IN THE SUPREME COURT OF FLORIDA

CASE NO. SC _____

LABRANT DENNIS,

Petitioner,

v.

WALTER A. MCNEIL,

Secretary, Florida Department of Corrections

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

SUZANNE MYERS KEFFER
Chief Assistant CCRC
Florida Bar No. 0150177

OFFICE OF THE CAPITAL COLLATERAL REGIONAL COUNSEL - SOUTH
101 NE 3rd Avenue, Suite 400
Fort Lauderdale, Florida 33301

COUNSEL FOR PETITIONER

INTRODUCTION

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, claims demonstrating that Mr. Dennis was deprived of the effective assistance of counsel on direct appeal and that the proceedings that resulted in his conviction and death sentence violated fundamental constitutional guarantees.

Citations to the record on the direct appeal shall be as (R. __) for citations to the record and (Vol. ___, T. ___).

JURISDICTION

A writ of habeas corpus is an original proceeding in this Court governed by Fla. R. App. P. 9.100. This Court has original jurisdiction under Fla. R. App. P. 9.030(a)(3) and Art. V, § 3(b)(9), Fla. Const. The Constitution of the State of Florida guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." Art. I, § 13, Fla. Const.

REQUEST FOR ORAL ARGUMENT

Mr. Dennis requests oral argument on this petition.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

Constitutional Provisions

PROCEDURAL HISTORY

On May 8, 1996, Mr. Dennis was indicted on two first-degree murder charges in the deaths of Timwanika Lumpkins and Marlin Barnes, one count of burglary with assault or battery while armed, and one count of criminal mischief. (R. 1-4). On October 28, 1998, the jury found Mr. Dennis guilty on both first-degree murder counts, as well as the burglary with assault and criminal mischief counts. (R. 2814-15; 2817-18). By eleven-to-one vote, the jury recommended sentences of death on December 2, 1998. (R. 3145). On January 22, 1999, a *Spencer* hearing was held, and on February 26, 1999, the Circuit Court sentenced Mr. Dennis to death. (R. 3220; R. 3254).

On direct appeal, this Court affirmed Mr. Dennis's convictions and sentence. *Dennis v. State*, 817 So. 2d 741 (2001), *cert. denied*, 537 U.S. 1051 (2002).[1]

[1] Appellate counsel raised the following issues: (1) the trial court's failure to instruct the jurors that they should use great caution in relying on the testimony of a witness who was involved in the crime was fundamental error; (2) Mr. Dennis was denied a fair trial by the state's improper bolstering of the credibility of its witnesses with inadmissible hearsay and opinions, and with the prosecutor's own unsworn testimony; (3) Mr. Dennis was denied a fair trial and a fair penalty phase by the state's introduction, under the pretense of impeaching its own witness, of evidence that the his girlfriend, Watisha Wallace, burned the car which the State contended was used in the crimes; (4) the trial court erred in denying the defendant's motion to exclude Nidia El-Djeije's identification of Ms. Wallace's car; (5) the state's impeachment of its own witness, Jessie Pitts, denied the Defendant a fair trial; (6) the trial court erred in allowing the state to introduce unfairly prejudicial evidence of collateral misconduct; (7) the trial Court erred in allowing the State to introduce testimony in its case-in-chief that the Defendant had a jealous character; (8) the trial court erred in allowing the introduction of horrific

On November 25, 2003, Mr. Dennis filed his initial motion for postconviction relief with request for leave to amend. The lower court held an evidentiary hearing on July 13, 14 and 28, 2004. On October 4, 2004, the lower court issued a written order denying all of Mr. Dennis's postconviction claims. Mr. Dennis timely filed an appeal.

On December 17, 2008, this Court issued an order holding that a new postconviction proceeding was warranted in this case and remanded to the trial court for a new proceeding on Mr. Dennis's postconviction motion filed under Fla. R. Crim. P. 3.851. Mr. Dennis filed a supplemental motion for postconviction relief on April 13, 2009. (Vol. 1, T. 55-147). On June 12, 2009, the lower court issued a written order summarily denying all of Mr. Dennis's postconviction claims. (Vol. 2, T. 297-323). Mr. Dennis timely filed an appeal. (Vol. 2, T. 324-325).

This petition for habeas corpus relief and Mr. Dennis's Initial Brief are being filed simultaneously with this Court.

---

autopsy photos which had little or no relevance to any disputed issue; (9) the sentencing order is replete with errors, conjecture, and conclusory assertions, providing an inadequate basis for appellate review and demonstrating the unreliability of the Court's decision to impose the death penalty; (10) the trial court erred in finding that the murder was cold, calculated and premeditated; (11) the trial court erred in finding that the murder was heinous, atrocious or cruel; (12) the trial court erred in giving little or no weight to the statutory mitigating circumstance that the murders were committed under the influence of extreme mental or emotional disturbance; and (13) Mr. Dennis's death sentence is disproportionate.

CLAIM I

MR. DENNIS WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL TO THE FLORIDA SUPREME COURT IN VIOLATION OF HIS RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ART. I §§ 9, 16(a) AND 17 OF THE FLORIDA CONSTITUTION.

A. Introduction

Mr. Dennis had the constitutional right to the effective assistance of counsel for purposes of presenting his direct appeal to this Court. *Strickland v. Washington*, 466 U.S. 668 (1984). "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." *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). The two-pronged *Strickland* test applies equally to allegations of ineffectiveness of trial counsel and appellate counsel. *See Orazio v .Dugger*, 876 F.2d 1508 (11th Cir. 1989). Appellate counsel's performance was deficient, and Mr. Dennis was prejudiced because these deficiencies compromised the appellate process to such a degree as to undermine confidence in the correctness of the result of the direct appeal. *Rutherford v. Moore*, 774 So. 2d 637, 643 (Fla. 2000).

Appellate counsel failed to present for review to this Court compelling issues concerning Mr. Dennis'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. Dennis to relief.

In *Wilson v. Wainwright*, 474 So. 2d 1162 (Fla. 1985), this Court underscored the importance of effective representation on direct appeal:

> [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.

Wilson, 474 So. 2d at 1165 . In Mr. Dennis's case, appellate counsel failed to act as a "zealous advocate." Mr. Dennis was therefore deprived of his right to the effective assistance of counsel for his direct appeal to this Court.

In *Wilson*, this Court reiterated that 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).

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").[2] "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 errors that appellate counsel failed to raise, there is more than a reasonable probability that the outcome of the appeal would have been different. A new direct appeal should be ordered.

B. Mr. Dennis was Denied Due Process Due to Improper and Inflammatory Testimony Offered by the State

The prosecutor's conduct in Mr. Dennis's case was contrary to the law and

---

[2] 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. However, notwithstanding the fact that Mr. Dennis's case was tried in 1998, 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*, 1125 S. Ct 2456 (2005), in which case 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.

Furthermore, as the Sixth Circuit explained in *Hamblin v. Mitchell*, 354 F.3d 482, (2003), "New ABA Guidelines adopted in 2003 simply explain in greater detail than the 1989 guidelines the obligations of counsel. The 2003 ABA guidelines do not depart in principle or concept from *Strickland* [or] *Wiggins*." *Hamblin* 354 F.3d at 487. Thus the 2003 guidelines are applicable, as the Sixth Circuit found, to cases tried before they were promulgated in 2003 since they merely explain in more detail the concepts promulgated previously.

prejudiced the jury's consideration of the evidence, in violation of the Constitution. This Court has held that when improper conduct by the prosecutor "permeates" a case, relief is proper. *Garcia v. State*, 622 So. 2d 1325 (Fla. 1993); *Nowitzke v. State*, 572 So. 2d 1346 (Fla. 1990).

