IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-1974

WYDELL JODY EVANS

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT FOR BREVARD COUNTY, STATE OF FLORIDA

PETITION FOR WRIT OF HABEAS CORPUS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

Article l, Section 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. These claims demonstrate that Mr.Evans was deprived of the right to a fair, reliable trial and individualized sentencing proceeding and that the proceedings resulting in his conviction and death sentence violated fundamental constitutional imperatives.

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

REQUEST FOR ORAL ARGUMENT

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

INTRODUCTION

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

The issues, which appellate counsel neglected, demonstrate that counsel=s performance was deficient and that the deficiencies prejudiced Mr. Evans. A[E]xtant legal principles . . . provided a clear basis for . . . compelling appellate argument[s].@ Fitzpatrick v. Wainwright, 490 So.2d 938, 940 (Fla. 1986). Neglecting to raise fundamental issues such as those discussed herein Ais far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome.@ Wilson v. Wainwright, 474 So.2d 1162, 1164 (Fla. 1985). Individually and Acumulatively,@ Barclay v. Wainwright, 444 So.2d 956, 959 (Fla. 1984), the claims omitted by appellate counsel establish that A*confidence* in the correctness and fairness of the result has been undermined.@ *Wilson*, 474 So.2d at 1165 (emphasis in original).

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

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

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

Jurisdiction in this action lies in this Court, *see, e.g.*, Smith v. State, 400 So.2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Evans' direct appeal. *See Wilson*, 474 So.2d at 1163 (Fla. 1985); *Baggett v. Wainwright*, 392 So.2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Evans to raise the claims presented herein. *See, e.g.*, Way v. Dugger, 568 So.2d 1263 (Fla. 1990); Downs v. Dugger, 514 So.2d 1069 (Fla. 1987); Riley v. Wainwright, 517 So.2d 656 (Fla. 1987); *Wilson*, 474 So.2d at 1162.

This Court has the inherent power to do justice. The ends of justice call on the

Court to grant the relief sought in this case, as the Court has done in similar cases in the past. The petition pleads claims involving fundamental constitutional error. *See* Dallas v. Wainwright, 175 So.2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So.2d 362 (Fla. 1984). The Court=s exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action. As the petition shows, habeas corpus relief would be more than proper on the basis of Mr. Evans= claims.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Evans asserts that his capital conviction and sentence of death were obtained and then affirmed during this Court=s appellate review process in violation of his rights as guaranteed by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

PROCEDURAL HISTORY

On November 10, 1998, the grand jury in and for Brevard County returned an indictment charging Mr. Evans with one count of first degree premeditated murder in violation of Section 782.04 (1) (a), Florida Statutes (1997), one count of kidnapping in violation of Sections 787.01 (1) (a)2, (1) (a)3, and (2), Florida Statutes (1997), one count of aggravated assault in violation of Section 784.021 (1) (a), Florida Statutes (1997) and one count of possession of a firearm by a convicted felon in violation of Sections 790.23

(1) and (3), Florida Statutes (1997). (FSC ROA Vol. III, 451-452). Upon defense motion, the trial court granted the motion to sever the possession of a firearm by a convicted felon charge from the remaining charges. (FSC ROA Vol. III 554-555). Mr. Evans proceeded to jury trial on the charges on October 25, 1999 with the Honorable Jere Lober, circuit court judge, presiding. FSC ROA Vols. V-XV 1-2145). Following deliberations, the jury returned verdicts finding Mr. Evans guilty as charged on all three counts. (FSC ROA Vol. XIV 2143-2145). On November 3, 1999, Mr. Evans proceeded with the penalty phase of the trial. Following deliberations, the jury returned an advisory recommendation that Mr. Evans be sentenced to death by a vote of ten to two. (FSC ROA Vol. XVII 2418). On February 15, 2000, Mr. Evans again appeared before Judge Lober for sentencing. (FSC ROA Vol. III 398-453) The trial court filed Written findings of fact in support of his sentence of death. (FSC ROA Vol. IV 542-662). The trial court sentenced Mr. Evans to life in prison as a prison releasee reoffender for the kidnapping conviction and a concurrent term of 108.15 months in prison for the aggravated assault conviction. These sentences were to run consecutive to the sentence of death imposed for the first degree murder charge. (FSC ROA Vol. III 446, Vol. IV 634-641). The judgments and sentences were affirmed in Evans v. State, 838 So.2d 1090 (Fla. 2002). The rehearing was denied on Feb. 26, 2003. The order appointing CCRC-M was dated 2/27/03. On June 17, 2004, a case management conference was held before the Honorable David Dugan. It was agreed among the parties that claims 1-5 required an

