IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-____

THOMAS ANTHONY WYATT,

Petitioner,

v.

WALTER McNEIL, Secretary
Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

The present habeas corpus petition is the first filed by Mr. Wyatt in this Court. The petition preserves claims arising under decisions of the United States Supreme Court and puts forth substantial claims of error under Florida law and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Those claims demonstrate that Mr. Wyatt was deprived of effective assistance of counsel on direct appeal and that his convictions and death sentences were obtained and affirmed on appeal in violation of fundamental constitutional guarantees.[1]

JURISDICTION

A writ of habeas corpus is an original proceeding in this Court governed by Florida Rule of Appellate Procedure 9.100. This Court has original jurisdiction under Florida Rule of Appellate Procedure 9.030(a)(3) and Article V, section 3(b)(9) of the Florida Constitution. *See Wilson v. Wainwright*, 474 So. 2d 1162, 1163 (Fla. 1985). The Florida Constitution guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." Art. I, § 13, Fla. Const.

Jurisdiction over the present action lies in this Court because the fundamental constitutional errors challenged herein arise in the context of a capital

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[1] Citations to the record on direct appeal appear in the following format: "(R. __)." Citations to the trial transcript appear in the following format: "(T. __)." All other citations shall be self-explanatory.

case in which this Court heard and denied a direct appeal. *See, e.g., Smith v. State*, 400 So. 2d 956, 960 (Fla. 1981); *see Wilson*, 474 So. 2d at 1163. The Court's exercise of its habeas corpus jurisdiction and its authority to correct constitutional errors is warranted in this case.

REQUEST FOR ORAL ARGUMENT

Mr. Wyatt requests oral argument on the claims asserted in the present petition.

STATEMENT OF CASE AND FACTS

On January 29, 1991, Mr. Wyatt was convicted by an Indian River County jury in the Circuit Court of the Nineteenth Judicial Circuit of three counts of first degree murder. (R. 3588).[2] At the conclusion of the penalty phase on January 31, 1991, the jury unanimously recommended a death sentence. (R. 3779). On February 22, 1991, the trial court sentenced Mr. Wyatt to death.

On direct appeal, this Court affirmed Mr. Wyatt's conviction and sentence. *Wyatt v. State*, 641 So. 2d 1336 (Fla. 1994) (cert. denied, 514 U.S. 1119 (1995)).

On March 24, 2006, Mr. Wyatt filed an Amended Motion to Vacate Judgment of Convictions and Sentence, which led to an evidentiary hearing on August 6 through August 9, 2007. Subsequent to the evidentiary hearing, new

[2] Mr. Wyatt was also convicted of sexual battery, three counts of kidnapping, two counts of robbery with a firearm, two counts of grand theft and second degree arson.

grounds for relief were discovered, and a Supplement To Amended Motion To Vacate Judgments of Conviction and Sentence With Special Request For Leave to Amend was filed on February 12, 2008, asserting new claims for relief. On February 18, 2008, the court entered an Amended Order Construing Supplement As Successive Motion And Staying Successive Motion pending the resolution of *Baze v. Reez*, which was at the time pending in the United States Supreme Court. Having stayed the claims contained in the February 12, 2008 motion, the court denied all previously-filed claims in an order entered February 29, 2008.

An appeal was filed in this Court on April 4, 2008. On July 15, 2008, the circuit court entered an order staying the claims contained in the February 12, 2008 motion pending the disposition of the appeal, finding under *Washington v. State*, 823 So. 2d 248 (Fla. 4th DCA 2002) that it lacked jurisdiction in the interim. This Court issued a briefing schedule on October 13, 2008.

On December 10, 2008, undersigned counsel received newly discovered evidence concerning the Federal Bureau of Investigation ("FBI") testimony in Mr. Wyatt's case, previously unknown to Mr. Wyatt and undersigned counsel. Mr. Wyatt thereafter filed a Motion to Relinquish in this Court, docketed on January 23, 2009. That motion has not been ruled on as of the date of the filing of this petition.

