IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-1860

TIMOTHY ROBINSON,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
STATE OF FLORIDA

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

JURISDICTIONAL STATEMENT 1

STATEMENT OF THE CASE AND THE FACTS 1

CLAIM I
APPELLATE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO FILE A CERTIORARI PETITION WITH THE SUPREME COURT AND FAILING TO ADVISE HER CLIENT APPROPRIATELY 5

CLAIM II
THIS COURT ERRED IN SUMMARILY DENYING PETITIONER'S PRO SE CLAIMS OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL 12

CLAIM III
MR. ROBINSON WAS IMPROPERLY CHARGED WITH AND CONVICTED OF ATTEMPTED FELONY MURDER, AND THE JURY WAS IMPROPERLY INSTRUCTED ON THIS NONEXISTENT OFFENSE 12

CLAIM IV
FLORIDA'S LEGISLATIVE SCHEME FOR THE APPOINTMENT OF COUNSEL IN CAPITAL POSTCONVICTION CASES IS UNCONSTITUTIONAL TO THE EXTENT THAT IT PROHIBITS CCRC (AND REGISTRY) ATTORNEYS FROM CHALLENGING THE STATE'S INTENDED METHOD OF EXECUTION BY WAY OF A 42 USC §1983 ACTION, REPRESENTATION IN NONCAPITAL CASES USED AS AGGRAVATORS, CLEMENCY AND OTHER RELATED PROCEEDINGS 14

CLAIM V
FLORIDA'S LETHAL INJECTION METHOD OF EXECUTION IS CRUEL AND UNUSUAL PUNISHMENT AND WOULD DEPRIVE MR. ROBINSON OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW IN VIOLATION OF THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION 20

CLAIM VI
MR. ROBINSON'S EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED AS DEFENDANT MAY BE INCOMPETENT AT TIME OF EXECUTION 22

CLAIM VII
THE PETITIONER SUFFERED FROM A MAJOR MENTAL ILLNESS AT THE TIME OF THE OFFENSE AND EXECUTION IS BARRED BY THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE U. S. CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION 23

CLAIM VIII
DOUBLE JEOPARDY PRECLUDES DEATH AS A POSSIBLE PUNISHMENT IN THE EVENT POSTCONVICTION RELIEF IN ANY FORM IS GRANTED 25

