IN THE SUPREME COURT OF FLORIDA
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No. SC

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ALVIN MORTON,
Petitioner

versus,

JAMES V. CROSBY,
Secretary, Florida Department of Corrections,
*Respondent***.**

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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 filed to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution. These claims demonstrate that Mr. Morton was deprived of his rights to fair, reliable, and individualized trial and sentencing proceedings, and that the proceedings resulting in his conviction and death sentence violated fundamental constitutional imperatives. The following symbols will be used to designate references to the record in this instant cause: "1994R." **B** record on first direct appeal to this Court; "1999R." **B** record on second direct appeal to this Court; **A**1994TR.**@ B** transcript on first direct appeal to this Court; **A**1999TR.**@ B** transcript on second direct appeal to this Court.

REQUEST FOR ORAL ARGUMENT

Mr. Morton has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. Mr. Morton, through counsel, requests the Court to permit oral argument.

INTRODUCTION

Significant errors which occurred at Mr. Morton=s 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. Morton. "[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. Wainwriqht, 474 So.2d 1162, 1164 (Fla. 1985). Individually and "cumulatively," Barclay v. Wainwriqht, 444 So.2d 956, 959 (Fla. 1984), the claims appellate counsel omitted 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 which were ruled on in direct appeal, but should now be revisited in light of subsequent case law in order to correct the violations of Mr. Morton=s fundamental constitutional rights. As this petition demonstrates, Mr. Morton is entitled to habeas relief.

PROCEDURAL HISTORY

Alvin Morton was charged by indictment with two counts of first degree murder. Mr. Morton plead not guilty to both charges and requested a jury trial. Mr. Morton was

tried from January 31, 1994 to February 4, 1994. On February 4, 1994, the jury found Mr. Morton guilty as charged on both counts. On February 8 and 9, 1994, the penalty phase was held and the jury recommended that Mr. Morton be sentenced to death. On March 18, 1994, the trial court sentenced Mr. Morton to death on both counts.

Mr. Morton filed a timely Notice of Appeal. Appellate counsel filed a brief raising six issues: 1) improper introduction of out-of-court statements of State witnesses under the guise of impeachment; 2) improper introduction of out-of-court statements as adoptive admissions; 3) abuse of discretion by trial court in minimizing weight given to certain mitigating circumstances; 4) error by trial court in instructing jury on the cold, calculated, premeditated (CCP) aggravator; 5) error by trial court in instructing on the avoid lawful arrest aggravator; and 6) error by trial court in refusing specific jury instructions on nonstatutory mitigators. This Court found that the repeated introduction of out-of-court statements of State witnesses was improper. Morton v. State, 689 So.2d 259, 264 (Fla.1997). This Court held that any error was harmless as to the guilt phase since Morton=s confession and other substantive evidence proved a strong case of felony murder. Id. However, this Court held that the error was not harmless as to the penalty phase, especially since much of the evidence supporting the CCP aggravator was introduced through impeachment. Id. at 264-65. While not ruling on the issue, this Court also noted that while improper doubling of the CCP and avoid lawful arrest aggravators sometimes occurs, there is no per se prohibition against a finding that both aggravators are

established. Id. This Court then vacated the sentence of death and remanded the case to the trial court to conduct a new penalty phase. Id.

Mr. Morton=s second trial lasted from February 8, 1999 to February 11, 1999. The jury recommended that Mr. Morton be sentenced to death: on March 1, 1999, the lower court sentenced Mr. Morton to death on both counts.

Mr. Morton again filed a timely Notice of Appeal. Appellate counsel filed a brief raising four issues: 1) error by resentencing judge in adopting the facts found by the prior sentencing judge; 2) improper closing arguments by the State; 3) error by resentencing court in failing to find Mr. Morton=s antisocial personality disorder was a mitigating circumstance; 4) abuse of discretion by resentencing court in assigning little weight to Mr. Morton=s age and abused childhood. This Court found that improper closing arguments by the State were not fundamental error, that the court=s failure to find or mention Mr. Morton=s antisocial personality disorder in its sentencing order was harmless error, that the court did not abuse its discretion in weighing mitigating circumstances, and that the sentencing order reflected an independent weighing and personal evaluation of the evidence in the case. Morton v. State, 789 So. 2d 324 (Fla.2001).

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Florida Rule of Appellate Procedure 9.l00(a). See Art. l, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(a)(3) and Article V, Section 3(b)(9) of the Florida

Constitution. This petition presents constitutional issues which directly concern the judgment of this Court during the appellate process and the legality of Mr. Morton=s death sentence.

This Court has jurisdiction, see, e.g., Smith v. State, 400 So.2d 956, 960 (Fla. 1981), because the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Morton=s direct appeal. See Wilson, 474 So.2d at 1163 (Fla. 1985); Baggett v. Wainwright, 229 So.2d 239, 243 (Fla. 1969); cf. Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981).

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. Wainwriqht, 175 So.2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So.2d 362 (Fla. 1984). This Court's exercise of its habeas corpus jurisdiction and of its authority to correct constitutional errors is warranted in this action. As the petition shows, habeas corpus relief is proper on the basis of Mr. Morton 's claims.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Morton 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 guaranteed by the Fourth, Fifth, Sixth,

Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

CLAIM I

APPELLATE COUNSEL FAILED TO RAISE ON APPEAL NUMEROUS MERITORIOUS ISSUES WHICH WARRANT REVERSAL OF MR. MORTON=S CONVICTIONS AND SENTENCES.

1. Introduction

Appellate counsel had the Aduty to bring to bear such skill and knowledge as will render the [appeal] a reliable adversarial testing process." Strickland v. Washington, 466 U.S. 668 (1984). To establish that counsel was ineffective, Strickland requires a defendant to demonstrate (1) specific errors or omissions which show that appellate counsel=s performance deviated from the norm or fell outside the range of professionally acceptable performance, and (2) the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result. Wilson v. Wainwright, 474 So.2d 1162, 1163 (Fla. 1985).

In order to grant habeas relief based on ineffectiveness of appellate counsel, this Court must determine Awhether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine

confidence in the correctness of the result.@ Pope v. Wainwright, 496 So.2d 798, 800 (Fla. 1986).

This Court has explained that when a petitioner alleges ineffective assistance of appellate counsel for failing to raise a preserved evidentiary issue, a harmless error analysis will be conducted. Jones v. Moore, 774 So. 2d 637, 643 (Fla. 2000). Appellate counsel may not be deemed ineffective for failing to challenge an unpreserved issue on direct appeal unless it resulted in fundamental error. Farina v. State, 937 So. 2d 612, 629 (Fla. 2006). Fundamental error is error that reaches Adown into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.@ Kilgore v. State, 688 So.2d 895, 898 (Fla.1996)(quoting State v. Delva, 575 So. 2d 643, 644-45 (Fla. 1991)).

Appellate counsel=s failure to raise the meritorious issues addressed in this petition prove his advocacy involved Aserious and substantial deficiencies@ which individually and Acumulatively@ establish that Aconfidence in the outcome is undermined@. Fitzpatrick v. Wainwright, 490 So.2d 938, 940 (Fla.1986); Barclay v. Wainwright, 444 So.2d 956, 959 (Fla. 1984); Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985).