evidentiary hearing and claim 8(cumulative error) could also be argued. On the 19th and 20th of October 2004, an evidentiary hearing was held and subsequently continued to December 16th, 2004. On 2/14/05 the trial court entered an order styled: Order Denying Defendant=s 3.851 Motion for Postconviction Relief. A timely motion for rehearing was filed on 2/28/05, citing recently released case law from the Florida Supreme Court, and denied in a one page order dated 3/22/05. A timely notice of appeal was filed and this petition for writ follows.

CLAIM I

THE FLORIDA DEATH SENTENCING STATUTE AS APPLIED IS UNCONSTITUTIONAL UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

In Mills v. Moore, the Florida Supreme Court held that because Apprendi v. New Jersey, 120 S.Ct. 2348, (2000), did not overrule Walton v. Arizona, the Florida death penalty scheme was not overruled. Mills v. Moore, 2001 WL 360893 * 3-4 (Fla. 2001). Therefore, Mr. Evans raises these issues now to preserve the claims for federal review.

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

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

In Apprendi, the issue was whether a New Jersey hate crime sentencing enhancement, which increased the punishment beyond the statutory maximum, operated

as an element of an offense so as to require a jury determination beyond a reasonable doubt. Apprendi 120 S.Ct. at 2365. A[T]he relevant inquiry here is not one of form, but of effect-does the required finding expose the defendant to a greater punishment than that authorized by the jury=s guilty verdict?@ Apprendi 120 S.Ct. at 2365.

Clearly, Florida capital defendants are not eligible for the death sentence simply upon conviction of first-degree murder. If the court sentenced Mr. Evans immediately after conviction, the court could only have imposed a life sentence. ' 775.082 Fla. Stat. (1995). Dixon, 283 So.2d at 9. Therefore, under Florida law, the death sentence is not within the statutory maximum sentence, as analyzed in Apprendi, because it increased the penalty for first degree murder beyond the life sentence Mr. Evans was eligible for based solely upon the jury=s guilty verdict. Under Florida law, the effect of finding an aggravator exposed Mr. Evans to a greater punishment than that authorized by the jury=s guilty verdict alone, the aggravator was an element of the death penalty eligible offense which required notice, submission to a jury, and proof beyond a reasonable doubt. Apprendi, at 2365. This did not occur in Mr. Evans= case. Thus, the Florida death penalty scheme was unconstitutional as applied.

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

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

Because aggravators are essential elements of a crime for which the death penalty may be imposed, they must be noticed. The finding of an aggravator exposed Mr.Evans to a greater punishment than the life sentence authorized by the jury=s guilty verdict, therefore, the aggravator must have been charged in the indictment, submitted to a jury, and proved beyond a reasonable doubt to a unanimous jury.

The Florida death penalty sentencing statute was unconstitutional as applied in Mr. Evans= case. The constitutional errors were not harmless. The Supreme Court of the United States held in Ring v. Arizona, 122 S.Ct. 2428, 2431 (2002):

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

Id. at 2431

In Mr. Evans= case, the trial court found the following

two aggravators: (1) defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person; (2) the defendant was on legal constraint. The effect of finding these aggravators exposed Mr. Evans to a greater punishment than that authorized by the jury=s guilty verdict alone. The aggravators were elements of the death penalty eligible offense which required notice in the indictment. Furthermore, the jury recommended death by a verdict of 10-2, which was not a unanimous verdict. After the jury arrived at a non-unanimous verdict, the judge, sitting alone enhanced Evans= sentence to a sentence of death. Under Ring, the procedural rights guaranteed under Apprendi - the rights to demand a (1) factual finding, (2) by a unanimous jury, (3) beyond a reasonable doubt, apply to capital sentencing. Mr. Evans was sentenced to death under a Florida statute that was unconstitutional because it is contingent upon an finding of sufficient statutory aggravation and insufficient mitigation but it allows a judge, sitting alone and without a jury, to make those findings of fact. To the extent that appellate counsel failed to litigate this issue on direct appeal, appellate counsel was ineffective.