The improprieties on the part of the State began prior to jury selection, as evidenced by the very fact that the original trial judge was forced to recuse herself due to State misconduct. The Florida courts have held that "a prosecutor's concern 'in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" *Rosso v. State*, 505 So. 2d 611, 614 (Fla. 3rd DCA 1987). The cumulative effect of the prosecutor's case in chief was to "improperly appeal to the jury's passions and prejudices." *See Cunningham v. Zant*, 928 F.2d 1006, 1020 (11th Cir. 1991). Such testimony prejudicially affects the substantial rights of the defendant when they "so infect the trial with unfairness as to make the resulting conviction a denial of due process." *See Donnelly v. DeChristoforo*, 416 U.S. 647 (1974); *See also United States v. Eyster*, 948 F.2d 1196, 1206 (11th Cir. 1991). Multiple witnesses gave improper and inflammatory testimony during Mr. Dennis's trial. Furthermore, the testimony was irrelevant to any element of the crime, and as such, denied Mr. Dennis due process at both the guilt and penalty phases. Had the jury not been subjected to this improper and inflammatory testimony, there is a reasonable probability that the outcome of the trial would have been different. *See*

Strickland v. Washington, 466 U.S. 688 (1984) . Relief is warranted.

Detective Edward Hudak testified as a State's witness during the guilt phase. He worked for the Coral Gables Police Department and worked as liaison officer with the Athletic Department at the University of Miami. (R. 3397-3398). On direct examination, he was permitted to testify that upon hearing about the crime, Earl Little was "very stoic. . .you could see the shock or disbelief. . .[and] broke down, was muttering something really kind of incoherent, but extremely upset." (R. 3402). The court overruled Mr. Dennis's relevancy objection and continued to allow irrelevant and inflammatory comments. Det. Hudak further explained that other University of Miami football players reacted angrily, with questions of why. (R. 3407-08). This was not victim impact evidence offered during the penalty phase. Rather, Det. Hudak testified during the guilt phase of the trial and his testimony served only to appeal to the jury's sympathies. The reactions of the other players were irrelevant and inflammatory testimony.[3]

Robin Gore, Ms. Lumpkins aunt, also testified for the state regarding a past incident in which no police reports, criminal charges or convictions were made. (R. 4254). Ms. Gore alleged that Mr. Dennis came to the parking area of her apartment one night wearing a hooded black pullover and carrying a gun. (R. 4264). She

[3] Similar testimony was offered by the State when Randy Shannon testified immediately after Det. Hudak. This is further addressed below in Claim I, Subsection C.

further alleged that she feared for her niece's safety so she watched closely as Ms. Lumpkins and Mr. Dennis talked. (R. 4275). Over defense objection, the court allowed the testimony as an excited utterance because Ms. Gore stated she "saw fright in [Timwanika's eyes]. . .She was very frightened." (R. 4268-69). The State elicited this inflammatory hearsay testimony and the trial court improperly allowed the jury to hear it.

In Florida, excited utterances are governed pursuant to Fla. Stat. § 90.803(2). Statements made while the declarant is in "an excited state which relate to the event or condition that caused the excitement are admissible if the person has not had an opportunity to engage in reflective thought." *See Evans v. State*, 838 So. 2d 1090, 1093 (Fla. 2002); *Strong v. State*, 947 So. 2d 552, 55 (Fla. 3d DCA 2007); *See also Holmes v. State*, 642 So. 2d 1387, 1389 (Fla. 2d DCA 1994); *State v. Skolar*, 692 So. 2d 309, 310 (Fla. 5th DCA 1997); *Corn v. State*, 796 So. 2d 641, 644 (Fla. 1st DCA 2001). The trial court must conclude that the preponderance of the evidence supports allowing the statement as an excited utterance. *Blandenburg v. State*, 890 So. 2d 267, 270 (Fla. 1st DCA 2004). There is no bright line rule on the amount of time that must elapse, but these cases set forth that excited utterances are only admissible in a narrow set of circumstances. At trial, the court failed to consider the time for reflective thought, or any other factors, and simply overruled defense objections to the improper testimony. Merely stating that

Ms. Lumpkins was frightened does not meet the standard for allowing hearsay testimony to be presented to a jury under the excited utterance exception. Here again, the State was improperly permitted to present inflammatory testimony to the jury.

Dr. Sam Gulino was the medical examiner who performed the autopsies in this case. (R. 4380-4451). Dr. Gulino testified in the guilt phase that the blood smears on the door were consistent with Mr. Barnes being blinded before he died. (R. 4450).[4] Over defense objection, Dr. Gulino further testified that the location of the blood on the floor and door indicated Mr. Barnes was reaching for the door. (R. 4450). Dr. Gulino was tendered as an expert in forensic pathology, not in blood spatter interpretation. The prejudice from his assumptions about the blood is compounded by the fact that he was never qualified as a blood spatter expert.

There was no basis whatsoever for the introduction of such collateral, immaterial, and intrinsically inflammatory testimony from multiple witnesses. Taken separately or cumulatively, Mr. Dennis was prejudiced by each of these individuals' irrelevant testimony. Appellate counsel's performance was deficient for failing to raise these meritorious issues on direct appeal. As such, confidence in the correctness and fairness of the result of the appellate proceeding has been

[4] During the penalty phase, Dr. Rao also extrapolated that the smears indicated that the victim attempted to get help. (R. 5255). Dr. Rao was never at the crime scene and did not perform the autopsies; however, she was allowed to testify based on another witness's report. *See also* Claim VI.

undermined.

C. Mr. Dennis was Denied Due Process Due to Improper and Inflammatory Testimony Offered by the State Which Constituted Fundamental Error

Generally, "appellate counsel cannot be ineffective for failing to raise issues not preserved for appeal. However, an exception is made where appellate counsel fails to raise a claim which, although not preserved at trial, represents fundamental error. *See Archer v. State*, 934 So. 2d 1187, 1205 (Fla. 2006); *Kilgore v. State*, 688 So. 2d 895, 898 (Fla.1996). 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)). Under Florida law, fundamental error occurs, as required for reversal of conviction in absence of contemporaneous objection at trial, only when the omission is pertinent or material to what the jury must consider in order to convict. *McClinton v. McNeil*, 615 F.Supp. 2d 1310 (M.D. Fla. 2008). Multiple witnesses gave improper and inflammatory testimony during both phases of Mr. Dennis's trial, and the jury was allowed to consider this testimony in deciding his conviction and sentence.

Wayne Sibley testified for the State during the guilt phase. He was a Coral Gables Fire-Rescue paramedic who arrived on the scene. (R. 3235). The State

elicited inflammatory testimony from Mr. Sibley. During direct examination, he testified that "there was so much blood smeared around the floor. . .the carpet was heavily saturated with blood and other types of tissue [and] it was probably the worst thing I've seen in a long time." (R. 3244-3245). This testimony did not assist the State in proving any element of the crime. A paramedic's opinion of the scene and comparing it to other scenes was irrelevant because he arrived on the scene to treat the victims. It was offered only to appeal to the jury's sympathies and inflame the prejudice against Mr. Dennis.

Detective Elvey Melgarejo also testified for the State at the guilt phase. He was a crime scene detective for Metro-Dade and assisted Detective Thomas Charles. (R. 3337). During direct examination, the State elicited inflammatory testimony that the back of one of the victim's skull was "very mushy." (R. 3343). Det. Melgarejo is not a medical examiner. His duties at the crime scene were limited to taking photographs. Like Mr. Sibley, Det. Melgarejo's testimony about injuries to the victims was inflammatory and did not assist the State in proving any element of the crime.

Immediately following Det. Hudak's objectionable testimony regarding the other football players' emotion reactions to the crime, Randy Shannon testified for the State during the guilt phase.[5] Coach Shannon was Mr. Barnes's position coach

[5] Claim I, Subsection B details Det. Hudak's testimony.

at the University of Miami, and at the time of trial, was a recognized national celebrity as the coach of the Miami Dolphins. (R. 3410). Coach Shannon testified that he called Ray Lewis, another nationally-known sports celebrity, in Lakeland about the murder and had to talk to him for 20 minutes "just to calm him down." Upon hearing the news, Ray Lewis was "hurt, distracted, and he just—it was painful for him." (R. 3413). Coach Shannon was never at the crime scene and had no responsibility in the investigation. Like Det. Hudak's testimony, Coach Shannon's testimony was irrelevant and inflammatory. The reactions of the other players and how Coach Shannon knew the victim did not assist the State in proving any element of the crime. Rather, the state improperly offered the testimony of Coach Shannon, as a celebrity, merely to curry favor with, and inflame the passions of, the jury.

