IN THE SUPREME COURT OF FLORIDA

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No. SC

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**FRED ANDERSON, JR.,**
*Petitioner*

**versus,**

**WALTER A. MCNEIL,**
**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. Anderson 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.

Citations shall be as follows: The record on appeal from Mr. Anderson's trial proceedings shall be referred to as "TR" followed by the appropriate volume and page numbers. All other references will be self-explanatory or otherwise explained herein.

## REQUEST FOR ORAL ARGUMENT

Mr. Anderson 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. Anderson, through counsel, requests the Court to permit oral argument.

## INTRODUCTION

Significant errors which occurred at Mr. Anderson'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. Anderson. "[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 claims appellate counsel omitted establish that "*confidence* in the correctness and fairness of the result has been undermined." Wilson, 474 So.2d at 1165 (emphasis in original). As this petition demonstrates, Mr. Anderson is entitled to habeas relief.

## PROCEDURAL HISTORY

On March 20, 1999 Fred Anderson was arrested and was subsequently charged in a five count indictment with Burglary of a Structure, Grand Theft with a Firearm, Armed Robbery, Attempted First Degree Murder, and First Degree Murder. TR Vol I, p. 6. The Public Defender of the Fifth Judicial Circuit was appointed on March 21, 1999. TR Vol I, p. 5. On April 1, 1999, William H. Stone of the public defender's office filed a written plea of not guilty, and a notice of discovery. TR Vol I, p. 8. Mr. Anderson's trial began on September 25, 2000 and concluded on October 3, 2000. The penalty phase began on October 5, 2000 and concluded on that same day. The jury recommended death by a vote of 12-0. The Spencer Hearing took place on December 8, 2000, and the trial court sentenced Mr. Anderson to death on January 11, 2001.

Mr. Anderson filed a timely Notice of Appeal. Appellate counsel filed a brief raising nine issues: (1) the trial court erred in finding CCP as an aggravating circumstance; (2) the trial court erred in finding pecuniary gain as an aggravating circumstance; (3) the death penalty is disproportionate; (4) the trial court erred in considering and weighing mitigating evidence; (5) the trial court erred in allowing testimony with respect to blood stain pattern analysis; (6) the trial court erred in denying Anderson's motion to suppress; (7) the trial court erred in admitting

photographs of victim Marisha Scott; (8) the cumulative effect of an improper comment by a forensic serologist and an improper comment by the prosecutor in closing argument violated Anderson's right to a fair trial; (9) Florida's death penalty scheme is unconstitutional in light of the Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466 (2000).

This Court found that (1) the trial court's finding of CCP was supported by competent, substantial evidence; (2) the trial court's finding of pecuniary gain as an aggravating factor was supported by competent, substantial evidence; (3) death was a proportionate penalty in this case; (4) the trial court did not abuse its discretion in weighing mitigating evidence; (5) the argument advanced against expert testimony was not properly preserved and that the trial court did not abuse its discretion in allowing the expert to testify; (6) the argument against the use of Mr. Anderson's confession was not preserved for review and that the trial court properly denied the motion to suppress; (7) the trial court did not abuse its discretion in admitting the photographs of Marisha Scott into evidence; (8) the trial court's curative instruction was sufficient to correct any potential misconception about the serologist's testimony, that the denial of the motion for mistrial was not an abuse of discretion, and that the improper comment by the prosecutor during closing arguments did not approach the level of improper comments requiring the

granting of relief; and (9) Apprendi and Ring did not entitle Mr. Anderson to relief. Anderson v. State, 863 So.2d 169 (Fla. 2003).

## 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. Anderson'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. Anderson'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. Wainwright, 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. Anderson 's claims.

## GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Anderson 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 MERITORIOUS ISSUES WHICH WARRANT REVERSAL OF MR. ANDERSON'S CONVICTIONS AND SENTENCES

### A. Introduction

Appellate counsel had the "duty 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 "whether 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 "down 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 "serious and substantial deficiencies" which individually and "cumulatively" establish that "confidence 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 "constitutional 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 "did 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.

