aggregated to make a single point in final argument. [p. 479]
>
> It is essential, therefore, that every closing argument address the subject of common sense. Explain why your theory is realistic, using examples and analogies from everyday life. [p. 484]
>
> Some part of every final argument should be devoted to the court's forthcoming jury instructions as well as to the elements of the claims and defenses in the case. Jury instructions can be extremely important in the way that the jurors decide the case, and it is to counsel's advantage to invoke some of the instructions during argument. [p. 489]
>
> Final argument is generally regarded as the advocate's finest hour. It is the time when all the skills – no, the arts – of persuasion are marshaled on behalf of the client's cause. While a polished delivery will not rescue a lost cause, a forceful presentation can certainly reinforce the merits of your case. [p. 491]
>
> Steven Lubet, Modern Trial Advocacy: Analysis and Practice, (National Institute for Trial Advocacy 1997).

Judge Brorby, dissenting in Moore v. Reynolds, 153 F.3d 1086 (10th Cir. 1998)(where a full waiver of closing argument was considered and approved), stated that "... a closing argument is far more than the sum of the proceeding's evidence. Limiting the possible persuasive value of an argument to that of the evidence presented evidences a misconception of the value of argument itself," (FN7, at 1118) and that "[b]alancing the factors – mitigating and aggravating – involves the exercise of judicial discretion and judgment. When such balancing is required, it is the duty of defense counsel to argue why the balance should be struck in his client's favor. No matter how great the odds may seem to be against winning the argument, counsel must make the best case he can." quoting Gerlaugh v. Stewart, 129 F.3d 1027, 1049

(9th Cir. 1997)(Reinhardt, J., concurring in part and dissenting in part). Moore, 153 F.3d at 1119.

Florida courts have similarly discussed the importance and nature of closing argument:

> "The purpose of closing argument is to help the jury understand the issues presented in a case by applying the evidence to the applicable law. See Murphy v. Int'l. Robotic Systems, Inc., 766 So.2d 1010, 1028 (Fla. 2000)(quoting Hill v. State, 515 So.2d 176, 178 (Fla. 1987).
>
> In Herring v. New York, 422 U.S. 853, 862, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975), the United States Supreme Court explained the purpose of closing argument as follows:
>
> > In can hardly be questioned that closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from the testimony, and point out the weaknesses of their adversaries' positions. And for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt. Herring, 422 U.S. at 862, 95 S.Ct. 2550 (citing In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)."
>
> Goodrich v. State, 854 So.2d 663, 664-65 (Fla. 3rd DCA 2003).

Relief at postconviction and for re-sentencing has been given for deficient penalty phase presentations even where the trial court independently considered the testimony and argument of counsel. See Orme v. State, No. SC02-2625, SC03-1375 (Fla. Feb. 24, 2005) (because the trial court only gave some weight to two statutory

mitigators, remand for re-sentencing to consider additional mitigating evidence not presented to the jury nor the court). See also Brownlee v. Haley, 306 F.3d 1043 (11th Cir. 2002)(holding that counsel's failure to present adequate mitigating evidence to the jury was deemed prejudicial under Strickland):

> It is evident that ... a prejudicial error in the jury phase of a bifurcated sentencing proceeding, such as the Sixth Amendment violation in this case, prevents the jury from issuing a valid advisory verdict. Without such a verdict, the trial judge is unable to perform his statutorily-mandated task of considering the jury's opinion and building upon that opinion to fashion an appropriate sentence for the defendant. As a result, a prejudicial error in the jury phase, such as a violation of the Sixth Amendment's right to counsel, taints the entire sentencing proceeding. Allowing a judge to cure this taint in this case of an individual defendant could limit the significance of the jury participation required by statute and would risk ... "infus[ing] an unacceptable level of arbitrariness into the administration of the death penalty." (quoting Magill v. Dugger, 824 F.2d 879, 894 (11th Cir. 1987). This is especially true in Alabama as it is in Florida. Because the Alabama legislature has given the jury an essential role in the sentencing process, that role cannot be readily abrogated.