CONCLUSION AND RELIEF SOUGHT 27

CERTIFICATE OF SERVICE 27

CERTIFICATE OF COMPLIANCE 29

APPENDIX TO PETITION FOR WRIT OF HABEAS CORPUS 30

TABLE OF AUTHORITIES

Arizona v. Rumsey, 467 U.S. 203 (1984) 26

Atkins v. Singletary, 965 F.2d 952 (11th Cir. 1992)....................5

Atkins v. Virginia, 536 U.S. 304 (2002) 23

Bullington v. Missouri, 451 U.S. 430 (1981) 26

Butterworth v. Kenny, 714 So. 2d 404 (Fla. 1998)....................17

Coleman v. State, 610 So. 2d 1283 (Fla. 1992)....................2

Cooper v. Rimmer, 379 F.3d 1029 (9th Cir. 2004) 21

Cox v. State, 5 So. 3d 659 (Fla. 2009)....................15

Diaz v. State, 945 So. 2d 1136 (Fla. 2006)....................17

Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987)....................1

Ford v. Wainwright, 477 U.S. 399 (1986) 22

Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88 (1992) 17

Gregg v. Georgia, 428 U.S. 153 (1976)....................20, 24

Harbison v. Bell, 129 So.Ct. 1481 (2009)....................15

Hill v. McDonough, 547 U.S. 5734 (2006) 15

Jones v. Moore, 794 So. 2d 579 (Fla. 2001) 5

Martinez-Villareal v. Stewart, 523 U.S. 637 (1998) 22

Murray v. Giarratano, 492 U.S. 1 (1989)....................17

Nelson v. Campbell, 541 U.S. 637 (2004)....15

Pennsylvania v. Finley, 481 U.S. 551 (1987)....17

Poland v. Stewart, 41 F.Supp.2d 1037 (D. Ariz. 1999)....22

Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987)....1

Robinson v. Florida, 10 U.S. 1170 (1994)....5

Robinson v. State, 610 So. 2d 1288 (Fla. 1992)....1

Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183 (2005)....21, 23

Rutherford v. McDonough, 466 F.3d 970 (11th Cir. 2006)....15

Rutherford v. Moore, 774 So. 2d 637 (Fla. 2000)....5

Schwab v. McNeil, et al., Case No. 3:08-cv-507-J-33 USMD (Fla. 2008)....20

State v. Gray, 654 So. 2d 552 (Fla. 1995)....13

State v. Harden, 938 So. 2d 480 (Fla. 2006)....16

Strickland v. Washington, 466 U.S. 668 (1984)....10

Tedder v. State, 322 So. 2d 908 (Fla. 1975)....9

United States v. Cronic, 466 U.S. 648 (1984)....10

Way v. Dugger, 568 So.2d 1262 (Fla. 1990)....1

Williams v. State, 622 So. 2d 456 (Fla. 1993)....1

Williams v. State, 987 So. 2d 1 (Fla. 2008)....1

Wilson v. Wainwright, 474 So. 2d 1162 (Fla. 1985)....1

JURISDICTIONAL STATEMENT

This is an original action under Florida Rule of Appellate Procedure 9.l00(a). See, Art. l, Sec. 13, Florida Constitution. This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, Section 3(b)(9) of the Florida Constitution. This petition presents constitutional issues which directly concern the judgment of this Court during the appellate process and the legality of Mr. Robinson’s death sentence.

This Court heard and denied Mr. Robinson's direct appeal *Robinson v. State*, 610 So. 2d 1288 (Fla. 1992). A petition for a writ of habeas corpus is the proper means for Mr. Robinson to raise the claims presented herein. *See*, *e.g., Way v. Dugger*, 568 So. 2d 1263 (Fla. 1990); *Downs v. Dugger*, 514 So. 2d 1069 (Fla. 1987); *Riley v. Wainwright*, 517 So. 2d 656 (Fla. 1987); *Wilson v. Wainwright*, 474 So. 2d 1162, 1164 (Fla. 1985).

STATEMENT OF THE CASE AND THE FACTS

This case arose from a dispute among associates of a drug dealing organization run out of Miami by Ronald Williams. *See Williams v. State*, 622 So. 2d 456 (Fla. 1993) (direct appeal); *Williams v. State*, 987 So. 2d 1 (Fla. 2008) (postconviction). Mr. Robinson was tried along with two of his codefendants, Michael Coleman and Darrell Frazier. The evidence presented at the trial was

summarized in *Coleman v. State*, 610 So. 2d 1283, 1284-1285 (Fla. 1992). Robinson was found guilty as charged of four counts of first degree murder, one count of attempted first degree murder, six counts of kidnapping with a firearm, two counts of sexual battery with a firearm, one count of conspiracy to traffic in more than 400 grams of cocaine, and two counts of robbery with a firearm. R. Vol. XI, 1970-1972.

Robinson's jury recommended that he be sentenced to life. R. Vol. XI, 2096-2097. The trial court overrode the jury's recommendation and imposed a death sentence on September 26, 1989. R. Vol. XIV, 2562-2566. The written sentencing order and judgment and sentence are located at R. Vol. XIV, 2582 -2587 and 2568-2581.

This Court's docket (Appendix A) reflects that the Public Defender for the Second Circuit Court of Appeals was designated to represent Mr. Robinson on appeal. The Public Defender then withdrew, citing a conflict of interest. Private counsel, Henry Barksdale, was appointed substitute counsel. He then withdrew and Laura Keene was appointed in his place. She was trial counsel Barry Beroset's spouse and law partner.

The claims raised on direct appeal were that the trial court erred in 1) overriding the jury recommendation of life, 2) admitting DNA evidence, 3)

requiring that the petitioner be shackled during trial, 4) denying requests for a continuance, 5) allowing the prosecutor to place two knives that had been entered into evidence on the bar of the jury box, 6) denying the petitioner's request to sever, 7) denying his motion for change of venue, and 8) denying his motion for judgment of acquittal as to the conspiracy charge. This Court struck the avoid arrest aggravator (raised within claim 1), but otherwise denied all of these claims on the merits.

