IN THE SUPREME COURT OF FLORIDA
CASE NO. SC07-_____

MAURICE LAMAR FLOYD,
Appellant,

vs.

THE STATE OF FLORIDA,
Appellee
_____/

PETITION FOR WRIT OF HABEAS CORPUS
TO THE CIRCUIT COURT OF THE
SEVENTH JUDICIAL CIRCUIT,
IN AND FOR PUTNAM COUNTY, FLORIDA

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William J. Bowers and Wanda D. Foglia, "Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing." Criminal Law Bulletin 39:51-86 (2003)16

PRELIMINARY STATEMENT

Article l, Section 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and corresponding provisions of the Florida Constitution. These claims demonstrate that Mr. Floyd 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.

The record on the appeal from the post-conviction motion hearing is in two parts, the original record which omitted the transcripts of the hearings, and a supplement consisting of the transcripts. The original record will cited as AROA [VOL #] [page #],@ e.g AROA IV 12-14.@ The supplement will be cited as AROA-S [VOL #] [page #].@ References to the record on appeal in the direct appeal will be cited as AROA 2002 [VOL #] [page #].@

REQUEST FOR ORAL ARGUMENT

The resolution of the issues in this action and of the Rule 3.851 appeal brought simultaneously pursuant to Florida Rule of Criminal Procedure 3.851(d)(3) will determine whether Mr. Floyd lives or dies. This Court has allowed oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues

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

INTRODUCTION

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

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

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

this petition will demonstrate, Mr. Floyd is entitled to habeas relief.

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Florida Rule of Appellate Procedure 9.100(a). See Article I, Section 13, Florida Constitution. This Court has original jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(a)(3) and Article V, Section 3(b)(9), Florida Constitution. The Petition presents constitutional issues which directly concern the judgments of this Court during the appellate process and the legality of Mr. Floyd's sentence of death.

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

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

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

GROUNDS FOR HABEAS CORPUS RELIEF

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

This Court affirmed Mr. Floyd's conviction and sentence to death on direct appeal. *Floyd v. State*, 850 So.2d 383 (Fla. 2003). Mr. Floyd timely filed his Motion for Post-Conviction Relief pursuant to Florida Rule of Criminal Procedure 3.851 on January 10, 2005. The post-conviction court denied all relief January 31, 2007. His appeal of that denial is before this Court and this petition is filed simultaneously pursuant to Florida Rule of Criminal Procedure 3.851(d)(3).

CLAIM I

MR. FLOYD WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF HIS MENTAL HEALTH EXPERT AT TRIAL.

Counsel=s deficiencies on this claim violated Mr. Floyd=s Fifth, Sixth, Eighth, and Fourteenth Amendment rights under the United States Constitution and his corresponding rights under the Florida Constitution. At the hearing, Dr. Krop was unable to recall anything about his evaluation of Mr. Floyd, other than to confirm his authorship of certain correspondence and the apparent truthfulness of those letters. ROA-S II 312. The fact that he lost Mr. Floyd=s file, when he takes special measures to preserve death penalty files, is indicative of the lack of care and diligence devoted to Mr. Floyd=s case. Dr. Krop found a learning disability which, as argued in the appeal file contemporaneously with this Petition, is a nonstatutory mitigating factor. That alone refutes his revised and final letter to Mr. Withee opining that no mitigation existed in this case B obviously a ACYA@ letter for all involved. ROA-S II 310-47.

The judge in his Amended Order Denying Relief held that this claim, pursuant to *Ake v. Oklahoma*, 470 U.S. 68 (1985), had to have been raised on direct appeal and was procedurally barred for collateral review. To the extent that the Order could be construed to be correct, appellate counsel was ineffective for failing to raise the issue on direct appeal. The mere fact that absolutely no mental health mitigation

was offered in the penalty phase might have triggered a claim. However, no mental health mitigation was discovered or in the record until the evidentiary hearing, suggesting the matter could not possibly have been raised on direct appeal, and commending review of this claim to the appeal from the post-conviction hearing.

CLAIM II

CUMULATIVELY, THE COMBINATION OF PROCEDURAL AND SUBSTANTIVE ERRORS DEPRIVED MR. FLOYD 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. Floyd did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments. *Derden v. McNeel,* 938 F.2d 605 (5th Cir. 1991) The sheer number and types of errors in Mr. Floyd=s 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. As discussed in this motion and as will be proved at an evidentiary hearing, repeated instances of ineffective assistance of counsel, flawed jury instructions, and an unconstitutional process significantly tainted Mr. Floyd=s capital proceedings. These errors cannot be harmless.