CLAIM II

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

A. The trial court=s instructions to the jury unconstitutionally diluted its sense of responsibility in determining the proper sentence.

Mr. Evans= jury was unconstitutionally instructed by the court that its role was merely "advisory." (R Vol. XVI -2384) Because great weight is given the jury's recommendation, the jury is a sentencer in Florida. Here, however, the jury's sense of responsibility was diminished by the misleading comments and instructions regarding the jury's role. This diminution of the jury's sense of responsibility violated the Eighth Amendment. See Caldwell v. Mississippi, 472 U.S. 320 (1985)

CLAIM III

MR. EVANS= EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED AS MR. EVANS MAY BE INCOMPETENT AT TIME OF EXECUTION TO THE EXTENT THAT THIS ISSUE WAS NOT LITIGATED ON DIRECT APPEAL, COUNSEL WAS INEFFECTIVE.

In accordance with Florida Rules of Criminal Procedure 3.811 and 3.812, a prisoner cannot be executed if Athe person lacks the mental capacity to understand the fact of the impending death and the reason for it.@ This rule was enacted in response to Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595 (1986).

The undersigned acknowledges that under Florida law, a claim of incompetency to be executed cannot be asserted until a death warrant has been issued. Further, the undersigned acknowledges that before a judicial review may be held in Florida, the defendant must first submit his claim in accordance with Florida Statutes. The only time a prisoner can legally raise the issue of his sanity to be executed is after the Governor issues a death warrant. Until the death warrant is signed, the issue is not ripe. This is established under Florida law pursuant to Section 922.07, Florida Statutes (1985) and Martin v. Wainwright, 497 So.2d 872 (1986)(If Martin=s counsel wish to pursue this claim, we direct them to initiate the sanity proceedings set out in section 922.07, Florida Statutes (1985).

The same holding exists under federal law. Poland v. Stewart, 41 F. Supp. 2d

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

However, most recently, in In RE:Provenzano, No. 00-13193 (11th Cir. June 21, 2000), the 11th Circuit Court of Appeals has stated:

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

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

exceptions set out in that provision.

Id. at pages 2-3 of opinion

Given that federal law requires, that in order to preserve a competency to be executed claim, the claim must be raised in the initial petition for habeas corpus, and in order to raise an issue in a federal habeas petition, the issue must be raised and exhausted in state court. Hence, the filing of this petition.

Mr. Evans has been incarcerated since 1998. Statistics have shown that an individual incarcerated over a long period of time will diminish his mental capacity. Inasmuch as Mr. Evans may well be incompetent at time of execution, his Eighth Amendment right against cruel and unusual punishment will be violated.

CLAIM IV

MR. EVANS' TRIAL WAS FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE, SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Mr. Evans contends that he did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments. See Heath v. Jones, 941 F.2d 1126 (11th Cir. 1991); Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991). It is Mr.

Evans= contention that the process itself failed him. It failed because the sheer number and types of errors involved in his trial, when considered as a whole, virtually dictated the sentence that he would receive. State v. Gunsby, 670 So. 2d 920 (Fla. 1996).

The flaws in the system which sentenced Mr. Evans to death are many. They have been pointed out throughout not only this pleading, but also in Mr. Evans= direct appeal; and while there are means for addressing each individual error, the fact remains that addressing these errors on an individual basis will not afford adequate safeguards against an improperly imposed death sentence -- safeguards which are required by the Constitution. These errors cannot be harmless. The results of the trial and sentencing are not reliable. Habeas relief must issue.

CLAIM V

THE JURY INSTRUCTIONS SHIFTED THE BURDEN TO MR. EVANS TO PROVE DEATH WAS INAPPROPRIATE AND IN THE PROCESS EMPLOYED A PRESUMPTION OF DEATH IN VIOLATION OF CONSTITUTIONAL RIGHTS. TO **THE EXTENT THAT THIS ISSUE WAS NOT LITIGATED ON DIRECT APPEAL , COUNSEL WAS INEFFECTIVE.**

Under Florida law, a capital sentencing jury must be:

> [T]old that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed . . .
>
> [S]uch a sentence could be given if the state showed the aggravating circumstances outweighed the mitigating circumstances.