While the appeal was pending, Mr. Robinson filed an eighteen page *pro se* pleading in this Court alleging that he was receiving ineffective assistance of appellate counsel. (Appendix B). The pleading was styled "Appellant's Notice to Court and Motion for Enlargement of Time to File Amended and Supplemental Initial Brief for Oral Argument." It alleged generally that Robinson was receiving ineffective assistance of appellate counsel and contained twenty six specific claims, which he contended that appellate counsel either failed to raise or had argued certain claims inadequately. Among others, the pleading contended that appellate counsel should have asserted that the trial court erred by denying the petitioner's motion for a change of venue, denying his request for additional peremptory challenges, not ordering the jury to be sequestered, denying the defense motions for mistrial and judgment of acquittal, not submitting separate

verdict forms for premeditated and felony murder, not permitting individual voir dire, and denying defense counsel's repeated motions for a continuance. The pro se pleading was summarily denied on January 6, 1992 (Appendix C), and oral argument took place on January 9, 1992. The Court affirmed the judgment and sentence on June 25, 1992. Robinson's timely motion for rehearing was denied October 15, 1992. The mandate issued November 16, 1992.

After the judgment and sentence were affirmed, there followed a series of communications between Robinson's appellate counsel and CCR in which the latter virtually begged Ms. Keane to file a certiorari petition with the U.S. Supreme Court. (Appendix D). As shown in the correspondence, Ms. Keane did not advise Mr. Robinson that he had a right to seek certiorari review. She told him only that she "did not find any additional relief available that we can file on your behalf," and that the case was being turned over to the Office of the Capital Collateral Representative. She gave as her reasons for not seeking certiorari review the fact that she was not qualified to file such a petition and was not licensed to practice before the U.S. Supreme Court.

As noted in the correspondence, CCR was prohibited by statute from filing a petition for certiorari review on direct appeal. Eventually, a staff attorney of the Fifteenth Circuit Public Defender's Office, which was also prohibited from

representing Mr. Robinson, found out about the situation and recruited a private attorney to file a belated certiorari petition. (Appendix E). The petition was denied without comment. *Robinson v. Florida*, 10 U.S. 1170 (1994).

CLAIM I

APPELLATE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO FILE A CERTIORARI PETITION WITH THE SUPREME COURT AND FAILING TO ADVISE HER CLIENT APPROPRIATELY.

A claim of ineffective assistance of appellate counsel is cognizable in a petition for a writ of habeas corpus. *See Rutherford v. Moore*, 774 So. 2d 637, 643 (Fla. 2000). The standard applicable to a claim of ineffective assistance of appellate counsel raised in a habeas petition mirrors the *Strickland v. Washington* standard for trial counsel ineffectiveness. *See Jones v. Moore*, 794 So. 2d 579, 583 (Fla. 2001); *Atkins v. Singletary*, 965 F.2d 952, 960 (11th Cir. 1992) (applying *Strickland* test to challenge of counsel's effectiveness on appeal).

As shown by the attached correspondence (Appendix D), after this Court affirmed the Petitioner's judgment and sentence on direct appeal, the Capital Collateral Representative, Larry Spalding, wrote a three page letter to appellate counsel, Laura Keane, urging her to file a petition for a writ of certiorari in the U. S. Supreme Court. In it, he cited a December 29, 1986 memorandum from the Florida Supreme Court Chief Justice explaining that CCR's representation begins

either when a mandate affirming a death sentence is rendered or when a petition for writ of certiorari is denied by the U.S. Supreme Court, whichever comes later. He said: "As I am sure you will agree, the memorandum by the Chief Justice as to the effect of a petition for writ of certiorari on the time-limitation provision of Rule 3.850 further demonstrates the importance, and indeed the necessity, of filing the petition on behalf of your client." He also explained that "there has been some confusion regarding whether the parameters of court-appointment for direct appeal in capital cases precludes the filing of certiorari petitions. This issue was also clarified by the Supreme Court of Florida in the December 29, 1986 memorandum. Chief Justice McDonald specifically defined petitions for writ of certiorari as part of the direct appeal process." He offered to help her file the petition. "Although CCR is prohibited by statute and court rule from filing the petition for writ of certiorari itself (because the initial petition is part of the direct appeal process rather than a postconviction action), CCR can nonetheless provide you with some sample pleadings and advise you on procedures and time limits if you are unfamiliar with United States Supreme Court practice."[1]

[1]Fla. Stat. 27.702 (1992) provided that "The capital collateral representative shall represent . . . any person convicted and sentenced to death . . . for the purpose of instituting and prosecuting *collateral* actions . . . in the state courts, federal courts in this state, the United States Court of Appeals for the Eleventh Circuit, and the United States Supreme Court." (Emphasis added.)

