IN THE SUPREME COURT OF FLORIDA
CASE NO. _____

SAMUEL L. SMITHERS

Petitioner,
v.

WALTER A. McNEIL

Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

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

Citations shall be as follows: The record on appeal concerning the original court proceedings shall be referred to as FSC ROA. ____ followed by the appropriate volume and page numbers. The Appellant's Initial Brief on direct appeal will be referred as IB ____ followed by the appropriate page numbers. The postconviction record on appeal will be referred to as PCR ____ followed by the appropriate volume and page numbers. All other references will be self-explanatory or otherwise explained herein.

REQUEST FOR ORAL ARGUMENT

The resolution of the issues in this action will determine whether Mr. Smithers lives or dies. This Court has allowed oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral

argument would be appropriate in this case, given the seriousness of the claims involved and the fact that a life is at stake. Mr. Smithers accordingly requests that this Court permit oral argument.

INTRODUCTION

Significant errors which occurred at Mr. Smithers' 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. Smithers. [E]xtant legal principles ...provided a clear basis for... compelling appellate argument[s]. Fitzpatrick v. Wainwright, 490 So.2d 938, 940 (Fl. 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 claims 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 direct appeal but should now be revisited in light of subsequent case law or in

order to correct error in the appeal process that denied fundamental constitutional rights. As this petition will demonstrate, Mr. Smithers is entitled to habeas relief.

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

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

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

This Court has the inherent power to do justice. The ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. The petition pleads claims involving fundamental constitutional

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

GROUNDS FOR HABEAS CORPUS RELIEF

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

A Hillsborough County grand jury returned a two-count indictment on June 12, 1996 charging Samuel Smithers with the first degree murders of Cristy Cowan and Denise Reach (FSC ROA Vol. I p. 22-23). The murder of Cowan was alleged to have taken place May 28, 1996 and the murder of Roach sometime between May 12, 1996 and May 28, 1996. (FSC ROA Vol. I p. 22).

Prior to trial, Mr. Smithers filed motions on May 21, 1998 to sever the offenses and to suppress his confession. (FSC ROA Vol. I p. 64-67). The court issued an order denying the motion to suppress confession on July 22, 1998 (FSC

ROA Vol. I p. 69-73A). After hearing additional argument concerning the motion to sever on August 13, 1998 (FSC ROA Vol. SII p. 235-71), the judge entered a written order denying severance August 24, 1998. (FSC ROA Vol. I p. 81-85).

The case proceeded to trial before Judge Fuente and a jury. The jury returned verdicts of guilty as charged on both counts (FSC ROA Vol. II p. 164-5; Vol. XI p. 1338). Mr. Smithers filed a motion for new trial which was heard and denied by the court on January 23, 1999. (FSC ROA Vol. XVII p. 2235-8).

Penalty phase commenced on January 22, 1999. (FSC ROA Vol. II p. 193 XII p. 1357). The jury recommended that Mr. Smithers be sentenced to death for both murders. (FSC ROA Vol. II p. 209; XVIII p. 2351). A Spencer hearing was held on April 15 and 16, 1999 (FSC ROA Vol. SIII p.425-541; SVI p. 759-79). Sentencing was held June 25, 1999, at which time the court read its sentencing order. (FSC ROA Vol. II pl 245-61; XIX p. 2362-82). The court concluded that as to both homicides, the aggravating circumstances outweighed the mitigating circumstances (FSC ROA Vol. II p. 259-60; XIX p. 2381-2; A 15-16). Two sentences of death were imposed (FSC ROA Vol. II p. 260, 264-74; XIX p. 2382, A 16). Mr. Smithers' notice of appeal was filed July 19, 1999. (FSC ROA Vol. II p. 275-6).

The Florida Supreme Court affirmed the conviction and sentences on May 16, 2002 in Smithers v. State, 826 So.2d 916 (Fla. 2002). The mandate issued on

September 13, 2002. A petition for certiorari was filed with the United States Supreme Court and denied on February 24, 2003.

