IN THE SUPREME COURT OF FLORIDA
CASE NO. _____

MICAH NELSON

Petitioner,
v.

WALTER A. McNEIL,
Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

Article l, Section 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. These claims demonstrate that Mr. Nelson 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 page numbers. The Appellant's Initial Brief on direct appeal will be referred to 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. Nelson 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. Nelson accordingly requests that this Court permit oral argument.

INTRODUCTION

Significant errors which occurred at Mr. Nelson'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. Nelson. "[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 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. Nelson 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. Nelson's 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. Nelson's 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. Nelson 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. Nelson's claims.

GROUNDS FOR HABEAS CORPUS RELIEF

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

On December 10, 1997, a Polk County grand jury indicted the

Appellant,Micah Louis Nelson, for first-degree murder, kidnapping, sexual battery, burglary, and grand theft (auto). On December 19, 1997, he was charged by information filed in Highlands County with Burglary and sexual battery.

Nelson was tried by jury, in Polk County, the Honorable J. Michael Hunter, Circuit Judge, presiding. The jury found Nelson guilty as charged on December 14, 1999. On December 22, 1999, following the penalty phase of the trial, the jury recommended death by a nine to three vote. A Spencer hearing was held February 8, 2000. The judge sentenced Appellant to death on March 17, 2000. His sentencing order was filed the same date. He sentenced Appeallant to four consecutive life sentences for burglar of a structure, sexual battery, kidnapping and burglary of a conveyance, as well as a consecutive 15-year prison term for grand theft, and four concurrent 60- month terms for violation of probation, to run consecutive to the 15-year term.

The Appellant filed a timely Notice of Appeal on April 13, 2000. On July 10, 2003 the judgments and sentences were affirmed on direct appeal in Nelson v. State, 850 So.2d 514 (Fla. 2003). On August 7, 2003 a mandate was issued by the Florida Supreme Court. On October 8, 2003, Appellant filed with the United States Supreme Court a Petition for a Writ of Certiorari. The Petition was denied by the United States Supreme Court on December 15, 2003.

The Appellant filed on September 16, 2004 his Motion for Post Conviction Relief. A competency hearing was held on September 27, 2006. An evidentiary hearing was held on October 16 and 17, 2007. The circuit court denied the Appellant's Motion for Post Conviction Relief on February 12, 2008. Appellant timely filed his Notice of Appeal on March 7, 2008.

CLAIM I

Florida Statute 921.141 is facially vague and overbroad in violation of the 8th and 14th Amendments, and the unconstitutionality was not cured because the jury did not receive adequate guidance in violation of the 8th and 14th Amendments. The trial court's instructions to the jury unconstitutionally diluted its sense of responsibility in determining the proper sentence. Mr. Nelson's death sentence is premised on fundamental error which must be corrected. To the extent appellate counsel failed to raise these issues, trial counsel was ineffective.

All other allegations and factual matters contained elsewhere in This motion are fully incorporated herein.

Mr. Nelson's jury was unconstitutionally instructed by the Court that its role was merely "advisory." (FSC ROA Vol. XXVI - p. 3339 - 40, 47). Because great weight is given the jury's recommendation, the jury is a sentencer in Florida. Here, however, the jury's sense of responsibility was diminished by the misleading comments and instructions regarding the jury's role. This diminution of

the jury's sense of responsibility violated the Eighth Amendment. See Caldwell v. Mississippi, 472 U.S. 320 (1985)

CLAIM II

Mr. Nelson is denied his rights under the 5th, 6th, and 14th Amendments to the United States Constitution because he is incompetent to proceed.

All other allegations and factual matters contained elsewhere in this motion are fully incorporated herein by specific reference.

Mr. Nelson is unable to communicate with his attorneys. When asked a question about his case, he does not respond - he is mute. In several prison visits, Mr. Nelson has not asked even one question of his attorneys about any aspect of his case, with the exception of an almost inaudible, "why am I here?" during the third prison visit.

Mr. Nelson has not provided his counsel information or facts Which might assist in his defense. He has provided no input. He does not appear to know why he is incarcerated. He does not know the names of his trial attorneys or the judge who presided over his case, let alone the legal issues raised in postconviction matters. Apparently, Mr. Nelson should be medicated for a psychosis and/or other mental illnesses but he has not been taking any medication. His condition has worsened since undersigned counsels assumed this case.

Mr. Nelson is unable to assist his attorneys in his defense.

Although no showing of prejudice is necessary to support this claim, Mr. Nelson's case is obviously prejudiced because he is unable to assist his attorneys in preparation and presentation of his postconviction claims.

Legal Argument as to Claim II

The Due Process Clause of the Fourteenth Amendment prohibits states from trying and convicting a mentally incompetent defendant. Dusky v. United States, 362 U.S. 402 (1960). The elements of an incompetency claim include: (a) clear and convincing evidence raising a substantial doubt as to competency to stand trial, in that (b) the petitioner could not consult with trial counsel with a reasonable degree of rational understanding, and (c) the petitioner did not have a rational as well as factual understanding of the proceedings. Id

Fla. Stat.§916.12 Mental Incompetence to proceed states:

> (1) A defendant is incompetent to proceed within the meaning of this chapter if the defendant does not have sufficient present ability to consult with her or his lawyer with a reasonable degree of rational understanding or if the defendant has no rational, as well as factual, understanding of the proceedings against her or him.