This Court had held that Aconstitutional errors, with rare exceptions, are subject to harmless error analysis@. State v. DiGuilio, 491 So.2d 1129, 1134 (Fla. 1986). This Court had also held that harmless error analysis:

> requires an examination of the entire record by the appellate court including a close examination of the permissible evidence on which the jury could

have legitimately relied, and in addition an even closer examination of the impermissible evidence which might have possibly influenced the verdict.

Id. at 1135. Once error is found, it is presumed harmful unless the state can prove beyond a reasonable doubt that the error Adid not contribute to the verdict or, alternatively stated, that there is no reasonable probability that the error contributed to the [verdict]@. DiGuilio, 491 So.2d at 1138.

2. Appellate counsel=s failure to raise a claim that an element of the offense of burglary was never established at the original guilt proceedings or the resentencing proceedings was ineffective assistance of counsel.

Ownership of the building or structure is a material element of the crime of burglary. D.S.S. v. State, 850 So. 2d 459, 461 (Fla. 2003). The ownership element in burglary is not the same as ownership in property law but, rather, means Aany possession which is rightful as against the burglar and is satisfied by proof of special or temporary ownership, possession, or control.@ Id.(citing In re M.E., 370 So. 2d 795, 797 (Fla. 1979). In the context of a private building or an automobile, the State must present evidence as to the owner or possessor of the property in order to prove a burglary. D.S.S. v. State, 806 So. 2d 554, 556 (Fla. 2d 2002) affirmed by D.S.S. v. State, 850 So. 2d 459 (Fla. 2003). This element was properly instructed at both the guilt phase of the original trial and the resentencing in 1999.[1]

[1] ABefore you can find the defendant guilty of burglary, the State must prove the following three elements beyond a reasonable doubt. One, Alvin Morton entered or remained in a structure, dwelling, or conveyance owned by or in the possession of Madeline Weisser and/or John Bowers.@ (1994TR.956) AThe

In L.D.S. v. State, 784 So. 2d 1227 (Fla. 2d DCA 2001), the court held that there was insufficient proof of the element of ownership in a burglary case. Although both the victim and a police officer testified about a window being broken out of a four-door Saturn car in AYbor City@ on the date of the offense, and the victim testified that he returned to his vehicle to find the police present, the court held that this evidence was insufficient proof of the essential ownership element of burglary. Id. at 1228.

Likewise, the court reviewing In the Interest of M.M., 571 So. 2d 112 (Fla. 4th DCA 1990), found proof of ownership in a burglary case to be lacking. In that case, the State alleged that the townhouse that was the subject of the burglary was owned by an individual who did not testify at trial. The State did present the testimony of a codefendant, who stated that he and the defendant did not know whom the house belonged to and that they did not have permission to enter. Id. at 113. The court held that this was insufficient proof of ownership, even though it may have tended to prove that the townhouse was not the defendant=s property. Id.

a. The State failed to prove the burglary underlying the charge of felony murder at Mr. Morton=s 1994 guilt phase

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elements of the crime of burglary that must be proved beyond a reasonabledoubt are: The defendant entered or remained in a structure owned by or in possession of John Bowers or Madeline Weisser.@ (1999TR.773, 775)

The 1994 guilt phase began with testimony from a number of witnesses involved in law enforcement and fire fighting who responded to 6730 Sanderling Drive[2] and saw the two deceased victims= bodies there. For example, Deputy David Buhs testified that he went to the house and that there were two people inside, obviously deceased. (1994TR.224-26) EMT Eric Marshall testified he also responded to that house, and it was apparent that both people inside were dead. (1994TR.229-30)

Shortly thereafter, during the examination of a crime scene technician, Jeff Boekeloo, the State introduced two aerial photographs. (1994TR. 241, 272) In referencing this evidence, the following exchange occurred:

> Q: I need to show you what=s already in evidence as Exhibit C. You have described that=s the aerial photograph of the scene. I need for you to point out to this jury which is the home you were at, which is the victims= home at 6730 Sanderling.
> A: This home right here on the corner that has the pool in the back yard. (1994TR.272)

There is no evidence in the record that Boekeloo knew the victims in any way or that he had any knowledge about their possession of a residence at 6730 Sanderling Drive.

Christopher Walker, a co-defendant in the case, appeared as a witness for the State at the first trial. He testified that he used to live on Sanderling Drive a couple of years before, and then the following exchange occurred:

> Q: Where did [Mr. Bower and Ms. Weisser] live in relation to your house?
> A: They lived on the left side, facing outwards on the right side if you were

[2] This road is sometimes spelled Sanderling and other times Sanderlin in the record. The former will be used in this petition.

coming in towards the house. (1994TR.499)

The State then asks Walker to point out some houses on a picture, but makes no reference to any exhibit. (1994TR.499-500) In asking Walker to point out where he lived, *the State informs him that there has Abeen testimony that this is the home of Mr. Bowers and Ms. Weisser*.@ (1994TR.500)(emphasis added)

In continued examination of Walker, the State asked about the intent of the group on that night:

> Q: Now, was there any discussion about robbing the house on Sanderling Lane?
> A: A burglary, yes. A robbery, no. (1994TR.502)

Shortly thereafter, when probed further on this topic, Walker testified that they did not discuss the specific house on Sanderling Lane. (1994TR.511)

Walker also mentioned the Avictims= house@ on a few occasions, but never established that the house Mr. Morton and the others entered was a house he knew to be owned or occupied by Mr. Bower and Ms. Weisser. (1994TR.538, 539) When Walker was asked about the vacant house in the area, the following exchange occurred:

> Q: Did you know that Mr. Bower and Mrs. Weisser, the two dogs occupied that house?
> A: I=d seen them before when I lived next door, yes, sir.
> Q: Did you know that those folks lived in that house?
> A: I would guess. They were there at that time. (1994TR.566-67)

No mention is made of what house is being discussed other than the vacant house in the area. The vague questions about Athe house@ continued:

Q: And you knew back on Sunday January 26th, that those two folks were the only occupants of that house, right? (1994TR.568)

Walker was never asked at any point during his examination if the house that Morton and the others went into that evening was the house that the victims occupied two years previously when he lived in the same neighborhood.

Another juvenile who was present the evening of the murders, Michael Rodkey, also testified for the State. Rodkey was not able to provide anything more specific than statements like, AThose people that live on that street.@ (1994TR.759) Rodkey was also shown an aerial photograph the State had previously introduced:

Q: If you would, maybe you could point to the jury which people Morton was referring to?
A: That house.(1994TR.759)

There is no description on the record whether Rodkey pointed to something on the exhibit, what Rodkey was pointing at if he did, and he was not asked to mark the exhibit in any way. (1994TR.759-60) There is also no evidence in the record that Rodkey knew Bowers or Weisser, could identify them, or that he had any knowledge of their possession of a house on Sanderling Drive.

During the examination of Detective William Lawless, the State also played a tape of Mr. Morton being interviewed by the detective. From the beginning of the interview, the scene of the crime is simply referred to as Athe house@. (1994TR.798) At only one point does the description become any more detailed:

Q: Still no reason you picked that house? Did anybody suggest that house at all?