The cumulative effect of these errors denied Mr. Floyd his fundamental rights

under the Constitution of the United States and the Florida Constitution. *Ray v. State*, 403 So. 2d 956 (Fla. 1981); *Stewart v. State*, 622 So. 2d 51 (Fla. 5th DCA 1993). *Heath v. Jones*, 941 F.2d 1126 (11th Cir. 1991).

In *Jones v. State*, 569 So.2d 1234 (Fla. 1990), this Court vacated a capital sentence and remanded for a new sentencing proceeding before a jury because of "**cumulative errors** affecting the penalty phase." *Id*. at 1235 (emphasis added). In *Nowitzke v. State*, 572 So.2d 1346 (Fla. 1990), cumulative prosecutorial misconduct was the basis for a new trial.

> [E]ven though there was competent substantial evidence to support a verdict ... and even though each of the alleged errors, standing alone, could be considered harmless, the cumulative effect of such errors was such as to deny to defendant the fair and impartial trial that is the inalienable right of all litigants in this state and this nation.

Seaboard Air Line R.R. Co. v. Ford, 92 So.2d 160, 165 (Fla.1956) (on rehearing); *see also, e.g., Alvord v. Dugger*, 541 So.2d 598, 601 (Fla.1989) (harmless error analysis reviewing the errors "both individually and collectively"), *cert. denied*, 494 U.S. 1090, 110 S.Ct. 1834, 108 L.Ed.2d 963 (1990); *Jackson v. State*, 498 So.2d 906, 910 (Fla.1986) ("the combined prejudicial effect of these errors effectively denied appellant his constitutionally guaranteed right to a fair trial").

The Supreme Court has consistently emphasized the uniqueness of death as a criminal punishment. Death is "an unusually severe punishment, unusual in its pain, in its finality, and in its enormity." *Furman v. Georgia*, 408 U.S. 238, 287 (1972) (Brennan, J., concurring). It differs from lesser sentences "not in degree

but in kind. It is unique in its total irrevocability." *Id*. at 306 (Stewart, J., concurring). The severity of the sentence "mandates careful scrutiny in the review of any colorable claim of error." *Zant v. Stephens*, 462 U.S. 862, 885 (1983). Accordingly, the cumulative effects of error must be carefully scrutinized in capital cases. A series of errors may accumulate a very real, prejudicial effect. The burden remains on the state to prove beyond a reasonable doubt that the individual and cumulative errors did not affect the verdict and/or sentence. *Chapman v. California*, 386 U.S. 18 (1967); *State v. DiGuilio*, 491 So.2d 1129 (Fla. 1986).

CLAIM III

MR. FLOYD'S CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN HE WAS SHACKLED IN FRONT OF THE JURY AT TRIAL

To the extent that the shackling claim raised in the contemporaneously filed appeal from the post-conviction proceeding could in any way be construed to have been required to have been raised on direct appeal, Mr. Floyd adopts and incorporates all elements of the claim made on this issue in the contemporaneous appeal and urges that relief is appropriate under any possible procedural approach.

CLAIM IV

APPELLATE COUNSEL FAILED TO ATTACK THE FACIALLY INADEQUATE QUALIFICATION OF THE CHILD WITNESS.

The only eyewitnesses to the shooting were the victim=s grandchildren, Jeritz Jones (AJ.J.@) (seven at the time of the shooting, eight at trial), and LaJade Evans (six at the time of the shooting and trial). *Floyd*, 850 So.2d at 189,nn.5 & 7. They testified at trial that they saw the events surrounding the shootings, and identified Mr. Floyd as the shooter. Multiple instances of the three identifications J.J. made the night of the murder were introduced without objection to their cumulative effect and prejudice.

Before these critical witnesses testified, the trial court conducted an

entirely inadequate examination of the children and made facially insufficient determinations of their competence to testify.

This Court specifically noted the lack of objection to the qualification of the children as witnesses, a fact not necessary for any of its holdings. Floyd, 850 So.2d at 389, nn. 5 & 7 (The judge questioned J.J., then, "After the trial judge indicated that he was prepared to have J.J. sworn as a witness, the defense voiced no objection."; "After the trial judge and the State asked qualifying questions, LaJade was sworn as a witness. The defense did not object.")

This Court has long recognized the necessity of protections to guarantee due process when a child is a witness in a criminal proceeding.