Mr. Nelson cannot continue in postconviction matters because he cannot consult with his attorneys. His mental illness is such that he has no rational

understanding of the postconviction proceedings or the substance of the claims raised by his attorneys. Mr. Nelson does not know who the judge was that sentenced him, his trial attorney, or why he is even incarcerated. Given his condition, Mr. Nelson is incompetent to proceed. Proceeding in this matter would be a denial of Mr. Nelson's constitutional rights. Fuse v. State, 642 So.2d 1142, 1146 (1994).

RULE

Fla.R.Crim.Pro. 3.851 (g) Incompetence to Proceed in Capital Collateral Proceedings states:

> (1) A death -sentenced prisoner pursuing collateral relief under this rule who is found by the court to be mentally incompetent shall not be proceeded against if there are factual matters at issue, the development or resolution of which require the prisoner's input. However, all collateral relief issues that involve only matters of record and claims that do not require the prisoner's input shall proceed in collateral proceedings notwithstanding the prisoner's incompetency.
>
> (2) Collateral counsel may file a motion for competency determination and an accompanying certificate of counsel that the motion is made in good faith and on reasonable grounds to believe that the death-sentenced prisoner is incompetent to proceed. The motion and certificate shall replace the signed oath by the prisoner that otherwise must accompany a motion filed under this rule.
>
> (3) If, at any stage of a postconviction proceeding, the court determines that there are reasonable grounds to believe that a death-sentenced prisoner is incompetent to

> proceed and that factual matters are at issue, the development or resolution of which require the prisoner's input, a judicial determination of incompetency is required.
>
> (4) The motion for competency examination shall be in writing and shall allege with specificity the factual matters at issue and the reason that competent consultation with the prisoner is necessary with respect to each factual matter specified. To the extent that it does not invade the lawyer-client privilege with collateral counsel, the motion shall contain a recital of the specific observations of, and conversations with, the death-sentenced prisoner that have formed the basis of the motion.
>
> (5) If the court finds that there are reasonable grounds to believe that a death-sentenced prisoner is incompetent to proceed in a postconviction proceeding in which factual matters are at issue, the development or resolution of which require the prisoner's input, the court shall order the prisoner examined by no more than 3, nor fewer than 2, experts before setting the matter for a hearing. The court may seek input from the death-sentenced prisoner's counsel and the state attorney before appointment of the experts.

Mr. Nelson was adjudged competent in response to his Motion for Competency Determination on December 12, 2006. The following testimony was unavailable when Circuit Court Judge J. Michael Hunter rendered his opinion.

A. DR. MARK ASHBY, MD

Dr. Mark Ashby was a psychiatrist employed by the Polk County jail who examined, diagnosed, and treated Mr. Nelson shortly after his arrest. At the evidentiary hearing on October 16, 2007, Dr. Ashby testified how he diagnosed Mr.

Nelson with schizo-effective disorder. (PCR Vol. I p. 79). Dr. Ashby described schizo-effective disorder as follows:

> DR. ASHBY: You could look at that as a combination of schizophrenia and depression superimposed on each other. Primarily it is a psychotic disorder involving impairment in processing thoughts. Typically delusions and hallucinations, such as auditory hallucinations, hearing voices. There would be a significant depression component to it also, feelings of sadness, lack of energy, and lack of interest in things. But mostly importantly would be a thought disorder which is characterized by unusual associations, idiosyncratic associations.
> MR KILEY: What is idiosyncratic associations, sir?
> DR. ASHBY: Well it would only mean something to the individual. They would not have a logic that ordinary society would make any sense of. (PCR Vol. I p. 80).

Dr. Ashby also stated that the medications he used to treat Mr. Nelson included, Mellaril and Imipramine. (PCR Vol I p. 80-81). Dr. Ashby also described what would happen to an untreated person with Mr. Nelson's condition:

> MR. KILEY: So, if he was treated for this condition it is possible it could reoccur?
> DR. ASHBY: Possible yes and maybe even probable.
> MR. KILEY: Well if this is untreated what happens to the patient?
> DR. ASHBY: It is generally considered to be a progressive deteriorating illness, and one of the criteria would be a progressive decline in social and occupational functions. They become more withdrawn, have less motivation, and less energy, and less ability to focus and function in society. Um, the newer medicines that we have now for the most part seem to at least arrest the situation. The older ones that were in vogue, even as

> recently at the 90's including Mellaril, didn't seem to do all that much. They stopped the hallucinations but the disease would still progress in terms of decline and function.
> MR. KILEY: Well, now what do you think would happen to someone who was medicated in 1997 with Mellaril but subsequent to the year 1999 was on no medication for anything whatsoever?
> DR. ASHBY: Well, the likelihood would be the symptoms and the disease would progress and they would have the same symptoms that occur or that were there before we start the medication. (PCR Vol. I p. 84-85).

Micah Nelson has had no continuous treatment for his disease over the course of the past eight years. Mr. Nelson isn't receiving any type of medical or psychological treatment at this time, and as Dr. Ashby described, Mr. Nelson's disease is a "progressive deteriorating illness". This court inquired of Dr. Ashby regarding how the Defendant's condition may have worsened, and how there are newer and better drugs than Mellaril used for Mr. Nelson's illness:

> COURT: The newer drugs, I guess, am I safe in assuming that they are at least as effective and don't cause liver problems.
> DR. ASHBY: That would be accurate sure.
> COURT: Okay. You were asked by Defense counsel would you expect someone who is - - who you prescribed this medication to, and then a period of time go by where he is no longer taking the medication to get worse again, your answer was yes?
> DR. ASHBY: Yes your Honor, I would say. (PCR Vol. I p. 99)

Based on the testimony of Dr. Ashby which described Mr. Nelson's diagnosis and

symptoms, and the likelihood of progressive deterioration due to lack of treatment, the Defendant asserts that he is currently incompetent to proceed at this time.