On December 22, 2003, Mr. Smithers filed a 3.851 Motion for Postconviction Relief With Special Request For Leave To Amend before he had received the public records to which he was entitled under 3.853(e) and the records that were the subject of his Demand. Mr. Smithers filed the 3.852 at that time to comply with Florida Rule of Criminal Procedure 3.851 and preserve his rights to federal review. At the same time, Mr. Smithers filed a Motion to Amend once the public records acquisition process was complete.

On January 28, 2004, the Court issued an Order, directing the State to respond to both motions within 60 days of December 22, 2003. On February 20, 2004, the State filed a response to the 3.851 motion. On February 26, 2004, Mr. Smithers filed a Request for Additional Public Records, directed to the Office of the State attorney. The Court denied the request for additional public records at a hearing on March 17, 2004.

Mr. Smithers filed on July 13, 2004 his Renewed Motion For In Camera Review Of Records The State Attorney Marked Exempt from Disclosure Under Florida Rule Of Criminal Procedure 3.852. The hearing on the motion was held on July 22, 2004. The Court, on October 12, 2004, entered an Order Denying Renewed Motion for In Camera Review Of Records The State Attorney Marked

Exempt From Disclosure Under Florida Rule Of Criminal Procedure 3.852.

Status reviews were held on December 13, 2004 and on March 7, 2005. The Defendant's Second Renewed Motion for In Camera Review of Records the State Attorney Marked Exempt from Disclosure Under Florida Rule of Criminal Procedure 3.852 was filed on March 4, 2005 and heard on April 20, 2005. The Court issued an Order For In Camera Review Of Records The State Attorney marked Exempt From Disclosure Under Florida Rule Of Criminal Procedure 3.852 Order Directing Records Repository Order Directing Clerk Of Court on April 25, 2005.

Status reviews were set on July 11, 2005, July 20, 2005, August 24, 2005, and November 3, 2005. The Defendant's last Amended Motion to Vacate Judgment of Conviction and Sentence was filed on April 5, 2006. An evidentiary hearing was held on the 16th and 17th of August, 2007. Both the State and the Defendant waived oral and written closing arguments. The trial court issued a written denial of the Amended Motion To Vacate Judgment Of Conviction And Sentence on October 24, 2007. This petition follows.

CLAIM I

THE RULES PROHIBITING MR. SMITHERS' LAWYERS FROM INTERVIEWING JURORS TO DETERMINE IF CONSTITUTIONAL ERROR WAS PRESENT VIOLATES EQUAL PROTECTION PRINCIPLES, THE FIRST, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION AND DENIES MR. SMITHERS ADEQUATE ASSISTANCE OF COUNSEL IN PURSUING HIS POSTCONVICTION REMEDIES.

The Eighth and Fourteenth Amendments of the United States Constitution and Article I, section 21 of the Florida Constitution, require that Mr. Smithers receive a fair trial. However, Rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar[1] prevents Mr. Smithers from determining whether he received a fair trial. Mr. Smithers can only discover jury misconduct through juror interviews. To the extent it precludes undersigned counsel from investigating and presenting jury bias and misconduct that can only be discovered through interviews with jurors, Rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar is unconstitutional. Because the

[1]The rule expressly prohibits counsel from directly or indirectly communication with jurors. The rule states that a lawyer shall not... after dismissal of the jury in a case with which the lawyer is connected, initiate communication with or cause another to initiate communication with any juror regarding the trial except to determine whether the verdict is subject to legal challenge; provided, a lawyer may not interview jurors for this purpose unless the lawyer has reason to believe that grounds for such challenge may exist.

Rule 4-3.5(d)(4), R. Regulating Fla. Bar.

Rule denies Mr. Smithers this opportunity to investigate and present a claim of juror misconduct, it infringes his rights to due process and access to the courts, and the reliability and integrity of Mr. Smithers' capital sentence is questionable.

Reason the claim could not have been or was not raised on appeal: This claim concerns matters which are not contained within the record on appeal and which are not ripe until the postconviction process begins.