A: Not that I remember.
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Q: [Y]ou all don=t even live on the street.
A: Chris and Bob used to live right next door to them**Y**The house right next door. Chris used to live in the house next door to that one Bob used to live in.
Q: Okay. Well, did either one of them mention anything about the house to you?
A: I don=t remember. (1994TR.811)

The State=s final witness at the first trial was Linda Custer, a coworker of John Bowers. She testified that she had met his mother a few times at Aher home on Sanderling Lane.@ (1994TR.860) She further testified that she had been inside the home and that she was not aware of anyone living there other than Bowers, Weisser and her two dogs. (1994TR.860) She then testified that she was asked to look at two bodies at the Medical Examiner=s Office and was able to identify both of them, but was not asked whose bodies she saw or if she ever identified them to authorities as being Bowers and Weisser. (1994TR.860)

In order to establish the material element of ownership to sustain a burglary charge under D.S.S., the State can present evidence of ownership, possession, or control, even if it is only temporary or special. Beginning with the testimony of crime scene technician Boekeloo, it can be seen that the state attorney assumed this element to be present in his questioning. This continued later when he told a witness during questioning that there has Abeen testimony that this is the home of Mr. Bowers and Ms. Weisser,@ when in fact the

only Atestimony@ to that fact had actually been a statement made by the state attorney in questioning Boekeloo.

The testimony of the two juveniles who were present near the scene on the night of the murders, Walker and Rodkey, likewise do not provide the necessary evidence of ownership or possession. Walker testified that he used to live near the victims a couple of years before, but never identifies the house where the bodies were found as the one that he knew to be previously occupied by Bowers and Weisser. The remainder of the testimony of Walker and all of Rodkey=s testimony is too vague to establish the ownership element. They repeatedly refer to Athat house@ without any identification that the home they are referring to is one owned or possessed by Bowers and Weisser. In fact, there is nothing in the record to indicate that Rodkey had ever seen the victims or knew them, meaning he could not provide any relevant testimony as to the ownership element of the burglary charge. Under L.D.S., such vague testimony referencing possible ownership, if not connected directly to the property in question, fails to establish the ownership element of a burglary charge.

Walker in his testimony also indicates that the group of boys involved in this case, which included himself and Mr. Morton, were planning a burglary. But he also testifies that there was no discussion of burglarizing that particular house. Under M.M., this testimony is wholly insufficient to establish ownership. In that case, the codefendant actually testified that he and the defendant went into the residence in question to

burglarize it, and the court held this was insufficient to establish ownership. In light of that case, Walker=s testimony that there was a plan to burglarize an unspecified residence is insufficient to establish ownership in this scenario.

Mr. Morton=s taped confession similarly fails to establish this element. Again, there is no evidence he had ever seen or knew Bowers and Weisser, and all his testimony refers simply to Athe house@. When pressed further by Detective Lawless about why the specific house was chosen, Mr. Morton is only able to say that two of the juveniles used to live next door to them, but he does not remember if either of them ever said anything about the house. Ultimately, Mr. Morton=s confession provides insufficient details to relate any evidence about the ownership element of the burglary charge.

The final witness brought forth by the State, Linda Custer, never testified that she had any knowledge of where this crime occurred, and she never testified that the house owned by Weisser that she visited was the house at 6730 Sanderling Drive. With the lack of any time frame to her having been to the house as well, Custer=s testimony is wholly insufficient to establish the ownership element. Importantly, Custer was also the only witness called to identify the bodies of Bowers and Weisser. Since she never testified that the bodies were those of Bowers and Weisser, there is nothing to establish that the two people who were killed inside of the home had possession as rightful against any burglar.

This failure to prove a material element was especially important in this case in light of this Court=s original decision to remand the case for a new sentencing phase, but not a new guilt phase, after the first trial because of the strong evidence of guilt based on a theory of felony murder.[3] As such, the error must be deemed a fundamental one which overcomes the preservation requirement.

With two exceptions, a defendant must preserve a claim of insufficiency of the evidence through timely challenge in the trial court. F.B. v. State, 852 So. 2d 226, 230 (Fla. 2003). The first exception is based on the longstanding appellate rule under which, in death penalty cases, this Court is required to review the sufficiency of the evidence to support the conviction. Id. (citing Fla. R. App. P. 9.140(j)). The second exception to the requirement that claims of insufficiency of the evidence must be preserved occurs when the evidence is insufficient to show that a crime was committed at all. Id. It has long been established that due process forbids a state to convict a person of a crime unless all the elements of that crime have been proven beyond a reasonable doubt. Bunkley v. Florida, 538 U.S. 835, 840 (2003).

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[3] ADespite these circumstances, we do not find it necessary to reverse the judgment of guilt. It is undisputed that Morton and his companion *committed burglary* by breaking into the victims= house, and Morton admitted killing Bowers and attempting to shoot and to stab Weisser. This confession together with other substantive evidence proved a strong case of felony murder without the benefits of the impeaching statements.@ Morton, 689 So. 2d at 264 (emphasis added).

Both of these exceptions apply in this case. As a death penalty case, this Court must review the sufficiency of the evidence even if it has not been preserved by proper objection. Likewise, the failure to prove the material element of ownership meant that there was insufficient evidence that the crime of burglary had occurred. Under either exception, this Court was required to remedy the error of a missing element at trial. Without proper proof, this Court should have remanded the entire case for a new trial, including a guilt phase, as the proof of felony murder at the first trial would have been properly challenged. As such, appellate counsel was ineffective for failing to raise the claim that the crime of burglary, as a basis for felony murder, was not proven.

b. The State failed to prove the aggravator that the crime occurred during the commission of a burglary at Mr. Morton=s resentencing

At Mr. Morton=s second trial, the State again called crime scene technician Boekeloo who testified to responding to 6730 Sanderling Drive and seeing the two bodies there. (1999TR.209,212) In addition, he identified an aerial photograph of the area which had an X on the home at 6730 Sanderling Drive. (1999TR.210) This time the State did not make reference in its question to the fact that this was the home of the victims.

Michael Rodkey testified for the State at the second trial. He again testified by making reference to Athose people@. (1999TR.377) However, at this proceeding Rodkey testified that the house in question had been picked out Aa week or so before@ and that it was Chris Walker=s neighbor. (1999TR.377-78)

Detective William Lawless was also again called as a witness, and during his

testimony the State again played the tape of Mr. Morton being interviewed by the detective. This tape reflected the same testimony as was presented in the first trial. Neither Christopher Walker nor Linda Custer were called as witnesses at the second trial.

The second trial offered even less evidence of ownership of the property so as to support a burglary charge. Neither Walker nor Custer testified, leaving only Boekeloo, Rodkey and Mr. Morton=s confession to establish these elements. Since there is no evidence that any of the three individuals ever knew Bowers and Weisser, and no evidence that they had any knowledge about their ownership of the house in question, the evidence at the second trial was even more deficient in establishing ownership for the purposes of a burglary charge.

This failure to prove a material element means that there was insufficient evidence of the aggravator that the murder was committed during the course of a burglary. Reasonably competent counsel would have raised this issue. Mann v. State, 470 So. 2d 578, 581 (Fla. 1982)(failure to present sufficient proof of a prior conviction warrants remand for a new sentencing proceeding). The consideration of this aggravator could not be said to be harmless beyond a reasonable doubt. Therefore, appellate counsel was ineffective in failing to raise this claim and counsel=s failure violated Mr. Morton=s Fifth, Sixth, Eighth, and Fourteenth Amendment rights because he was sentenced to death on an unproven aggravator.