B. DR. HENRY DEE

Dr. Henry Dee is a licensed psychologist who initially examined Mr. Nelson in June of 1998 at the request of trial attorney Robert Trogolo. (PCR Vol. I p. 101). Dr. Dee found the Defendant to be mute and unresponsive to questions. (PCR Vol. I p. 102). Dr. Dee described his diagnosis as follows:

> MR. VIGGIANO: Did your review indicate that Micah Nelson was brain damaged?
> DR. DEE: Yes it did. Based on the testing I had and history I had he showed certain features that looked to me that he has sustained brain damage as a boy, and might have helped account for his current state, although it was difficult to know how they interact always. He was also suffering I believed a form of schizophrenia, schizo effective disorder but I know that he would have met all the specific criteria....(PCR Vol. I p. 104-105).

Dr. Dee felt that the Defendant's condition was so serious, that he recommended that he be sent to the State Hospital. (PCR Vol. I p. 106). Dr. Dee further testified about his opinion of Mr. Nelson's marginal competency in 1998 as follows:

> MR. VIGGIANO: And you have testified regarding competency in other cases, of course, correct?
> DR. DEE: Yes, many cases.
> MR. VIGGIANO: And what was the basis of your - -
> DR. DEE: May - - maybe I'm not finished with that

> response. The more adequate response is, yes, I was concerned about his competency and suggested he be sent to the State Hospital more than once. But let me also say his presentation was confusing because it waxed and waned. This is often the case. Sometimes he was better than others, when he was at his worse he was unresponsive and mute and at other times seemed to be responding to or having internal stimuli. Other times he was open and easy to talk to. (PCR Vol. I p. 107).
> MR. VIGGIANO: And at other times when he was reticent and mute it appeared to you that he was incompetent to stand trial?
> DR. DEE: Correct. (PCR Vol. I p. 108).

Dr. Dee was very clear in stating that Micah Nelson was absolutely incompetent during his last evaluation conducted in 2006.

> MR. VIGGIANO: Your opinion today based upon your meeting with him after the trial and before this hearing, you again would say he is marginally competent?
> DR. DEE: As of the last time I saw him no. The last time I saw he feels psychotic again, angry about what I don't know. Um, and I felt that the last time I saw him in 2006 he was at that point clearly incompetent to proceed.
> MR. VIGGIANO: Clearly incompetent?
> DR. DEE: Yes.
> COURT: Do you know what medications, if any, he is presently on?
> DR.DEE: The only one I'm aware of, the last medication
>
> chart I saw, he is maintained on Imipramine, it's a rather
>
> old fashioned antidepressant, and I don't understand why,
>
> frankly. (PCR Vol. I p. 126).

Dr. Dee's testimony clearly demonstrates that in addition to his schizo

effective disorder, the Defendant also suffers from brain damage. As recently as 2006, Dr. Dee made a determination that the Defendant was clearly incompetent, and the Defendant submits that he remains incompetent to this day. The circuit court did not have the benefit of Dr. Dee's evidentiary hearing testimony when it rendered its Order of Competency on December 12, 2006.

C. DR. MICHAEL MAHER

The Defendant was evaluated by Dr. Michael Maher after being retained by his post-conviction counsel in June of 2004. To aid in his evaluation, Dr. Maher utilized a report created by Dr. William G. Kremper, PH.D., from when Mr. Nelson was a juvenile. From the Kremper report, Dr. Maher was able to deduce that Mr. Nelson was a victim of sexual abuse and incest as a child. (PCR Vol. II p. 213-214). Dr. Maher also concurred with Dr. Ashby's diagnosis of schizo effective disorder. (PCR Vol. II p. 220-221). As to the issue of the Defendant's competency to proceed and allegation of malingering, Dr. Maher testified as follows:

> MR. KILEY: So, if an evaluator stated, in essence, that I tried to talk to Mr. Nelson, he refused to respond, he is malingering. What would you think of a diagnosis such as that?
> DR. MAHER: There are lots of reasons why people don't respond and why people may appear to be refusing to respond. Malingering is but one of those. In this there is, in my opinion, an overwhelming amount of documentary, long term, credible evidence that he suffers from a major psychiatric disorder; so, it would certainly

not be my conclusion that his communication problems, whether they appear to be voluntary or not are related to malingering. It would rather be my conclusion that they are related to his fundamental brain disease.
MR. KILEY: So that is, knowing what you know and researching the data what is abnormal behavior for others, without Mr. Nelson's condition, Mr. Nelson acts like that all the time, sir, correct?
DR. MAHER: Essentially, all the time, yes.
MR. KILEY: Doctor, is there - - again and your diagnosis was what? He was competent or incompetent to proceed?
DR. MAHER: It was my opinion and conclusion that he

was not competent? (PCR Vol. II p. 227)

Dr. Maher also furthered testified why he rejects the notion that the Defendant could be malingering.