CLAIM II

THE JURY DID NOT RECEIVE ADEQUATE GUIDANCE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. MR. SMITHERS' DEATH SENTENCES ARE PREMISED ON FUNDAMENTAL ERROR WHICH MUST BE CORRECTED. TO THE EXTENT TRIAL COUNSEL FAILED TO LITIGATE THESE ISSUES, MR. SMITHERS WAS DENIED HIS RIGHTS TO COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

The jury received several instructions which constituted fundamental constitutional error and violated Mr. Smithers' rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution. The instructions the jury

received diminished their responsibility, shifted the burden of proof to Mr. Smithers to establish that he was not guilty of first degree death penalty eligible murder, and were premised on unconstitutionally vague and overbroad aggravators. The jury's death recommendations are, therefore, unreliable. The sentencing judge was required to give "great weight" to the jury's recommendations. Thus the trial court indirectly weighed the unconstitutional aggravating factors the jury is presumed to have found. Espinosa v. Florida, 112 S.Ct. 2926, 2928 (1992); Kearse v. State, 662 So.2d 677 (Fla. 1995). These errors were not harmless.

A. The jury was unconstitutionally relieved of its responsibility to determine the appropriateness of Mr. Smithers' death sentence.

In a capital case, the jurors are placed "in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice... Given such a situation, **the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role."** Caldwell v. Mississippi, 472 U.S. 320, 332-33 (1985) (emphasis added).

Defense counsel submitted an instruction which somewhat reflected the jury's solemn duty in advising the court to impose sentences of life or death. (FSC ROA Vol. II p. 186). During the penalty phase charge conference, the trial court declined to give defense counsel's requested instruction, but offered to give a

similarly worded instruction that the court wrote.

Mr. Smithers' jury was instructed:

> Okay. Ladies and Gentlemen of the jury it is now your duty to advise the Court as to what punishment should be imposed upon the defendant for the crime of murder in the first degree as to Count One of the indictment and murder in the first degree as to Count Two of the indictment.
>
> As you have been told the final decision as to what punishment shall be imposed is my responsibility. However, it is your duty to follow the law that will now be given to you by me and render to me an advisory sentence as to each count based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty or whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist. (FSC ROA Vol. XVIII p. 2329-30).
>
> **********
>
> Your advisory sentence as to what sentence should be imposed on the defendant are entitled by law to be given and will be given great weight by this court in determining what sentence to impose. It is only under rare circumstances that this court could impose a sentence other than what you recommend. (FSC ROA Vol. XVIII p. 2336-37).

On twenty three separate occasions during the penalty phase jury instruction, the jury was reminded that their verdict was merely an advisory recommendation, unconstitutionally minimizing the importance of their role in the death penalty process. (FSC ROA Vol. XVIII p. 2329-38). Counsel made no objections.

In Caldwell v. Mississippi, 472 U.S. 320 (1985), the United States Supreme

Court held that, it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere. Id. At 328-29. If the jury's responsibility for its role in determining a death sentence has been diminished, the defendant may be biased. It may likely deprive a defendant of his constitutional rights to an individualized sentencing proceeding because the jury feels that any lack of consideration will be appropriately decided by another authority. Id. At 330-1. For example, the jury might be unconvinced that death is the appropriate punishment but, nevertheless, recommend a death sentence to express disapproval for the defendant's acts or send a message to the community. Id. At 331. Moreover, a jury confronted with the truly awesome responsibility of decreeing death for a fellow human, McGautha v. California, 412 U.S. 183, 208 (1971), might find a diminution of its role and responsibility for sentencing attractive.

Caldwell, 472 U.S. at 332-33. As the Caldwell Court explained:

> In evaluating the prejudicial effect of the prosecutor's argument, we must also recognize that the argument offers jurors a view of their role which might frequently be highly attractive. A capital sentencing jury is make up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument on the issue of whether another should die, and they are asked to decide that issue on behalf of the community. Moreover, they are given only factual guidance as to how

> their judgment should be exercised, leaving them with substantial discretion. Given such a situation, the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize its role. Indeed, one could easily imagine that in a case in which the jury is divided on the proper sentence, the presence of appellate review [or judge sentencing] could effectively be used as an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless give in.
> Id. At 332-33 (emphasis supplied).

