IN THE SUPREME COURT OF FLORIDA

CASE NUMBER SC05 __________
Lower Tribunal Case No. 78-0041-CFA

ROBERT ANTHONY PRESTON, JR.,

Petitioner,

v.

JAMES McDONOUGH,
Interim Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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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 and corresponding provisions of the Florida Constitution. These claims demonstrate that Mr. Preston 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 1981 trial proceedings shall be referred to as "R. ___" followed by the appropriate volume and page numbers. The 1986 postconviction record on appeal will be referred to as "PC1-R. ___" followed by the appropriate volume and page numbers. The record on the 1991 re-sentencing shall be referred to as "RS. ___" followed by the appropriate volume and page numbers. The current postconviction record on appeal will be referred to as "PC2-R. or Supp.R. ___" followed by the appropriate volume and 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 and of the Rule 3.851 appeal brought simultaneously pursuant to Fla.R.Crim.P. 3.851(d)(3) will determine whether Mr. Preston 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 given the seriousness of the claims involved and the fact that a life is at stake. Mr. Preston accordingly requests that this Court permit oral argument.

INTRODUCTION

Errors involving several issues which occurred at Mr. Preston's capital re-sentencing were not presented to this Court on appeal due to the ineffective assistance of appellate counsel.

The issues demonstrate that counsel's performance was deficient and that the deficiencies prejudiced Mr. Preston. "[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 "is 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

"cumulatively," Barclay v. Wainwright, 444 So.2d 956, 959 (Fla. 1984), the issues omitted by appellate counsel establish that "*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 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. Preston 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 judgments of this Court during the appellate process and the legality of Mr. Preston's sentence of death.

Jurisdiction in this action lies in this Court for the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Preston's direct appeal and his re-sentencing appeal. Wilson, 474 So.2d at 1163 (Fla. 1985); Smith v. State, 400 So.2d 956, 960 (Fla. 1981);

Baggett v. Wainwright, 392 So.2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Preston to raise the claims presented herein. 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. 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. Preston's claims.

GROUNDS FOR HABEAS CORPUS RELIEF

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

The Circuit Court for the Eighteenth Judicial Circuit in and for Seminole County, Florida, entered the judgment of conviction and death sentence at issue.

Mr. Preston was indicted on January 20, 1978, by a grand jury in Seminole County, Florida, on first degree murder and other charges. (R. Vol. XII 2188-89). Trial commenced on June 1, 1981. At the close of the first phase of the trial, the jury found Mr. Preston guilty of first degree murder but found Mr. Preston not guilty of the charge of sexual battery. The jury thereafter rendered an advisory verdict of death by a vote of seven to five (R. Vol. XI 2036).

On November 6, 1981, the Court sentenced Mr. Preston to death (R. Vol. XII 2103-05, Vol. XV 2733). The trial court entered written findings (R. Vol. XV 2813-19). A timely direct appeal was filed and this Court affirmed Mr. Preston's conviction and sentence. Preston v. State, 444 So. 2d 939 (Fla. 1984).

On October 9, 1985, Governor Bob Graham denied clemency. A motion for relief pursuant to Fla. R. Crim. P. 3.850 was filed in the Circuit Court for the Eighteenth Judicial Circuit and an evidentiary hearing was held in October, 1986. After the evidentiary hearing, Mr. Preston filed a supplemental pleading setting forth newly discovered evidence in the form of sworn affidavits (PC1-R. Vol. VII 1263-88). This supplemental pleading alleged that Mr. Preston was innocent, that

his brother, Scott Preston, had confessed to several people that he was responsible for the murder at issue, that Scott was involved with a Marcus Morales, and that a representative of the State Attorney's Office had this information a year before Mr. Preston's trial. The circuit court denied relief on February 13, 1987, without addressing the newly discovered evidence (PC1-R. Vol. VII 1307-13).

Mr. Preston appealed to this Court from the denial of his 3.850 motion. On May 26, 1988, the Court affirmed the denial of Mr. Preston's Motion to Vacate Judgment and Sentence, indicating that the claims arising from the newly discovered evidence could be presented in a *coram nobis* action. Preston v. State, 528 So. 2d 896 (Fla. 1988); cert. denied, 489 U.S. 1072, 109 S.Ct. 1356, 103 L.Ed.2d 824 (1989). Such an action was taken, and relief was denied. Preston v. State, 531 So. 2d 154 (Fla. 1988).