The State also presented improper and inflammatory medical examiner testimony. Dr. Gulino testified that the victims' injuries were "very typical of high speed motor vehicle crashes." (R. 4422). During the penalty phase of the trial, Dr. Valerie Rao testified that the type of fracture was those she had seen in "a head being run over by a car. . ." (R. 5232). The difference is evident. Dr. Rao's comparison was particularly inflammatory. In any event, neither description assisted the State in proving any element of the crime and only served to create prejudice against Mr. Dennis, especially during penalty phase. *See also* Claim V.

The State had unbridled discretion during Det. Charles's testimony. Even though he was never qualified as an expert, he was permitted to testify regarding blood spatter and toolmark identification. His testimony was highly prejudicial and inflammatory. Det. Charles testified that the blood near the front door was "consistent with a person's hands and arms are soaked in blood flailing or moving. . .and striking a wall. . ." (R. 3292). Like Dr. Gulino, Det. Charles testified to unfounded conclusions that the blood spatter was an indication that "[t]here's some act of violence going on here." (R. 3268-69); *See also* Claim I, Subsection B. The prejudice from these assumptions is compounded by the fact that Det. Charles was never qualified as a blood spatter expert, but he was one of three unqualified witnesses permitted to testify as if he was.

Det. Charles was further allowed to opine that a "puncture" mark in the victim's tires "had a particular shape to it. It was a particular length. It was the type that I would associate with a knife puncture. . ." (R. 3262). This left the jury with the impression that the knife admitted into evidence was the only knife that could have left the puncture marks in the tires. Here again, the prejudice from these assumptions is compounded by the fact that he was not qualified as a toolmark expert.

Similar to Det. Charles, there simply is no indication that Dr. Gulino was qualified to give opinion testimony in the area of toolmark identification.

Dr. Gulino, in comparing the alleged weapon (shotgun) to photographs of both victims' wounds, opined that the wounds were "consistent with" being "struck with the blunt end of this shotgun." (R. 4414) (emphasis added). This testimony left the jury with the impression that no other object could have left the wounds on the victims. Again, Dr. Gulino was never qualified as a toolmark expert. The prejudice is apparent.

D. Conclusion

The inflammatory and prejudicial testimony was not supported by the evidence but simply presented to match the State's theory of the case. *See also* Claim II. Furthermore, the testimony was irrelevant and only used to inflame the prejudices of the jury. The prosecutor improperly invoked victim sympathy by presenting testimony about other players' reactions and the nature of the crime scene. As illustrated above, the instances in which the State brought forth inflammatory and irrelevant testimony were not isolated and destroyed the essential fairness of the trial.

Even if the preserved and unpreserved errors in isolation are not sufficient to rise to the level of fundamental error, they contribute to the overall, cumulative effect of the improper and irrelevant testimony in Mr. Dennis's case. It is appropriate to consider both the preserved and unpreserved errors in determining whether the preserved error was harmless beyond a reasonable doubt. *Martinez v.*

State, 761 So. 2d 1074, 1083 (Fla. 2000); *See Gore v. State*, 719 So. 2d 1197, 1202 (Fla.1998); *Whitton*, 649 So. 2d at 865; *Jackson v. State*, 575 So. 2d 181, 189 (Fla.1991). Where multiple errors are found, even if deemed harmless individually, "the cumulative effect of such errors" may deny a "defendant the fair and impartial trial that is the inalienable right of all litigants." *Brooks v. State*, 918 So. 2d 181, 202 (Fla. 2005) (quoting *Jackson v. State*, 575 So. 2d 181, 189 (Fla. 1991)); *See also McDuffie v. State*, 970 So. 2d 312, 328 (Fla. 2007). Where several errors are identified, the Court "considers the cumulative effect of evidentiary errors and ineffective assistance claims together." *Suggs v. State*, 923 So. 2d 419, 441 (Fla. 2005). As illustrated above, the cumulative effects of the preserved and unpreserved errors at Mr. Dennis's trial warrant relief.

The Constitutional violations that occurred during Mr. Dennis's trial were "obvious on the record" and "leaped out upon even a casual reading of the transcript." *Matire v. Wainwright*, 811 F.2d 1430, 1438 (11th Cir. 1987). Therefore, it cannot be said that the "adversarial testing process worked" in Mr. Dennis's direct appeal. *Id.* The lack of appellate advocacy on Mr. Dennis's behalf is similar to the lack of advocacy present in other cases in which this Court has granted habeas relief. *Wilson v. Wainwright*, 474 So. 2d 1162 (Fla. 1985). Appellate counsel's failure to present the meritorious issues discussed in this petition demonstrates that counsel's representation of Mr. Dennis on direct appeal

involved serious and substantial deficiencies. *Fitzpatrick v. Wainwright*, 490 So. 2d 938, 940 (Fla. 1986). Individually and cumulatively, *Barclay v. Wainwright*, 444 So. 2d 957, 959 (Fla. 1984), the claims omitted by appellate counsel establish that confidence in the correctness and fairness of the result of Mr. Dennis's appellate proceeding has been undermined. *Wilson*.

In evaluating a claim of ineffective assistance of appellate counsel, this Court determines 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 "whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result." *Groover v. Singletary*, 656 So. 2d 424, 425 (Fla.1995) (quoting *Pope v. Wainwright*, 496 So. 2d 798, 800 (Fla.1986)). It is clear that several meritorious arguments were available to be raised on direct appeal, yet appellate counsel unreasonably failed to assert them. Particularly when compared with the arguments that appellate counsel did advance, the unreasonably prejudicial performance of appellate counsel is obvious. These errors, singularly or cumulatively, demonstrate that Mr. Dennis was denied the effective assistance of appellate counsel. This failure to raise on direct appeal other rulings which, alone or in combination, particularly with the other errors described in this petition, establishes that a new trial and/or a resentencing is warranted.

CLAIM II

MR. DENNIS WAS DENIED A FAIR TRIAL AND SENTENCING DUE TO MISCONDUCT AND BIAS BY THE TRIAL JUDGE AND THE PROSECUTOR IN THIS CASE WHICH IRREPARABLY TAINTED THE JURY AGAINST MR. DENNIS, ALL OF WHICH RISE TO THE LEVEL OF FUNDAMENTAL ERROR.

A. Introduction

As discussed in Claim I, appellate counsel is not ineffective for failing to raise issues not preserved for appeal; however, an exception is made where appellate counsel fails to raise a claim which, although not preserved at trial, represents fundamental error. This occurs when the error is "equivalent to a denial of due process." *State v. Johnson*, 616 So. 2d 1, 3 (Fla. 1993). "Fundamental error goes to the foundation of the case or the merits of the cause of action and can be construed on appeal without objection." *Crump v. State*, 622 So. 2d 963, 972 (Fla.1993). During Mr. Dennis's trial, there were several instances in which the judge and/or the prosecutor had inappropriate interactions with the jurors. Furthermore, the trial judge's rulings on several objections plainly show favoritism to the State and bias against Mr. Dennis. The misconduct and bias are fundamental error and should have been raised on direct appeal. Counsel's failure to do so rendered his assistance ineffective.

B. The Jury Was Tainted Due to Misconduct by the State and the Trial Court

The right to an impartial jury is a fundamental constitutional right, a violation of which may never be harmless. *Ratliff v. Com.*, 194 S.W.3d 258 (Ky. 2006), as modified, (July 28, 2006). Under the Fifth, Sixth, Eighth and Amendments, Mr. Dennis is entitled to a fair trial and sentencing. Misconduct by the State and trial judge, along with the biases of the jury, is evident on the record. *See also* Claim I. These contributed to the unfairness of Mr. Dennis's trial. Implicit in the right to a jury trial is the right to an impartial and competent jury. *Tanner v. United States*, 483 U.S. 107, 126 (1987). In *Irvin v. Dowd*, the Supreme Court explained:

> In essence, 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 minimum standards of due process. 'A fair trial in fair tribunal is a basic requirement of due process.'