This Petition is being filed simultaneously with Mr. Wyatt's initial brief appealing the denial of his motion for postconviction relief. Mr. Wyatt relies on facts presented in his initial brief.

ARGUMENT

CLAIM I

MR. WYATT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL TO THE FLORIDA SUPREME COURT AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I §§ 9, 16(a) AND 17 OF THE CONSTITUTION OF THE STATE OF FLORIDA.

Mr. Wyatt had a constitutional right to effective assistance of counsel, *Strickland v. Washington*, 466 U.S. 668 (1984), which extended to his direct appeal to this Court. *See Evitts v. Lucey*, 469 U.S. 387, 396 (1985). "A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." *Id*. The two-prong test articulated in *Strickland* that governs ineffective assistance of counsel claims applies equally to ineffectiveness allegations of trial counsel and appellate counsel. *See Orazio v. Dugger*, 876 F. 2d 1508 (11th Cir. 1989). A defendant is prejudiced by the deficient performance of appellate counsel when the deficiencies compromise the appellate process to such a degree as to undermine confidence in

the correctness of the result. *Rutherford v. Moore*, 774 So. 2d 637, 643 (Fla. 2000). Such deficiencies and prejudice occurred in Mr. Wyatt's case.

Appellate counsel failed to present for review to this Court compelling issues concerning Mr. Wyatt's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Appellate counsel's brief was deficient and omitted meritorious issues, which had they been raised, would have entitled Mr. Wyatt to relief.

In *Wilson v. Wainwright*, this Court said:

> [O]ur judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate. It is the unique role of that advocate to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deviations from due process. Advocacy is an art, not a science.

474 So. 2d 1162, 1165 (Fla. 1985). Appellate counsel in Mr. Wyatt's case failed to perform its constitutionally-required function, as articulated in *Wilson*, of ensuring that all critical errors in the lengthy record were identified, highlighted for the Court and presented in the light of zealous advocacy. Appellate counsel's failure to focus the Court's attention on substantial constitutional errors amounted to a violation of *Strickland*.

As this Court stated in *Wilson*:

> The criteria for proving ineffective assistance of appellate counsel parallels the *Strickland* standard for ineffective trial counsel: Petitioner must show 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.

Id. at 1163 (citing *Johnson v. Wainwright*, 463 So. 2d 207 (Fla. 1985)). While appellate counsel is not ineffective for failing to raise issues which were procedurally barred because they were not properly raised at trial, *Rutherford v. Moore*, 774 So. 2d 637, 646 (Fla. 2000), such failure does warrant reversal if it constitutes fundamental error, which has been defined as 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." *Urbin v. State*, 714 So. 2d 411, 418 n.8 (1998) (quoting *Kilgore v. State*, 688 So. 2d 895, 898 (Fla. 1996)); *see also Chandler v. State*, 702 So. 2d 186, 191 n.5 (Fla. 1997) (describing "fundamental error" as error "so prejudicial as to vitiate the entire trial"), *cert. denied*, 523 U.S. 1083 (1998).

Applicable professional standards are set forth in the American Bar Association Standards of Criminal Justice and Guidelines for the Performance of

Counsel in Death Penalty Cases ("ABA Guidelines").[3] "Given the gravity of the punishment, the unsettled state of the law, and the insistence of the courts on rigorous default rules, it is incumbent upon appellate counsel to raise every potential ground of error that might result in a reversal of defendant's conviction or punishment." Commentary to ABA Guideline 6.1 (2003). Appellate counsel failed to raise a number of such grounds. In light of the serious reversible error that appellate counsel failed to raise, there is more than a reasonable probability that the outcome of the appeal would have been different.