On August 25, 1988, a second death warrant was signed. The United States Supreme Court granted a stay of execution pending the disposition of a Petition for a Writ of Certiorari. The United States Supreme Court denied *certiorari* review on March 6, 1989, and a third death warrant was signed on March 30, 1989. Mr. Preston had, before that date, filed a Rule 3.850 motion challenging the constitutionality of a previous conviction presented to the jury at the trial and relied upon by this Court to establish aggravation and rebut mitigation. An evidentiary

hearing was conducted and the court granted Rule 3.850 relief. The State took an appeal, the District Court of Appeals affirmed, the State moved for rehearing, rehearing was denied, and the District Court of Appeals issued its mandate on March 8, 1990.

Mr. Preston filed a Petition for Writ of Habeas Corpus with this Court on April 19, 1989, presenting the claim predicated upon Johnson v. Mississippi, 486 U.S. 578 (1988). The Court granted a stay of execution on April 19, 1989, and remanded the claim by denying habeas corpus relief "without prejudice to raise the same argument by 3.850 motion in the trial court." Preston v. Dugger, 545 So. 2d 1368 (Fla. 1989)(unpublished opinion).

Mr. Preston thereafter filed a Rule 3.850 motion presenting the claim predicated upon Johnson v. Mississippi. The trial court denied relief. An appeal was taken to this Court. The Court reversed the death sentence and ordered a new penalty phase proceeding conditioned upon Mr. Preston not being re-convicted of the vacated felony used in aggravation. Mr. Preston was subsequently acquitted of the vacated felony at jury trial.

In January, 1991, a new penalty phase jury sentencing was held. The jury recommended death by a vote of nine to three but the Court granted a motion for new penalty phase (amid allegations that one of the jurors had not accurately

responded to voir dire interrogation) and the jury recommendation was vacated. In April, 1991, another penalty phase jury was impaneled and evidence was presented. The jury unanimously recommended a sentence of death (RS. Vol. VI 1130). In May 1991, the circuit court sentenced Mr. Preston to death (RS. Vol. IX 1674-78).

An appeal of the re-sentencing was taken to this Court. The Court affirmed the death sentence. Preston v. State, 607 So. 2d 404 (1991). The United States Supreme Court denied *certiorari* on March 22, 1993. Preston v. Florida, 507 U.S. 999, 113 S. Ct. 1619, 123 L.Ed.2d 178 (1993).

On May 24, 1994, Mr. Preston filed a new Motion to Vacate Judgments of Conviction and Sentences with Special Leave to Amend. (PC2-Supp.R. Vol. I 01). With leave of court, it was amended on March 21, 1995 (PC2-Supp.R. Vol. I 97), and February 25, 2000 (PC2-Supp.R. Vol. VII 1081). A hearing was held on September 1, 2000, pursuant to the then existing Fla.R.Crim.P. 3.850, for determining which claims would be set for evidentiary hearing. The trial court rendered its order, pursuant to Huff v. State, 622 So.2d 982 (Fla. 1993), on September 19, 2000. (PC2-Supp.R. Vol. VIII 1380). On January 7 and 27, 2004, the trial court conducted an evidentiary hearing and rendered its order denying the motion on March 31, 2005. (PC2-Supp.R. Vol. XIII 2124). Notice of Appeal was

timely filed on April 25, 2005. (PC2-Supp.R. Vol.XIII 2188). The appeal is properly before this Court and this petition is filed simultaneously pursuant to Fla.R.Crim.P. 3.851(d)(3).

CLAIM I

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, Mr. Preston 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 —, 30 Fla.L.Weekly S677 (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 S677 and S680.

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 Mr. Preston 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. Preston immediately after conviction, the court could only have imposed a life sentence. § 775.082 Fla. Stat. (1995). Dixon, 283 So.2d at 9.

Mr. Preston'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.

Mr. Preston's death recommendation also violates the constitutional 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).

Mr. Preston'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. To the extent that appellate counsel failed to raise this issue on appeal, counsel was ineffective.

CLAIM II

FLORIDA STATUTE 921.141(5) IS FACIALLY VAGUE AND OVERBROAD IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. THE JURY DID NOT RECEIVE ADEQUATE GUIDANCE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. MR. PRESTON'S DEATH SENTENCE IS PREMISED ON FUNDAMENTAL ERROR WHICH MUST BE CORRECTED. TO THE EXTENT APPELLATE COUNSEL FAILED TO LITIGATE THESE ISSUES, APPELLATE COUNSEL WAS INEFFECTIVE.