After the parties have developed the factual basis for a determination of competency through pretrial discovery and voir dire, the trial court is obliged to make specific findings of fact to justify a finding of competency. In *Wade v. State*, 586 So.2d 1200 (Fla. 1st DCA 1991), the court explained the factors which the trial court must address with specific findings of fact:

> We reverse on the authority of *Griffin v. State*, 526 So.2d 752 (Fla. 1st DCA 1988). In Griffin this Court held that before finding a child competent to testify, "the trial court should consider (1) whether the child is capable of observing and recollecting facts, (2) whether the child is capable of narrating those facts to the court or to a jury, and (3) whether the child has a moral sense of the obligation to tell the truth." Id. at 753 (citing Lloyd v. State, 524 So.2d 396 (Fla.1988), and sections 90.603(2) and 90.605(2), Florida Statutes (1985)). In this case, as in Griffin, the competency determination was of increased significance because the critical facts are totally dependent on the child's ability to observe and recollect.

Wade, 586 So.2d at 1203. The voir dire of the child in Wade was far more extensive than the perfunctory and desultory voir dire in this case. If the lengthy voir dire in Wade was inadequate, then surely the voir dire of the children in this case falls even further below constitutional propriety. It was apparent on the record and should have been raised in the direct appeal.

One of the grounds for reversal in Wade was "troubling contradictions in the child's out-of-court statements and the testimony in court, reflecting not only on her credibility but also on the reliability and competence of her testimony." Wade, 586 So.2d at 1204. There are multiple contradictions as well in this case, discussed in detail in the contemporaneously filed brief on appeal from the post-conviction evidentiary hearing..

The judge in this case made no findings to support competency of the child witnesses in this case. His ruling as to LaJade was conclusory and without findings of facts: "I'm comfortable that she is properly qualified for her age to give testimony." ROA 2002 IX 1701. His ruling as to J.J. was even more remarkable, constituting no ruling whatsoever: "I'm prepared to him to have sworn [sic]." ROA 2002 IX 1726.

Regarding the ruling on LaJade's competency, a strikingly similar case shows the ruling here to be constitutionally infirm. The First District found that the trial court's ruling in that case that "the child was competent to testify ›within the

confines of what was reasonable for a four-year-old'" was insufficient. *Griffin v. State*, 526 So.2d 752, 755 (Fla. 1st DCA 1988). The judge in this case made the same vague and nonspecific finding of competence for LaJade Evans, "I'm comfortable that she is properly qualified for her age to give testimony." ROA 2002 IX 1701. In other words, both judges made a conclusory and qualified determination that, for her age, a child witness was competent.

The child in *Griffin* was asked the de minimis litany of questions "consistent with those questions employed in other jurisdiction admitting the unsworn testimony of children." *Id*. at 755. That litany was characterized by the court thus:

> [J]urisdictions which, like Florida, admit a child's unsworn testimony, usually employ a series of simple, direct questions to determine the child's competency. For example, "[c]hildren are often asked their names, where they go to school, how old they are, whether they know who the judge is, whether they know what a lie is, and whether they know what happens when one tells a lie."

Griffin, 526 So.2d at 754.

In *Griffin*, the examination was inadequate:

> In the instant case, apparently on the basis of the de minimis competency examination conducted at the beginning of the child's videotaped deposition, the trial court found the child was competent to testify "within the confines of what is reasonable for a four-year-old." This finding does not satisfy the criteria set forth in section 90.605(2), which require the trial court to determine whether "the child understood the duty to tell the truth or the duty not to lie." In interpreting this statute, Florida courts have held that it is the duty of the trial court to determine whether the child was capable of observing, recollecting, and narrating facts, and whether the child had a moral sense of the duty to tell the truth. In fulfilling that duty, the trial court may examine the child personally, or may determine the

> child's competency on the basis of the examination conducted by the attorneys. In addition, in applicable circumstances, the trial court may rely on the testimony and reports prepared by experts regarding the child's ability to testify. See, generally, *Lloyd v. State*, 524 So.2d at 400.

Griffin, 526 So.2d 755-56 (emphasis added). The absence of any ruling on J.J.'s competence is even more egregious.

The rulings on competence in this case were facially inadequate and should have been attacked on direct appeal.

CLAIM V

ANY CLAIMS RAISED IN THE 3.851 MOTION WHICH SHOULD HAVE BEEN RAISED BY A PETITION FOR A WRIT OF HABEAS CORPUS SHOULD BE CONSIDERED IN THIS PROCEEDING, CONTEMPORANEOUS AND COLLATERAL TO THE APPEAL FROM THE 3.851 PROCEEDING.

To the extent that any other matter raised in the post-conviction proceeding and the appeal therefrom which accompanies this Petition may in any way be deemed not cognizable because it should have been raised on direct appeal, Mr. Floyd adopts all facts and argument relating to that claim and incorporates same herein.