3. Appellate counsel=s failure to raise a claim that the lower court=s finding of the CCP and avoiding arrest aggravators was improper and duplicative was deficient performance which prejudiced Mr. Morton.

In the direct appeal from Mr. Morton=s first trial, appellate counsel attacked the finding of both the CCP and avoiding lawful arrest aggravators on the basis of a lack of proof beyond a reasonable doubt and the duplicative nature of the two aggravators. On the first direct appeal, this Court stated that, A[w]hile the improper doubling of these aggravators sometimes occur, there is no per se prohibition against a finding that both aggravators are established.@ Morton, 689 So. 2d at 265. This Court explained that, since the case was being remanded for a new penalty proceeding in which the evidence might vary, it was unable to determine at that time as to whether the record supports a finding that either or both aggravators exist. Id. After Mr. Morton=s second trial, appellate counsel failed to attack either of the aggravators or argue that the finding was improper doubling. This was deficient performance which prejudiced Mr. Morton.

a. Finding of CCP aggravator was improper

To establish CCP, the State must show that the murder was (1) the product of a careful plan or prearranged design; (2) the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage; (3) the result of heightened premeditation; and (4) committed with no pretense of moral or legal justification. Rodriguez v. State, 753 So. 2d 29, 46 (Fla. 2000).

The resentencing court found CCP as to both victims based on the following:

> The Defendant had a heightened level of premeditation as indicated by his having thought and discussed committing this murder for several days beforehand to the point of apparent obsession, having enunciated this intent on several occasions to several individuals, having considered and solicited suggestions of what proof would be needed to establish the murder B such as a human body part as a trophy; having made careful plans as evidenced by the thought process demonstrated in choosing a victim who lived only with his elderly mother in an isolated area, on a dead-end street, across from a vacant dwelling which served as headquarters for a preliminary stakeout and/or Adry run@; arranging for the phone wires to be cut in carrying out the preordained plan under cover of darkness, to kick in the front door and rush into the dwelling while heavily armed with a sawed-off shotgun loaded with four rounds, and Rambo-style knife, both being serious deadly weapons which could have no other purpose than implements of destruction or death, and extra ammunition; having taken the time to carefully conceal the shot gun in a towel, and concealing the getaway bikes in nearby brush; having worn gloves to avoid leaving fingerprints; having expressed a hope that the killing would produce a rush; all as further evidence [sic] by the Defendant=s own confession and statements to others.[4]

(1999R. 153-154).

A number of these grounds for the finding of CCP were improperly included in the judge=s sentencing order because they were not supported by the evidence presented at the second trial. The findings appear to be a result of the second trial court copying the first trial court=s sentencing order. Among the evidence the resentencing court relied upon

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[4] On his appeal from the resentencing, Mr. Morton raised the issue that a number of these pieces of evidence were not introduced at his second trial and included in the sentencing order as a result of the resentencing court adopting wholesale large parts of the original trial court=s sentencing order. This court rejected the argument, based on this duplication, that the resentencing judge did not perform an independent weighing and personal evaluation of the evidence in the case. Morton, 789 So. 2d at 334. In making that finding, this Court did note that AMorton does not challenge the validity of the aggravating circumstances found in

that was not presented during the second trial was that Mr. Morton Asolicited suggestions of what proof would be needed to establish the murder B such as a human body part as a trophy@; that Mr. Morton brought extra ammunition with him to the house; and that Mr. Morton Aexpressed a hope that the killing would produce a rush.@

The Aclean slate@ rule is employed in Florida in resentencing proceedings. Preston v. State, 607 So. 2d 404, 408 (Fla. 1992), cert. denied, 507 U.S. 999 (1993). On all sentencing issues, the resentencing court must proceed de novo. Id. At resentencing, the State is required to prove aggravating circumstances beyond a reasonable doubt during the resentencing proceedings. Bonifay v. State, 680 So. 2d 413, 419 (Fla. 1996).

Under the clean slate rule, evidence which was not presented at the resentencing procedure must be excluded from any analysis of whether the CCP aggravator was proven beyond a reasonable doubt. The elimination of the improper facts listed above (body part as a trophy, extra ammunition, and killing as a rush) leaves four general areas which form the resentencing court=s basis for finding CCP. The first relates to the evidence that the murder was discussed and planned ahead of time. The second is that the victims were an elderly woman and her son who lived on a dead-end street. The third is the method in which the murder was carried out, including the fact that the phone lines were cut, Mr. Morton and the others involved were armed with a gun and knife, and that they wore gloves. And fourth, the Defendant=s confession and statement to others.

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this case nor does he argue that there was insufficient evidence presented to

The first three categories found by the resentencing judge as a basis for the CCP aggravator go to the issues of a careful plan or prearranged design and heightened premeditation. However, they do not speak to the issue of whether the murders were the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage. A finding that previous discussion of the murder, a targeting of a certain house and individuals, and the execution of a plan relating to cutting phone lines, wearing gloves, and being armed as also evidence of cool and calm reflection would essentially eliminate this as a separate factor in the CCP analysis. As held previously by this Court, the cool and calm reflection element is the distinct cold element of CCP and must be proven separately from the calculated and premeditated elements. Jackson v. State, 704 So. 2d 500, 504 (Fla. 1997).

The evidence most related to this factor of whether the killings resulted from cool and calm reflection or were part of an emotional outburst comes from the fourth category of evidence, Mr. Morton=s statements to others and confession. However, this evidence in its conflicting forms point to a killing resulting from actions by Bowers at the time of the incident, not as part of a cool and calm reflection. According to Mr. Morton=s confession, the killing resulted from Bowers attempting to stand up when Mr. Morton told him to stay down. According to the testimony given by other witnesses, the shooting happened either when Bowers turned around to look at Mr. Morton when told not to or during a discussion about whether Bowers would call the police on Mr. Morton and his

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support the aggravators.@ Id. at 332-33.[22]

companions, with Mr. Morton expressing disbelief as to the fact that anyone would do that. All three versions of the events that night point to an emotional, spur of the moment act in killing Bowers as opposed to a cool and calm reflection on the decision to kill that victim at that time.

Since the finding of the CCP aggravator requires that all four of the prerequisites are found beyond a reasonable doubt, the lack of evidence as to the cool and calm reflection requirement means this aggravator was not established beyond a reasonable doubt and was improperly taken into account by the sentencing court when deciding to impose the death penalty on Mr. Morton.

b. Finding of Avoiding Lawful Arrest aggravator was improper

In extending the application of the avoiding or preventing lawful arrest aggravator beyond law enforcement personnel, this Court cautioned that Aproof of the requisite intent to avoid arrest and detection must be very strong,@ in such cases to sustain the avoid arrest aggravator as it extends to witness elimination. Urbin v. State, 714 So. 2d 411, 415 (Fla. 1998)(citing Riley v. State, 366 So. 2d 19 (Fla. 1978)). This Court specifically held that AAn intent to avoid arrest is not presentYunless it is clearly shown that *the dominant or only motive* for the murder was the elimination of witnesses.@ Id. (emphasis in original)(citing Menendez v. State, 368 So. 2d 1278 (Fla. 1979)). The proof must demonstrate beyond a reasonable doubt that the victim was murdered solely or predominately for the purpose of witness elimination. Id. at 416.