## B. Appellate Counsel Failed to Raise on Appeal the Trial Court's Improper Denial of the Motion to Change Venue

*i. Failure to Appeal Denial of Motion*

The right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, indifferent jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. Irvin v. Dowd, 366 U.S. 717, 722 (U.S. 1961). In Irvin, the Supreme Court overturned a murder conviction and death sentence, and in so doing detailed the clear and convincing evidence of pretrial prejudice which built up against the defendant. Id. At 725-7.

The 11th Circuit Court of Appeals has detailed the prejudice standard for requiring that a motion for change of venue be granted. A defendant in entitled to a change of venue if he can demonstrate either actual prejudice or presumed prejudice. Meeks v. Moore, 216 F.3d 951, 961 (11th Cir. 2000). Actual prejudice requires a showing that one or more of the seated jurors had a pretrial opinion that the defendant was guilty and that the jurors could not lay aside such opinions. Id. The court described the presumed prejudice standard as follows:

> Prejudice is presumed from pretrial publicity when pretrial publicity is sufficiently prejudicial and inflammatory and the prejudicial pretrial publicity saturated the community where the trials were held.... [W]here a petitioner adduces evidence of inflammatory, prejudicial pretrial publicity that so pervades or saturates the community as to render virtually impossible a fair trial by an impartial jury drawn from

> the community, jury prejudice is presumed and there is no further duty to establish bias.

Id. (citing Coleman v. Kemp, 778 F.2d 1487, 1490 (11th Cir. 1985)).

This Court has addressed the importance of a fair trial and the potential need for a change of venue:

> Every reasonable precaution should be taken to preserve to a defendant trial by such a jury and to this end if there is reasonable basis shown for a change of venue a motion therefor properly made should be granted.
>
> A change of venue may sometimes inconvenience the State, yet we can see no way in which it can cause any real damage to it. On the other hand, granting a change of venue in a questionable case is certain to eliminate a possible error and to eliminate a costly retrial if it be determined that the venue should have been changed. More important is the fact that real impairment of the right of a defendant to trial by a fair and impartial jury can result from the failure to grant change of venue.

Singer v. State, 109 So.2d 7, 14 (Fla. 1959). This Court has since established that a trial judge is bound to grant a motion for a change of venue when the evidence presented reflects that the community is so pervasively exposed to the circumstances of the incident that prejudice, bias, and preconceived opinions are the natural result, similarly to the presumed prejudice standard identified by the 11th Circuit. Manning v. State, 378 So.2d 274, 276 (Fla. 1979).

Pursuant to Fla. R. Crim. P. 3.240, a party may move for a change of venue up to ten days before the case is called for trial on the ground that a fair and

impartial trial cannot be had in the county where the case is pending. The rule further requires that at least two affidavits accompany the motion and that a certificate by the movant's counsel be submitted stating that the motion is made in good faith. Fla. R. Crim. P. 3.240 (b).

On September 14, 2000, the Defendant filed his Motion for Change of Venue with the required affidavits and certificate of good faith. TR Vol. IV, p.541-580. In the Motion for Change of Venue, Mr. Anderson argued that a fair and impartial trial could not be conducted in Lake County, and in support of such, directed the trial court to his supporting affidavits, the prospective juror questionnaires, and extensive pre-trial publicity through both television and newspaper coverage, with numerous newspaper articles attached to the motion as a composite exhibit. TR Vol. IV, p. 541. The motion specifically alleged that the news coverage was "extensive, sensationalized, [and] crime-driven" and that the pretrial publicity included "speculative details of the investigation, sensational details extracted from witness statements and the substance of alleged statements or 'confessions' attributed to the Defendant." TR Vol. IV, p.542.

The newspaper articles attached as an exhibit to the motion show the widespread and prejudicial nature of the media coverage. One article was titled "Attorney wants confession suppressed in bank killing" and included details such

as the fact that Mr. Anderson was charged with stealing one of the handguns used in the robbery, and another was titled "Police: Robber confessed" and included details of a confession allegedly given by Mr. Anderson. TR Vol. IV, p.549, 573. Numerous articles detailed the injuries to the victims, efforts on their behalf, and the surviving victim's permanent injuries and efforts at recovery. See, e.g., TR Vol. IV, p.550-2, 554, 557, 559, 570-1, 576. In addition, newspaper coverage included numerous stories on Mr. Anderson and details of his background, including the facts that he had "money woes" (TR Vol. IV, p.574), that he "cased the bank" (TR Vol. IV, p.567), that he had a "history of nonviolent crimes" (TR Vol. IV, p.568), and that he had a "trail of debt" and was "plagued" by bad checks and theft charges (TR Vol. IV, p.572).