The jury's instruction on the aggravator of commission of a murder during the course of a kidnaping is unconstitutional on its face and as applied. The trial court's instructions to the jury unconstitutionally diluted its sense of responsibility in determining the proper sentence. To the extent appellate counsel failed to litigate these issues, appellate counsel was ineffective.

The jury was given the following instructions at re-sentencing:

> Your advisory sentence should be based upon the evidence that has been presented to you in these proceedings.

...

> The crime for which the Defendant is to be sentenced was committed while he was engaged in the commission of the crime of kidnapping.

(RS. Vol. VI, 1097; RS. Vol. X 1899).

The jury's deliberation was tainted by the unconstitutional and vague instruction. See Sochor v. Florida, 112 S. Ct. 2114 (1992). The use of the underlying felony as an aggravating factor rendered the aggravator "illusory" in violation of Stringer v. Black, 112 S. Ct. 1130 (1992). The jury was instructed regarding an automatic statutory aggravating circumstance and Mr. Preston thus entered the penalty phase already eligible for the death penalty, whereas other similarly (or worse) situated petitioners would not.

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

The instructions violated Florida law and the Eighth and Fourteenth Amendments in two ways. First, the instructions shifted the burden of proof to Mr. Preston on the central sentencing issue of whether death was the appropriate sentence. Secondly, in being instructed that mitigating circumstances must outweigh aggravating circumstances before the jury could recommend life, the jury was effectively told that once aggravating circumstances were established, it need

not consider mitigating circumstances unless those mitigating circumstances were sufficient to outweigh the aggravating circumstances. Thus, the jury was precluded from considering mitigating evidence, and from evaluating the "totality of the circumstances" in considering the appropriate penalty. According to the instructions, jurors would reasonably have understood that only mitigating evidence which rose to the level of "outweighing" aggravation need be considered.

Because great weight is given the jury's recommendation, the jury is a sentencer in Florida. Here, however, the jury's sense of responsibility was diminished by the misleading comments and instructions regarding the jury's role. This diminution of the jury's sense of responsibility violated the Eighth Amendment. See Caldwell v. Mississippi, 472 U.S. 320 (1985) as applied to Ring v. Arizona, 122 S.Ct. 2468 (2002). To the extent that appellate counsel failed to litigate these issues, Mr. Preston is entitled to a new sentencing hearing because his sentencing was tainted by improper instructions.

CLAIM III

PETITIONER'S EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED AS HE MAY BE INCOMPETENT AT TIME OF EXECUTION.

In accordance with Fla.R.Crim.P. 3.811 and 3.812, a prisoner cannot be executed if "the 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 petitioner acknowledges that, under Florida law, a claim of incompetency to be executed cannot be asserted until a death warrant has been issued. Further, the petitioner acknowledges that before a judicial review may be held in Florida, the petitioner 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").

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, 523 U.S. 637, 118 S. Ct. 1618, 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, in In Re Provenzano, 215 F.3d 1233 (11th Cir. 2000), the Eleventh 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.

Federal law in this circuit, therefore, requires that a competency to be executed claim be raised in the initial federal petition for habeas corpus. 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 claim.

The petitioner has been incarcerated since 1978. Statistics have shown that an individual incarcerated over a long period of time will diminish his mental capacity. Inasmuch as the defendant may well be incompetent at time of execution, his Eighth Amendment right against cruel and unusual punishment will be violated.

CLAIM IV

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE THAT FLORIDA'S RULE PROHIBITING COUNSEL FROM INTERVIEWING JURORS VIOLATES EQUAL PROTECTION AND DUE PROCESS RIGHTS, AND THE FIRST, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Because of the alternative basis for the ruling on this claim at post-conviction, petitioner argues here that appellate counsel was ineffective for failing to raise the issue that Florida's rule prohibiting counsel from interviewing jurors violates equal protection and due process rights, and the First, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. As presented in the Rule 3.850 motion below (PC2-R. Vol. VII 1109-13), this legal claim required no evidence. It was denied an evidentiary hearing by the *Huff* order of September 19, 2000 (PC2-R. Vol. VIII 1380). The post-conviction court denied the claim and ruled in the alternative as follows:

> The Defendant alleges in his eighth claim that Florida's rule prohibiting defense counsel from interviewing jurors violates equal protection and due process and the First, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. *This claim is procedurally barred because it could have been raised on direct appeal. (citation omitted)*. Notwithstanding, the Defendant has failed to present any evidence of juror misconduct in this case and there is no report by a juror or anyone else that the jurors considered extrinsic matters. Therefore, he has not shown that he has been prejudiced by this rule. This is alternative and secondary to the procedural bar holding, which is an adequate and independent basis for the denial of relief. Post-conviction relief should be denied on this claim.
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> (PC2-R. Vol. XIII 2219)(emphasis added).