366 U.S. 717, 721 (1960) (citations omitted). The Sixth Amendment to the United States Constitution guaranteed Mr. Dennis a fair and impartial jury. "A trial by jury is fundamental to the American scheme of justice and is an essential element of due process." *Scruggs v. Williams*, 903 F.2d 1430 (11th Cir. 1990). It simply cannot be said that Mr. Dennis's trial comported with the mandate or spirit of the constitutional guarantee of a "fair tribunal." To assert that Mr. Dennis's jury was "impartial" is to render due process "but a hollow formality." *Rideau v. Louisiana*,

373 U.S. 723, 726 (1963).

On October 9, 1998, after the trial court released the jury for the day, Juror Reid stayed in the courtroom to discuss a scheduling conflict with the court. Juror Reid provided the Judge with a letter indicating she had a meeting with the Office of the State Attorney - Child Support Enforcement on October 14, 1998. After some discussion on the record about the nature of Juror Reid's appointment and who she had attempted to contact regarding rescheduling (R. 3558-59), Judge Crespo and the prosecutors went to the Judge's chambers to make any necessary phone calls to resolve the issue (R. 3559). At this point, the proceedings were adjourned. There is no record of what occurred in chambers. There is no indication in the record that trial counsel for Mr. Dennis was present, or even aware of anything happening, in chambers. Based on the record, it can only be concluded that the State and the trial judge assisted Juror Reid with his child support issues and thereby created bias on Juror Reid's part in favor of the State.

In another incident involving a juror, during the penalty phase of the trial, Juror Thomas asked to speak with the judge and attorneys after proceedings ended that day. The prosecutor asked "Did he lose his job?" (R. 5208). The judge stated they have to find out what happened, to which the prosecutor immediately stated "I already have another job lined up for him." (R. 5208). There is no indication in the record that the judge or defense counsel knew at that point that Mr. Thomas had

lost his job; however, it is clear from the record that the prosecutor already knew, and had secured other employment for him. Based on the record, the only conclusion to be drawn is that the State had improper contact with Juror Thomas or outside the presence of the trial judge and defense counsel and the State assisted him in finding employment.

During the penalty phase of the trial after the jury had left for the day, Elaine Williams, Mr. Dennis's mother, was arrested for allegedly threatening a witness. (R. 5334). At the end of proceedings the following evening, jurors asked through the bailiff if they could be "escorted to their cars individually" because they did not want to only be escorted to the street as was the case throughout the trial. (R. 5418). According to the record, this was the first time any such request was made by the jurors. Despite a request by Defense counsel, the trial court never made any inquiry as to why the jury asked for special escorts directly to their individual cars. Therefore, Mr. Dennis cannot know what information the jury had about the prior day's events or what led the jury to make this request for the first time.

Mr. Dennis was prejudiced by the misconduct of the judge and prosecutor and such bias clearly had an impact on the jury. A juror's loss of their job and child support enforcement issues are clearly serious and personal and emotional matters, and the State and trial judge's assistance in such matters curried favor with the

jurors. The request by the jury to be escorted to their cars further indicates bias. This goes directly to the validity of the trial itself .It was fundamental error. *See Kilgore v. State*, 688 So. 2d 895, 898 (Fla.1996) (quoting *State v. Delva*, 575 So. 2d 643, 644-45 (Fla.1991)). This error should have been raised on direct appeal. Failure to raise fundamental error is ineffective. Relief is warranted.

C. Trial Court Exhibited Bias Against Mr. Dennis at Guilt and Penalty Phases

Due process guarantees the right to a neutral, detached judiciary in order "to convey to the individual a feeling that the government has dealt with him fairly, as well as to minimize the risk of mistaken deprivations of protected interests." *Carey v. Piphus*, 425 U.S. 247, 262 (1978). The United States Supreme Court has explained that in deciding whether a particular judge cannot preside over a litigant's trial:

> the inquiry must be not only whether there was actual bias on respondent's part, but also whether there was "such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused." *Ungar v. Sarafite*, 376 U.S. 575, 588, 84 S. Ct. 841, 849, 11 L.Ed.2d 921 (1964). "Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties," but due process of law requires no less. *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99 L.Ed. 942 (1955).

Taylor v. Hayes, 418 U.S. 488, 501 (1974).

The appearance of impropriety violates state and federal constitutional rights

to due process. A fair hearing before an impartial tribunal is a basic requirement of due process. *In re Murchison*, 349 U.S. 133 (1955). "Every litigant[] is entitled to nothing less than the cold neutrality of an impartial judge." *State ex rel. Mickle v. Rowe*, 131 So. 331, 332 (Fla. 1930). Absent a fair tribunal there is no full and fair hearing. Even the appearance of impartiality is sufficient to warrant reversal.

Canon 3E, Fla. Code Jud. Conduct, and Rule 2.160, Fla. R. Jud. Admin., mandate that a judge disqualify himself in a proceeding "in which the judge's impartiality might reasonably be questioned," including, but not limited to, instances where the judge has a personal bias or prejudice concerning a party or a party's lawyer, has personal knowledge of disputed evidentiary facts concerning the proceeding, or where the judge has been a material witness concerning the matter in controversy. Canon 3E(1)(a) & (b) , Rule 2.140(d)(1) & (2) . As set forth below, the situation in Mr. Dennis's case mandated disqualification.

In Florida, the disqualification rules direct that a judge must avoid even the appearance of impropriety:

> It is the established law of this State that every litigant, including the State in criminal cases, is entitled to nothing less than the cold neutrality of an impartial judge. It is the duty of the court to scrupulously guard this right of the litigant and to refrain from attempting to exercise jurisdiction in any manner where his qualification to do so is seriously brought into question. The exercise of any other policy tends to discredit and place the judiciary in a compromising attitude which is bad for the administration of justice. *Crosby v. State*, 97 So. 2d 181 (Fla. 1957); *State ex rel. Davis v. Parks*, 141 Fla. 516, 194 So. 613 (1939); *Dickenson v. Parks*, 104

> Fla. 577, 140 So. 459 (1932); *State ex rel. Mickle v. Rowe*, 100 Fla. 1382, 131 So. 3331 (1930).
>
> * * *
>
> The prejudice of a judge is a delicate question for a litigant to raise but when raised as a bar to the trial of a cause, if predicated on grounds with a modicum of reason, the judge in question should be prompt to recuse himself. No judge under any circumstances is warranted in sitting in the trial of a cause who neutrality is shadowed or even questioned. *Dickenson v. Parks*, 104 Fla. 577, 140 So. 459 (1932); *State ex rel. Aguiar v. Chappell*, 344 So. 2d 925 (Fla. 3d DCA 1977).

State v. Steele, 348 So. 2d 398 (Fla. 3d DCA 1977).

The United States Supreme Court has also recognized the basic constitutional precept of a neutral, detached judiciary:

> The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision making process. *See Carey v. Piphus*, 435 U.S. 247, 259-262, 266-267, 98 S. Ct. 1042, 1043, 1050-1052, 1053, 1054, 55 L.Ed.2d 252, (1978). The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. *See Matthews v. Eldridge*, 424 U.S. 319, 344, 96 S. Ct. 893, 907, 47 L.Ed.2d 18 (1976). At the same time, it preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done," *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 172, 71 S. Ct. 624, 649, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring), by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980).

The Eleventh Circuit Court of Appeals explained:

> The Commentary to Canon 3E(1) [Code of Judicial Conduct] provides that a judge should disclose on the record information which the judge believes the parties or their lawyers might consider relevant to the question of disqualification. We conclude that both litigants and attorneys should be able to rely upon judges to comply with their own Canons of Ethics. A contrary rule would presume that litigants and counsel cannot rely upon an unbiased judiciary, and that counsel, in discharging their Sixth Amendment obligation to provide their clients effective professional assistance, must investigate the impartiality of the judges before whom they appear. Such investigations, of course, would undermine public confidence in the judiciary and hinder, if not disrupt, the judicial process -- all to the detriment of the fair administration of justice.

Porter v. Singletary, 49 F.3d 1483, 1489 (11th Cir. 1995).