As evidenced by his closing statement, counsel failed to function reasonably as an effective counsel when he permitted the prosecutor's characterizations of appellant to go unobjected to and unanswered. Silence in the face of accusation is tantamount to agreement. Counsel completely abdicated his responsibility to the defendant when he failed to spell out for the jury all of the mitigating evidence (such as it was) which would have argued in favor of a lesser recommendation than death. When counsel virtually took a pass on closing argument (as he did at the Spencer hearing and on submitting a Spencer memorandum to this court after being invited to do so), he

deprived appellant of an adversarial testing of the prosecution's case. The closing argument in the penalty phase of this case was deficient and prejudicial. Clark v. State, 690 So.2d 1280 (Fla. 1997); Horton v. Zant, 941 F.2d 1449, 1463 (11th Cir. 1991). Appellant was also prejudiced by the his counsel's failure to object to the prosecution's argument (R. Vol. XX, 3951), and as a consequence thereof, was denied the effective assistance of counsel in violation of his Fifth, Sixth, Eighth and Fourteenth Amendment rights under the United States Constitution and the corresponding provisions of the Florida Constitution. Confidence in the outcome of the trial is undermined by this deficiency in trial counsel's performance; prejudice is thereby shown and the results of the penalty phase are unreliable.

## ARGUMENT II

### TRIAL COUNSEL WAS INEFFECTIVE AND PREJUDICED APPELLANT'S CASE WHEN HE FAILED TO FILE A SENTENCING MEMORANDUM OF LAW FOR THE HEARING HELD PURSUANT TO SPENCER V. STATE, 615 SO.2D 688 (FLA. 1993).

The issue in this claim, presented as number twelve in the 3.851 motion, is whether the appellant received ineffective assistance of counsel when his trial attorney failed to file a sentencing memorandum of law at the hearing held pursuant to Spencer v. State, 615 So.2d 688 (Fla. 1993). In deciding ineffective assistance of counsel claims, this Court reviews legal questions *de novo* and gives deference to the lower court's findings of fact. Reichmann v. State, 777 So.2d 342, 350 (Fla. 2000)(citations omitted). The court below denied the claim as follows:

> Israel argues that he was denied effective assistance of counsel when his trial counsel failed to provide a Spencer memorandum as requested by the judge. This court did request such a memorandum from trial counsel that was not provided. While a memorandum is not required under Spencer it can be helpful to the Court and this Court's request was not complied with. While this may be considered a deficiency in trial counsel's performance this Court does not find it to be prejudicial. The Court bears the ultimate responsibility to independently identify and weigh the mitigating and aggravating factors in determining whether to impose the death penalty. As noted above this Court did so finding 4 aggravating factors and 2 mitigating factors in making the determination.
>
> This Court heard and considered testimony presented at various stages of the proceedings going to non-statutory mitigators, including Mr. Israel's drug abuse, brain damage, low intellectual functioning as well as Mr. Israel's character, background, record and other circumstances surrounding the offense. This Court choose to assign no weight to non-statutory mitigating circumstances stating, "[Mr. Israel's} record is bad, his character worse, and the offense itself is horrible". Sentencing Order at page 4. Because there was no prejudice to Mr. Israel his burden set forth in Strickland has not been met.
>
> (PCR. Vol. V, 854-55).

On May 14, 1999, the trial court held a Spencer hearing. Prior to the commencement of that hearing the court heard argument of defense counsel on a motion for a new trial which it denied. (R. Vol. XX, 3901). The only witness to testify during the Spencer hearing was the appellant, who addressed the court with respect to the irregularities he perceived to have occurred in the collection of the evidence used against him at trial. Following appellant's testimony the court made inquiry of the attorneys "Is there anything further anyone wishes to say that we haven't gone over on the issues of sentencing, any matter you wish to bring to my attention that we need to discuss?" (R. Vol. XX, 3908). The state attorney told the

court that he had submitted a sentencing memorandum to the court on the first of April and asked if the court if it had received the memorandum.