MR. WALLACE: If you don't use the instruments we are talking about, what procedure do you follow or did you follow in this case with Mr. Nelson to attempt to determine whether or not there was any malingering?
DR. MAHER: The primary method that I use is to compare the nature of my face-to-face interaction with the individual with their long term history, background, and records. It is very, very difficult for an individual to maintain a false front on a continuous and ongoing basis over a period of weeks, months, or years. So this very withdrawn state, this lack of communication, this, um, tendency to respond with short phrases which have ambiguous and questionable relevance to anything other than the very immediate circumstances, such as, here is a chair have a seat, is present in his record in some manner or another from the time his is 16 years old. And certainly throughout the more documented record after his arrest, all of that leads me to believe that he presented

> himself to me in a manner which is consistent with his usual state of mind and not a malingered or falsified state. This is the primary method that I use. (PCR Vol. II p. 238).

In Dr. Maher's testimony he also clearly stated that he believes the Defendant is incompetent to proceed at this time.

> MR. KILEY: And in your opinion he is incompetent to proceed now?
> DR. MAHER: That is correct. That is certainly my opinion. (PCR Vol. II p. 263)

One key aspect of Dr. Maher's testimony is that he does feel that it is not impossible for Mr. Nelson's competency to be restored with the right combination of care and medication.

> COURT: Did you determine if he was treated at all through medication while he was at Union Correctional Institution?
> DR. MAHER: To the best of my ability to glean from the records I did not see an indication that he was treated.
> COURT: Sir, if Mr. Nelson - - well. How would you, if Mr. Nelson was a patient of yours what would you prescribe for him?
> DR. MAHER: I would certainly prescribe a low dose of antipsychotic medication. In his case it would be easy to over medicate him and make him even more withdrawn so that would need to be carefully managed. I would also prescribe an antidepression medication because although he doesn't fit in the typical pattern of uni-polar depression it is very likely that he is depressed. And that the antidepressants clearly can help even if we don't

> understand why. The problem is that even in the context of his incarceration his treatment requires an environment which to the best of my knowledge is unavailable, that is a hospital environment rather than a prison environment.
> COURT: Well, if the prison has a hospital would that suffice?
> DR. MAHER: I have visited the prison hospital that I believe is the only prison hospital available to him and it is not in my opinion a hospital environment, it is a prison environment. There is an important difference. I don't think it is likely to have a substantial effect on his illness.
> COURT: Well, can treatment, if this man is treated with medication could he regain some degree of competency?
> DR. MAHER: I think it would help. His disorder is entrenched and difficult to treat. I would not want to offer my opinion that the prognosis is good. Certainly there is some hope. The prognosis is not good, it's poor.
> COURT: However, if he were placed on a regimen of psychiatric medication and he improves would it necessitate another evaluation to see if this medication worked on this man?
> DR. MAHER: Yes, I think treating him and evaluating the effect of that treatment would be reasonable. I think he's close enough to having the potential to improve his competency that he might get to the level where he could be competent. (PCR Vol II p. 230-232)

The Defendant submits that Dr. Maher's testimony demonstrates that he suffers from a serious brain disease and schizo effective disorder. He has showcased these symptoms since he was a juvenile, and he is currently incompetent to proceed. Dr. Maher does believe that Mr. Nelson's competency could possibly be restored as long as he receives the proper medication at the proper dosage, and his treatment takes place in a hospital setting. The circuit court did not have the

benefit of Dr. Maher's testimony when it rendered it's Order of Competency on December 12, 2006. As seen above, Dr. Maher's testimony completely vitiates the Competency Hearing testimony of Dr. Ralph Dolente and Dr. Joseph Sesta on which Judge Hunter relied. See Order of Competency p. 4-6. Micah Nelson is not malingering. Mr. Nelson has been and remains dreadfully incompetent to proceed.

CLAIM III

Mr. Nelson was denied the effective assistance of counsel, in violation of the 6th and 14th Amendments of the United States Constitution, by failing to object to the Court instructing the jury on and finding that Mr. Nelson killed the victim to avoid a lawful arrest. The evidence failed to prove this aggravator beyond a reasonable doubt. Appellate counsel was ineffective for failing to raise this claim.

All other allegations and factual matters contained elsewhere in this motion are fully incorporated herein by specific reference.

Trial counsel failed to object to the Court giving the avoid arrest aggravator jury instruction at trial. Trial counsel also failed to object to the Court's error of not informing the jurors that when the victim is not a police officer, the primary or dominant motive must be to eliminate the witness or that the State's proof must be very strong. Because trial counsel failed to object, Mr. Nelson was prejudiced as the jury was incorrectly instructed regarding the avoid arrest

aggravator.