In Mann v. Dugger, 844 F.2d 1466 (11th Cir. 1988), The Eleventh Circuit Court of appeals held that the Caldwell principles apply to Florida juries. Noting that the Florida legislature intended that the sentencing jury play a significant role in the Florida death penalty sentencing scheme and the Florida Supreme Court's severe limitations on a trial judge's ability to override the jury's recommendation, the Eleventh Circuit held that the jury and trial judge are essentially dual sentencers. Id. Tedder v. State, 322 So.2d 908, 910 (Fla. 1975) The jury's sentencing verdict may be overturned by the judge only if the facts are so clear and convincing that virtually no reasonable person could differ). Thus, comments that mislead or confuse the jury as to the nature of its sentencing responsibility under Florida law result in an invalid death sentence which violates the Eighth Amendment. Id. At 1458.

Despite the federal authority, in Grossman v. State, 525 So.2d 833 (Fla. 1988), the Florida Supreme Court held that the rationale of Caldwell is inapplicable

in Florida because the judge, not the jury renders the sentence. That Court has rejected Caldwell claims in the past because, under Florida's statutory scheme, the jury render[s] an advisory sentence to the court and the trial court, notwithstanding the recommendation of a majority of the jury, enters the sentence.

Ring v. Arizona, 122 S.Ct. 2428 (2002), caused members of the Florida Supreme Court to re-examine the holding of Grossman. In Bottoson v. Moore, 833 So.2d 693 (Fla. 2002), Justice Lewis wrote:

> I write separately to express my view that in light of the dictates of Ring v. Arizona, it necessarily follows that Florida's standard penalty phase jury instruction may no longer be valid and are certainly subject to further analysis under the United States Supreme Court's Caldwell v. Mississippi , 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), holding. In Caldwell, the Supreme Court concluded it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the Defendant's death rests elsewhere. ... Following the decision in Caldwell, this Court evaluated the constitutionality of Florida's standard jury instructions.
> . . . .
> Just as the high Court stated in Caldwell, Florida's standard jury instructions minimize the jury's sense of responsibility for determining the appropriateness of death. Id., 833 So.2d at 731-34 (Lewis, J., concurring in result only)(citations omitted).

Caldwell embodies the principle stated in Justice Breyer's concurring opinion in Ring: the Eighth Amendment requires individual jurors to make, and to take responsibility for, a decision to sentence a person to death and it clearly

establishes that Mr. Smithers' death sentences violate his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Reason the claim could not have been or was not raised on appeal: Counsel did not make a contemporaneous objection, and the Florida Supreme Court has held the underlying claim has no merit in Florida.

B. The jury instructions unconstitutionally relieved the state of its burden to prove an element of the death penalty eligible offense.

Under Florida law and the death penalty scheme approved by the United States Supreme Court, a death sentence may not be imposed unless the jury is instructed:

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

State v. Dixon, 283 So.2d 1 (Fla. 1973) (emphasis added); Proffitt v. Florida, 428 U.S. 242, 251 (1976). Trial counsel submitted a proposed instruction reflecting this standard (FSC ROA Vol. II p.188-89). The proposed instruction was denied, and the court shifted this burden of proof to Mr. Smithers. Mr. Smithers' jury was instructed:

> As you have been told the final decision as to what punishment shall be imposed is my responsibility. However, it is your duty to follow the law that will now be given to you by me and render to me an advisory

> sentence as to each count based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty or whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist. (FSC ROA Vol. XVIII p. 2329-30).
>
> * * *
>
> Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances. (FSC ROA Vol. XVIII p. 2332).

The jury instruction violated the Due Process Clause of the Fourteenth Amendment of the United States Constitution because it relieved the state of its burden to prove beyond a reasonable doubt the element that "sufficient aggravating circumstances" exist which outweighed mitigating circumstances. The instruction shifted the burden of proof to Mr. Smithers to prove that the mitigating circumstances outweigh sufficient aggravating circumstances.

The Due Process clause of the Fourteenth Amendment requires the state to prove beyond a reasonable doubt every fact necessary to constitute a crime. In re Winship, 397 U.S. 358 (1970). In Florida, the existence of sufficient aggravating circumstances that outweigh the mitigating circumstances is an essential element of death-penalty-eligible first degree murder because it is the sole element that distinguishes it from the crime of first degree murder for which life is the only possible punishment. Fla. Stat. § § 775.082, 921.141. For that reason, Winship

requires the prosecution to prove the existence of that element beyond a reasonable doubt.