A. APPELLATE COUNSEL WAS RENDERED INEFFECTIVE BY AN INCOMPLETE RECORD ON APPEAL.

Capital defendants have a right to complete review of trial records by the Florida Supreme Court. *Delap v. State*, 350 So. 2d 462, 463 n.1 (Fla. 1977). Circuit courts are required to certify the record on appeal in capital cases. FLA. STAT. § 921.141(4); FLA. CONST. art. V, § 3(b)(1). This Court then must review

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[3] The ABA Guidelines were originally promulgated in 1989, and revised in 2003. The 2003 version of the Guidelines spells out in more detail the reasonable professional norms that trial counsel should have utilized in the investigation of Mr. Wyatt's case. However, notwithstanding the fact that Mr. Wyatt's case was tried prior to 2003, there is no doubt as to the applicability of the 2003 Guidelines to his case. The United States Supreme Court has recently reaffirmed the applicability of the Guidelines to those cases tried before the Guidelines were promulgated. In *Rompilla v. Beard*, 545 U.S. 374 (2005), in which the trial took place in 1989, prior to the promulgation of either the 1989 or the 2003 Guidelines, the Supreme Court applied not only the 1989 Guidelines but also the 2003 Guidelines to the case.

"the entire record of the conviction and sentence of death." *Delap*, 350 So. 2d at 463 n.1 (citing FLA. STAT. § 921.141(4)). If a full and complete record of the trial court proceedings is not available for review by this Court, there is "no alternative but to remand for a new trial." *Id*. at 463. When errors or omissions appear, re-examination of the complete record in the lower tribunal is required. *See id*.

Critical portions of the record were missing from Mr. Wyatt's appeal. For example, the jury came back with questions for the court yet this entire area is missing from the record. (ROA Supp. Vol. I at 7). Additionally, the penalty phase charging conference where trial counsel may or may not have objected to certain instructions is missing from the record. This is especially prejudicial to Mr. Wyatt's case due to the unconstitutionality of the actual instructions provided to the jury. Furthermore, off the record instructions took place with no explanation as to why they were not recorded. (R. 3616, 3617, 3618). While Mr. Wyatt's case was pending on direct appeal, the trial court had to reconvene to attempt to reconstruct the record due to various omissions. (ROA Supp. Vol. I). While there were clearly omissions in the record, the reconvening of the trial court merely resulted in the judge ruling that he believed the original record to be accurate. (ROA Supp. Vol. I at 26). Notwithstanding the trial court's ruling, Mr. Wyatt was prejudiced because this Court could not and cannot review crucial areas of the trial where errors may have occurred. As a result of unrecorded conversations and

substantive proceedings, this Court was unable to satisfy its obligations under *Delap*. Direct appellate counsel had no way of knowing what occurred during critical phases of the trial without a complete record, and was therefore rendered ineffective.

Appellate counsel was also ineffective in failing to assure that a proper record was provided to the Court. Certainly counsel knew, or should have known, that Mr. Wyatt had a right to review of the complete record. Counsel failure to secure that review amounted to unconstitutionally ineffective assistance.

Federal law likewise requires a complete record for appellate review. The United States Supreme Court has "emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally." *Parker v. Dugger*, 498 U.S. 308, 321 (1991). The United States Supreme Court has "held specifically that the Florida Supreme Court's system of independent review of death sentences minimizes the risk of constitutional error . . . ." *Id*. (citing *inter alia Dobbert v. Florida,* 432 U.S. 282, 295 (1977) and *Proffitt v. Florida*, 428 U.S. 242, 253 (1976)). If complete and independent appellate review is crucial to preventing constitutional error, the affirmance of Mr. Wyatt's conviction on an incomplete record is unconstitutional. With regard to a state's constitutional obligations to a defendant on appellate review, the United States Supreme Court has explained that when a state such as

Florida "opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause." *Evitts v. Lucey*, 469 U.S. 387, 401 (1985). Specifically with regard to transcripts on appeal, the United States Supreme Court has explained that when "counsel represents the indigent on appeal, how can he faithfully discharge the obligation which the court has placed on him unless he can read the entire transcript? His duty may possibly not be discharged if he is allowed less than that." *Hardy v. United States*, 375 U.S. 277, 279-80 (1964). "A court-appointed counsel who represents the indigent on appeal gets at public expense, as a minimum, the transcript which is relevant to the points of error assigned." *Id*. Similarly, the appellate court cannot review the trial proceedings without a complete record of the trial.