The objective standards implementing the Due Process Clause do not require proof of actual bias. *See Caperton v. A.T. Massey Coal Co., Inc., et. al*., 129 S. Ct. 2252, 2263 (2009); *Tumey v. OH*, 273 U.S. 510, 532 (1927); *Mayberry v. PA*, 400 U.S. 455, 465-466 (1971); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986). The United States Supreme Court held that the "probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable." *Caperton* 129 S. Ct. 2252, 2259 (2009) ; citing to *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). The issue is whether "'under a realistic appraisal of psychological tendencies and human weakness,' the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is

to be adequately implemented.'" *Caperton*, 129 S. Ct. 2252, 2255 (2009) ; citing to *Withrow*, 421 U.S. at 47. It is "axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" *Caperton*, 129 S. Ct. 2252, 2259 (2009) ; citing to *In re Murchison* 349 U.S. 133, 136 (1955). The Court determined that the issue is "not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" *Caperton*, 129 S. Ct. 2252, 2262 (2009) . In addition, "if a judge discovers that some personal bias or improper consideration seems to be the actuating cause of the decision or to be an influence so difficult to dispel that there is a real possibility of undermining neutrality, the judge may think it necessary to consider withdrawing from the case." *Caperton*, 129 S. Ct. 2252, 2263 (2009) . An objective standard "may require recusal whether or not actual bias exists or can be proved. Due process 'may sometimes bar trial by judges who would do their very best to weigh the scales of justice equally between contending parties.'" *Caperton*, 12 S. Ct. 2252, 2265; citing *Murchison*, 349 U.S., at 136.

1. The Trial Judge in Mr. Dennis's Case Demonstrated His Bias By His Statements and Evidentiary Rulings During Both Phases of the Trial

During the guilt phase, Judge Crespo, following an objection by defense counsel to the relevancy of football players reactions, allowed the line of questioning to continue and stated that it was clear from the beginning that one of

the victims was a football player and that he did not think there was "anything wrong, and it is relevant for the jury to have the information of the relationship with this dead young man to the rest of his team." (R. 3409); *See also* Claim I, Subsections B and C. The testimony regarding the team reactions was not presented as victim impact evidence, but evidence in the State's case in chief at the guilt phase. It was error to admit this evidence.

Similarly, during the penalty phase of Mr. Dennis's trial, Judge Crespo denied a Defense motion to exclude family members who were testifying as State's witnesses from the courtroom during other testimony.[6] Judge Crespo noted on the record that he was "very aware of the two witnesses that have sat through the trial. I have seen their faces and their sorrow." (R. 5146). On its face, this statement is a clear indication of bias by the judge, and his ruling favored the State.

Judge Crespo, following Defense objection and sidebar, allowed the State to introduce evidence of Watisha Wallace's felony conviction and photographs of the burned car. (R. 3594). Ms. Wallace was a State's witness in the guilt phase. The court stated "Normally I would sustain, but I think the facts are in." (R. 3595). Photos of the burned car allegedly also used in the murders were shown to the witness and testimony was given concerning the conviction. This information was irrelevant to the case because it involved a completely separate criminal act

[6] Defense counsel made a motion to exclude Mr. Barnes's mother and Ms. Lumpkins's father. (R. 5147-48).

involving insurance fraud; however, it gave the jury the perception that the two crimes were related. Furthermore, the State was impeaching the credibility of its own witness with inflammatory testimony. The bias is apparent given that Judge Crespo admitted he would normally sustain similar testimony but admitted it in Mr. Dennis's case. Again, the ruling favored the State.

Judge Crespo again allowed the State to present evidence over defense objection during Joseph Stewart's testimony. This time State's witness Stewart was allowed to use a "model gun" to describe the weapon he allegedly gave Mr. Dennis. The State argued it was "the exact model of the gun." (T. 3631-32). The gun Mr. Stewart allegedly gave Mr. Dennis was already in evidence and was used in the testimony of other State witnesses. It was improper for the court to allow a model gun to be used during the trial, especially by the only person who admitted to the partial destruction of the alleged murder weapon in evidence. *See also* Claim III. No other State expert used it, attempted to do so, or even referred to it. One does not have to look very deep in order to recognize the bias of the lower court's rulings. Like the other rulings, it is apparent that this one favored the State as well.

2. The Trial Judge in Mr. Dennis's Case Had Ex-Parte Communications With the Jury During the Penalty Phase of the Trial.

During the penalty phase of the trial, State and defense counsel discussed the

jury instructions and verdict forms with Judge Crespo. (R. 5201-06). With regard to the verdict forms, the Court stated, "I will read this to them and show them these verdict forms, like I do during the regular instructions. I am going to go down and speak to them like I did the last time." (R. 5203) (emphasis added). There is no indication in the record when Judge Crespo went to speak with the jury previously or on how many occasions; however he planned to do so again regarding the penalty phase jury instructions. On its most basic level, this is clear ex-parte communication by the judge with the jury outside the presence of Mr. Dennis, defense counsel, or the State.

3. The Trial Judge in Mr. Dennis's Case Had a Personal Relationship with the Medical Examiner Who Testified During the Penalty Phase.

Dr. Rao testified at the evidentiary hearing in 2004 regarding a memorandum she received from the State, her testimony at Mr. Dennis's penalty phase proceedings, and her professional conduct and employment history (PC-R. 1135). When the State finished its cross examination of Dr. Rao, the Court informed counsel that it would allow counsel to continue questioning Dr. Rao regarding her professional conduct and employment history even though Judge Crespo had *sua sponte* instructed counsel to "move on" from those questions during direct examination (PC-R. 1137, 1142). Immediately following defense counsel's redirect, Judge Crespo informed both parties that he allowed the redirect

because he remembered that while he was in private practice he worked with Dr. Rao on several cases, became very friendly with her and had written Dr. Rao a letter of recommendation upon her leaving Miami-Dade County Medical Examiner's Office (PC-R. 1146-47). Mr. Dennis filed a motion to recuse Judge Crespo ((PC-R. 1151-52; PC-R. 586). On July 21, 2007, the motion was denied.

As Judge Crespo explained that the friendly relationship with Dr. Rao developed while he was in private practice, before taking the bench, the relationship necessarily existed at the time of Mr. Dennis's trial. Judge Crespo failed to disclose the relationship at the time of trial. Judge Crespo's friendship with Dr. Rao operated to prejudice Mr. Dennis and his trial counsel in seeking life sentences. In its sentencing order, the trial court relied on the testimony of the "medical examiner" in finding the aggravating circumstance of heinous, atrocious and cruel (R. 3256-59). Dr. Rao was the medical examiner that testified at the penalty phase and provided the support for this aggravating circumstance. Certainly his relationship with Dr. Rao, influenced his ability to evaluate the medical examiner's credibility and ultimately rely on her opinion testimony. Due process was violated. *Caperton v. A.T. Massey Coal Co., Inc., et. al*., 129 S. Ct. 2252 (2009).

Judicial bias may arise from personal or emotional involvement. Judicial bias exists in violation of due process whenever the criminal judicial proceedings

at issue "offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him to hold the balance nice, clear and true between the state and the accused." *Marshall*, *supra*, 446 U.S. at 242. Here, the balance was tipped in favor of death. Mr. Dennis is entitled to a new penalty phase.

4. Conclusion

Judicial integrity is "a state interest of the highest order." *Caperton*, 129 S. Ct. 2252, 2267 (2009); citing to *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring). "The Due Process Clause demarks only the outer boundaries of judicial disqualifications." *Caperton*, 129 S. Ct. 2252, 2267 (2009); quoting *Lavoie* at 828.

It is evident from the record that Judge Crespo was biased against Mr. Dennis from the beginning. On multiple occasions he expressed sympathy for the family of the victims and allowed inadmissible evidence to be presented to the jury. *See also* Claim I. Furthermore, Judge Crespo stated he had ex-parte communication with the jury, but there is no indication the State or Defense was present when he discussed the jury instructions. In addition, Judge Crespo had a prior relationship with State's witness, Dr. Rao, before being elected to the bench in Miami-Dade County. After the trial when Dr. Rao left Dade County, Judge Crespo wrote a letter of recommendation for her. The bias is apparent. *See also*

Claim IV. Taken singularly or cumulatively, Judge Crespo's rulings and actions were improper and rise to the level of fundamental error.