This aggravator has been applied to cases in which the evidence supported a finding that the victim would have summoned the authorities and in cases where the defendant had expressed an apprehension regarding arrest. Zack v. State, 753 So. 2d 9, 20 (Fla. 2000). The ability to identify the defendant alone is insufficient to support this aggravator. Id.

The resentencing court found the avoiding lawful arrest aggravator based on the fact that Mr. Morton wanted to commit murder and did not want to get caught. Specifically, the resentencing court found that:

> The killing occurred immediately after the victim begged for his life, asserting that he wouldn=t inform on the Defendant, and the Defendant remarking, AThat=s what they all say!@; and then pulling the trigger of the shotgun against the victim=s neck. The Defendant later also admitted that he Ahad no choice@ but to kill this victim since he turned and looked at the Defendant. As further evidence of Defendant=s desire to avoid arrest for these murders he caused fires to be set in the victim=s house in an effort to conceal the murders.

(1999R. 154-155).

Three witnesses for the State, Whitcomb, Madden and Sowell, testified to some version of the story that Mr. Morton had told them that Bowers informed Mr. Morton that he would not call the police and Mr. Morton said Athat=s what they all say@ and then shot him. (1999TR.286, 305,330) Joseph Savino, a corrections officer from the Pasco County Jail, testified that he overheard Mr. Morton tell another inmate, AThe guy turned around and looked. We told him not to, he turned around, and I shot him. I didn=t have a choice, he looked.@ (1999TR.444).

The sentencing court relied on these two alleged statements of Mr. Morton and the arson at the crime scene in finding the avoid arrest aggravator. It is important to note that in his taped confession, Mr. Morton was asked about the killing of Mr. Bowers and stated the following: AThe guy started to get up and I told him to get down. He didn=t, so I shot him.@ (1999TR.250)

The first alleged statement of Mr. Morton relating to Bowers saying he would not call the police does not sufficiently establish the avoid arrest aggravator. In order to establish this aggravator, it must be shown, beyond a reasonable doubt, that the murders were committed for the sole or dominant reason of avoiding arrest. The version of events as related by Whitcomb, Madden and Sowell, simply show that Mr. Morton was not persuaded by Bowers not to harm him on the basis that Bowers promised not to inform the police. This interaction is not proof of the fact that Bowers was killed to avoid arrest. The only thing revealed in this exchange about Mr. Morton=s state of mind is that he was unconcerned with Bowers promises, not that he decided to kill Bowers based on this exchange because he was concerned about a possible future arrest.

As to the second statement overheard by the corrections officer, it should be noted that this version of events is more consistent with Mr. Morton=s version of events than with that given by the other three witnesses. In his taped confession, Mr. Morton asserted that he killed Bowers because he failed to listen to commands, as related in the jailhouse confession, not because he was concerned about being identified and later

arrested. In addition, the jailhouse statement is inconsistent with the version of events that Bowers was shot because of Bowers= statement that he would not go to the police, in that the jailhouse statement relates that the killing was done based on actions alone, and not the result of any conversation between the parties.

The intent to avoid arrest aggravator goes to the motive of the murder itself, not to the individual=s desire to avoid arrest in general. Therefore, the fact that a number of hours after the murders Mr. Morton and a codefendant returned to the scene and attempted to light the house on fire is only evidence of the fact that they were attempting to avoid arrest after the killings had been completed. This act has no relevance on whether the killings themselves were done to avoid arrest.

Ultimately, the finding of the avoid arrest aggravator was based upon inferences from two statements allegedly made by Mr. Morton that are inconsistent with one another. Neither statement establishes that the dominant motive for the murders was to avoid arrest, but rather that these were possible reasons. There is no direct evidence that the killings were done because the victim would have called authorities or that Mr. Morton was apprehensive about being arrest, as required under Zack. As such, this aggravator was improperly found by the resentencing court.

c. Finding both CCP and Avoiding Lawful Arrest improper doubling

In Troedel v. State, 462 So. 2d 392, 398 (Fla. 1984), this Court held that the avoid arrest aggravator was improperly applied where the evidence showed that the primary

purpose in the defendant going to the home in question was to commit murder. In that case, the court previously found the CCP aggravator to be present based upon the evidence which showed that the defendant wielded one of two murder weapons and that he shared in the premeditated intent to kill the two victims according to a pre-arranged plan. Id. at 397.

In addressing the avoiding arrest aggravator, this Court stated that the evidence that the defendants Ahad discussed going to the victims= home for the specific purpose of killing them would seem to indicate that the primary purpose of the defendants= action was not burglary and robbery but murder.@ Id. This court held that the avoid arrest aggravator most clearly applies when the offender=s primary purpose is an antecedent crime (such as burglary) and the offender then kills in order to avoid arrest and prosecution. Id. While there might have been a reasonable inference from the evidence that the purpose of the defendants= entering the home was to rob and that the killing of the victims was for the ancillary purpose of avoiding arrest, that was not the only reasonable inference. Id. Since the evidence showed that the primary purpose of the entry to the home was to commit murder, the avoid arrest aggravator was not proved beyond a reasonable doubt and it was disapproved by this Court. Id.

If this Court were to find that the CCP aggravator was properly applied, it would be based on testimony relating to a prearranged plan to go to this house and kill the victims. Since this evidence would show that the primary purpose for going to the house

in question was to commit murder, avoiding arrest could not also be the Asole or dominant@ motive for the murders, given the ordinary meaning of the word dominant to be that there is only one such motive. As in Troedel, Agoing to the victims= home for the specific purpose of killing them would seem to indicate that the primary purpose of the defendants= action was not burglary and robbery but murder.@ Applying Troedel to this case then, with very similar facts, it would be improper to find avoiding arrest was a dominant or primary purpose where a finding of CCP was already based on the fact that the home was entered with premeditated intent to kill. Reasonably competent appellate counsel would have raised the issue of the improper doubling of the CCP and avoid arrest aggravators and this court would have struck one of both of those aggravators so confidence in the outcome is undermined. When combined with the other sentencing errors, the consideration of these aggravators could not be said to be harmless beyond a reasonable doubt. Therefore, appellate counsel was ineffective in failing to raise this claim and counsel=s failure violated Mr. Morton=s Fifth, Sixth, Eighth, and Fourteenth Amendment rights because he was sentenced to death on an unproven aggravator. Espinosa v. Florida, 505 U.S. 1079 (1992); Zant v. Stephens, 462 U.S. 862 (1983).

4. Appellate counsel failed to raise a claim that Mr. Morton=s right to a public trial was violated at his 1994 and 1999 trials.

The press and general public have a constitutional right of access to criminal trials embodied in the First Amendment to the United States Constitution and applied to the States through the Fourteenth Amendment. Globe Newspaper Company v. Superior

Court, 457 U.S. 596, 603 (1982). This benefit of a public trial is also one created for the benefit of a criminal defendant under the Sixth Amendment. Waller v. Georgia, 467 U.S. 39, 46 (1984). Likewise, the Florida Constitution guarantees that all those accused in a criminal proceeding shall have the right to a speedy and public trial. Art. 1, Sec. 16. A public trial ordinarily is one Aopen to the general public *at all times*.@ People v. Prince, 156 P.3d 1015 (Cal. 2007)(emphasis added).