The court then asked defense counsel: "Are you intending to submit one as well, Mr. Wolfe?" Mr. Wolfe answered: "*If I had to*, it would be no later than Friday of next week." (R. Vol. XX, 3909)(emphasis added). The court responded: "Why don't I give you leave to do that. I'm not sure I have - - I haven't read a memorandum yet, but I was about to ask that Counsel provide me with your memorandum, your analysis of aggravating and mitigating factors." Mr. Wolfe never filed a sentencing memorandum on the behalf of his client.

As to the basis for and reasoning of trial counsel's decision not to file a sentencing memorandum as did the State, the January, 2005, evidentiary hearing included the following exchanges on direct examination:

> Q: Mr. Wolfe, what kind of decision making process did you go through in terms of deciding not to file a written memorandum in support of a life sentence in opposition to the death sentence?
>
> A: I thought I could articulate it verbally better.
>
> Q: Do you recall indicating ever to the trial judge that you intended to file a written memorandum?
>
> (PCR. Vol. IV, 692).
>
> A: I don't recall if I did or not.
>
> Q: When was it that you were going to - - let me strike and start again, Mr. Wolfe. How would you describe it was that you verbally argued to the Court that life was the appropriate sentence for Mr. Israel as opposed to death?

A: Whatever is in the record. I don't recall specifically.

Q: You don't recall what you told the judge or when it was?

A: Whatever is in the record is in the record.

(PCR. Vol. IV, 693).

Q: [T]his is the proceeding of May 14 and as my tab may indicate, I think we start with the Court in the second paragraph saying, We're here for the purpose of the Spencer hearing. ... Mr. Wolfe, is there any - - can you point to me in there where it is that you argued to the Court about mitigation in support of a life sentence in opposition or diminishingaggravators in Mr. Israel's favor?

A: Well, the testimony from the - - we argued the motion for new trial.

Q: I am talking about - -

A: I'm getting to it. Mr. Israel testified. And I believe you are correct, that I did not argue that. I don't know why.

(PCR. Vol. IV, 696).

Mr. Wolfe's inability to give an explanation for not filing a written sentencing memorandum and for failing to argue for life at the Spencer hearing is subject to the following. As presented in the previous claim regarding the closing argument, in granting relief to a postconviction petitioner in Duncan v. State, 894 So.2d 817 (Fla. 2004), this Court addressed the matter of when a trial attorney is unable to provide the reason or basis for an act or omission during his handling of a trial:

> If the trial court's order was understood as holding that Duncan is entitled to relief *solely* because his former attorney was unable to provide

> the court with a reason for his failure to call Dr. Berland to testify, then such a holding would be in error, as it would constitute improper burden shifting. Ineffective assistance of counsel is not proven, per se, merely because the attorney whose acts are being questioned cannot provide a justification for his actions. The United States Supreme Court has held, and we have recognized, that the burden is on the moving party to demonstrate that the two components of Strickland, namely that the acts or omissions of the lawyer were outside the broad range of reasonably competent performance and that the substantial deficiency so affected the proceeding that confidence in the outcome is undermined, have been satisfied. See Strickland, 466 U.S. [668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)] at 690, 104 S.Ct. 2052; Asay, 769 So.2d [974 (Fla. 2000)] at 984. Once the moving party has made the required showing, an objective basis for counsel's action's actions must be found, within the record, to justify counsel's performance, and thereby rebut the moving party's claim. If the record itself does not provide such justification, then the court has no choice but to require the State, and the attorney whose performance is in question, to answer the moving party's allegation.

A Spencer hearing is the capital defendant's "last stop on the line" before sentencing. At a Spencer hearing the now convicted murderer is allowed to present additional mitigating evidence for the trial judge to consider before the imposition of sentence. This is where the law presents the defense attorney with the opportunity to make his last ditch effort to save his client from the death penalty. This is where the court presented counsel with the opportunity to submit a sentencing memorandum wherein he could thoughtfully and methodically set forth the case for *sparing* his client's life to counter balance the memorandum submitted by the state attorney a month and a half earlier setting forth the case for *taking* his client's life.