All parties before a court are entitled to full and fair proceedings, including the fair determination of the issues by a neutral, detached judge. *In re Murchison*, 349 U.S. 133 (1955); *Porter v. Singletary*, 49 F.3d 1483 (11th Cir. 1995); *See also Holland v. State*, 503 So. 2d 1354 (Fla. 1987). Mr. Dennis 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). Due process was deprived by the sheer number and types of errors involved in his trial, when considered as a whole, virtually dictated the sentence that he would receive. *See Jones v. State*, 569 So. 2d 1234 (Fla. 1990); *Nowitzke v. State*, 572 So. 2d 1346 (Fla. 1990); *Jackson v. State*, 575 So. 2d 181, 189 (Fla. 1991); *Ellis v. State*, 622 So. 2d 991 (Fla. 1993); *Taylor v. State*, 640 So. 2d 1127 (Fla. 4th DCA 1994). The Honorable Manuel Crespo, who was Mr. Dennis's original trial judge, denied Mr. Dennis a full and fair hearing before an impartial tribunal. This is fundamental error and should have been raised on direct appeal. Failure to do so is ineffective.

CLAIM III

THE STATE LACKED SUFFICIENT EVIDENCE TO PROSECUTE MR. DENNIS AND THE EVIDENCE PRESENTED AT TRIAL WAS INSUFFICIENT TO SUPPORT HIS CONVICTION AND DEATH SENTENCE

The Due Process Clause protects the accused against convictions except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *In re Winship*, 397 U.S. 358, 364 (1970). This Court has long held that one accused of a crime is presumed innocent until proven guilty beyond and to the exclusion of a reasonable doubt. It is the responsibility of the State to carry this burden. *Cox v. State*, 555 So. 2d 352 (Fla. 1989). Where circumstantial evidence is presented, it must lead to a "reasonable and moral certainty that the accused and no one else committed the offense charged." *Hall v. State*, 90 Fla. 719, 720, 107 So. 2d 246, 247 (1925). Circumstances that create nothing more than a strong suspicion that the defendant committed the crime are not sufficient to support a conviction. *Williams v. State*, 143 So. 2d 484 (Fla. 1962); *Davis v. State*, 90 So. 2d 629 (Fla. 1956); *Mayo v. State*, 71 So. 2d 899 (Fla. 1954).

Furthermore, stacking or pyramiding inferences to speculate that a defendant is guilty is not permissible. *See Miller v. State*, 770 So. 2d 1144, 1149 (Fla. 2000) ("the circumstantial evidence test guards against basing a conclusion on impermissibly stacked inferences"); *Gustine v. State*, 86 Fla. 24, 28, 97 So. 207,

208 (Fla. 1923) (conviction reversed because "only by pyramiding assumption upon assumption and intent upon intent can the conclusion necessarily for conviction be reached"); *Brown v. State*, 672 So. 2d 648, 650 (Fla. 4th DCA 1996) ("circumstantial evidence is insufficient when it requires pyramiding of assumptions or inferences in order to arrive at the conclusion of guilt") *Collins v. State*, 438 So. 2d 1036 (Fla. 2d DCA 1983) (pyramiding of inferences lacks the conclusive nature to support conviction); *Chaudoin v. State*, 362 So. 2d 398, 402 (Fla. 2d DCA 1978).

The State of Florida was required to prove each and every element of the offenses charged against Mr. Dennis. *See In Re Winship*, 397 U.S. 358 (1970). There was no physical evidence or eyewitnesses linking Mr. Dennis to the crime. Instead of offering evidence, the State presented irrelevant and inflammatory testimony which did not prove any element of the crime. *See* Claim I. The State's case was based on a key witness who admitted to hiding and destroying evidence. From there, the State used inflammatory testimony to stack inferences of domestic violence and the prior relationship of Mr. Dennis and Ms. Lumpkins to inflame the passions of the jury.

State's Witness, Joseph Stewart, allegedly loaned a shotgun to Mr. Dennis, which was later returned. He testified that he alone took apart the shotgun and "threw it away. . .in a sewer about a block away." (R. 3652). Mr. Stewart further

testified that he "threw a knife down there also." (R. 3653). There is no indication in the record that Mr. Dennis asked him to destroy or hide any evidence. In fact, other than Mr. Stewart's own self-serving testimony, there is no evidence showing Mr. Dennis ever borrowed a gun from him. Mr. Stewart also testified that he was "going to leave" because he "was scared" when police arrived at his job. (R. 3663). Despite admitting to destruction of evidence, Mr. Stewart was never charged in the present case. Furthermore, with regard to the gun, Mr. Stewart testified that before taking apart and throwing away his shotgun, he did not notice any blood on it. (R. 3689).

Detective Thomas Romagni testified as a State's witness at the guilt phase of the trial. He was the lead homicide detective for Metro-Dade Police Department. (R. 4008). Det. Romagni met with Mr. Dennis the morning after the murders, and Mr. Dennis consented to give fingerprints and be photographed. (R. 4040-41). Det. Romagni testified that Mr. Dennis had no injuries or markings on his body indicating he had recently been in a fight or struggle. (R. 4043). Det. Romagni further testified that Mr. Dennis's Mazda was searched and nothing was found relating to the murders. (R. 4089). Watisha Wallace's Nissan, which was allegedly at the crime scene, was also searched and nothing was found. (R. 4090-91). Det. Romagni testified that the cars were investigated because the crime scene was bloody and some of the blood may have gotten on the perpetrator and in the car.

(R. 4090-91). Again, no physical evidence was found on Mr. Dennis or in either car searched by police.

The State somehow overlooked the fact that no physical evidence was found in either car the police allege could have been used the morning of the crime. Even though the State elicited testimony from multiple witnesses about a bloody and horrific crime scene, the prosecutor also ignored the fact that Mr. Dennis had no signs of injury the day after the murders. *See* Claim I. However, the State had no problem charging Mr. Dennis in the crime, even though he was a man without any injury the morning after and without any physical evidence linking him to the crime. Stewart, an admitted liar who hid and destroyed evidence, hardly qualifies as a credible witness, especially given the lack of any physical evidence corroborating his story or implicating Mr. Dennis. The State simply stacked inference upon inference to create a circumstantial case against Mr. Dennis.

Taking all of the evidence in a light most favorable to the State, no rational fact-finder could find Mr. Dennis guilty of premeditated or felony murder beyond a reasonable doubt. The State lacked sufficient evidence to prove every element of the crimes Mr. Dennis was charged with and instead used irrelevant and inflammatory testimony to appeal to the sympathies of the jury. *See* Claim I. Instead, the State used the testimony of Stewart, who admitted to hiding evidence, to build its case against Mr. Dennis. Relief is warranted.

CLAIM IV

THE ADMISSIBILITY OF DR. VALERIE RAO'S PENALTY PHASE TESTIMONY MUST BE REVISITED IN LIGHT OF THE SUPREME COURT'S DECISION IN *MELENDEZ-DIAZ V. MASSACHUSETTS*

The United States Supreme Court held in *Melendez-Diaz v. Massachusetts* that the Confrontation Clause cannot be suspended "when a preferable trial strategy is available." 129 S. Ct. 2527, 2536 (2009). The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right. . .to be confronted with the witnesses against him. The Sixth Amendment right of an accused to confront witnesses against him is a fundamental right which has been made obligatory on the states by the due process clause of the Fourteenth Amendment." *Engle v. State*, 438 So. 2d 803, 814 (Fla. 1983); (citing *Pointer v. Texas*, 380 U.S. 400 (1965)). "The primary interest secured by, and the major reason underlying the confrontation clause, is the right of cross-examination." *Id.* This right has also been applied to the sentencing process in capital cases. *Specht v. Patterson*, 386 U.S. 605 (1967).

In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court held that the Sixth Amendment guarantees a defendant's right to confront those "who 'bear testimony'" against him. 541 U.S. at 51. A witness's testimony against a defendant is [thus] inadmissible unless the witness appears at trial or, if the witness

is unavailable, the defendant had a prior opportunity for cross-examination. *Id.* at 54.