While the right of access to criminal trials is not absolute, the circumstances under which the press and public can be barred from a criminal trial are limited B the State=s justification in denying access must be a weighty one. Globe, 457 U.S. at 606. There are four prerequisites that must be satisfied before the presumption of openness can be overcome: (1) the party seeking to close the hearing must advance an overriding interest that it is likely to be prejudiced; (2) the closure must be no broader than necessary to protect that interest; (3) the trial court must consider reasonable alternatives to closing the proceedings; and (4) the court must make findings adequate to support the closure. Pritchett v. State, 566 So. 2d 6, 7 (Fla. 2d DCA 1990)(citing Waller, 467 U.S. at 47.)

In order to justify any type of closure, whether the closure is total or partial, the court must find Athat a denial of such right is necessitated by a compelling governmental interest and is narrowly tailored to serve that interest.@ Pritchett, 566 So. 2d at 6(citing Globe, 457 U.S. at 607). The public trial guarantee has been considered so important that courts have reversed convictions or granted habeas relief where the courtroom was closed

for the announcement of the verdict, U.S. v. Canady, 126 F.3d 352, 364 (2d Cir.1997), where a trial inadvertently ran so late one night that the public was unable to attend, Walton v. Briley, 361 F.3d 431, 433 (7th Cir.2004), and where the trial was closed for the testimony of just one witness, U.S. v. Thunder, 438 F.3d 866, 868 (8th Cir.2006). A trial closure has not yet been justified on the basis of convenience to the court. Owens v. U.S., 483 F. 3d 48, 62 (1st Cir. 2007).

AThe Constitution requires that every effort be made to see to it that a defendant in a criminal case has not unknowingly relinquished the basic protections that the Framers thought indispensable to a fair trial.@ Schneckloth v. Bustamonte, 412 U.S. 218, 241-42 (1973). Consequently, Aevery reasonable presumption should be indulged against@ waiver of a fundamental trial right. Hodges v. Easton, 106 U.S. 408, 412 (1882). This heightened standard of waiver has been applied to plea agreements, the right against self-incrimination, the right to a trial, the right to a trial by jury, the right to an attorney, and the right to confront witnesses. Walton v. Briley, 361 F.3d 431, 434 (7th Cir. 2004)(citing Brady v. United States, 397 U.S. 742, 748 (1970); Miranda v. Arizona, 384 U.S. 436, 444 (1966); Moltke v. Gillies, 332 U.S. 708 (1948)). Furthermore, in dealing with the fundamental trial right to representation by counsel, the Supreme Court has held that presumption of waiver from a silent record is impermissible. Carnley v. Cochran, 369 U.S. 506 (1962).

The common element of the cases above is the fact that the rights with which they deal all concern the fairness of the trial. Walton, 361 F.3d at 434. The right to a public trial also concerns the right to a fair trial. Id. (citing Waller, 467 U.S. at 46 (AThe requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned ....@)). Like other fundamental trial rights, a right to a public trial may be relinquished only upon a showing that the defendant knowingly and voluntarily waived such a right. Id.

A defendant is not required to prove specific prejudice in order to obtain relief for a violation of the public trial guarantee. Waller, 467 U.S. at 49. A[O]nce a petitioner demonstrates a violation of his Sixth Amendment right to a public trial, he need not show that the violation prejudiced him in any way. The mere demonstration that his right to a public trial was violated entitles a petitioner to relief.@ Judd v. Haley, 250 F.3d 1308, 1315 (11th Cir.2001).

At Mr. Morton=s 1994 guilt phase, the court held a bench conference immediately after the closing arguments. At that bench conference, the only issue discussed was the copies of the jury instructions. (1994TR.950) Immediately after the bench conference, the trial court, without any hearing or request from either party, ordered the courtroom secured prior to instructing the jury:

> COURT: Yes. Courtroom secure. Folks, anyone wishing to leave now must leave now prior to me instructing the jury.
> BAILIFF: Your honor, the courtroom has been secured. (1994TR.951)

At Mr. Morton=s trial in 1999, the trial court again, without any hearing or request from either party, ordered the courtroom secured prior to instructing the jury. The following exchange occurred immediately after the conclusion of closing arguments with no break or prior discussion:

> THE COURT: Will the bailiff please secure the courtroom.
> THE BAILIFF: The courtroom is secured, Your Honor. (1999TR.771)

There is no evidence in either the 1994 or the 1999 record that either trial court: put any reasons for, or justification of, such a closure on the record; that the closure was done at the request of either party; that either party had advanced notice of the closure, or; that a hearing was held prior to such a closure of the courtroom being ordered. In addition, there is no indirect evidence on the record that could be used to justify such a closure (e.g., outbursts by people watching the proceedings or incidences where the courtroom was disrupted by people entering or leaving the courtroom.) Specifically, nothing in the record reflects that, prior to closing the courtroom, any announcements were made to ensure that members of the press and public who wanted to be present were made aware of this closure. Rather, it appears that each trial court simply announced that the courtroom was about to be closed and it was immediately done. There is likewise no evidence that these closures were part of a practice on the part of either court to avoid disruptions or distractions by allowing entry into and exit from the courtroom only at specific times.

Based on this complete lack of justification for the closure in the record, the State has not met the weighty burden required for violating the right to a public trial. No overriding interest for the closure was put forth by any party and the court did not make adequate findings of such as required under Waller. Likewise, there is nothing in the record to show that the closure was limited in its scope or that reasonable alternatives were considered, as is required.[5] Any finding that the closure was justified by some substantial need to control access to the courtroom during the trial is not supported by the record and in fact contradicted by the fact that at only one part of each trial was such a restriction, without any warning, put into place.

Similarly, any arguments that there is no evidence on the record that any specific person was excluded and that the actions in securing the courtroom during the reading of the jury instructions were harmless runs contrary to Waller. Where there has been a violation of the public trial guarantee, no evidence of prejudice need be shown. AWhile the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance, the Framers plainly thought them nonetheless real.@ Waller, 467 U.S. at 50, n9. As such, Mr. Morton=s rights to a public trial under the Sixth and Fourteenth Amendments

[5]Some courts have employed a more lenient substantial, rather than compelling, reason test to partial closures. Douglas v. Wainwright, 739 F.2d 531 (11th Cir. 1984). The closure in this case fails under that test as well, as there is no justification for the closure anywhere in the record for the 1994 or 1999 trials.

to the U.S. Constitution, and his right to a public trial under the Florida Constitution, were violated by the closing of the courtroom during both of his trials.

This error, which relates to a fundamental trial right similar to the right to an attorney and the right to a jury trial, is fundamental error. If this fundamental error had been properly raised on appeal, this court would have determined that the right to a public trial had been violated. Therefore, appellate counsel was ineffective in failing to raise this claim and counsel=s failure violated Mr. Morton=s Fifth, Sixth, Eighth, and Fourteenth Amendment rights because he was sentenced to death at a trial that did not meet the public trial requirements.