With Florida's bifurcated sentencing procedure, the opportunities for argument and presentation given to the defense at the Spencer hearing make it a component of

closing argument to the final trier of fact in this system. What applies to closing argument for the jury must also apply to the court at the Spencer hearing. "Based on the Supreme Court's citation of Herring [v. New York, 422 U.S. 853, 862, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975)] in the [United States v.] Cronic [466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)] opinion, it is clear that closing argument is a "critical stage" of a trial..." Hunter v. Moore, 304 F.3d 1066, 1070 (11th Cir. 2002).

This court must again consider the standards for counsel's performance as reiterated in Wiggins v. Smith, 123 S.Ct. 2527 (2003). The ABA Standards for the Appointment and Performance of Counsel in Death Penalty Cases (1989) provide, among others:

> The objective in providing counsel in cases in which the death penalty is sought should be to ensure that quality legal representation is afforded to defendants eligible for the appointment of counsel during all stages of the case. [1.1, p. 2]
>
> [D]eath penalty cases have become so specialized that defense counsel has duties and functions definably different from those of counsel in ordinary criminal cases. [1.1, commentary, p. 21]
>
> In many capital cases, no credible argument for innocence exists, so that the life or death issue of punishment is the real focus of the entire case. The Constitution requires individualization of the capital sentencing process. A capital defendant has the right to present his or her sentencer with any mitigating evidence that might save his or her life. Counsel should be aware of methods to effectively advocate for the life of the client, and should strive for an effective defense presentation in every case... [1.1, commentary, p. 22 ]
>
> Counsel should ensure that all reasonably available mitigating and favorable information consistent with the defense sentencing theory is presented to the sentencing entity or entities in the most effective

possible way. [11.8.2(D), p. 69].

Again, appellant's attorney took a pass on the opportunity. By his lackadaisical "let the chips fall where they may" rejection of this final chance to once again argue his client's case, he, in effect, acquiesced to whatever sentence the judge and the state attorney thought was appropriate. At the very least he could have argued that appellant's history of drug abuse coupled with his diagnosed paranoia could have resulted in him killing Mrs. Hagans unintentionally. Even though this court found two mitigators, if counsel had taken every opportunity he had to strongly argue those mitigating circumstances there is a reasonable chance that the court would have weighted them more heavily than it did. The trial attorney's performance in this regard was most emphatically not the reasonably effective representation that the Sixth Amendment establishes as the proper standard of attorney performance as set forth by the Supreme Court in Strickland v. Washington, supra.

Appellant was prejudiced by the his counsel's failure to effectively argue the mitigation evidence in a Spencer memorandum, and, as a consequence thereof, was denied the effective assistance of counsel in violation of his Fifth, Sixth, Eighth and Fourteenth Amendment rights under the United States Constitution and the corresponding provisions of the Florida Constitution. Confidence in the outcome of the trial is undermined by this deficiency in trial counsel's performance; prejudice ensued; and the results of the penalty phase are unreliable.

## ARGUMENT III

### TRIAL COUNSEL WAS INEFFECTIVE AND PREJUDICED APPELLANT'S CASE IN FAILING TO PRESENT MITIGATING EVIDENCE AND FAILING TO PREPARE HIS EXPERT WITNESS.

The issue presented in Claim 10 of the motion below was whether trial counsel was ineffective and prejudiced appellant's case in failing to present mitigating evidence and failing to prepare his expert witness. In deciding ineffective assistance of counsel claims, this Court reviews legal questions *de novo* and gives deference to the lower court's findings of fact. Reichmann v. State, 777 So.2d 342, 350 (Fla. 2000) (citations omitted). The court below denied the claim. It noted, in part, that trial counsel successfully proved the two subject statutory mental health mitigators and that counsel made tactical decisions not to focus on drug abuse or present testimony from family member. (PCR. Vol. V, 852). Noting further that the postconviction expert witnesses for the appellant agreed with the trial expert's diagnosis and found appellant "not very forthcoming," the court found trial counsel's performance effective and not prejudicial.[7] (PCR. Vol. V, 853).