The extreme sensationalism of the coverage is shown through a number of other stories. In one, the headline read "Gunman: 'Which one of you wants to die first?'", revealing that and other "chilling" details about the crime. TR Vol. IV, p.577. In another story, a detective from the Lake County Sheriff's Office told a local paper that Mr. Anderson plotted to rob the bank in hopes of paying off debts and that he shot the two victims to eliminate them as witnesses. TR Vol. IV, p.572. And two other articles show the near panic in the local community over this incident. The first described the local community and its members as "numb as a

zombie", "like shock victims", "profoundly saddened", "horrified", and described the incident as a "brutal killing" which weighed heavily on people's minds. TR Vol. IV, p.553. The second is simply titled "Is city under siege?" and asks whether "this delightful tourist town [has] turned into an unsafe bloody trap for anyone who ventures inside its borders?" TR Vol. IV, p.556.

The extent to which pretrial publicity dominated local television coverage is aptly summarized during the questioning of one potential juror during voir dire. When being questioned about potential hardships for serving two weeks on the jury, the prospective juror stated the following:

> I don't know whether or not I could be impartial because I feel that, I mean, when they had him on the media, because I did watch it prior to receiving my summons, when they showed what his background was and that one was killed and one was paralyzed, that I kind of felt as though he's already probably going to get the electric chair.

TR Vol. VII, p. 266. Likewise, another prospective juror stated that a person would "have to be buried" not to have heard about the case. TR Vol. VIII, p.559.

The geographic range of the media coverage also reveals the extent to which this story was covered in the media. As can be seen in the articles attached to the Motion for Change of Venue, extensive newspaper coverage was not just limited to Mount Dora or Lake County, but also included the Orlando area. See, e.g., TR Vol. IV, p.559, 556-7. In addition, testimony at the postconviction hearing reveals the

extent of the coverage. At that hearing, the following exchange occurred between the state attorney and a witness:

> Q: Was he also aware or are you aware that at that point this was one of the most sensational cases going on here in Lake County?
> A: I had heard it on some of the news media stuff about it. I had read it.
> Q: You live in Gainesville?
> A: Yes.
> Q: And you had even heard about it up there.

Postconviction ROA Vol. IX, p.1658.

The extensive pretrial news coverage and answers to the initial jury questionnaires was concerning enough that the state attorney admitted on the record that he was originally prepared to agree to the motion to change venue until he read more questionnaires which "encouraged" him about the chances of picking an unbiased jury. TR Vol. VI, p.176. He further admitted he was "distressed" by the fact that local law enforcement was disclosing facts to the media, including details about Mr. Anderson's "confession". TR Vol. IV, p.176-7.

In addition, a letter that is part of the postconviction record reveals how prominent this case was in the media and that the news coverage had an effect on the case. Jacqueline Handy, a witness listed by the defense for possible testimony at the penalty phase, informed the defense at the last minute that she no longer wished to testify. Her letter to counsel, and an accompanying email from the

defense investigator, identified two reasons for her withdrawing her agreement to testify. Both speak to the degree to which this case was covered in the local media and how it had captured the attention of the local community. Mrs. Hardy first stated that she had been repeatedly contacted by individuals questioning her as to why she was listed as a defense witness. Postconviction ROA Vol. VII, p.1179-1182. And second, Mrs. Hardy stated that, based upon the local news coverage she had seen and read, she was no longer comfortable with the testimony she was expected to give since it seemed to conflict with what was being reported about Mr. Anderson and the incident in the media. Id.

The trial court held a hearing on the Motion for Change of Venue a couple of weeks before trial, and denied the motion. TR Vol. VI, p.178. During the hearing, counsel for Mr. Anderson specifically noted that the responses to the questionnaires that had been received were a significant basis for the trial court to grant a change of venue. TR Vol. VI, p.174.