The Court instructed the jury regarding the avoid arrest aggravator. The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence: ... Number three, the crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest. (FSC ROA. Vol. XXVI p 3341)

The jury found the aggravator proved and the Court gave it great weight saying the following in the sentencing order:

> It has been long held "that in order to establish this aggravator, where the victim is not in law enforcement, the state must show that the sole, or dominant, motive for the murder was the elimination of the witness." Perry v. State, 522 So.2d 817, 820 (Fla. 1988). However, this aggravator may be proven by circumstantial evidence.
>
> The Supreme Court has upheld this aggravating factor in cases similar to this one where the victim is abducted from the scene of the initial crime and transported to a different location where she is killed. Gore v. State, 706 So.2d 1328 (Fla. 1997), Preston v. State, 607 So.2d 404 (Fla. 1992), Swafford v. State, 533 So.2d 270 (Fla. 1988) Cave v. State, 467 So.2d 180 (Fla. 1985), Martin v. State, 420 So.2d 583 (Fla. !992).
>
> There are a number of factors that indicate this was the Defendant's sole motive:
>
> (1) The Defendant in his confession to the police said he killed the victim because he was afraid that Virginia Brace could identify him, "because she saw his face."
>
> (2) Once he removed her from her home and placed her in the trunk of her car, she was no longer a threat to his

> escape.
>
> (3) The Defendant placed the victim in the trunk of her car and drove her around over six hours. This he had ample opportunity to release the victim or simply leave her in the trunk. See Alton v. State, 723 Do.2d 148, 160 (Fla. 1988).
>
> (4) The victim was abducted from her home and transported to an isolated area where she was killed.
>
> Therefore, the only reasonable inference to be drawn from the facts of this case is the Defendant kidnapped Virginia Brace and took her to a remote area in order to eliminate the sole witness to this crime.
>
> This aggravating factor has been proven beyond a reasonable doubt and is given great weight.

5. The evidence adduced at Mr. Nelson's trial was not sufficient to satisfy the standards for finding the avoid arrest aggravator. The evidence presented would support alternative reasons for the killing other than avoiding arrest. Alternative reasons include Mr. Nelson telling Officer Robinson that the reason why this happened is that he was just "mad at the world, mad about his life," (FSC ROA. Vol. XXI p. 2458-60) that Mr. Nelson was scared, and because he was mentally unstable and did not know what to do, the situation simply got out of control. There was no evidence that Mr. Nelson intended to kill Ms. Brace when he transported her. There was only evidence that Mr. Nelson tried to stop Mr. Brace from screaming. (FSC ROA. Vol. XXII p. 2614). Furthermore, Mr. Nelson told a Sergeant that he first tried to choke the victim until she passed out in the grove, so that he could leave. (FSC ROA. Vol. XXII p. 2614) At one point, Mr. Nelson told

law enforcement that he killed the victim because he got scared. (FSC ROA. Vol. XXI p. 2488). This suggests that he was not intending to kill her, but that the situation got out-of-hand, or perhaps he became angry when she would not pass out and impulsively killed her.

6. The evidence showed that Mr. Nelson did not commit the killing to avoid arrest and the aggravator instruction should not have been given. Mr. Nelson was prejudiced because his trial counsel failed to object to the instruction. He was further prejudiced because the jury was instructed on an improper aggravator. When the jury found the aggravator to be proven, the finding lent support to the death sentence. Had the instruction not been given, Mr. Nelson would not have been sentenced to death.

Legal memorandum as to Claim III

Trial counsel's failure to object to the Court reading to the jury an instruction on the avoid arrest aggravator fell below the sixth amendment standard for effective representation. In Nero v. Blackburn, 597 F.2d 991, 994 (5th Cir. 1979) the court held:

> Appellee argues that under our totality of the circumstances test, the failure of Nero's counsel to request a mistrial cannot alone render his assistance ineffective. We disagree. Sometimes a single error is so substantial that it alone cause the attorney's assistance to fall below the sixth amendment standard. This case presents such an

error. Id. at 994.

The Nero court went on to hold:

> Nero's attorney allowed the State to introduce inadmissible evidence of Nero's past conviction. The attorney failed to move for a mistrial when the court would have automatically granted one. This error by Nero's attorney is crucial since the evidence of past convictions is so prejudicial that it can render the entire trial fundamentally unfair. For these reasons we hold that Nero was denied the effective assistance of counsel in violation of the sixth amendment. Id. at 994

In Mr. Nelson's case, trial counsel filed a pretrial motion challenging the avoid arrest aggravator, yet that motion was never argued before the Court. (FSC ROA. Vol. II p. 278). Trial counsel compounded the failure to challenge the aggravator when he failed to object to the reading of the avoid arrest instruction to the jury, especially when the evidence did not support giving the instruction. This substantial error prejudiced Mr. Nelson because the error ascribed to him an additional aggravating circumstance.

Trial counsel's failure cannot be deemed strategic. The pretrial filing of the motion attacking the avoid arrest aggravator belies any suggestion that the failure to object was strategic. There can be no credible strategic reason to file a motion attacking the aggravator only to stand idly by as the Court reads the very instruction which was the subject of the pretrial motion. In Eure v. State, 764 So.2d 798 (Fla.

2nd DCA 2000), the court held:

> If we could determine that in any way the defense counsel's failure to object was a strategic move, we would not find ineffectiveness; however, in light of the egregious arguments made by the prosecutor, we conclude that counsel's failure to object fell below any standard of reasonable professional assistance. Moreover, there is a reasonable probability that the outcome would have been different because, had an objection and motion for mistrial been made and denied by the trial court, the error would have been preserved. In such a scenario, we undoubtedly would have reversed Eure's conviction in this appeal. Id. at 801.

As in Eure, there can be no determination that counsel's failure to object was a strategic move. There is no strategic reason, in a capital murder trial, for defense counsel to allow the Court to read to the jury an instruction of another aggravating circumstance.