Appellate counsel wrote back to say only that she had filed a motion for rehearing, but that she did not intend to file a certiorari petition. Mr. Spalding wrote another letter to her urgently requesting that she reconsider her position. "I genuinely hope that you will reconsider your decision, and that you will agreed [sic] to file the petition on your client's behalf."

Appellate counsel replied: "I am not in a position to file a Petition for Writ of Certiorari in the U. S. Supreme Court on Mr. Robinson's behalf. I do not feel qualified to file that document, am not a member of the U. S. Supreme Court, and am constricted by the limitations of my practice which precludes me at this time from taking that action on Mr. Robinson's behalf." In other words, she did not know how to do it, was not licensed to do it, and did not have the time to do it even if she were.

On November 3, 1992 she wrote to Mr. Robinson to advise him that the motion for rehearing had been denied. She went on to say that "Barry [Beroset, trial counsel] and I have both researched and do not find any additional relief available that we can file on your behalf." The letter also says "Enclosed you will find correspondence to Mr. Spalding with Capital Collateral Representative wherein I have forwarded him a copy of the Order on our Motion for Rehearing." The letter to CCR, bearing the same date, contains only two sentences: "Enclosed please

find correspondence from the Supreme Court of Florida wherein our Motion for Rehearing has been denied. I will not be filing any other Motions at this time."

Petitioner avers that copies of appellate counsel's two letters to CCR specifically declining to file a certiorari petition were not furnished to him at the time. This is significant because they are inconsistent with and even contradict the November 3 letter she sent to Robinson. In her letters to CCR, she said nothing about any evaluation of the merits or strategic advisability of filing a certiorari petition. She said nothing about the best interests of her client at all, despite the CCR's insistence that filing such a petition would be in his best interests. Instead she said that she was incompetent to file such a petition and would not have the time to file it even she were competent to do so. In her letter to Robinson, she avoided any mention of the word "certiorari." Instead she said that she and her husband had "researched and do not find any additional relief available," thus implying that she would have been competent and willing to pursue any avenues of relief if any were available, but that none existed.

That was simply false. Nearly a year later, a badly belated certiorari petition was filed by a *pro bono* lawyer who was eventually recruited for the purpose. Although it was denied without comment, there was nothing frivolous about it; it raised serious questions about the scope of mitigation evidence that could be

considered by the court (whether it could encompass the character of the victims) and argued that this Court erred by declining to reweigh the evidence after striking the "avoid arrest" aggravator. In particular with regard to the first contention, it is noteworthy that Justice Barkett dissented from this Court's affirmance of the override of the jury's life recommendation: "Based on the circumstances of the killings, as well as the evidence of nonstatutory mitigation, I cannot say that no reasonable person could have recommended a life sentence here," citing *Tedder v. State*, 322 So. 2d 908 (Fla.1975). *Robinson*, 610 So. 2d at 1292 (Barkett, J., dissenting). The "circumstances of the killings" were that they arose from a falling out among drug dealers, which was essentially what *pro bono* counsel was arguing in the certiorari petition.

Moreover, appellate counsel's initial brief cited three U. S. Supreme Court cases and expressly predicated Claims I and IV on the Sixth, Eighth and Fourteenth Amendments to the Federal Constitution. It would be hard to argue that Federal Constitutional claims presented to this Court in good faith somehow lost their viability if presented to the U. S. Supreme Court.