The Court outlined in *Crawford* that the nature of what constitutes 'testimonial statements' which are covered by the Confrontation Clause consists of:

> *ex parte* in-court testimony or its functional equivalent-that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements. . .contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

Id. at 51-52. Furthermore, the status of autopsy reports is not admissible without an opportunity to confront. *See Crawford*, 541 U.S., at 47, n. 2, 124 S. Ct. 1354; *Giles v. California,* 553 U.S. ___, 128 S. Ct. 2678, 2705-06; 171 L.Ed.2d 488 (2008).

Recently, in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), the Supreme Court extended this class of testimonial statements to scientific experts' "certificates of analysis" which the Court considered "affidavits within [the] the core class of testimonial statements covered by [the] Confrontation Clause." *Id.* The Court further stated that "analysts were [also] not removed from coverage of Confrontation Clause on [the] theory that their testimony consisted of neutral scientific testing." *Id.* Based upon the understanding that such statements were

created with the sole intention of establishing or proving some fact, the Court held that drug analysis certificates were "functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.'" *Melendez-Diaz*, 129 S. Ct. at 2532; (citing *Davis v. Washington*, 547 U.S. 813, 830 (2006)) (emphasis deleted).

The Court determined that the analyst certificates functioned as "testimonial" statements and the analysts amounted to "witnesses" for purposes of the Sixth Amendment. *Melendez-Diaz*, 129 S. Ct. at 2532. Without some showing that the analysts were unavailable to testify at trial and that the defendant had a prior opportunity to cross-examine them, the Court held that the defendant was entitled to be confronted with the analysis at trial.[7]

A similar federal court case citing to *Melendez-Diaz* parallels Mr. Dennis's trial. In *People v. Dungo*, 176 Cal.App.4th 1388 (2009), Dr. Bolduc conducted the autopsy but did not testify at the trial. In *Dungo*, the "defendant was not able to

[7] Melendez-Diaz was charged with distributing and trafficking in cocaine. At his trial the prosecution placed into evidence the bags seized from the defendant and another co-defendant along with three certificates of analysis showing the results of the forensic analysis performed on the seized substances. The certificates reported the weight of the seized bags along with indicating the results of the examinations which had been performed to determine their consistency and the possible presence of narcotics. The defendant objected to the admission of the certificates, arguing that the submission of the certificates into evidence, without requiring the analyst who actually performed the tests to testify in court, violated his right to confront and cross examine the witnesses against him. The Supreme Court found that introduction of such evidence did in fact violate the core principles of the Sixth Amendment's Confrontation Clause.

cross-examine Dr. Bolduc either on the facts contained in the report or his competence to conduct an autopsy." *Id*. at 1391. The court held that:

> the autopsy report, which was prepared in the midst of a homicide investigation, is testimonial, and that Dr. Bolduc was a 'witness' for purposes of the Sixth Amendment. Because there was no showing that Dr. Bolduc was unavailable or that defendant had a prior opportunity to cross-examine him, defendant was entitled to 'be confronted with' Dr. Bolduc at trial.

Id. at 1392.

The court further held that given the Supreme Court's holding in *Melendez-Diaz*, there can be little doubt that Dr. Bolduc's autopsy report is testimonial. The same is true in Mr. Dennis's case, and his case should be reviewed in light of the Supreme Court's decision in *Melendez-Diaz v. Massachusetts*.

Dr. Valerie Rao was an associate medical examiner at the Miami-Dade County Medical Examiner's Office at the time of Mr. Dennis's trial. (R. 5222). Dr. Rao was tendered as an expert in the field of forensic pathology. (R. 5224). Dr. Sam Gulino, however, performed both autopsies in this case. (R. 5225). Dr. Rao only reviewed the autopsy reports and Dr. Gulino's guilt phase testimony in Mr. Dennis's case. (R. 5227). Dr. Rao admitted that "[i]t was Dr. Gulino who did everything." (R. 5245).

Dr. Gulino, who testified in the guilt phase that he was the associate medical examiner assigned to this case, was not called to testify at the penalty phase. Rather, the State presented Dr. Rao, who testified in detail as to the information

contained in Dr. Gulino's autopsy reports. (R. 5228-5244). The State never established that Dr. Gulino was unavailable to testify at the penalty phase. Instead, the State argued that hearsay is admissible in the penalty phase of capital cases. (R. 5227).

Significantly, Dr. Rao's testimony was much more prejudicial, inflammatory and speculative than Dr. Gulino's. For example, when asked if Ms. Lumpkins would know she was being beaten to death, Dr. Gulino responded that he could not say she would know she was being beaten to death but would know she was being beaten. (R. 4433). When asked the same question, Dr. Rao stated "[s]he probably had a good idea that she was going to die, yes." (R. 5238). Similarly, Dr. Gulino testified that Ms. Lumpkins's fractures were similar to those he had observed in car crashes. (R. 4422); Dr. Rao testified that Ms. Lumpkins's fractures were like those where a head was run over by a car with a crushing force that "split right at the base of the skull." (R. 5232). The inflammatory nature of Dr. Rao's testimony is apparent. Dr. Rao prefaced much of her testimony regarding injuries to Mr. Barnes with "the autopsy report indicates. . ." and "Dr. Gulino stated in the report. . ."(R. 5243). Dr. Rao's own testimony clearly indicates she had no independent knowledge of the autopsies or the crime scene.

The purpose of an autopsy is to determine the circumstances, manner, and cause of death." *Dungo* at 1399. Furthermore, "officially inquiring into and

determining the circumstances, manner and cause of a criminally related death is certainly part of a law enforcement investigation." *Dungo* at 1399; *See also Dixon v. Superior Court*, 170 Cal.App.4th 1271, 1277 (2009). Autopsy reports are prepared in the "midst of a homicide investigation" and a medical examiner is no doubt aware of that fact. *Dungo* at 1400. In *Dungo*, the court recognized that the "primary purpose of Dr. Bolduc's autopsy report was to establish or prove some past fact, *i.e.*, the circumstances, manner, and cause of. . .death, for possible use in a criminal trial." *Dungo* at 1401. The autopsy report was "formally prepared in anticipation of a prosecution." *Dungo* at 1402. In Mr. Dennis's case, following a hearsay objection by the defense, the prosecution affirmed that the medical reports were "prepared in the regular course of business of the Medical Examiner's Office" (R. 5227), thereby asserting the "business records" exception to Florida's hearsay rules. Clearly, the autopsy reports in this case are testimonial hearsay.

Statements, whether in the forms of reports, sworn affidavits, depositions, etc., which were made "under circumstances which would lead an objective witness [to] reasonably believe that the statement would be available for use at a later trial" have been long deemed 'testimonial' in nature. *Crawford*, at 541 U.S. at 52. In *Dungo*, the weight of Dr. Lawrence's opinion was "entirely dependent upon the accuracy and substantive content of Dr. Bolduc's report." *Dungo* at 1403. The same is true of Dr. Rao's testimony concerning Dr. Gulino's report. Dr. Rao relied

upon Dr. Gulino's reports in forming her opinion. In Mr. Dennis's case, however, the hearsay testimony is even more prejudicial. Dr. Rao testified at the penalty phase of Mr. Dennis's trial and her testimony was used in attempts to establish the aggravators used in sentencing. Without her testimony, there was insufficient evidence to support the heinous, atrocious and cruel (HAC) aggravator.

Despite the opportunity to confront Dr. Gulino at the guilt phase, trial counsel was stonewalled during the penalty phase. Dr. Rao testified outside of the material contained in the reports that Dr. Gulino prepared. Furthermore, Dr. Gulino's testimony was substantially different. Defense counsel had no way of knowing Dr. Rao would testify beyond that of Dr. Gulino. The cross examination at guilt phase was thus insufficient to satisfy Mr. Dennis's confrontation clause rights at the penalty phase given Dr. Rao's inflammatory testimony.