5. Appellate counsel=s failure to raise a claim that the 1994 trial court improperly denied Mr. Morton=s motions to dismiss was ineffective assistance of counsel.

This Court has held that these issues have no merit, however, they are raised herein to preserve the issues for federal review.

Prior to Mr. Morton=s first trial, he filed six separate motions to dismiss the Indictment in this cause. On January 19, 1994, the trial court denied all of the motions to dismiss (1994R. 1046-48) Motion to Dismiss No. 1 argued that the Indictment should be dismissed since it did not specify what aggravating circumstances the State believed justified the imposition of the death penalty in this case. Motion to Dismiss No. 4 argued that the Indictment should be dismissed because Section 921.141, Fla. Stat. (1989) is unconstitutionally vague and overbroad, that it is unconstitutional because it does not

require a jury to make written factual findings so as to allow for meaningful appellate review, and that it fails to require the judge to examine the circumstances upon which jurors make their recommendation and allows the Court to arbitrarily impose the penalty of death. Motion to Dismiss No. 6 argued that the Indictment should be dismissed because death by electrocution constitutes cruel and unusual punishment under both the Florida and federal constitutions.

The trial court improperly denied Motion to Dismiss No. 1 and Mr. Morton was prejudiced by appellate counsel=s failure to raise this claim. The Sixth Amendment requires that A[i]n all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation . . .@ A conviction on a charge not made by the indictment is a denial of due process of law. State v. Gray, 435 So.2d at 818(citing Thornhill v. Alabama, 310 U.S. 88 (1940), and De Jonge v. Oregon, 299 U.S. 353 (1937)).

Because the State did not submit to the grand jury, and the indictment did not state, the essential elements of the aggravated crime of capital murder, Mr. Morton=s rights under Article I, Section 15, of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution were violated. By omitting any reference to the aggravating circumstances that would be relied upon by the State in seeking a death sentence, the indictment prejudicially hindered Mr. Morton Ain the preparation of a defense@ to a sentence of death. Fla. R. Crim. Pro. 3.140(o). The

failure to raise this issue on appeal Acompromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result.@

The trial court improperly denied Motion to Dismiss No. 4. That motion properly argued that Section 921.141., Fla. Stat. (1989) was unconstitutional because: (1) it is so vague, ambiguous and indefinite as to deprive Mr. Morton of the right to know the nature of the charges and be able to present a defense accordingly; (2) it is unconstitutionally vague and thus denies effective appellate review; (3) it enumerates aggravating circumstances which are impermissibly vague and overbroad; (4) it is unconstitutional in that it does not require the jury to make written factual findings, thereby thwarting effective review and making consistent application of the statute impossible; and (5) it fails to require the judge to examine the circumstances upon which jurors make their recommendation and allows the Court to arbitrarily impose the penalty of death, all in violation of the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and in violation of the Florida Constitution, Art. I, Sec. 2, 9, 16 and 22. The failure of appellate counsel to raise this claim was obvious error that prejudiced Mr. Morton in that it compromised the appellate process and undermined confidence in the appellate result.

Finally, the trial court erred in improperly denying Motion to Dismiss No. 6. Death by electrocution is cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution and also the Florida Constitution, Art. I, Sec. 9 and 17. In order to comply with the Constitution, punishment must not involve the

unnecessary and wanton infliction of pain. Furman v. Georgia, 408 U.S. 238 (1972). The procedure for electrocution involves unnecessary and wanton infliction of pain, unnecessary mutilation of the body of the accused and unnecessary and wanton infliction of psychological torture. As such, it is unconstitutional under both the state and federal constitutions. The failure of appellate counsel to raise this claim was obvious error that prejudiced Mr. Morton in that it compromised the appellate process and undermined confidence in the appellate result.

CLAIM II

MR. MORTON=S DEATH SENTENCE VIOLATES HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE HE DID NOT HAVE A CONSTITUTIONAL JURY VERDICT ON EACH ELEMENT OF THE CAPITAL OFFENSE.

This Court has held that Ring v. Arizona and Apprendi v. New Jersey do not affect Florida=s death penalty proceedings or apply retroactively[6], however, this claim is raised herein to preserve the issue for future review.

On February 4, 1992, the grand jury returned an indictment charging that Mr. Morton, Aunlawfully and from a premeditated design,@ inflicted mortal wounds on the victims, who died as a direct result of these wounds. (1999R.6-7). The indictment did not indicate whether the State would seek the death penalty, or, if so, upon what factual basis.

[6] Johnson v. State, 904 So. 2d 400, 405 (Fla. 2005).

Although the indictment charged only premeditated murder, the judge at the first trial instructed on both felony murder and premeditated murder. (1994TR.953) The record also reflects that the State argued both theories of first murder in closing arguments. (1994TR.929-32)

Before sending the jury out, the resentencing court instructed it that, AThe final decision as to what punishment shall be imposed rests solely with the judgment of this court; however, the law requires that you, the jury, render to the court an advisory sentence as to what punishment should be imposed upon the defendant@ (1999TR.771).

The second jury returned an advisory recommendation of death by a vote of 11 to 1. The jurors did not indicate whether they had unanimously found any statutory aggravating circumstance. The court agreed with that recommendation and sentenced Mr. Morton to death.

1. The process by which Mr. Morton was sentenced to death violated his Sixth and Fourteenth Amendment Rights under the United States Constitution.

In Ring v. Arizona, 122 S.Ct. 2428 (2002), the United States Supreme Court overruled Walton v. Arizona, 497 U. S. 639 (1990), Ato the extent that . . . [Walton] allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty.@ Id. at 2443. Ring mandates that capital sentencing must comply with the Sixth and Fourteenth Amendment rule of Apprendi v. New Jersey, 530 U.S. 466 (2000), Athat the Sixth Amendment does not permit a defendant to be >expose[d] ... to a penalty exceeding the maximum he would receive if

punished according to the facts reflected in the jury verdict alone.=@ Ring, 122 S.Ct. at 2432(quoting Apprendi, 530 U.S. at 483.) ACapital defendants, no less than non-capital defendants, Aare entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.@ Id. That rule squarely and indisputably outlaws the Florida sentencing procedure used to impose Mr. Morton=s death sentence.

Mr. Morton=s death sentence was imposed without a Ajury determination of any fact on which the legislature condition[ed] an increase in their maximum punishment@ from imprisonment to death. Ring, 122 S.Ct. at 2432. Under the plain terms of Florida Statute '775.082, a person convicted of first-degree murder A**shall** be punished by life imprisonment . . . **unless** the proceedings held to determine sentence according to the procedure set forth in [Fla. Stat.] '921.141 result in **a finding by the court** that such person shall be punished by death.@ (emphasis added.) Therefore, Mr. Morton was Aexpose[d] ... to a penalty exceeding@ life imprisonment. Ring, 122 S.Ct. at 2432. He was also subjected to Aan increase in . . . [his] maximum punishment@ only upon the legislatively specified condition that certain factual findings were made going beyond Athe facts reflected in the jury verdict alone.@ And those findings, Anecessary for imposition of the death penalty,@ were made by a sentencing judge, not by a jury. Id.