Prejudice and Remedies

Admittedly there are some logical problems here. Remanding the case only to permit the filing of a certiorari petition would be pointless. Nevertheless, the

fact that counsel who accepted an appointment to represent a capital defendant on direct appeal was unlicensed and by her own admission incompetent to conduct what had been identified as a part of the direct appeal process by the Florida Supreme Court Chief Justice in a 1986 memorandum, and then misled her client about the situation, should not go unnoticed. The usual remedy for a finding of ineffective assistance of appellate counsel is a new appeal de novo. That is the remedy sought here, with the proviso that death be excluded as a possible penalty for the reasons set out *infra*. Such a remedy would permit a timely certiorari petition to be filed should this Court deny relief.

As to prejudice, the usual formulation is that the prejudice prong of an ineffective assistance of appellate counsel claim "mirrors" that of *Strickland*, namely a reasonable probability of a different outcome *Strickland v. Washington*, 466 U.S. 668 (1984). If that standard is applied here relief could never be granted. Instead, the petitioner claims entitlement to relief without a showing of prejudice under the doctrine of *United States v. Cronic*, 466 U.S. 648 (1984). *Cronic* is a companion case to *Strickland*, filed on the same day. The *Cronic* opinion explicates and expands on the statement in *Strickland* that "In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. . . . Prejudice in these

circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost." *Strickland*, 466 U.S. at 692. With regard to what had been identified as a part of the direct appeal process, namely certiorari proceedings, Robinson was altogether denied the assistance of even minimally legally qualified counsel. Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. *Cronic*, 466 U.S. at 659. Counsel failed to even initiate the certiorari process because she was unqualified to do so. The prejudice standard applicable here should "mirror" the *Strickland/Cronic* doctrine, and this Court should apply *Cronic*.

In the alternative, the Petitioner urges adoption of an adverse effect standard of prejudice similar to that applied where there is a conflict of interest. The adverse effect here is both that described at length by the CCR in his correspondence regarding present and anticipated time frames and Robinson's inability secure timely review of his case in the Supreme Court, regardless of the probability or otherwise of receiving relief.

CLAIM II

THIS COURT ERRED IN SUMMARILY DENYING PETITIONER'S PRO SE CLAIMS OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

In a trial court setting where an indigent defendant complains that he is receiving inadequate representation by appointed counsel, the court will normally conduct a *Nelson* hearing. Here, the Petitioner expressed serious dissatisfaction with the appellate representation he was receiving and requested that this Court intervene. (Appendix B). The Court should have ordered that counsel, and if necessary the defendant himself, file a response. In the alternative, the Court could have temporarily relinquished jurisdiction to the trial court to conduct a fact finding hearing. In this case, a further inquiry would have revealed information about appellate counsel's lack of qualification to handle a capital appeal.

CLAIM III

MR. ROBINSON WAS IMPROPERLY CHARGED WITH AND CONVICTED OF ATTEMPTED FELONY MURDER, AND THE JURY WAS IMPROPERLY INSTRUCTED ON THIS NONEXISTENT OFFENSE.

Count V of the Indictment charged the Petitioner along with co-defendants Darrell Frazer and Michael Coleman with attempting to murder Amanda Merrill from a premeditated design to kill "or while engaged in the perpetration of or attempt to perpetrate a felony to-wit: kidnapping, burglary, robbery and/or sexual

battery in violations of Sections 777.04 and 782.04, Florida Statutes." Vol. XII, 2106. As to all three co-defendants, the jury was instructed as follows:

> Before you can find [co-defendats] guilty of Attempted First Degree Murder, the State must prove the following two elements beyond a reasonable doubt:
> 1. . . [co-defendants] did some act toward comitting the crime of First Degree Murder that went beyond just thinking or talking about it.
> 2 . . . [co-defendants] would have committed the crime except that they failed . . .

Vol. X, 1940.

The verdict form did not require the jury to specify whether they found evidence of premeditated murder or felony murder. The verdict form read:

> WE THE JURY FIND . . . AS FOLLOWS:
> AS TO COUNT 5:
> THE DEFENDANT IS GUILTY OF ATTEMPTED FIRST DEGREE MURDER OF AMANDA MERRELL AS CHARGED IN COUNT FIVE OF THE INDICTMENT

Vol. XIII, 2431.