State v. Dixon, 283 So. 2d 1 (Fla. 1973)(emphasis added). This straightforward standard was never applied at the penalty phase of Mr. Evans= capital proceedings. To the contrary, the court repeatedly and unconstitutionally shifted to Mr. Evans the burden of proving whether he should live or die. [R.780]. In Hamblen v. Dugger, 546 So. 2d 1039 (Fla. 1989), a capital post-conviction action, the Florida Supreme Court addressed the question of whether the standard employed shifted to the defendant the burden on the question of whether he should live or die. The Hamblen opinion said these claims should be addressed on a case-by-case basis in capital post-conviction actions. Mr. Evans urges that this Court assess this significant issue in his case and grant him the relief to which he entitled.

Shifting the burden to the defendant to establish that mitigating circumstances outweigh aggravating circumstances conflicts with the constitution for such instructions unconstitutionally shift to the defendant the burden with regard to the ultimate question of whether he should live or die. In so instructing a capital sentencing jury, a court injects misleading and irrelevant factors into the sentencing determination, thus violating Caldwell.

In his preliminary penalty phase instructions to the jury, the judge explained that the jury's job was to determine if the mitigating circumstances outweighed the aggravating circumstances. (FSC ROA. Vol. XVI - 2384)

The jury understood that Mr. Evans had the burden of proving whether he should live or die. But just in case the jury was unsure, the judge twice repeated the incorrect statement of the law immediately before the jury retired for deliberations:

> As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge. However, it is your duty to follow the law that will now be given you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficicent mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

(FSC ROA. Vol. XVI - 2384,2385) (emphasis added). And:

> Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating

circumstances.

(FSC ROA. Vol. XVI - 2386) (emphasis added).

The instructions violated Florida law and the Eighth and Fourteenth Amendments in two ways. First, the instructions shifted the burden of proof to Mr. Evans on the central sentencing issue of whether death was the appropriate sentence.

Secondly, in being instructed that mitigating circumstances must outweigh aggravating circumstances before the jury could recommend life, the jury was effectively told that once aggravating circumstances were established, it need not consider mitigating circumstances unless those mitigating circumstances were sufficient to outweigh the aggravating circumstances. (FSC ROA.Vol. XVI - 2386). Thus, the jury was precluded from considering mitigating evidence, Hitchcock, and from evaluating the Atotality of the circumstances" in considering the appropriate penalty. Dixon, 283 So. 2d at 10. According to the instructions, jurors would reasonably have understood that only mitigating evidence which rose to the level of Aoutweighing" aggravation need be considered. Therefore, Mr. Evans is entitled to a new sentencing hearing because his sentencing was tainted by improper instructions.

Counsel's failure to object to the instructions was deficient performance. But for counsel's deficient performance, there is a reasonable probability that the jury would have recommended life.

CLAIM VI

EXECUTION BY LETHAL INJECTION CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT AND WOULD DEPRIVE MR. EVANS OF DUE PROCESS AND EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The newly amended execution statute provides that death sentences in Florida may by election be presumptively carried out by the injection of poison into a condemned person's body. RCW 10.95.180. The change in the law appears inspired by the common perception that death by lethal injection is painless and swift.

The Eighth Amendment prohibits governmental imposition of "cruel and unusual punishments," and bars "infliction of unnecessary pain in the execution of the death sentence," Louisana ex rel. Francis v. Resweber, 329 U.S. 459, 464, 91 L. Ed. 422, 67 S. Ct. 374 (1947) (plurality opinion). "Punishments are deemed cruel when they involve torture or a lingering death . . ." In re Kemmler, 136 U.S. 436, 447, 34 L.Ed. 519, 10 S. Ct. 930 (1890). The meaning of "cruel and unusual" must be interpreted in a "flexible and dynamic manner," Gregg v. Georgia, supra, 428 U.S. at 171 (joint opinion), and measured against "evolving standards of decency that mark the progress of a maturing society," Trop v. Dulles, 356 U.S. 86, 101, 2 L.Ed. 2d 630, 78 S. Ct. 590 (1958)(plurality opinion).

Despite the perception that lethal injection is a painless and swift means of inflicting death, it is a method in which negligent or intentional errors have caused the persons

executed intense suffering. Even when persons executed by lethal injection are first paralyzed, it is not clearly demonstrated that they become unconscious of their pain and impending death.