The jury=s verdict of Aguilty as charged@ at the guilt phase of Mr. Morton=s trial Areflected@ no more than a finding of guilt of first degree murder, but not under what

theory. Under the plain terms of '775.082, such first-degree murder was punishable by life imprisonment unless some further factual finding was made by the court. This finding occurred when the judge made the findings necessary for imposition of the death penalty. This Court upheld Mr. Morton=s death sentence solely by reference to those findings. No jurors made further findings of fact at any penalty stage so as to satisfy the requirements of Ring, Apprendi, and the Sixth Amendment. Specifically, the jury did not make factual findings at the penalty stage of a capital trial,[5] Mr. Morton=s jury did not have to find the existence of any fact unanimously, and did not report that it had done so, the jury=s penalty-stage verdict was merely advisory[6] **B** as the court had told the jurors it would be. The jury factfinding requirement of Apprendi, Ring, and the Sixth and Fourteenth Amendments, based on recognition of the importance of interposing independent jurors between a criminal defendant and punishment at the hands of a

[5]The consequences of Florida law=s diminution of the jury=s role in capital sentencing proceedings also lead to violations of Mr. Morton=s state-law right to have notice in the indictment of all the elements on which the State would seek to impose a death sentence, Art. I, ' 15(a), Fla. Const. (1980); State v. Rodriguez, 575 So.2d 1262, 1265 (Fla. 1991) (receded from on other grounds, Harbaugh v. State, 754 So.2d 691 (Fla. 2000), the right to a unanimous verdict on each such element, Art. I, ' 16, Fla. Const. (1980); Jones v. State, 92 So.2d 262 (Fla. 1957) (on reh=g); Brown v. State, 690 So.2d 309 (Fla. 1st DCA 1995); and the right to proof beyond a reasonable doubt to the satisfaction of a unanimous jury. Art. I, ' 16, Fla. Const. (1980); Russell v. State, 71 Fla. 236, 71 So. 27 (1916).

[6] This Court has frequently upheld such instructions as consistent with Caldwell v. Mississippi, 472 U.S. 320 (1985), precisely because they accurately state that under Florida law the jury is not the ultimate, responsible decisionmaker at the penalty stage.

Acompliant, biased, or eccentric judge,@[7], was not satisfied by a jury which is told that Athe final decision as to what punishment shall be imposed rests solely with the judgment of this court.@

Mr. Morton specifically was entitled to a unanimous jury finding as to any aggravating factors. The reason that aggravating factors must be found unanimously is because they are elements of the murder offense that make the defendant death eligible. Davis v. Mitchell, 318 F.3d 682, 687 (6th Cir. 2002); contra State v. Steele, 921 So. 2d 538, 546-548 (Fla. 2005)(holding that the requirement of a majority vote on each aggravator is an unnecessary expansion of Ring and noting that Florida is the only state that allows a jury to decide that aggravators exist and allows a jury to recommend a sentence of death by a mere majority vote). All of the elements of a criminal offense must be found by a jury unanimously as a matter of constitutional criminal procedure, particularly all elements that make a defendant death eligible. Id. at 687-88(citing Richardson v. U.S., 526 U.S. 813 and Ring, 122 S.Ct. at 2341)

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[7] Duncan v. Louisiana, 391 U.S. 145, 156 (1968). The context is: AThe guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. . . . Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it.@ Id. at 155-156.

2. Mr. Morton=s Death Sentence Violates the State and Federal Constitutions Because the Elements of the Offense Necessary to Establish Capital Murder Were Not Charged in the Indictment

Jones v. United States, 526 U.S. 227 (1999), held that 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, at 243, n.6. Apprendi v. New Jersey, 530 U.S. 466 (2000), held that the Fourteenth Amendment affords citizens the same protections when they are prosecuted under state law. Apprendi, 530 U.S. at 475-476.[8] Ring held that a death penalty statute=s Aaggravating factors operate as >the functional equivalent of an element or a greater offense.=@ Ring, 122 S.Ct. at 2443(quoting Apprendi at 494, n. 19). In Jones, the Supreme Court noted that A[m]uch turns on the determination that a fact is an element of an offense, rather than a sentencing consideration,@ because Aelements must be charged in the indictment.@ Jones, 526 U.S. at 232.

Like the Fifth Amendment to the United States Constitution, Article I, Section 15, of the Florida Constitution provides that ANo person shall be tried for a capital crime without presentment or indictment by a grand jury.@ Florida law clearly requires every Aelement of the offense@ to be alleged in the information or indictment. In State v. Dye, 346 So. 2d 538, 541 (Fla. 1977), this Court said A[a]n information must allege each of the essential elements of a crime to be valid. No essential element should be left to

[8] The grand jury clause of the Fifth Amendment has not been held to apply to the States. Apprendi, 530 U.S. at 477, n.3.

inference.@ In State v. Gray, 435 So. 2d 816, 818 (Fla. 1983), this Court said A[w]here an indictment or information wholly omits to allege one or more of the essential elements of the crime, it fails to charge a crime under the laws of the state.@ An indictment in violation of this rule cannot support a conviction; the conviction can be attacked at any stage, including Aby habeas corpus.@ Gray, 435 So.2d at 818. Finally, in Chicone v. State, 684 So. 2d 736, 744 (Fla. 1996), this Court said A[a]s a general rule, an information must allege each of the essential elements of a crime to be valid.@

The Sixth Amendment requires that A[i]n all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation . . .@ A conviction on a charge not made by the indictment is a denial of due process of law. State v. Gray, 435 So.2d at 818(citing Thornhill v. Alabama, 310 U.S. 88 (1940), and De Jonge v. Oregon, 299 U.S. 353 (1937)).

Because the indictment did not state the essential elements of the aggravated crime of capital murder, Mr. Morton=s rights under Article I, Section 15, of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution were violated. By omitting any reference to the aggravating circumstances that would be relied upon by the State in seeking a death sentence, the indictment prejudicially hindered Mr. Morton Ain the preparation of a defense@ to a sentence of death. Fla. R. Crim. Pro. 3.140(o).

CLAIM III

MR. MORTON=S EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED

AS MR. MORTON MAY BE INCOMPETENT AT THE TIME OF EXECUTION.

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).

Mr. Morton acknowledges that under Florida law, a claim of incompetency to be executed cannot be asserted until a death warrant has been issued. Further, he acknowledges that before judicial review may be held, 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. See Section 922.07, Florida Statutes (1985) and Martin v. Wainwright, 497 So. 2d 872 (1986)(in order to pursue this claim, Martin must 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, 523 U.S. 637 (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 (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. June 21, 2000), the 11th Circuit Court of Appeals 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 1235.

This claim is necessary at this stage because 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 federal law requires all issues raised in a federal habeas petition to be exhausted in state court. Hence, Mr. Morton raises this claim now.

Mr. Morton has been incarcerated since 1992. He suffers from mental illness and brain damage. Mr. Morton may well be incompetent at time of execution, and his Eighth Amendment right against cruel and unusual punishment will be violated.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Morton respectfully urges this Honorable Court to grant habeas relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Habeas Corpus has been furnished by U.S. Mail to all counsel of record on this ____ day of June, 2007.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Petition for Writ of Habeas Corpus, was generated in a Times New Roman, 14 point font, pursuant to Fla. R. App. P. 9.210**.**

_____

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