In *State v. Gray*, 654 So. 2d 552 (Fla. 1995), this Court held that there is no criminal offense of attempted felony murder in Florida. In Mr. Robinson's case, it was error to charge him with attempted felony murder, instruct the jury such that it permitted a finding of attempted felony murder, and adjudge him guilty of said offense without requiring a specific jury finding as to whether its verdict was

predicated on attempted premeditated murder or attempted felony murder. The conviction should be reversed. Moreover, because the Petitioner's death sentences rest in part on this conviction, they are unreliable and unconstitutional.

CLAIM IV

FLORIDA'S LEGISLATIVE SCHEME FOR THE APPOINTMENT OF COUNSEL IN CAPITAL POSTCONVICTION CASES IS UNCONSTITUTIONAL TO THE EXTENT THAT IT PROHIBITS CCRC (AND REGISTRY) ATTORNEYS FROM CHALLENGING THE STATE'S INTENDED METHOD OF EXECUTION BY WAY OF A 42 USC §1983 ACTION, REPRESENTATION IN NONCAPITAL CASES USED AS AGGRAVATORS, CLEMENCY AND OTHER RELATED PROCEEDINGS.

This Petition argues that Florida's legislative scheme for the appointment of counsel in capital postconviction cases is preempted by federal statute to the extent that it prohibits CCRC (and registry) attorneys from challenging the State's intended method of execution by way of a 42 USC §1983 action and from representing their clients in ancillary proceedings such as clemency and postconviction challenges to noncapital cases used as aggravators, that those provisions are constitutionally invalid under the Supremacy Clause.

This Court originally determined that capital postconviction lawyers did have the ability to raise the equivalent of such a §1983 method of execution claim in the federal courts via a federal habeas corpus petition – which is authorized by chapter

27 – so the legislative restrictions could not be faulted if the attorneys failed to exercise that option in a timely manner. More recently such defendants have argued that the federal landscape has changed. In particular, the Supreme Court authorized federal method of execution challenges by way of §1983 rather than 28 USC §2254 in *Hill v. McDonough*, 547 U.S. 5734 (2006) and *Nelson v. Campbell*, 541 U.S. 637 (2004), and the U.S. Eleventh Circuit Court has indicated that they can only be brought that way. *Rutherford v. McDonough*, 466 F.3d 970, 973 (11th Cir. 2006) (observing that pre-*Nelson* circuit law requiring challenges to lethal injection procedures to be brought in a §2254 proceeding is "no longer valid in light of the Supreme Court's *Hill* decision"). Moreover, as a practical matter a method of execution claim will often be raised in a successive rather than an original habeas petition, however such a claim will be barred as a matter of federal statutory law. *In re Schwab*, 506 F.3d 1369 (11th Cir. 2007). *Cf. Cox v. State*, 5 So. 3d 659 (Fla. 2009) LEWIS, J., dissenting.

The Supreme Court decided *Harbison v. Bell*, 129 S.Ct. 1481 (2009), on April 1, 2009. The *Harbison* Court held that the provisions of 18 U.S.C. §3599, the Federal Death Penalty Act (FDPA) governing appointment of counsel for indigent state prisoners seeking federal habeas corpus relief to vacate a death sentence, also authorizes such counsel to represent the prisoner in subsequent state

clemency proceedings. *Id.* 18 U.S.C. §3599 applies to "any defendant" in "any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence." 18 U.S.C. §3599 (a)(2). While the specific holding speaks to clemency proceedings only, the Court got to that point because the federal statute broadly directs that attorneys who are appointed to represent a death sentenced state prisoner in an original §2254 proceeding also "shall represent the defendant throughout every subsequent stage of available judicial proceedings, including . . . all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures." 18 U.S.C. §3599(2)(e).

Of note is that the *Harbison* Court explicitly rejected the contention that 18 U.S.C. §3599(2)(e) referred only to subsequent federal proceedings. "Implied conflict preemption" occurs where compliance with both federal and state regulations is a physical impossibility or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Under the Supremacy Clause, U.S. Const. Art. 6, cl. 2, the provision of the FDPA authorizing subsequent representation in all available proceedings preempts state legislative restrictions on a federally appointed capital postconviction attorney's scope of representation. *State v. Harden*, 938 So. 2d 480 (Fla. 2006); *Gade v. Nat'l*

Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992) (plurality opinion) (explaining categories of preemption recognized in Supreme Court case law). The Federal Death Penalty Act begins with a preemption clause: "Notwithstanding any other provision of law to the contrary . . ." 18 U.S.C. §3599 (a)(1).