Indeed, a significant number of the persons executed by lethal injection in other states have suffered extremely painful and prolonged deaths resulting in wanton and unnecessary infliction of pain. Accounts of botched executions have been widely reported. For example, one of the many botched executions reported includes the lethal injection of Rickey Ray Rector, described as follows:

> On January 24, 1992, in Varner, Arkansas, it took the medical staff more than 50 minutes to find a suitable vein in Rickey Rector's arm. Witnesses were not permitted to view this scene, but reported hearing Rector's loud moans throughout the process. During the ordeal, Rector, who suffered serious brain damage from a lobotomy, tried to help the medical personnel find a patent vein. The administrator of the State's Department of Corrections Medical Programs said, paraphrased by a newspaper reporter, "the moans came as a team of two medical people, increased to five, worked on both sides of Rector's body to find a suitable vein." The administrator said that may have contributed to his occasional outbursts. Joe Farmer "Rector, 40 Executed for Officer's Slaying," Arkansas Democrat-Gazette, January 25, 1995; Sonya Clinesmith, "Moans Pierced Silence During Wait," Arkansas Democrat-Gazette, January 26, 1992.

Based on eyewitness accounts of such executions, coupled with available scientific evidence regarding the hazards, lethal injection is unreliable as a "humane" method for extinguishing life. Accordingly, execution by lethal injection constitutes cruel and unusual

punishment.

Because Florida=s protocol has never been subjected to judicial review, much less revealed, because the state has no person qualified to administer lethal injection and because no Florida court has ruled on the merits of the cruel and unusual punishment claim, the lethal injection method of execution must be subjected to judicial review at the trial level and subsequent stages of the proceedings to determine whether the method constitutes cruel and unusual punishment. Fierro v. Gomez, 77 F.3d 301 (9th Cir. 1986), vacated and remanded, 136 L.Ed.2d 204 (1996); Campbell v. Wood, 18 F.3d 662 (9th Cir.) (en banc), reh'g and reh'g en *banc* denied, 20 F.3d 1050 (1994).

The Florida procedures for executing by lethal injection run the serious risk of causing excruciating pain to the condemned inmate and therefore is unconstitutional and violates the Eighth and Fourteenth Amendments to the United States Constitution and the Florida Constitution prohibition against cruel and unusual punishment.

Mr. Evans alleges that executing by lethal injection will violate his constitutional rights to be free from unnecessary or excessive pain.

If Mr. Evans is given sodium penthoal followed by pancurion bromide and regains consciousness before the potassium chloride takes effect, he will be unable to move or communicate in any way while experiencing excruciating pain. As the potassium chloride is administered he will experience an excruciating burning sensation in his vein, like the sensation of a hot poker inserted into the arm and traveling up the arm and spreading

across the chest until it reaches the heart where it will cause the heart to stop.

If the sodium penthoal, pancurion and potassium bromide chloride are administered in the sequence described and Mr. Evans' heart fibrillates but does not stop, he will soon wake up but be unable to breathe.

The initial dose of sodium Pentothal could sensitize Mr. Evans' pharynx, causing him to choke gag and vomit. He would risk aspirating his vomit or swallowing his tongue and suffocating.

The insertion of the IV catheter is likely to be extremely difficult because of Mr. Evans' stress facing imminent execution, which is likely to cause him to have constricted veins. If the failure to require that all the procedures be done by qualified personnel results in the improper insertion of the catheter, the chemicals may be injected into Mr. Evans' muscle and other tissue rather than into his blood stream causing extreme pain in the form of an intense burning sensation.

It is extremely likely that such improper insertion will occur in the hands of an unqualified person. In addition, the chemicals if not injected directly into the blood stream, will be absorbed far more slowly and will not have the intended effects.

Improper insertion of the catheter could also result in its falling out of the vein resulting in a failure to inject the intended dosage of chemicals.

Moreover unless the catheter has adequate strength and all the joints and connections are properly reinforced, it may rupture or leak as pressure builds up during

the administration of the chemicals. A qualified person would be likely to notice and correct such problems, which an insufficiently trained person would fail to notice.

If there are insufficient protocols required for the careful labeling and organizing of syringes, it is likely that they will be unlabeled and that the chemicals may become confused during the stressful process of carrying out the execution. Mistakes in this process would result in the chemicals being administered in the wrong sequence thereby causing Mr. Evans to suffer extreme pain with effects similar to those described above the previous paragraph.

If the flow of the solution during initial injection of Sodium Pentothal is too fast, Mr. Evans is likely to suffer a violent muscular reaction. An unskilled technician would be very likely to fail to detect the improper flow rate.