At the time of the writing of this petition, postconviction counsel for Mr. Anderson has filed a Motion to Correct/Supplement Record and Toll Time to include all of the jury questionnaires maintained as part of the record by the Lake County Clerk of Court. At this time that motion has not been ruled upon. A blank

copy of the questionnaire sent out to prospective jurors is found in the record. TR Vol. I, p.72-78.

A review of the answers on these questionnaires provides an insight into the extent, and tone, of the media coverage in the community relating to the events in this case. The juror under badge number 42984 answered question 33, about the forming of an opinion of the defendant's guilt, by writing that "I would say guilty according to the newscast I saw." Likewise, the answer to question 33 for badge number 54605 is that "opinion based on news reports is that the person or persons were guilty." Badge number 85104 likewise stated that "based on news reports it would seem the defendant is guilty," and badge number 87940 also answered that "yes based on the media publicity I would say he's guilty." And finally, in answering question 35, also about an opinion of the defendant's guilt, badge number 11087 states that "the media releasing the alleged victim's [sic] criminal history almost convicts before tried by a jury."

In addition to revealing the extent and nature of the media coverage, the answers provided in the questionnaires also reveal the depth of ill will harbored towards the defendant in the local community from which the jury pool was drawn. A few examples highlight these sentiments. Badge number 92551 wrote under question 33 that "I think he is guilty as hell." Badge number 76381 responded to

the same question, using all capital letters, that the defendant was "GUILTY & SHOULD BE PUNISHED BY DEATH!" One final example is the response of badge number 18823. In responding to questions 33 through 37, that prospective juror wrote, among other things, that "he is a cold blooded killer", "Guilty as heck he needs to be burned at the stake, the electric chair is to [sic] quick a death for his terrible crimes", and "Guilty as heck, I'll supply the State with the wood to burn him at the stake if they still did that."

A preliminary review of these questionnaires as a whole reveals that approximately 85% of potential jurors had pretrial knowledge of the facts of the case. In addition, an examination of these questionnaires reveals that at least half of the respondents expressed the belief that they had already decided that Mr. Anderson was guilty.

Trial counsel for Mr. Anderson clearly met their burden for establishing presumed prejudice against Mr. Anderson from pretrial publicity in this case. As detailed in the Motion for Change of Venue and the accompanying exhibits, the pretrial publicity in this case was both inflammatory and prejudicial, including "chilling" details of the crime, the defendant's alleged confession, and contrasting details of Mr. Anderson's history and the fate of the two shooting victims. Prejudice was also established by the fact that the pretrial publicity pervaded and

saturated the community, as shown by the extensive media coverage reaching all the way to Orlando and Gainesville, the fact that witnesses were being repeatedly contacted simply because their name appeared on a witness list, newspaper articles detailed a "horrified" and "numb" city that was "under siege", and the answers in the jury questionnaires stating that the defendant was guilty based on the media coverage. When combined with the fact that approximately 85% of prospective jurors admitted knowledge of the events in question, this pervasive and sensationalistic news coverage requires that prejudice be presumed against Mr. Anderson in his right to a fair trial.

In order to preserve Mr. Anderson's constitutional right to a fair trial, the Motion for Change of Venue should have been granted, especially as this Court has held that granting such a motion can cause no real damage to the State and also ensures that there is no impairment of the right of the defendant to trial by a fair and impartial jury. Appellate counsel was ineffective for failing to raise this issue on appeal.

*ii. Failure to Ensure Complete Record on Appeal*[1]

[1] Collateral counsel for Mr. Anderson has filed a Motion to Supplement the Record with this Court to include the juror questionnaires recently discovered to be part of the record and held by the Lake County Clerk of Court. That motion was still pending at the time of the submission of this habeas petition.

Fla. R. App. P. 9.200(a)(1) states that the contents of the record "shall consist of the original documents, exhibits, and transcript(s) of proceedings, if any, filed in the lower tribunal. Further, the burden to ensure that the record is properly prepared and transmitted in accordance with the rules in on the appellant. Fla. R. App. P. 9.200(e).

In this case, one thousand three hundred questionnaires were sent out to potential jurors. TR Vol. VI, p. 172. The questionnaires that were returned formed the basis of many of the pre-trial recusals of potential jurors and the subsequent questioning of jurors through individual voir dire. The defense moved to have the court take judicial notice of the questionnaires, without objection from the state. TR Vol. VI, p.171. The court granted the motion and all of the questionnaires were collected by the Lake County Clerk of Court and held in their evidence locker as part of the record of this case. TR Vol. VI, p.171.