Pursuant to *Melendez-Diaz*, Mr. Dennis was denied his Sixth Amendment right to confront witnesses against him. Dr. Rao relied solely on Dr. Gulino's reports and gave testimony inconsistent with that of the medical examiner who actually performed the autopsies. The State's preference for Dr. Rao's inflammatory testimony over that of Dr. Gulino does not justify the denial Mr. Dennis's Sixth Amendment rights to confront the witnesses against him. *Melendez-Diaz*, 129 S. Ct. 2527, 2536 (2009). Relief if warranted.

CLAIM V

MR. DENNIS WAS ABSENT FROM CRITICAL STAGES OF HIS CAPITAL TRIAL PROCEEDINGS IN VIOLATION OF THE FUNDAMENTAL FAIRNESS PRINCIPLES OF THE DUE PROCESS CLAUSE, FLA. R. CRIM. P. 3.180, AND MR. DENNIS'S RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, REQUIRING REVERSAL OF HIS CONVICTION AND DEATH SENTENCE.

A criminal defendant has the constitutional right to be present at the stages of his trial where fundamental fairness might be thwarted by his absence. *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); *Francis v. State*, 413 So. 2d 1175, 1177 (Fla. 1982) (citing *Snyder v. Massachusetts*, 291 U.S. 97, 54 S. Ct. 330, 78 L. Ed. 674 (1934)). In all prosecutions for crime the defendant shall be present at any pretrial conference, unless waived by the defendant in writing. Fla. R. Crim. P. 3.180(a)[8]. The involuntary absence of a

[8] A criminal defendant's right to be present at critical stages of his trial has been codified in Fla. R. Crim. P. 3180(a), which provides:

> a) *Presence of Defendant*.--In all prosecutions for crime the defendant shall be present:
> (1) at first appearance;
> (2) when a plea is made, unless a written plea of not guilty shall be made in writing under the provisions of rule 3.170(a);
> (3) at any pretrial conference, unless waived by the defendant in writing;
> (4) at the beginning of the trial during the examination, challenging, impaneling, and swearing of the jury;
> (5) at all proceedings before the court when the jury is present;
> (6) when evidence is addressed to the court out of the presence of the

criminal defendant at certain stages of the proceeding constitutes error under Rule 3.180(a). Counsel's waiver of a defendant's presence at a crucial stage of a trial, without later acquiescence or ratification by the defendant, is error. *Garcia v. State*, 492 So. 2d 360, 364 (Fla. 1986); *State v. Melendez*, 244 So. 2d 137 (Fla. 1971). When the defendant is involuntarily absent contrary to rule 3.180(a), the burden is on the state to show beyond a reasonable doubt that the error was not prejudicial. *Garcia v. State*, 492 So. 2d 360, 364 (Fla. 1986). A defendant may waive his right to be present through his counsel but the court must inquire as to whether that waiver was knowing, voluntary and intelligent. *Cooney v. State*, 653 So. 2d 1009; 1013 (1995). However, such a waiver by trial counsel must be later acquiesced or ratified by the defendant. *Id*.

Trial counsel waived Mr. Dennis's presence at several pretrial hearings, thereby denying him his rights under the Florida Constitution, the United States Constitution, and Rule 3.180(a). The record reflects that Mr. Dennis was absent for

---

> jury for the purpose of laying the foundation for the introduction of evidence before the jury;
> (7) at any view by the jury;
> (8) at the rendition of the verdict; and
> (9) at the pronouncement of judgment and the imposition of sentence.
> (b) *Presence; Definition*. --A defendant is present for purposes of this rule if the defendant is physically in attendance for the courtroom proceeding and has a meaningful opportunity to be heard through counsel on the issues being discussed.

at least 24 pretrial conferences, without having submitted a written waiver.[9]

Mr. Dennis submits that his absence at some of these proceedings, when considered on an individual basis, did not affect the overall fairness of the proceedings since they were merely scheduling discussions.[10] However, several of these hearings concerned matters which necessitated Mr. Dennis's presence. In any event, Mr. Dennis maintains his constitutional and statutory right to be present, and therefore his absence without a written waiver constituted error.

Had it merely been one or two - or even five or six – hearings that were conducted in Mr. Dennis's absence, then this violation may not rise to a constitutional magnitude. However, when the number of pre-trial hearings where Mr. Dennis's presence was waived, without a valid waiver, amounts to such a staggering number, the entire pre-trial process cannot be considered fair and constitutionally valid. Rule 3.180 and the constitutional rationale that it is based upon is turned on its head when a defendant is consistently denied his right to be present at his own trial. This is especially true when the State is seeking the

[9] Among the pretrial hearings for which Mr. Dennis was absent are those occurring on June 12, 1996; June 18, 1996; June 21, 1996; July 1, 1996; July 3, 1996; September 12, 1996; October 23, 1996; November 13, 1996; December 5; 1996; January 7, 1997; February 14, 1997; May 2, 1997; June 3, 1997; June 27, 1997; July 28, 1997; August 13, 1997; December 9, 1997; February 17, 1998; May 13, 1998; May 20, 1998; May 28,1998; August 18, 1998; and September 4, 1998.

[10] *See hearings conducted on*: July 1, 1996; July 3, 1996; September 12, 1996; October 23, 1996; December 5, 1996; January 7, 1997; February 14, 1997; May 2, 1997; June 3, 1997; June 27, 1997; July 28, 1997; August 13, 1997; December 9, 1997; February 17, 1998; and May 13, 1998.

ultimate punishment.

Notwithstanding some pre-trial hearings which consisted of scheduling matters, other hearings involved evidentiary matters for which Mr. Dennis clearly needed to be present to assist his attorney. For example, on May 28, 1998, Judge Platzer scheduled a special hearing to explain the reasons why she recused herself (R. 1136-48). Prior to this special hearing, neither defense counsel nor Mr. Dennis understood the reasons behind the recusal. Defense counsel and Mr. Dennis only knew that she had recused herself. There is no mention in the record that Mr. Dennis was present for this hearing, nor did defense counsel waive Mr. Dennis's presence. For such a hearing to be conducted where factual and legal matters were discussed, Mr. Dennis's presence was critical. Therefore, his absence constituted error. *See Francis v. State,* 413 So. 2d 1175, 1177 (Fla. 1982); *Cooney v. State,* 653 So. 2d 1009, 1013 (Fla. 1995); F1a. R. Crim. P. 3.850.

Mr. Dennis was also absent from the September 4, 1998 hearing on the state's motion to allow *Williams* Rule evidence. At that hearing, the court heard argument regarding alleged threats and assaults by Mr. Dennis against Timwanika Lumpkins and her uncle. Mr. Dennis should have been present where such factual matters were being presented. Instead, defense counsel waived his presence. There is no record of this or any other waived absence being later ratified or acquiesced to by Mr. Dennis. *See Garcia v. State*, 492 So. 2d 360, 364 (Fla. 1986).

Mr. Dennis's absence at this pretrial conference thwarted the fundamental fairness of the proceedings.

The United States Constitution and Fla. R. Crim. P. 3.180(a) guaranteed Mr. Dennis's presence at these critical pretrial conferences to ensure he was afforded a fair trial. Absent these guarantees, the verdict and sentences of death cannot stand. To the extent that trial counsel failed to ensure Mr. Dennis's presence at these pretrial proceedings, as well as waiving his appearance without Mr. Dennis's consent, trial counsel was ineffective. Mr. Dennis's due process rights to a fair trial as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution were violated, and the result of Mr. Dennis's trial is fundamentally unfair and unreliable.

CONCLUSION

For all of the arguments discussed above, Mr. Dennis respectfully urges this Court to grant habeas corpus relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Sandra Jaggard, Office of the Attorney General, Rivergate Plaza, Suite 950, 444 Brickell Avenue, Miami, Florida 33131 by United States Mail on December 14, 2009.

SUZANNE MYERS KEFFER
Florida Bar No. 0150177
Assistant CCRC-South

Office of the CCRC-South
101 NE 3rd Avenue, Suite 400
Fort Lauderdale, Florida 33301
(954) 713-1284

CERTIFICATE OF FONT

This is to certify that the above Petition has been reproduced in 14pt Times New Roman type, pursuant to Rule 9.100 (l), Florida Rules of Appellate Procedure.

SUZANNE MYERS KEFFER