B. APPELLATE COUNSEL FAILED TO RAISE MERITORIOUS ARGUMENTS BASED ON REVERSIBLE ERRORS COMMITTED BY THE TRIAL COURT AND PRESERVED BY OBJECTIONS.

During voir dire the trial judge addresses the jury to explain that following the guilt phase "we then go into a phase called penalty." (T. 750). Defense counsel moved for a mistrial on the basis that the judge's statement to the jury presented a penalty phase as a forgone conclusion. (T. 751). The jury was left with a conception of the guilt phase as merely a precursor to the penalty phase. The trial thus proceeded in a posture of anticipation of an inevitable penalty phase.

In other words, the jury was given the impression by the court that guilt would be presumed.

The trial court denied defense counsel's motion for a mistrial immediately, stating "Your motion is denied. Now, let's sit down and go on." (T. 751). The judge added, "I am a little tired of all this. Go on and let's finish this." (T. 752). The judge was clearly unwilling at that point to rule fairly and to give consideration to defense counsel's motion. Interested only in moving on and "finish[ing] this," the judge failed to recognize his error and biasing of the jury. In fact, the court denied to defense counsel that he had made such an error." (T. 751). Mr. Wyatt was prejudiced by the jury's misconception of the phases of his capital trial. The State was relieved of its burden of proof and instead given the benefit of a jury prepared and instructed to find guilt and move on to the penalty phase.

However, despite the clear prejudice to Mr. Wyatt and the motion preserving the issue for appeal, appellate counsel failed to raise the issue. This Court was not directed by appellate counsel to the fact that the trial court presented Mr. Wyatt's guilt phase to the jury as a mere precursor to the inevitable penalty phase. Without that constitutionally-required direction, this Court was unable to adequately analyze the errors of the trial court.

Defense counsel made a pretrial motion to declare the felony murder aggravator unconstitutional as it is imposed automatically in violation of double

jeopardy principles and the Sixth, Eighth and Fourteenth Amendments to the United States Constitution as it fails to narrow the class of defendants eligible for the death penalty. (T. 3858-59). The trial court found the felony murder aggravator to exist in Mr. Wyatt's case, and that finding tainted the court's imposition of the death penalty on Mr. Wyatt.

In *Stringer v. Black*, the United States Supreme Court explained that aggravating factors must "channel the sentencer's discretion" and may be unconstitutional if they "create[] the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be . . ." or "create[] the possibility not only of randomness but also of bias in favor of the death penalty." 503 U.S. 222, 235-36 (1992). While *Stringer* dealt with unconstitutionally vague aggravators, the principle that "if a State uses aggravating factors in deciding who shall be eligible for the death penalty or who shall receive the death penalty, it cannot use factors which as a practical matter fail to guide the sentencer's discretion" applies with equal force to automatic aggravators. *Id*. at 235 (citing *Clemons v. Mississippi*, 494 U.S. 738, 756 n.1 (1990). The judge in the present case considered an automatic aggravating circumstance that caused Mr. Wyatt to enter the penalty phase already eligible for the death penalty. Defendants convicted of first degree murder but not subject to the felony murder aggravator

are similarly situated to Mr. Wyatt but enter their penalty phases without the predetermined establishment of an aggravating factor against them.