It is likely that Mr. Evans' heart activity will not be adequately monitored because the EKG monitoring pads attached to him will become detached because faced with imminent execution, it is likely the he will sweat, the moisture on his skin will cause the pads to come loose, and this circumstance will not be detected, causing the risk that any state of medical distress or other emergency will not be detected.

To the extent that Mr. Evans can discern what procedures exist to protect his constitutional right to be free from unnecessary or excessive pain during his execution, he alleges that they are inadequate in at least the ways enumerated below.

The State of Florida has no coherent set of procedures and fails to designate

adequate equipment or trained personnel for the preparation and administration of the injection, thereby raising substantial and unnecessary risks of causing extreme pain and suffering before and during his execution.

The State of Florida does not provide that properly trained personnel (i.e., an individual or individuals trained to, among other things, locate usable veins, distinguish between usable and unusable veins, minimize the risk of injecting the chemicals directly into muscle or other tissue, or take appropriate action in the event of a technical problem) insert the intravenous line or catheter (AIV@).

If the catheter is not properly inserted, there is a risk that the chemicals will be inserted into Mr. Evans= muscle and other tissue rather than directly into his bloodstream, causing extreme pain in the form of a severe burning sensation. Furthermore, a failure to inject the chemicals directly into the bloodstream will cause the chemicals to be absorbed far more slowly, and the intended effects will not occur. Improper insertion of the IV catheter could also result in its falling out of the vein, resulting in a failure to inject the intended dose of chemicals.

There is also the risk that the catheter will rupture or leak as pressure builds up during the administration of the chemicals unless the catheter has adequate strength and all the joints and connections are adequately reinforced.

The State of Florida does not provide that properly trained personnel (i.e., an individual or individuals trained to, among other things, deliver the chemicals in the proper

sequence and in the proper dosages, and to prevent or treat extreme physical pain and suffering resulting from the injection) administer the lethal injection.

The pre-set dosage amounts may be inadequate to cause the intended sedation in Mr. Evans. Because he will be in a state of stress during his execution, Mr. Evans may require a higher dosage of sodium Pentothal, he will retain or recover consciousness and sensation during the administration of the other chemicals in the execution, pancuronium bromide and potassium chloride.

Under such circumstances, Mr. Evans will suffer an extremely painful sensation of crushing and suffocation, as the pancuronium bromide will paralyze him. He will be unable to move or communicate in any way, while he is experiencing excruciating pain.

As the potassium chloride is administered, he will experience an excruciating burning sensation in his vein. This burning sensation, equivalent to the sensation of a hot poler being inserted in the arm, will then travel with the chemical up Mr. Evans= arm and spread across his chest until it reaches his heart, where it will cause the heart to stop.

The state does not mandate that a physician or other trained medical expert be present to render treatment or assistance to a prisoner in the event of an emergency. Instead, the state mandates only that a physician be present to oversee the cardiac monitor.

The state sets forth no procedures (e.g., separate labeling of the syringes) to prevent the chemicals from being confused prior to or during the execution, and few if

any procedures concerning the proper storage and safekeeping of the chemicals.

There have been many occasions in other jurisdictions when Abotched@ executions by lethal injection have occurred. In the absence of reasonable standards to ensure that the injection is accomplished skillfully and safely, there is a real and substantial danger that Mr. Evans will suffer such a fate.

In addition to the authorities cited above, Mr. Evans hereby expressly, but not exclusively, relies upon the following principles of law:

Absent comprehensive and coherent procedural safeguards, a prisoner is exposed to, at the very least, a risk of unnecessary or excessive pain. Fierro v. Gomez, supra, 865 F. at 141; Campbell v. Wood, 18 F. 3d 662, 681 As the District Court noted in Fierro v. Gomez, 865 F. Supp 1387, 1410 (N.D.Cal.1994), Campbell Aset forth a framework for determining when a particular mode of execution is unconstitutional: objective evidence of pain must be the primary consideration, and evidence of legislative trends may also be considered where the evidence of pain is not dispositive.@Id. at 1412. Significantly, the court in Fierro pointed out that the execution must also be considered in terms of the risk of pain. Id, at 1411.