Historically, Florida Rule of Criminal Procedure 3.850 derived from the old ARule 1" which was a substitute for a habeas corpus petition for administrative convenience of the courts. As such, Rule 3.850 and its offspring, Rule 3.851, are

in essence ARule Habeas Corpus@ proceedings. The distinction between claims cognizable under a ARule Habeas Corpus@ motion and a true Habeas Corpus Petition, while serving certain administrative ends, should be deemed a distinction without a difference if it results in the denial of relief because the defendant chose the wrong seat the habeas corpus vehicle to sit in. The courts are obliged to construe any pleading so as to give it effect, regardless of how the pleading is labeled.

In this procedural stance, a capital defendant is required to file an appeal from the denial of his post-conviction 3.851 motion and, simultaneously, a petition for a writ of habeas corpus which would encompass any claims of ineffective assistance of appellate counsel.

A capital 3.851 post-conviction motion has its historic roots in equitable habeas corpus relief. All equitable claims are deemed to include a general plea for relief. The equitable remedy of 3.851 is limited to those matters deemed cognizable under that rule, with all other forms of equitable relief falling outside the penumbra of the 3.851 equity umbrella to be raised under the larger umbrella which includes the old equitable writs. The appellate record provides all the Court needs to resolve a claim such as this under the standards for habeas petitions. A habeas petition does not provide for an evidentiary hearing, so there is nothing which could be added to the record to resolve whether appellate counsel was ineffective for failing to raise a matter on appeal which was raised in the 3.851

motion, reached on the merits by the 3.851 trial court, and taken up on appeal in that stance. If a claim in the 3.851 proceeding should have been raised in the habeas petition, nothing except a compulsive adherence to form over substance prevents a full review of the claim as a habeas claim.

CLAIM VI

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

In accordance with 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 petitioner acknowledges that, under Florida law, a claim of incompetency to be executed cannot be asserted until a death warrant has been issued. Further, the petitioner acknowledges that before a judicial review may be held in Florida, the petitioner must first submit his claim in accordance with Florida Statutes. The only time a prisoner can legally raise the issue of his sanity to be executed is after the Governor issues a death warrant. Until the death warrant is signed the issue is not ripe. This is established under Florida law pursuant to Section 922.07, Florida Statutes (2007) and *Martin v. Wainwright*, 497 So.2d 872 (1986) ("If Martin's counsel wish to pursue this claim, we direct them to initiate the

sanity proceedings set out in section 922.07, Florida Statutes").

The same holding exists under federal law. *Poland v. Stewart*, 41 F. Supp. 2d 1037 (D.C. Ariz. 1999) (such claims truly are not ripe unless a death warrant has been issued and an execution date is pending); *Stewart v. Martinez-Villareal*, 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. 2000), the Eleventh Circuit Court of Appeals has stated:

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

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

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

The petitioner has been incarcerated since 1998. Statistics have shown that an individual incarcerated over a long period of time will diminish his mental capacity. The evidence adduced at the evidentiary hearing, discussed in the appeal from the post-conviction proceeding contemporaneously before this Court, shows Mr. Floyd has suffered impaired mental health since childhood. Inasmuch as the defendant may well be incompetent at time of execution, his Eighth Amendment right against cruel and unusual punishment will be violated.

CLAIM VII

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

Appellate counsel was ineffective for failing to raise the issue that Florida's rule prohibiting counsel from interviewing jurors violates equal protection and due process rights, and the First, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

To the extent defendants' counsel are treated differently from academics, journalists and other non-lawyers who are not subject to the Rules Regulating the Florida Bar, there is a violation of defendants' rights to equal protection as the concept is enunciated in *Bush v. Gore*, 531 U.S. 98 (2000). See William J. Bowers and Wanda D. Foglia, "Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing." Criminal Law Bulletin 39:51-86 (2003).

The petitioner notes that a new procedural rule regarding juror interviews has been established effective on January 1, 2005. Florida Rule of Criminal Procedure 3.575 provides as follows:

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

The thrust of the argument is that Florida's restrictions on post-trial juror interviews is an equal protection violation as enunciated in *Bush v. Gore*. Criminal

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

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

Additionally, journalists are permitted without restriction to interview jurors post-trial. See, e.g., Chris Tisch, "Defense Fears Comments Affect Verdict;" St. Petersburg Times, Oct. 25, 2004 (available at http://www.sptimes. com/advancedsearch.html), where the jury foreman of a murder trial is interviewed about the jury's deliberations.

Lastly, Florida Rule of Criminal Procedure 3.575 and Rule Regulating the Florida Bar 4-3.5(d)(4) only apply to cases "with which the lawyer is connected."

Hence, lawyers not connected with a case are treated differently because the rule does not apply to them.

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

CONCLUSION AND RELIEF SOUGHT

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief has been furnished to the Barbara Davis as designated below by mail on October 9, 2007.

_____
David R. Gemmer

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

_____
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