The automatic nature of the felony murder aggravator fails to narrow the sentencer's discretion as required by Eighth Amendment precedents. "[L]imiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988) (citing *inter alia Gregg v. Georgia*, 428 U.S. 153, 189, 206-207 (1976); *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988)). What could be more arbitrary than automatic application of an aggravating factor without the necessity for findings during the penalty phase, where Eighth Amendment narrowing must occur?

The Wyoming Supreme Court addressed this issue in *Engberg v. Meyer*, 820 P.2d 70 (Wyo. 1991). In *Engberg*, the court found the use of an underlying felony both as an element of first degree murder and as an aggravating circumstance to violate the Eighth Amendment:

> In this case, the enhancing effect of the underlying felony (robbery) provided two of the aggravating circumstances which led to Engberg's death sentence: (1) murder during commission of a felony, and (2) murder for pecuniary gain. As a result, the underlying robbery was used not once but three times to convict and then enhance the seriousness of Engberg's crime to a death sentence. All felony murders involving robbery, by definition, contain at least the two aggravating circumstances detailed above. This places the felony murder defendant

> in a worse position than the defendant convicted of premeditated murder, simply because his crime was committed in conjunction with another felony. This is an arbitrary and capricious classification, in violation of the *Furman/Gregg* narrowing requirement.
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> * * *
>
> We now hold that where an underlying felony is used to convict a defendant of felony murder only, elements of the underlying felony may not again be used as an aggravating factor in the sentencing phase. We acknowledge the jury's finding of other aggravating circumstances in this case. We cannot know, however, what effect the felony murder, robbery, and pecuniary gain aggravating circumstances found had in the weighing process and in the jury's final determination that death was appropriate.

Id. at 89-90, 92. As in *Engberg*, the application of an automatic aggravator in Mr. Wyatt's case violated Eighth Amendment requirements.

Appellate counsel had a constitutional duty to obtain a reweighing of the factors by this Court, exclusive of the constitutionally infirm automatic aggravator.

> [W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale. When the weighing process itself has been skewed, only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence.

Stringer, 503 U.S. at 223. However, appellate counsel failed to present this issue to this Court to conduct the constitutionally-required analysis.

Thus, Mr. Wyatt was denied a reliable and individualized capital sentencing determination, in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and appellate counsel was ineffective for raising the issue, preserved by motion at trial, for review.

C. APPELLATE COUNSEL FAILED TO CHALLENGE FLORIDA'S RULE PROHIBITING COUNSEL FROM INTERVIEWING JURORS, WHICH VIOLATES THE FIRST, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Florida Rule of Professional Responsibility 4-3.5(d)(4) provides that a lawyer shall not initiate communications or cause another to initiate communication with any juror regarding the trial after the dismissal of the jury. While appellate counsel challenged the trial court's excusal and refusal to excuse certain jurors, due to and despite expressed biases, counsel failed to challenge the unconstitutional barrier which prevented him from investigating how those biases translated into the jury's deliberations and potentially led to juror misconduct. This ethical rule is unconstitutional on its face.

Under the Sixth, Eighth, and Fourteenth Amendments, Mr. Wyatt is entitled to a fair trial and sentencing. Mr. Wyatt's inability to fully explore possible misconduct and biases of the jury prevents him from fully detailing the unfairness of the trial. Misconduct may have occurred that Mr. Wyatt could only discover through juror interviews. *Cf. Turner v. Louisiana*, 379 U.S. 466 (1965) (finding a

showing of prejudice and violation of Due Process when an intimate relationship is established between jurors and witnesses); *Russ v. State*, 95 So. 2d 594 (Fla. 1957) (finding "where a juror on deliberation [relies on or] relates to the other jurors material facts claimed to be within his personal knowledge, but which are not adduced in evidence, it is misconduct which may vitiate the verdict").