In appellant's penalty phase proceedings the only witness presented by the defense was Dr. Harry Krop, the psychologist hired by the defense. The deficiency of trial counsel's performance in not focusing on the appellant's drug abuse, brain

[7]As the court noted, the appellant did not pursue the "failure to prepare" component of the claim. (PCR. Vol. V, 853).

damage and low intellectual functioning is manifest. In addition, as demonstrated at the evidentiary hearing, appellant has established that his counsel's deficient performance resulted in prejudice. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064. A petitioner satisfies the prejudice prong of Strickland by showing that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687, 104 S.Ct. at 2064. Mr. Israel "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." id. at 694, 104 S.Ct. at 2068.

The prejudice to Mr. Israel resulting from the absence of this and other mitigation is clear. Confidence in the outcome of the trial is undermined by trial counsel's deficient performance and the results of the penalty phase are unreliable.

## ARGUMENT IV

### CUMULATIVELY, THE COMBINATION OF PROCEDURAL AND SUBSTANTIVE ERRORS DEPRIVED APPELLANT OF A FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISION OF THE FLORIDA CONSTITUTION.

As presented in the defendant's motion for this claim, number sixteen in the motion, cumulatively, the combination of procedural and substantive errors deprived appellant of a fundamentally fair trial guaranteed under the Fourth, Fifth, Sixth, Eighth, and Fourteenth amendments to the United States Constitution and the corresponding provision of the Florida Constitution. To the extent this argument

applies to ineffective assistance of counsel claims, this Court reviews legal questions *de novo* and gives deference to the lower court's findings of fact. Reichmann v. State, 777 So.2d 342, 350 (Fla. 2000)(citations omitted). The court denied the claim, stating that "[h]aving found the prior fifteen counts to be without merit this Court cannot then find Mr. Israel has received anything less than a fundamentally fair trial." (PCR. Vol. V, 856).

Particularly with the penalty phase and the abbreviated effort with closing argument by trial counsel, both to the jury and for and at the Spencer hearing, appellant did not receive the fundamentally fair trial to which he was entitled. See Heath v. Jones, 941 F.2d 1126 (11th Cir. 1991); Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991). Under the law, the cumulative effect of these errors denied appellant his fundamental rights under the Constitution of the United States and the Florida Constitution. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986); Ray v. State, 403 So.2d 956 (Fla. 1981); Taylor v. State, 640 So.2d 1127 (Fla. 1st DCA 1994); Stewart v. State, 622 So.2d 51 (Fla. 5th DCA 1993); Landry v. State, 620 So.2d 1099 (Fla. 4th DCA 1993).

Because all these deficiencies relate to showing prejudice, there is no doubt that the penalty phase of the trial did not involve "a reliable adversarial testing." Strickland v. Washington, 466 U.S. 668 at 688 (1984). "Confidence in the outcome is undermined." Strickland at 688. "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot

be shown by a preponderance of the evidence to have determined the outcome." Strickland at 688.

In this day of post-*Ring* awareness of the importance of the jury's role in criminal cases [Justice Scalia's concurring opinion in *Ring* noted his belief that "the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives–whether the statute calls them elements of the offense, sentencing factors, or Mary Jane–must be found by the jury beyond a reasonable doubt." Ring v. Arizona, 536 U.S. 584, 610 (2002)], the appellant again notes that when cumulative errors exist the issue is whether "even though there was competent substantial evidence to support a verdict . . . and even though each of the alleged errors, standing alone, could be considered harmless, the cumulative effect of such errors was such as to deny to defendant the fair and impartial trial that is the inalienable right of all litigants in this state and this nation." Jackson v. State, 575 So. 2d 181, 189 (Fla. 1991)(citations omitted).