In Mullaney v. Wilbur, 421 U.S. 684, 698 (1975), the United States Supreme Court held that a Maine statutory scheme delineating the crimes of murder and manslaughter violated the Due Process Clause of the Fourteenth Amendment. Id. The Maine law at issue required a defendant to establish, by a preponderance of the evidence, that he acted in the heat of passion on sudden provocation, in order to reduce a charge of murder to manslaughter. Id. The Court held that the statutory scheme unconstitutionally relieved the state of its burden to prove the element of intent. Id. In Sandstrom v. Montana, 442 U.S. 510 (1979), the United States Supreme Court held that a Montana jury instruction: the law presumes a person intends the ordinary consequences of his voluntary acts, created the unconstitutional presumption explained in Mullaney because it shifted the burden of proof to the defendant to prove he lacked the mental state necessary to constitute the crime charged. Id. The instructions to Mr. Smithers' jury produced the same fatal flaw.

To comply with the Eighth Amendment's requirement that the death penalty be applied only to the worst offenders, Florida adopted Statute 921.141 as a means of distinguishing between death-penalty eligible and non-death-penalty eligible murder. State v. Dixon, 283 So.2d 1, 10 (Fla.1973). Florida chose to distinguish

those for whom "sufficient aggravating circumstances outweigh mitigating circumstances from those for whom "sufficient aggravating circumstances do not outweigh the mitigating circumstances. Id.; Fla. Stat. § 921.141. Because the former are more culpable, they are subjected to the most severe punishment: death. By drawing this distinction, while refusing to require the prosecution to establish beyond a reasonable doubt the fact upon which it turns, [Florida] denigrates the interests found critical in Winship. Mullaney v. Wilbur, 421 U.S. 684, 698 (1975). Accordingly, Mr. Smithers' death sentences are unconstitutional.

Reason the claim could not have been or was not raised on appeal: The Florida Supreme Court has held the underlying claim has no merit in Florida.

C. The heinous, atrocious or cruel jury instruction was unconstitutionally vague and broad, violating Mr. Smithers' Eighth and Fourteenth Amendment Rights.

Mr. Smithers' jury was given the following instruction regarding the heinous, atrocious or cruel aggravating element:

> Two, the crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel.
>
> Heinous means extremely wicked or shockingly evil.
>
> Cruel means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others.
>
> The kind of crime intended to be included as heinous, atrocious or cruel is one accompanied by

> additional acts that show the crime was consciousless, pitiless and unnecessarily torturous to the victim.

(FSC ROA Vol. XVIII p.2330-31).

* * *

> Counsel have pointed out that I may have left out a sentence when I instructed you. I'll re-instruct you on the aggravating circumstance of heinous, atrocious and cruel and it reads as follows:
>
> The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel. Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. Cruel means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others.
>
> The kind of crime intended to be included as heinous, atrocious or cruel is one accompanied by additional acts that show the crime was consciousless, pitiless and unnecessarily torturous to the victim.

(FSC ROA Vol. XVIII p. 2339).

A state cannot use such aggravating factors "which as a practical matter fail to guide the sentencer's discretion." Stringer v. Black, 503 U.S. 527 (1992). If an aggravating circumstance "applies to every defendant eligible for the death penalty, the circumstance is constitutionally infirm." Arave v. Creech, 507 U.S. 463, 474 (1993). Moreover, "it is not enough for an aggravating circumstance, as construed by the state courts, to be determinate. Our precedents

make clear that a State's capital sentencing scheme also must `genuinely narrow the class of persons eligible for the death penalty.'" Arave, 507 U.S. at 474 quoting Zant v. Stephens, 462 U.S. 862, 877 (1983)). Nevertheless, the heinous atrocious or cruel instruction Mr. Smithers' jury received was nothing more than a conglomeration of language the United States Supreme Court had held to be unconstitutional to support a death sentence. It gave no discernable content to the aggravating element and violated the Eighth and Fourteenth Amendments because it was unconstitutionally vague.