In addition, these questionnaires formed part of the basis for Mr. Anderson's pre-trial Motion for Change of Venue. In that motion, counsel for the defendant specifically requested that all of the "Jury Questionnaires(s)"[sic] be made a part of the record for the resolution of the motion. TR Vol. IV, p.541. That motion was heard less than two weeks before the start of the trial. TR Vol. IV, p.543. At the hearing, counsel for Mr. Anderson advised the court that, as of the date of the

motion, only fifty-two of the more than one thousand questionnaires mailed out had "been thus far deemed to be sufficiently unbiased and objective to warrant further personal inquiry." TR Vol. IV, p.543.

Appellate counsel did not ensure that the record on appeal included these questionnaires as is required under the appellate rules. These questionnaires were: (1) "original documents" from the lower court, (2) specifically made a part of the record by the Defendant's Motion for Change of Venue, and (3)taken judicial notice of by the trial court upon motion by the defense. Appellate counsel's failure to ensure that the questionnaires were part of the appellate record constitutes ineffective assistance of appellate counsel.

### C. Appellate Counsel Failed to Raise on Appeal the Violation of Mr. Anderson's Due Process Right to be Present as Required During the Examination of Prospective Jurors and for the Trial Court Judge to be Present for a Fundamental Aspect of the Trial

This Court has recognized that one of a criminal defendant's most basic constitutional rights is the right to be present in the courtroom at every critical stage in the proceedings. Jackson v. State, 767 So.2d 1156, 1159 (Fla. 2000)(citing Illinois v. Allen, 397 U.S. 337, 338 (1970)). This includes the fact that defendants have a due process right to be physically present in all critical stages of trial. Muhammad v. State, 782 So. 2d 343, 351 (Fla. 2001)(citing Snyder v.

Massachusetts, 291 U.S. 97 (1934)). This Court has further recognized that the critical stages of trial include examination of prospective jurors. Id. Likewise, under Florida law, no questioning of prospective jurors in a criminal case may take place outside of the presence of a trial judge. State v. Singletary, 549 So.2d 996, 999 (Fla. 1989). The requirement that the judge be present cannot be waived by anyone, including a defendant. Id.

Fla. R. Crim. P. 3.180 requires the presence of the defendant for various critical stages in the proceedings of his case. This rule includes the requirement that the defendant be present "at the beginning of the trial during the examination, challenging, impaneling, and swearing of the jury." Fla. R. Crim. P. 3.180(a)(4). This rule was adopted in 1968, and the committee notes to that rule state that "the words 'at the beginning of the trial' are recommended for inclusion to avoid questions arising as to the necessity for the defendant's presence at times other than upon trial, such as when the jury venire is ordered, etc."

Under the federal constitution, for the purpose of an accused's constitutional right to be present at all stages of a trial, the trial runs from the commencement of the selection of the jury through rendition of the verdict and discharge of the jury. See Diaz v. United States, 223 U.S. 442 (1912); Frank v. Mangum, 237 U.S. 309

(1915). The selection of the jury is a critical stage of the trial, and the defendant has a right to be present in a felony case. Hopt v. Utah, 110 U.S. 574 (1884).

This Court has already decided the issue of whether the trial begins with the swearing of the jury panel in relation to the right of the defendant to be present in Robinson v. State, 520 So. 2d 1 (Fla. 1988). In that case, the appellant argued that his right to be present at a critical stage of trial was violated when he was not present for the general qualification of a combined jury panel for multiple criminal trials. This court held that the general qualification process was not a critical stage of the proceedings requiring his presence. Id. at 4. The Court noted that Robinson was present at the time the jury panel for his particular case was sworn, and identified this moment as the beginning of his trial. Id.

Likewise, Florida court's have held that, under the speedy trial rule, a person is deemed to have been brought to trial when trial commences by the swearing of a jury panel for voir dire examination, citing Fla. R. Crim. P. 3.191(a)(3). See Moore v. State, 368 So.2d 1291, 1292 (Fla. 1979); State v. Vukojevich, 392 So.2d 297, 298 (Fla.App. 1980). This rule is now found at Fla. R. Crim. P. 3.191(c), which states that "A person shall be considered to have been brought to trial if the trial commences within the time herein provided. The trial is considered to have

commenced when the trial jury panel for that specific trial is sworn for voir dire examination."