A trial court's finding of an aggravator is reviewed under the substantial competent evidence standard. Mansfield v. State, 758 So.2d 636 (Fla. 2000). The "avoid arrest" aggravator is typically found in cases in which the defendant killed a law enforcement officer. See e.g. Burns v. State, 609 So.2d 600 (Fla. 1992). When, as here, the victim was not a law enforcement officer, proof of the requisite intent to avoid arrest and detection must clearly show that the **sole or dominant motive** for the killing was the elimination of a witness. Robertson v. State, 611 So.2d 1228 (Fla. 1993); Davis v. State, 604 So.2d 794 (Fla. 1992); Geralds v. State, 601 So.2d

1157; Jackson v. State, 599 So.2d 103 (Fla. 1992); Perry v. State, 522 So.2d 817 (Fla. 1988); Rogers v. State, 511 So.2d 526 (Fla. 1987); Floyd v. State, 497 So.2d 1211 (Fla. 1986). Even where the victim and the perpetrator knew each other, which was not the case here, this fact alone is not enough to establish the aggravator in question. Robertson, 611 So.2d 1228; Hansbrough v. State, 509 So.2d 1081 (Fla. 1987); Floyd, 497 So.2d 1211. If this aggravator was applied in every case in which the defendant was afraid the victim might identify him, thus leading to his arrest, this factor would apply to many if not most murders, and would not serve the narrowing purpose of an aggravating factor.

CLAIM IV

Mr. Nelson's 8th, Amendment right against cruel and unusual punishment will be violated as he 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).

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.

CLAIM V

Mr. Nelson's trial was fraught with procedural and substantive errors which cannot be harmless when viewed as a whole, since the combination of errors deprived him of the fundamentally fair trial guaranteed under the 6th, 8th, and 14th Amendments. Appellate counsel was ineffective for failing to raise this claim.

The allegations and factual matters contained elsewhere in this document are fully incorporated herein by specific reference.

Mr. Nelson contends that he 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). It is Mr. Nelson's contention that the process itself failed him. It failed because the sheer number and types of errors involved in his trial, when considered as a whole, virtually dictated the sentence that he would receive. State v. Gunsby, 670 So. 2d 920 (Fla. 1996). Even when the court finds error to be harmless, it must still consider whether the cumulative effect of the 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. State v. Penalver, 926 So.2d 1118, 1137 (Fla. 2006); State v. McDuffie, 970 So.2d 312, 328 (Fla. 2007).

The flaws in the system which sentenced Mr. Nelson to death are many. They have been pointed out throughout not only this pleading, but also in Mr. Nelson's direct appeal; and while there are means for addressing each individual error, the fact remains that addressing these errors on an individual basis will not afford adequate safeguards against an improperly imposed death sentence -- safeguards which are required by the Constitution. The "harmless errors" mentioned in the direct appeal opinion include misstatements, and an improper query regarding the Frye standard in the trial court's sentencing order. Nelson, at 530-531. These errors cannot be harmless. The results of the trial and sentencing are not reliable. Relief must is required.

CLAIM VI

The Florida death sentencing statute as applied is unconstitutional under the 6th, 8th, and 14th Amendments of the United States Constitution.

This claim is evidenced by the following:

In Mills v. Moore, the Florida Supreme Court held that because Apprendi v. New Jersey, 120 S.Ct. 2348, (2000), did not overrule Walton v. Arizona, the Florida death penalty scheme was not overruled. Mills v. Moore, 2001 WL 360893 * 3-4 (Fla. 2001). Therefore, Mr. Nelson raises these issues now to preserve the claims for federal review.

In Jones v. United States, the United States Supreme Court held, "under the Due Process Clause of the Fifth Amendment and the notice and jury guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Jones v. United States, 526 U.S. 227, 243, n.6 (1999). Subsequently, in Apprendi v. New Jersey, the Court held that the Fourteenth Amendment affords citizens the same protections under state law. Apprendi v. New Jersey, 120 S.Ct. 2348, 2355 (2000).

In Apprendi, the issue was whether a New Jersey hate crime sentencing enhancement, which increased the punishment beyond the statutory maximum, operated as an element of an offense so as to require a jury determination beyond a reasonable doubt. Apprendi 120 S.Ct. at 2365. "[T]he relevant inquiry here is not one of form, but of effect-does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" Apprendi 120 S.Ct. at 2365. Applying this test, it is clear that aggravators under the Florida death penalty sentencing scheme are elements of the offense which must be noticed, submitted to a jury, and proven beyond a reasonable doubt. The state was obligated to prove at least one aggravating factor in the separate penalty phase proceeding before Mr. Nelson was eligible for the death penalty. § 775.082 Fla. Stat. (1995).

> The aggravating circumstances of Fla. Stat. § 921.414(6), F.S.A., actually define those crimes-when read in conjunction with Fla. Stat. § 782.04(1) and 794.01(1), F.S.A.-to which the death penalty is applicable in the absence of mitigating circumstances.