In the present case, Mr. Wyatt believes that circumstances exist that indicate bias and a lack of impartiality on the part of his jury. Juror Ryden said she could not do her work if on the jury, could not put her work out of her mind, might not be able to give full attention to the case and would be bothered by photographs. (T. 105-06, 147). She would have "hesitation" about following instructions forbidding sympathy for the victim from playing a role in the verdict. (T. 258). She had a "very strong opinion for the death penalty in first degree murder" and was therefore "against imprisonment for first degree murder." (T. 293). Juror Haughey read about the case in the newspaper, including the severed murder case. (T. 855, 888). As for his views on the death penalty, juror Haughey explained that "if the evidence in the case warranted a guilty verdict and I had the option of life imprisonment with twenty-five years parole or the death penalty, I would say I would choose the death penalty." (T. 856-57). He further explained that he "would be lying if [he] said [he] wouldn't be leaning toward the death penalty." (T. 858). Jurror McConnell believed that the death penalty was a "necessary

outcome" when "you murder someone, and are found guilty." (T. 267). She responded affirmatively when asked if she thought the death penalty was necessary based on the "type of crime." (T. 150).

As the judge mistakenly indicated to the jury that a penalty phase would inevitably occur in Mr. Wyatt's trial, presuming a finding of guilt, several jurors expressed the view that the death penalty should inevitably follow a finding of guilt. Thus, Mr. Wyatt's guilt phase and penalty phase were predetermined before voir dire was even completed and long before the presentation of evidence.

Defense counsel at trial attempted to excuse jurors Ryden and Haughey. The judge, perhaps aware of the error accumulating already in the proceedings, responded harshly and without consideration: "I don't want any argument. If you challenge for cause, I will rule on it. You can carry this thing out too damn far. Now, cut it out. If you want to challenge for cause, challenge it and I will rule." (T. 344).

Despite the many errors which combined to create a prejudiced jury in Mr. Wyatt's case, appellate counsel failed to challenge the rules that prevented him from interviewing those jurors and investigating such prejudice.

Rule 4-3.5(d)(4), Rules Regulating the Florida Bar, is unconstitutional because it is in conflict with the First, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. It unconstitutionally burdens the exercise of

fundamental constitutional rights, including Mr. Wyatt's rights to due process, *see Smith v. Phillips*, 455 U.S. 209, 217 (1982) (finding "due process means a jury capable and willing to decide the case solely on the evidence before it"); *Turner v. Louisiana*, 379 U.S. 466 (1965) (finding "[t]he right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial, indifferent jurors") and access to the courts of this State under Article I, § 21 of the Florida Constitution. Appellate counsel failed to argue this issue on direct appeal and thusly caused this Court to assess the constitutionality of Mr. Wyatt's conviction and sentence without full knowledge of the errors undermining his trial.

The many errors described above, the incomplete record and appellate counsel's failure to present such to this Court on direct review entitle Mr. Wyatt to relief. Because the constitutional violations which occurred during Mr. Wyatt's trial were "obvious on the record" and "leaped out upon even a casual reading of the transcript," it cannot be said that the "adversarial testing process worked in [Mr. Wyatt's] direct appeal." *Matire v. Wainwright*, 811 F. 2d 1430, 1438 (11th Cir. 1987). Appellate counsel's failure to present the meritorious issues discussed above demonstrates that the representation of Mr. Wyatt involved serious and substantial deficiencies. *See Fitzpatrick v. Wainwright*, 490 So. 2d 938, 940 (Fla. 1986). The burden remains on the State to prove beyond a reasonable doubt that the individual and cumulative errors did not affect the verdict and/or sentence.

Chapman v. California, 386 U.S. 18 (1967). In light of the serious reversible error that appellate counsel never raised, relief is appropriate.

CLAIM 2

THE FLORIDA SUPREME COURT FAILED TO CONDUCT A CONSTITUTIONALLY ADEQUATE HARMLESS ERROR ANALYSIS ON DIRECT APPEAL.