Challenges in this Court to chapter 27 scope of representation restrictions have generally been couched either as arguments that this Court has construed the statute more narrowly than the Legislature intended or, assuming that the construction was correct, that the statute as construed violates Due Process or Equal Protection. At the federal level, the Due Process and Equal Protection arguments have been unavailing. The Supreme Court has adhered to its position in *Murray v. Giarratano*, 492 U.S. 1 (1989) and *Pennsylvania v. Finley*, 481 U.S. 551 (1987) that there is no constitutional right to postconviction counsel; it follows that limitations on a statutory grant of counsel do not violate Due Process or Equal Protection. This Court followed *Murray v. Giarratano* and *Finley* in *State ex rel. Butterworth v. Kenny*, 714 So. 2d 404 (Fla. 1998) and *Diaz v. State*, 945 So. 2d 1136, 1142-45 (Fla. 2006). The argument presented by this petition has a different basis, namely that federal statutory law as recently interpreted in *Harbison* provides the relief sought by the defendant and that it conflicts with and therefore preempts the restrictive provisions of Chapter 27.

The Tennessee legislative scheme described in *Harbison* is different from Florida's, but different in a way that reinforces the contentions made here. Harbison was a death sentenced state prisoner who was represented by the Federal Defender's Services during his original §2254 proceedings. After his federal habeas petition was denied, he sought counsel to represent him in a state clemency proceeding. Ultimately the Tennessee Supreme Court held that state law did not authorize the appointment of state public defenders as clemency counsel and upheld the removal of Harbison's state appointed counsel from the case. Thereafter, Harbison's federal defender moved to expand the scope of her appointment to include state clemency proceedings, which prompted the litigation that eventually led to the Court's April 1 decision.

In Florida, CCRC attorneys are directed to file §2254 federal habeas corpus petitions by §27.702 (1). The statute also provides that "The capital collateral regional counsel shall file motions seeking compensation for representation and reimbursement for expenses pursuant to 18 U.S.C. §3006A when providing representation to indigent persons in the federal courts, and shall deposit all such payments received into the General Revenue Fund." §27.702 (3)(a). The corresponding provisions regarding registry counsel are located at §§27.710, 27.711(1)(c), and 27.711(11). Collateral representation by registry counsel

includes "any authorized federal habeas corpus litigation with respect to the sentence" and also authorizes the attorney to seek compensation under the CJA. §27.711(3).

In contrast with the situation in *Harbison*, federal defenders in this jurisdiction not only do not represent state prisoners in capital postconviction proceedings under §2254, they are prohibited from representing state capital prisoners in any litigation at all, whether in state or federal court. By letter dated October 23, 1995, the Honorable Gerald Tjoflat, writing on behalf of the U.S. Eleventh Circuit Court of Appeals, advised Mr. Robert J. Vossler, Federal Public Defender for the Northern District of Florida: "The Court has determined as a matter of policy that federal public defenders in the Eleventh Circuit should not represent in post conviction proceedings – whether in state or federal court – those convicted of capital crimes in state court." In June 2008, Mr. James T. Skuthan, Acting Federal Defender for the Middle District of Florida, cited this letter in response to an effort to appoint his office in at least some capacity to represent Mark Schwab, then under a warrant, in a pending §1983 action challenging lethal injection. Mr. Skuthan reported that "the undersigned subsequently contacted ODS [Administrative Office of the United States Courts, Offices of Defender Services] personnel for clarification after reading Judge Tjoflat's 1995 letter. In

subsequent conversations with ODS personnel, the undersigned confirmed that the policy set forth in Judge Tjoflat's 1995 letter was still in effect today. As a result, this Defender does not have the authority to represent Florida death sentenced inmates in state or federal post-conviction proceedings." Appendix F, Federal Public Defender's Response to Plaintiff's Motion for an Order Pursuant to Fed.R.Civ.P. 59(e) and 60(b) to Alter or Amend Final Judgment, Reinstate Case, and for Appointment of Counsel, Doc. 29, *Schwab v. McNeil, et al.*, Case No. 3:08-cv-507-J-33 USMD (Fla. 2008), with attached letters.