The United States Supreme Court has addressed the vague and overbroad especially heinous, atrocious or cruel aggravating element and other similar vague and overbroad aggravating elements in a number of cases. In Godfrey v. Georgia, 446 U.S. 420 (1980), the Court held that a death sentence based upon an aggravating circumstance that the offense was outrageously or wantonly vile, horrible and inhuman was unconstitutionally overbroad. Id. at 428. There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as outrageously or wantonly vile, horrible and inhuman'. Godfrey, 486 U.S. 1764-65. In Maynard v. Cartwright, 486 U.S. 356, 361-64 (1988), the Court deemed the aggravator especially heinous, atrocious or cruel, when given with no limiting instructions,

unconstitutionally vague. Id. In Cartwright, the United States Supreme Court held:

> the language of the Oklahoma aggravating circumstance at issue--especially heinous, atrocious, or cruel gave no more guidance than the outrageously or wantonly vile, horrible or inhuman language that the jury returned in its verdict in *Godfrey* To say that something is especially heinous merely suggests that the individual jurors should determine that the murder is more than just heinous, whatever that means, and an ordinary person could honestly believe that every unjustified taking of a human life is especially heinous. *Godfrey*, *supra*, at 428-429, 100 S.Ct. at 1764-1765. Likewise, in *Godfrey* the addition of "outrageously or wantonly to the term vile did not limit the overbreadth of the aggravating factor. Cartwright, 486 U.S. at 364. In Shell v. Mississippi, 498 U.S. 1 (1990), the jury received the following limiting instruction regarding the especially heinous, atrocious or cruel aggravator:
>
> [T]he word heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with indifference to, or even enjoyment of[,] the suffering of others.

Id. at 2. The United States Supreme Court held that the limiting instruction was not constitutionally sufficient. Id. at 1. This instruction was essentially the instruction Mr. Smithers'jury received.

The instructions given to the jury in this case were words that are hopelessly ambiguous and could be understood to apply to any murder. Evil is commonly defined as morally reprehensible, sinful, and wicked. Merriam-Webster online, http://www.m-w.com/cgi-bin/dictionary (2002). Wicked is commonly defined as

morally very bad, evil, and vile. Merriam-Webster online, http://www.m-w.com/cgi-bin/dictionary (2002). Vile is commonly defined as morally despicable or abhorrent and disgustingly or utterly bad. Merriam-Webster online, http://www.m-w.com/cgi-bin/dictionary (2002). Using this instruction, the jury could have recommended a death sentence if they found the murder to be morally very bad. The instruction did nothing to guide by clear, objective, and specific standards, because a person of ordinary sensibility could fairly characterize every murder as morally very bad. Godfrey, 486 U.S. 1764-65; Cartwright, 486 U.S. at 364; Shell, 498 U.S. at 1. [2]

Mr. Smithers'sentencing jury is presumed to have found this aggravator established. Espinosa v. Florida, 112 S. Ct. 2926, 2928 (1992). Under these circumstances, erroneous instruction presumably tainted the jury's recommendation and, in turn, the judge's death sentence in violation of the Eighth and Fourteenth Amendments. Espinosa, 112 S.Ct. 2926.

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[2]Nor is it of any consequence that the trial court defined cruel in an *arguably* more concrete fashion than heinous and atrocious. Cf. Walton v. Arizona, supra, 497 U.S. at 655, 110 S.Ct. at 3058 (approving instruction equating cruel with infliction of mental anguish or physical abuse). It has long been settled that when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction [or verdict] be set aside. Shell, 498 U.S. at 3 (Marshall, J concurring) quoting Leary v. United States, 395 U.S. 6, 31-32 (1969)(emphasis added). Even assuming that the trial court permissibly defined cruel, the instruction in this case left the jury with two constitutionally infirm alternative bases on which to find that Mr. Smithers committed the charged murder in an especially heinous, atrocious *or* cruel fashion. Id.

Reason the claim could not have been or was not raised on appeal: Counsel did not make a contemporaneous objection, and the Florida Supreme Court has held the underlying claim has no merit in Florida.

D. The cold, calculated and premeditated jury instruction was unconstitutionally vague and broad, violating Mr. Smithers' Eighth and Fourteenth Amendment Rights.