State v. Dixon, 283 So.2d 1, 9 (Fla. 1973); Fla. Stat. § 775.082 (1995); § 921.141 (2)(a), (3)(a) Fla. Stat. (1995). Clearly, Florida capital defendants are not eligible for the death sentence simply upon conviction of first-degree murder. If the court sentenced Mr. Nelson immediately after conviction, the court could only have imposed a life sentence. § 775.082 Fla. Stat. (1995). Dixon, 283 So.2d at 9. Therefore, under Florida law, the death sentence is not within the statutory maximum sentence, as analyzed in Apprendi, because it increased the penalty for first degree murder beyond the life sentence Mr. Nelson was eligible for based solely upon the jury's guilty verdict. Under Florida law, the effect of finding an aggravator exposed Mr. Nelson to a greater punishment than that authorized by the jury's guilty verdict alone. The aggravator was an element of the death penalty eligible offense which required notice, submission to a jury, and proof beyond a reasonable doubt. Apprendi, at 2365. This did not occur in Mr. Nelson's case. Thus, the Florida death penalty scheme was unconstitutional as applied.

Mr. Nelson's indictment violated the Sixth and Fourteenth Amendments because it failed to charge the aggravating circumstances as elements of the offense

for which the death penalty was a possible punishment. Under the principles of common law, aggravators must be noticed.

> Where a statute annexes a higher degree of punishment to a common-law felony, if committed under particular circumstances, an indictment for the offence, in order to bring the defendant within that higher degree of punishment, must expressly charge it to have been committed under those circumstances, and must state the circumstances with certainty and precision.[2M. Hale, Pleas of the Crown * 170]. Apprendi v. New Jersey, 120 S.Ct. 2348,2355 (2000) quoting Archbold, Pleading and Evidence in Criminal Cases, at 51.

Because aggravators are circumstances of the crime and the defendant's mental state, they are essential elements of a crime for which the death penalty may be imposed, and they must be noticed.

As well, Mr. Nelson's death recommendation violates Florida law because it is impossible to determine whether a unanimous jury found any one aggravating circumstance. Florida Rule of Criminal Procedure 3.440 requires unanimous jury verdicts on criminal charges. "It is therefore settled that '[i]n this state, the verdict of the jury must be unanimous' and that any interference with this right denies the defendant a fair trial." Flanning v. State, 597 So.2d 864, 867 (Fla. 3d DCA 1992), quoting Jones v. State, 92 So.2d 261 (Fla. 1956). However, in capital cases, Florida permits jury recommendations of death based upon a simple majority vote, and does

not require jury unanimity as to the existence of specific aggravating factors. See, e.g., Thompson v. State, 648 So.2d 692, 698 (Fls. 1994). Jones v. State, 569 So.2d 1234, 1238 (Fla. 1990). In light of the fact that aggravators are elements of a death penalty offense, the procedure followed in the sentencing phase must receive the protections required under Florida law and require a unanimous verdict. § 912.141(1),(2) Fla. Stat. (1999).

Mr. Nelson's death recommendation violated the minimum standards of constitutional common law jurisprudence because it is impossible to know whether the jurors unanimously found any one aggravating circumstance. Each of the thirty-eight states that use the death penalty require unanimous twelve person jury convictions.[1] "We think this near-uniform judgement of the Nation provides a useful guide in delimiting the line between those jury practices that are

[1]Ala.R.Cr.P 18.1; Ariz. Const. Art 2, s.23; Ark. Code Ann. § 16-32-202; Cal. Const. Art. 1, § 16; Colo. Const. Art 2, §23; Conn. St. 54-82(c), Conn.R. Super. Ct. C. R. §42-29; Del. Const. Art. 1, §4; Fla. Stat. Ann § 913.10(1); Ga. Const. Art. 1 § 1, P XI; Idaho. Const. Art. 1, § 7; Ill. Const. Art. 1, § 13; Ind. Const. Art. 1, § 13; Kan. Const. Bill of Rights § 5; Ky. Const. § 7, Admin. Pro. Ct. Jus. A.P. 11 § 27; La. C.Cr.P. Art. 782; Md. Const. Declaration Of Rights, Art. 5; Miss. Const. Art. 3, § 31; Mo. Const. Art. 1, §22a; Mont. Const. Art. 2, §26; Neb. Rev. St. Const. Art. 1, §3; N.H. Const. PH, Art. 16; N.J. Stat. Ann. Const. Art. 1, p. 9; N.M. Const. Art. 1 § 12; N.Y. Const. Art. 1, § 2; N. C. Gen. Stat. Ann. § 15A-1201; Ohio Const. Art. 1, § 5; Okla. Const. Art. 2, § 19; Or. Const. Art. 1, § 11, Or. Rev. Stat. § 136.210; Pa. Stat. Ann. 42 Pa. C.S.A. § 5104: S.C. Const. Art. V, § 22; S.D. ST § 23A-267; Tenn. Const. Art. 1, § 6; Tex. Const. Art. 1, § 5; Utah Const. Art. 1 § 10; Va. Const. Art. 1, § 8; Wash. Const. Art. 1, § 21; Wyo. Const. Art. 1, § 9.

constitutionally permissible and those that are not." Burch v. Louisiana, 441 U.S. 130, 138 (1979) (reversing a non-unanimous six person jury verdict in a non-capital case). The federal government requires unanimous twelve person jury verdicts. "[T]he jury's decision upon both guilt and whether the punishment of death should be imposed must be unanimous. This construction is more consonant with the general humanitarian purpose of the Anglo-American jury system." Andres v. United States, 333 U.S. 740, 749 (1948).

Implicit in the state and federal government's requirements that a capital conviction must be obtained through a unanimous twelve person jury, is the idea that "death is qualitatively different from a sentence of imprisonment, however long." Woodson v. North Carolina, 428 U.S. 280, 304 (1976). The Sixth, Fourteenth, and Eighth Amendments require more protection as the seriousness of the crime and severity of the sentence increase. See Johnson v. Louisiana, 406 U.S. 354, 364 (1972).