In Lagrand v. Lewis, 883 F. Supp. 469, 470-471 (D. Arizona 1995), a prisoner=s challenge to the constitutionality of lethal injection was based in part upon a doctor=s affidavit, in which the doctor concluded that the lack of specific guidelines controlling dosage, sequence and delivery rate exposed the condemned to the risk that the drugs

would not be administered properly, and that an improper procedure could cause the condemned to feel great pain. The doctor also noted that written instructions did not prescribe a level of training for the Aconsultants@ who carried out the execution. The doctor concluded that severe infliction of pain could result from repeated attempts to insert the IV catheter into the prisoner=s veins and that, if the catheter was not inserted into a vein, the drugs would be injected into the muscle tissue, producing a much slower rate of absorption. The court rejected his claim, concluding, among other things that the relevant written procedures clearly indicated that the executions were to be conducted under the direction of the prison=s Health Administrator, knowledgeable personnel were to be used, and the presence of a physician was required.

AThe punishment of death shall be inflicted by the administration of a lethal gas or by an intravenous injection of a substance or substances in a lethal quantity sufficient to cause death, by standards established under the direction of the Department of Corrections.@ Mr. Evans submits that the primary purposeBperhaps the sole purposeBof the Astandards@ mentioned in section 3604 is to protect a prisoner=s constitutional right not to be cruelly executed. The cursory list of procedures set forth in the states submission, however, does not serve that purpose. The state has broad discretion to determine the procedures for conducting an execution. McKenzie v. Day, 57 F.3d 1461, 1469 (9th Cir. 1995). In McKenzie, the Ninth Circuit Court of Appeals noted that the state of Montana has developed procedures which Aare reasonable calculated to ensure a swift, painless

death and are therefore immune from constitutional attack.@ Id. Moreover, the Ninth Circuit declared in Campbell v. Wood, supra, 18 F.3d at 687, that A[t] the risk of accident cannot and need not be eliminated from the execution.

Since the decision of the Court of Appeal in the Ninth Circuit in the Ninth Circuit in Fierro v. Gomez (No. 94-16775, February 21, 1996), holding execution by gas to be unconstitutional, the sole method execution which the state may carry out under this provision is by lethal injection. Under the clear language of the statute, such a method of execution may only be carried out by explicit Astandards@ which the department of Corrections must Aestablish@. Thus, the process due to a condemned prisoner from the state is the administration of lethal objection by established standards.

In McKenzie v. Day 57 F.3d 1461, 1469, the Ninth Circuit Court of Appeals held that execution by lethal injection under the procedures which had been defined in Montana was Constitutional. The Court of Appeal explained that those procedures passed constitutional muster because they were Areasonably@ calculated to ensure a swift, painless death....@ McKenzie v. Day, 57 F3d at 1469. Such a statement cannot be made about the procedures in Florida. A swift, painless death cannot be ensured without standards in place to ensure that the lethal chemicals will be administered to Mr. Evans in a competent, professional manner by someone adequately trained to do so.

Similarly, in LaGrand v. Lewis, 883 F. Supp. 469 (1995) the District Court in Arizona upheld the written Internal Management Procedures prescribing standards for the

administration of lethal injection because Athey clearly indicated that executions are to be conduction under the direction of the ASPC-Florence Facility Health Administrator, knowledgeable personnel are to used, and...the presence of a physician is required.@

Further, the United States Supreme Court=s repeated holdings that A[capital proceedings must of course satisfy the dictates of the Due Process clause,@ Clemons v Mississippi, 494 U.S. 738, 746 (1990) (citing Gardner v. Florida, 430 U.S. 349 (1977) (plurality opinion), surely must apply to the procedures for actually carrying out an execution, which is the quintessential Acapital proceeding.@ see also Hicks v. Oklahoma, 477 U.S. 343 (1980).

Florida=s lethal injection law lacks necessary safeguards, procedures and protocols rendering the administration of lethal injection cruel and unusual punishment.

CONCLUSION AND RELIEF SOUGHT

In light of the facts and legal arguments presented above, Mr. Evans contends that his constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States have been violated. Mr. Evans respectfully moves that his convictions and sentences including his sentence of death be vacated.

CERTIFICATE OF FONT SIZE AND SERVICE

I HEREBY CERTIFY that a true copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS APPELLANT which has been typed in Font Times New Roman , size 14, has been furnished by U.S. Mail to all counsel of record on this 25TH day of October, 2005.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing **PETITION FOR WRIT OF HABEAS CORPUS** APPELLANT, was generated in a Times New Roman, 14 point font, pursuant to Fla. R. App. P. 9.210.

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