This Court has held that it is elementary that a trial jury panel is first sworn before voir dire examination of jurors. State ex rel. Maines v. Baker, 254 So.2d 207, 208 (Fla. 1971). Thus Fla. R. Crim P. 3.300, which governs the voir dire process, requires that all prospective jurors be sworn to answer truthfully all questions asked of them. In our court systems, swearing is not a minor procedural or administrative act, but rather is an integral part of the criminal trial process. Indeed, it is required for the filing of court documents such as an information (Fla. R. Crim. P. 3.140(g)), for voir dire examination (Fla. R. Crim. P. 3.300(a)), for a seated jury (Fla. R. Crim. P. 3.360), for all witnesses who testify in court (Fla. Stat. 90.605 (2007)), and for interpreters (Fla. Stat. 90.606 (2007)), as just a few examples. It should also be noted that all public employees in Florida are required to swear to support the Florida and United States Constitutions (Fla. Stat. 876.05 (2007)), and that a sworn oath is generally required for admission to the bar and for judges prior to assuming their positions. Most importantly though, the right of criminal defendants to have the jury receive its oath in their presence has been recognized in the federal system. U.S. v. Pinero, 948 F.2d 698, 700 n.4 (11th Cir. 1991)(citing U.S. v. Martin, 740 F.2d 1352, 1358-59 (6th Cir. 1984)).

The record in this case is clear on the issue of the swearing of the panel of prospective jurors. In this case, the prospective jurors were brought into the courtroom in two large groups and asked to answer both general qualifications questions as well as questioning on the ability to serve for a two week period. TR Vol. II, p. 225, 259. At the beginning of each of the large group sessions, the record indicates that the panels of potential jurors had already been sworn outside the presence of the judge and Mr. Anderson by the jury clerk. TR Vol. II, p. 224-5, 258-9. No additional swearing of the jurors was done before individual voir dire commenced. See, e.g., TR Vol. II, p. 295-6, 307-8, 339-40.

Mr. Anderson's due process right to be present at all critical stages of the proceedings against him, including the beginning of trial, has clearly been violated. Under both federal and Florida law, the trial begins with the swearing of the panel of potential jurors, and a federal appellate court has already recognized that the defendant has the right to be present at the swearing of the venire. Florida law and rules of procedure dictate the same result in this case. As this court found in Robinson, a trial begins when the venire is sworn, and Fla. R. Crim. P. 3.180 requires the defendant's presence when the trial begins. In addition, the swearing of the panel of potential jurors, an essential part of our criminal justice system, cannot be separated out from the other parts of the "examination" of the jury, but

instead is an integral part of that process. Likewise, the presence of the judge for voir dire, as required by Singletary, has also been violated in this case. Therefore, Mr. Anderson's constitutional right to be present, and to have the judge present, at the beginning of his trial and the examination of his jury, has been violated.

Florida courts have repeatedly found that violations of the defendant's right to be present at critical stages of the trial process, as outlined in Fla. R. Crim. P. 3.180, required remand for new proceedings below. See Orta v. State, 919 So. 2d 602 (Fla. 3d DCA 2006)(remand for new sentencing where defendant was not present at sentencing – 3.180(a)(9)); Williams v. State, 785 So. 2d 652 (Fla. 2d DCA 2001)(remand for new proceedings where defendant was not present at pretrial conference – 3.180(a)(3)); T.D.T v. State, 561 So. 2d 1333 (Fla. 5th DCA 1990)(remanded for new trial where defendant not present for jury view – 3.180(a)(7)); Savino v. State, 555 So. 2d 1237 (Fla. 4th DCA 1989), quashed on other grounds, 567 So. 2d 892 (Fla. 1990)(remand for new trial where defendant not present for jury question and court's answer – 3.180(a)(5)); Taylor v. State, 385 So. 2d 149 (Fla. 3d DCA 1980)(finding per se error and remanding for new trial where defendant not present for jury instructions – 3.180(a)(5)). Based on this line of cases, and the fact that the violation of Mr. Anderson's right to be present at

a critical stage of trial was a constitutional due process violation under both the state and federal constitutions, this case must be remanded for a new trial.