## ARGUMENT V

**UNDER *APPRENDI AND RING* THE FLORIDA DEATH SENTENCING STATUTES AS APPLIED ARE UNCONSTITUTIONAL UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.**

In 2001, this 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, appellant raises these issues now to preserve the claims for possible federal review. The petitioner acknowledges such rulings on this claim as found in Schriro v. Summerlin, 542 U.S. 348, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004) and Johnson v. State, 904 So.2d 400, 412 (Fla. 2005). However, the petitioner also refers to State v. Steele, — So.2d —, 31 Fla.L.Weekly S74 (Fla. Oct. 12, 2005) as supplemental authority to the arguments contained herein. ("The effect of that decision [Ring v. Arizona] on Florida's capital sentencing scheme remains unclear ... 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. Florida is now the only state in the country that allows a jury to decide that aggravators exist *and* to recommend a sentence of death by a mere majority vote."). Steele at S74.

Further, the appellant refers to the concurring opinion of Justice Cantero in Windom v. State, 886 So.2d 915 (Fla. 2004) regarding Ring v. Arizona, 536 U.S. 584

(2002), :

> Neither Bottoson nor King, therefore, finally settled the question of whether Ring applies in Florida. As if to emphasize that fact, virtually every post-conviction appeal to this Court continues to raise the Ring issue. In the ensuing months, we have repeatedly denied relief under Ring in both direct appeals and post-conviction cases, relying for the most part on citations to Bottoson and King. (footnote omitted). Chief Justice Anstead has reminded us, however, that neither Bottoson nor King garnered a majority. (footnote omitted). ... [D]espite the ever-growing mountain of cases raising this issue, we have come no closer to forging a majority view about whether Ring applies in Florida than we did in Bottoson and King.
>
> Windom, 886 So.2d at 936-37.

The defendant urges, therefore, that this Court make its own independent ruling based on the status of current Florida law on this matter.

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 1999, the United States Supreme Court held that "under 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 2000, 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. "[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 appellant was eligible for the death penalty. Fla. Stat. § 775.082 (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. Israel immediately after conviction, the court could only have imposed a life sentence. § 775.082 Fla. Stat. (1995). Dixon, 283 So.2d at 9.

Appellant's indictment violated the Sixth and Fourteenth Amendments because it failed to charge the aggravating circumstances as elements of the offense for which the death penalty was a possible punishment. Under the principles of common law,

aggravators must be noticed.

> Where a statute annexes a higher degree of punishment to a common-law felony, if committed under particular circumstances, an indictment for the offence, in order to bring the defendant within that higher degree of punishment, must expressly charge it to have been committed under those circumstances, and must state the circumstances with certainty and precision. 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.

Appellant's death recommendation also violates the constitution because it is impossible to determine whether a unanimous jury found any one aggravating circumstance. Fla.R.Crim.P. 3.440 requires unanimous jury verdicts on criminal charges. "It 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. Fla. Stat. § 912.141(1),

(2) (1999).

Appellant's death recommendation violated the minimum standards of constitutional common law jurisprudence because it is impossible to know whether the jurors unanimously found any one aggravating circumstance. 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 "death is qualitatively different from a sentence of imprisonment, however long." Woodson v. North Carolina, 428 U.S. 280, 304 (1976). The Sixth, Fourteenth, and Eighth Amendments require more protection as the seriousness of the crime and severity of the sentence increase.

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

A new penalty phase is the remedy in this case because it is impossible to know whether the jurors unanimously found any one aggravating circumstance in support of the recommendation of death.

## CONCLUSION AND RELIEF SOUGHT

Based on the foregoing, the lower court improperly denied Rule 3.851 relief to Connie Ray Israel. This Court is respectfully urged to order that his conviction for

and sentence of death be vacated and remand the case for such further relief as the Court deems proper.

Respectfully submitted,

_____
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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of the Appellant has been furnished by United States Mail, first class postage prepaid, to Kenneth S. Nunnelley, Senior Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, Florida 32118-3958 on this _____ day of _____, 2006.

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## CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY, pursuant to Fla.R.App.P. 9.210, that the foregoing was generated in Times New Roman 14-point font.

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