23. Mr. Smithers' jury was given the following instruction regarding the cold, calculated and premeditated element:

> Three, the crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.
>
> Cold means the murder was a product of calm and cool reflection.
>
> Calculated means having a careful plan or prearranged design to commit murder.
>
> A killing is premeditated if it occurs after the defendant consciously decides to kill. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing.
>
> However,in order for this aggravating circumstance to apply, a heightened level of premeditation demonstrated by a substantial period of reflection is required.
>
> A pretense of moral or legal justification is any

> claim of justification though insufficient to deduce [sic] the degree of murder nevertheless rebuts the cold, calculated or premeditated nature of the murder.

(FSC ROA Vol. XVIII p. 2331-32).

A state cannot use such aggravating factors which as a practical matter fail to guide the sentencer's discretion." Stringer v. Black, 503 U.S. 527 (1992). If an aggravating circumstance "applies to every defendant eligible for the death penalty, the circumstance is constitutionally infirm." Arave v. Creech, 507 U.S. 463, 474 (1993). Moreover, "it is not enough for an aggravating circumstance, as construed by the state courts, to be determinate. Our precedents make clear that a State's capital sentencing scheme also must 'genuinely narrow the class of persons eligible for the death penalty.'" Arave, 507 U.S. at 474 quoting Zant v. Stephens, 462 U.S. 862, 877 (1983).

This instruction clearly did not guide the jury's discretion. During the penalty phase deliberation, the jury asked the court to distinguish heightened premeditation from the ordinary premeditation that is required to convict a person of first degree murder.

> There is a written question reads as follows: Difference between, difference been or I don't understand this. Difference between or premeditated and a heightened level of premeditation, signed by Donald Danburry.

(FSC ROA Vol. XVIII p. 2342). The court informed the jury that they had to rely

on the instructions given without further guidance (FSC ROA Vol. XVIII p. 2343-45). The jury then asked for a legal dictionary, presumably to get the answer to their question regarding the difference between heightened premeditation and regular premeditation, which they necessarily found when finding Mr. Smithers guilty of two counts of premeditated first degree murder and, again, the court refused to give the jury further guidance (FSC ROA Vol. XVIII p.2345-46).

Because this aggravating factor "as a practical matter fail[ed] to guide the sentencer's discretion" Stringer v. Black, 503 U.S. 527 (1992), it did not genuinely narrow the class of persons eligible for the death penalty", and Mr. Smithers' death sentences therefore violate the Eighth and Fourteenth Amendments to the United States Constitution. Arave, 507 U.S. at 474 see also Godfrey v. Georgia, 446 U.S. 420 (1980); Maynard v. Cartwright, 108 S. Ct. 1853 (1988); Zant v. Stephens, 462 U.S. 862, 876 (1983; Espinosa v. Florida, 112 S. Ct. 2926 (1992); Stringer v. Black, 112 S. Ct. 1130 (1992); Sochor v. Florida, 112 S. Ct. 2114 (1992); Maynard v. Cartwright, 108 S. Ct. 1853 (1988).

Reason the claim could not have been or was not raised on appeal: Counsel did not make a contemporaneous objection, and the Florida Supreme Court has held the underlying claim has no merit in Florida.

Conclusion

Two of the three aggravating element instructions the jury received were

constitutionally flawed, the court unconstitutionally shifted the burden of proof of an element of the offense to Mr. Smithers, and led the jury to believe that responsibility for the sentencing decision rested elsewhere. Mr. Smithers was denied a reliable and individualized capital sentencing determination in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. To the extent trial counsel did not litigate and preserve these issues, Mr. Smithers did not receive the assistance of counsel to which he was entitled under the Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

CLAIM III

FLORIDA'S CAPITAL SENTENCING SCHEME WAS UNCONSTITUTIONAL AS APPLIED, DENYING MR. SMITHERS HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. TO THE EXTENT TRIAL COUNSEL FAILED TO LITIGATE THESE ISSUES, MR. SMITHERS WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO COUNSEL.

This claim is evidenced by the following:

In Ring v. Arizona, 122 S.Ct. 2428 (2002), the United States Supreme Court held that the Arizona statute pursuant to which, following a jury adjudication of a defendant's guilt of first-degree murder, the trial judge, sitting alone, determines the presence or absence of the aggravating factors required by Arizona law for

imposition of the death penalty, violates the Sixth Amendment right to a jury trial in capital prosecutions; receding from Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047 (1990). If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact--no matter how the State labels it--must be found by a jury beyond a reasonable doubt. A defendant may not be exposed to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone. The Court noted that the right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a noncapital defendant's sentence by a term of years, as was the case in Apprendi, but not the fact-finding necessary to put him to death. Ring, 122 S.Ct. at 2243.