As for any concern over the preservation of the issue, there is a presumption against the waiver of constitutional rights, and for a waiver to be effective it must be clearly established that there was an intentional relinquishment or abandonment of a known right or privilege. Brookhart v. Janis, 384 U.S. 1, 4 (1966)(citations omitted). Even with a waiver by counsel, the record must demonstrate that the defendant made a knowing, intelligent and voluntary waiver of his right to be present at essential stages of the trial. Savino v. State, 555 So. 2d 1237, 1238 (Fla. 4th DCA 1989), quashed on other grounds, 567 So. 2d 892 (Fla. 1990). A defendant's silence is not properly interpreted as acquiescence or ratification of his counsel's actions in such a situation. Id. Since there is no evidence that Mr. Anderson knowingly waived his due process right under the state and federal constitutions to be present for all critical stages of his trial, and no evidence that counsel waived it for him, the right cannot be deemed to have been waived and appellate counsel was ineffective for failing to raise the meritorious issue on appeal.

### D. Appellate Counsel Failed to Raise on Appeal the Failure of the Trial Court to Give the Legally Required Merging Instruction for the Penalty Phase

The standard jury instructions for the penalty phase in a capital case (Florida Standard Jury Instructions in Criminal Cases 7.11) include a specific instruction for the merging of aggravating factors. That instruction contains the following directions to the trial court: "Merging aggravating factors: Give the following paragraph if applicable. When it is given you must also give the jury an example specifying each potentially duplicitous aggravating circumstance. See Castro v. State, 596(sic) So.2d 259 (Fla. 1992)."[2] The instruction itself then reads:

> The State may not rely upon a single aspect of the offense to establish more than one aggravating circumstance. Therefore, if you find that two or more of the aggravating circumstances are proven beyond a reasonable doubt by a single aspect of the offense, you are to consider that as supporting only one aggravating circumstance.

This Court in Castro held that, when applicable, the jury may be instructed on "doubled" aggravating circumstances since it may find one but not the other to exist. Castro, 597 So.2d at 261. A limiting instruction properly advises the jury that should it find both aggravating factors present, it must consider the two factors as one. Id. The Castro court clarified the holding in Suarez v. State, 597 So.2d 259 (Fla. 1985), by noting that Suarez held that "it was not reversible error when the jury was instructed on both factors *as long as the trial court did not give the factors double weight in its sentencing order*." Id. at 1209 (emphasis added).

In Mr. Anderson's case, the state sought, and the jury found, two aggravators based on the same facts. The two aggravators were "cold, calculated, and premeditated," and "pecuniary gain." Mr. Anderson's jury was not given the merging instruction. Moreover, the trial court did give the factors double weight in the sentencing order. The trial judge gave great weight to CCP and moderate weight to Pecuniary Gain. TR Vol. V, p. 852, 855. The trial judge's order cites almost exclusively to facts relating to the premeditation and planning of the robbery under its discussion of CCP. The discussion of the facts supporting Pecuniary Gain is a mere three sentences and simply a restatement of the facts under CCP:

> The defendant's plan was to rob the bank, deposit the stolen money in another bank, pay his restitution in order to stay out of the Probation and Restitution Center, and then continue to live a normal life. In order to successfully carry out his plan, he had to kill the two eyewitnesses who had observed and talked with him for hours over a two day period. This Court finds this aggravator was proven beyond a reasonable doubt and is accorded moderate weight in determining the appropriate sentence in this case.

Id. at 855. Since the trial court gave double weight to these aggravators, under both Castro and Suarez, it was reversible error for the jury not to be read the limiting instruction on merging aggravating factors. Therefore, appellate counsel was ineffective for failing to raise this viable claim on appeal.

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[2] The correct cite for the Castro case is 597 So. 2d 259.

## CLAIM II

**MR. ANDERSON'S EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED AS MR. ANDERSON 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 "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).

Mr. Anderson 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. Anderson raises this claim now.

Mr. Anderson has been incarcerated since 1999. He suffers from mental illness and brain damage. Mr. Anderson may well be incompetent at the time of his 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. Anderson 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 April, 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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