In reviewing the direct appeal of Mr. Wyatt's conviction and sentence, this Court struck an aggravating circumstance. *See Wyatt v. State*, 641 So. 2d 1336, 1341 (Fla. 1994). The Court found:

> Wyatt also claims that the trail court erred in finding the murder to have been committed in a cold, calculated and premeditated manner. On this point, we tend to agree. Proof of the cold, calculated and premeditated aggravating factor requires evidence of calculation prior to the murder, i.e., a careful plan or prearranged plan to kill. The evidence in the record is insufficient to sustain the level of premeditation required for the finding of this circumstance.

Id. at 1341 (citation omitted). The jury and sentencing court considered this improper aggravating circumstance.[4] "By giving 'great weight' to the jury recommendation, the trial court indirectly weighed the invalid aggravating factor

[4] While Florida capital juries do not reveal the aggravators on which they relied, "we must presume that the jury did so . . . just as we must further presume that the trial court followed Florida law . . . and gave 'great weight' to the resultant recommendation." *Espinosa v. Florida*, 505 U.S. 1079, 1082 (1992).

that we must presume the jury found." *Espinosa v. Florida*, 505 U.S. 1079, 1082 (1992). As this Court failed to consider the effect of the invalid aggravating factor on the sentencer's decision and failed to perform a constitutionally adequate harmless error analysis, it failed to satisfy the Eighth Amendment. *See Sochor v. Florida*, 504 U.S. 527, 539 (1992); *Clemons v. Mississippi*, 494 U.S 738, 753-54 (1990); *Johnson v. Mississippi*, 486 U.S. 578, 590-91 (1988).

In Florida, a new sentencing calculus can only be performed by the trial court because appellate review in Florida is limited to harmless error analysis and does not consist of appellate level fact-finding or reweighing of aggravation and mitigation. *See Parker v. Dugger*, 498 U.S. 308, 318 (1991); *White v. Dugger*, 565 So. 2d 700 (Fla. 1990); *Hudson v. State*, 538 So. 2d 829, 831 (Fla. 1989); *Brown v. Wainwright*, 393 So. 2d 1327 (Fla. 1981). Here, a constitutionally adequate harmless error analysis would have concluded that a resentencing was required.

The errors resulting from the sentencer's consideration of the "cold, calculated, and premeditated" aggravating factor was not harmless beyond a reasonable doubt. Unless the State can establish beyond a reasonable doubt that consideration of the invalid statutory provision had no effect upon the weighing process, the error cannot be harmless.

"When the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb

had been removed from death's side of the scale." *Stringer*, 503 U.S. at 223. "[T]he use of a vague aggravating factor in the weighing process creates the possibility not only of randomness but also of bias in favor of the death penalty." *Id*. at 235-36. The Eighth Amendment requires the reviewing court to "determine what the sentencer would have done absent the factor." *Id*. at 230. Mr. Wyatt's death sentence should be vacated and a new sentencing proceeding provided.

CLAIM 3

THE JURY WAS IMPROPERLY INSTRUCTED AND THE SENTENCING COURT IMPROPERLY CONSIDERED INVALID AGGRAVATING CIRCUMSTANCES IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The "heinous, atrocious, and cruel aggravator" and the "cold, calculated and premeditated" aggravator are facially unconstitutional due to vagueness and overbreadth. As applied in Mr. Wyatt's case, the jury was improperly instructed on this aggravator in violation of Mr. Wyatt's due process rights.

CONCLUSION

For the foregoing reasons and in the interest of justice, Mr. Wyatt respectfully urges this Court to grant habeas corpus relief.

CERTIFICATE OF FONT

Counsel certifies that this brief is typed in Times New Roman 14-point font.

_____

RACHEL L. DAY
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Florida Bar No. 68535

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing petition has been furnished by U.S. mail, first class postage prepaid, to Leslie Campbell, Office of Attorney General, 1515 N. Flagler Drive, 9th Floor, West Palm Beach, FL 33401 this ___ day of March 2009.

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