Because the jury's death recommendation verdict did not list the aggravators found, it is impossible to know whether the jurors unanimously found any one aggravator proved beyond a reasonable doubt. The finding of an aggravator exposed Mr.Nelson to a greater punishment than the life sentence authorized by the jury's guilty verdict, therefore, the aggravator must have been charged in the

indictment, submitted to a jury, and proved beyond a reasonable doubt to a unanimous jury.

The Florida death penalty sentencing statute was unconstitutional as applied in Mr. Nelson's case. The constitutional errors were not harmless. The denial of a jury verdict beyond a reasonable doubt has unquantifiable consequences and is a "structural defect in the constitution of the trial mechanism, which defies analysis by 'harmless error' standards'". Sullivan v. Louisiana, 508 U.S. 275, 2081-83 (1993) *quoting* Arizona v. Fulminante, 499 U.S. 279, 308-312 (1991). A new penalty phase trial is the remedy. Additional recent authority to support the above contention is Ring v. Arizona, 2002 WL 1357257 (U.S.).

The Supreme Court of the United States held in Ring v. Arizona, 122 S.Ct. 2428, 2431 (2002):

> If a legislature responded to such a decision by adding the element the Court held constitutionally required, surely the Sixth Amendment guarantee would apply to that element. There is no reason to differentiate capital crimes from all others in this regard. Arizona's suggestion that judicial authority over the finding of aggravating factors may be a better way to guarantee against the arbitrary imposition of the death penalty is unpersuasive. Id. at 2431

In Mr. Nelson's case the trial court found the following six aggravators: (1) defendant was previously convicted of a felony while under a sentence of

imprisonment, and was on felony probation, or controlled release, at the time of the murder; (2) the crime for which the defendant was to be sentenced was committed while the defendant was engaged in the commission of, or flight after, committing a sexual battery, burglary, or kidnapping; (3) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest; (4) the murder was especially heinous, atrocious or cruel (HAC); and (5) the capital felony was committed in a cold, calculated, and premeditated manner, and without any pretense of moral or legal justification ("CCP"); and (6) the victim was particularly vulnerable due to advanced age or disability. A new penalty phase is the remedy because it is impossible to know whether the jurors unanimously found any one aggravating circumstance in support for the recommendation of death.

CLAIM VII

Florida's capital sentencing statute is unconstitutional on its face and as applied for failing to prevent the arbitrary and capricious imposition of the death penalty and for violating the guarantee against cruel and unusual punishment in violation of the 5th, 6th, and 14th Amendments to the United States Constitution. To the extent this issue was not properly litigated at trial or on appeal, Mr. Nelson received prejudicially ineffective assistance of counsel.

All other allegations and factual matters contained elsewhere in this motion are fully incorporated herein by specific reference.

Florida's capital sentencing scheme denies Mr. Nelson his right to due process of law, and constitutes cruel and unusual punishment on its face and as applied. Florida's death penalty statute is constitutional only to the extent that it prevents arbitrary imposition of the death penalty and narrows application of the penalty to the worst offenders. See Profitt v. Florida, 428 U.S. 242 (1976). Florida's death penalty statute, however, fails to meet these constitutional guarantees, and therefore violates the Eighth Amendment to the United States Constitution. Richmond v. Lewis, 113 S.Ct. 528 (1992).

Execution by both electrocution and lethal injection impose unnecessary physical and psychological torture without commensurate justification, and

therefore constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.

Florida's death penalty statute fails to provide any standard of proof for determining that aggravating circumstances "outweigh" the mitigating factors, Mullaney v. Wilbur, 421 U.S. 684 (1975), and does not define "sufficient aggravating circumstances." Further, the statute does not sufficiently define for the judge's consideration each of the aggravating circumstances listed in the statute. See Godfrey v. Georgia, 446 U.S. 420 (1980). Florida's capital sentencing procedure does not utilize the independent reweighing of aggravating and mitigating circumstances envisioned in Profitt v. Florida, 428 U.S. 242 (1976).

The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner. See Godfrey v. Georgia; Espinosa v. Florida, 112 S. Ct. 2926 (1992). Florida law creates a presumption of death where but a single aggravating circumstance applies. This creates a presumption of death in every felony murder case, and in almost every premeditated murder case. Once one of these aggravating factors is present, Florida law provides that death is presumed to be the appropriate punishment, and can only be overcome by mitigating evidence so strong as to outweigh the aggravating factors.

The systematic presumption of death is fatally offensive to the Eighth Amendment's requirement that the death penalty be applied only to the worst offenders. See Richmond v. Lewis, 113 S. Ct. 528 (1992); Furman v. Georgia, 408 U.S. 238 (1972); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988). To the extent trial counsel failed to properly preserve this issue, defense counsel rendered prejudicially deficient assistance. See Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990).

Because of the arbitrary and capricious application of the death penalty under the current statutory scheme, the Florida death penalty statute as it exists and as it was applied in this case is unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution and under Article 1 Section 17 of the Constitution of the State of Florida. Its application in Mr. Nelson's case entitles him to relief.

CONCLUSION AND RELIEF SOUGHT

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Habeas Corpus has been furnished by United States Mail, first class postage prepaid, to all counsel of record on October_____,2008.

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

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