CLAIM IV

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

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

sheer number and types of errors in Mr. Smithers' guilt and penalty phases, when considered as a whole, virtually dictated the sentence of death. While there are means for addressing each individual error, addressing these errors on an individual basis will not afford adequate safeguards required by the Constitution against an improperly imposed death sentence. Repeated instances of ineffective assistance of counsel, flawed jury instructions, and an unconstitutional process significantly tainted Mr. Smithers' capital proceedings. Additionally, in Smithers v. State, 826 So.2d 916 (Fla. 2002) this Court found: We agree with Smithers that the trial court erred in holding the pretrial motion in limine hearing in his absence without an express written waiver. Nevertheless, we find the error harmless Id. At 928. The direct appeal Court further held:

> In *Shellito v. State, 701 So.2d 837, 842 (Fla. 1997)*, this Court stated that lack of remorse is a nonstatutory aggravating circumstance and cannot be considered in a capital sentencing. However, the Court further stated that the brief reference to lack of remorse was of minor consequence and constituted harmless error. *Id*
> Similarly, in the instant case, Dr. Stein's brief reference to lack of remorse was of minor consequence, especially in light of the fact that the State did not mention lack of remorse in its closing argument. Hence the trial court did not abuse its discretion in denying Smithers' motion for mistrial. Id. At 930-31.

The improper reference to racial bias, the improper voir dire of Juror Collins, the failure to conduct a proper investigation into Smithers' psychotic episodes and the failure of counsel to properly rebut the inference of drowning by hiring an

independent medical examiner in addition to the errors on direct appeal; all of these errors deprived Mr. Smithers of a fair adversarial testing of the evidence in both guilt and penalty phase. When considered in the aggregate, these errors cannot be harmless. Under Florida case law, the cumulative effect of these errors denied Mr. Smithers his fundamental rights under the Constitution of the United States and the Florida Constitution. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986); Ray v. State, 403 So. 2d 956 (Fla. 1981); Taylor v. State, 640 So. 2d 1127 (Fla. 1st DCA 1994); Stewart v. State, 622 So. 2d 51 (Fla. 5th DCA 1993); Landry v. State, 620 So. 2d 1099 (Fla. 4th DCA 1993), Penalver v. State, 926 So.2d 1118 (Fla. 2006)..

Reason the claim could not have been or was not raised on appeal: This claim did not exist prior to postconviction proceedings.

CLAIM V

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

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

The same holding exists under federal law. Poland v. Stewart, 41 F. Supp. 2d 1037 (D. Ariz 1999) (such claims truly are not ripe unless a death warrant has been issued and an execution date is pending); Martinez-Villareal v. Stewart, 118 S. Ct. 1618, 523 U.S. 637, 140 L.Ed.2d 849 (1998)(respondent's Ford claim was dismissed as premature, not because he had not exhausted state remedies, but because his execution was not imminent and therefore his competency to be executed could not be determined at that time); Herrera v. Collins, 506 U.S. 390, 113 S. Ct. 853, 122 L.Ed.2d 203 (1993)(the issue of sanity [for Ford claim] is properly considered in proximity to the execution).

However, most recently, in In RE:Provenzano, No. 00-13193 (11th Cir. June

21, 2000), the 11th Circuit Court of Appeals has stated:

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

Stewart v. Martinez-Villareal does not conflict with Medina's holding that a competency to be executed claim not raised in the initial habeas petition is subject to the strictures of 28 U.S.C. Sec 2244(b)(2), and that such a claim cannot meet either of the exceptions set out in that provision. Id. at pages 2-3 of opinion

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

The defendant has been incarcerated since [1997]. 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.

Reason this claim could not have been raised on direct appeal:

This claim is unripe for review until a death warrant is signed.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Smithers 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** of Petitioner has been furnished by United States Mail, first class postage prepaid, to all counsel of record on May ___, 2008.

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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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