The court faulted the petitioner for not pleading or presenting any evidence of juror misconduct. However, the court ignored the fact that Florida's rules precluded any of petitioner's counsel from investigating jury bias and misconduct that can only be discovered, absent press or academic reports about the jury, through interviews with jurors themselves.

To the extent defendants' counsel are treated differently from academics, journalists and other non-lawyers who are not subject to the Rules Regulating the Florida Bar, there is a violation of defendants' rights to equal protection as the concept is enunciated in Bush v. Gore, 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000). See William J. Bowers and Wanda D. Foglia, "Still Singularly

Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing." Criminal Law Bulletin 39:51-86 (2003).

The petitioner notes that a new procedural rule regarding juror interviews has been established since the time of filing this claim. Effective on January 1, 2005, Fla.R.Crim.P. 3.575 provides as follows:

> A party who has reason to believe that the verdict may be subject to legal challenge may move the court for an order permitting an interview of a juror or jurors to so determine. The motion shall be filed within 10 days after the rendition of the verdict, unless good cause is shown for the failure to make the motion within that time. The motion shall state the name of any juror to be interviewed and the reasons that the party has to believe that the verdict may be subject to challenge. After notice and hearing, the trial judge, upon a finding that the verdict may be subject to challenge, shall enter an order permitting the interview, and setting therein a time and a place for the interview of the juror or jurors, which shall be conducted in the presence of the court and the parties. If no reason is found to believe that the verdict may be subject to challenge, the court shall enter its order denying permission to interview. COURT COMMENTARY: This rule does not abrogate Rule Regulating the Florida Bar 4-3.5(d)(4), which allows an attorney to interview a juror to determine whether the verdict may be subject to legal challenge after filing a notice of intention to interview.

The thrust of the argument is that Florida's restrictions on post-trial juror interviews is an equal protection violation as enunciated in Bush v. Gore, 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000). Criminal defense counsel in Florida

are treated differently, unfairly and unequally compared to academics, journalists and those lawyers not connected with a particular case.

Florida lawyers, including defense trial and postconviction counsel, cannot interview jurors on behalf of their clients outside the constraints created by Fla.R.Crim.P. 3.575 and Rule Regulating the Florida Bar 4-3.5(d)(4). Yet, academics are allowed to and, in fact, do interview capital jurors, post-trial, about a wide range of matters, not just those factors which may be "grounds for legal challenge" under the rules. See the Capital Jury Project website at http://www.cjp.neu.edu which discusses, in part, the completed 1,198 interviews with jurors from 353 capital trials in 14 states, including Florida (as of August 15, 2005). The website also lists a number of doctoral dissertations based on Capital Jury Project data including Julie Goetz, "The Decision-Making of Capital Jurors in Florida: The Role of Extralegal Factors." Unpublished dissertation (1995), School of Criminology and Criminal Justice, Florida State University, Tallahassee, Florida.

Additionally, journalists are permitted without restriction to interview jurors post-trial. See, e.g., Chris Tisch, "Defense Fears Comments Affect Verdict;" St. Petersburg Times, Oct. 25, 2004 (available at http://www.sptimes.com/

advancedsearch.html), where the jury foreman of a murder trial is interviewed about the jury's deliberations.

Lastly, Fla.R.Crim.P. 3.575 and Rule Regulating the Florida Bar 4-3.5(d)(4) only apply to cases "with which the lawyer is connected." Hence, lawyers not connected with a case are treated differently because the rule does not apply to them.

The point remains that application of justice in this case could well benefit from learning whether the petitioner's jurors agree with any of the several arguments in this proceeding. The answers to any number of hypothetical or direct questions are presently unknown and cannot come from counsel for the petitioner because of the "catch-22" nature of the rules. That the answers to juror-posed questions could come from an academic researcher, a journalist or a lawyer not connected with the case infringes upon the appellant's rights to due process, access to the courts, and the equal protection concepts enunciated in Bush v. Gore, supra. The reliability and integrity of appellant's capital sentence is thereby questionable based on these constitutional violations. Again, appellate counsel failed to raise this claim on direct appeal and relief should therefore issue.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Robert Anthony Preston, Jr., respectfully urges this Honorable Court to grant habeas relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Habeas Corpus has been furnished by United States Mail, first class postage prepaid, to Barbara C. Davis, 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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