For the foregoing reasons, the various limitations on representation in Florida's statutory scheme and the Court's opinions have been superseded by the construction of federal law in Harbison and by operation of the Supremacy Clause.

CLAIM V

FLORIDA'S LETHAL INJECTION METHOD OF EXECUTION IS CRUEL AND UNUSUAL PUNISHMENT AND WOULD DEPRIVE MR. ROBINSON OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW IN VIOLATION OF THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION[2].

The Eighth Amendment to the United States Constitution prohibits the "unnecessary and wanton infliction of pain," *Gregg v. Georgia*, 428 U.S. 153, 173,

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[2]Counsel acknowledges that this claim is not supported by current case law.

(1976) (plurality opinion), and procedures that create an "unnecessary risk" that such pain will be inflicted. *Cooper v. Rimmer*, 379 F. 3d 1029, 1033 (9th Cir. 2004). The Eighth Amendment has been construed by the Supreme Court of the United States to require that punishment for crimes comport with "the evolving standards of decency that mark the progress of a maturing society." *Roper v. Simmons*, 543 U.S. 551, 561, 125 S. Ct. 1183 (2005) (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01, 78 S. Ct. 590 (1958) (plurality opinion)). Executions that "involve the unnecessary and wanton infliction of pain," *Gregg*, 428 U.S. at 173 (plurality opinion), or that "involve torture or a lingering death," *In re Kemmler*, 136 U.S. 436, 447, 10 S. Ct. 930 (1890), are not permitted.

Florida's present method of execution by lethal injection entails an unconstitutional level of risk that it will cause extreme pain to the condemned inmate in violation of the Eighth and Fourteenth Amendments of the U. S. Constitution and the Florida Constitution prohibition against cruel and unusual punishment. This claim is evidenced by the botched execution in Florida of Angel Diaz on December 13, 2006. As such, the defendant requests that the death sentence be vacated or that this Court order that any execution be stayed.

Trial counsel raised a method of execution claim aimed at the use of the electric chair, but appellate counsel overlooked or abandoned the claim.

CLAIM VI

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

A prisoner cannot be executed if "the person lacks the mental capacity to understand the fact of the impending death and the reason for it." This rule was enacted in response to *Ford v. Wainwright*, 477 U.S. 399 (1986). The only time a prisoner can legally raise the issue of his sanity to be executed is after the Governor issues a death warrant. Until the death warrant is signed, the issue is not ripe. *Poland v. Stewart*, 41 F.Supp.2d 1037 (D. Ariz. 1999) (such claims truly are not ripe unless a death warrant has been issued and an execution date is pending); *Martinez-Villareal v. Stewart*, 523 U.S. 637 (1998) (respondent's Ford claim was dismissed as premature, not because he had not exhausted state remedies, but because his execution was not imminent and therefore his competency to be executed could not be determined at that time).

Federal law requires that, in order to preserve a competency to be executed claim, the claim must be raised in the initial petition for habeas corpus. Hence, the filing of this petition.

CLAIM VII

THE PETITIONER SUFFERED FROM A MAJOR MENTAL ILLNESS AT THE TIME OF THE OFFENSE AND EXECUTION IS BARRED BY THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE U. S. CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

All allegations regarding the Petitioner's mental condition asserted elsewhere in these proceedings are incorporated herein. The Petitioner suffers from a psychotic disorder, and he suffered from that illness at the time of the offense. Psychosis is a major mental illness. Evidence in support of all such allegations will be presented during the evidentiary hearing on the claims raised in this motion regarding ineffective assistance during the penalty phase and other such matters. In addition to asserting prejudice under the *Strickland/Wiggins* cases, it is asserted here that the Petitioner's mental condition at the time of the offense bars the death penalty under the rationale of *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Roper v. Simmons*, 543 U.S. 551(2005). The Eighth Amendment prohibits "excessive" sanctions. A claim that punishment is excessive is judged by the evolving standards of decency that mark the progress of a maturing society. Persons suffering from mental illness to the same degree as the Petitioner by definition have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning,

to control impulses, and to understand the reactions of others. While their deficiencies may or may not warrant an exemption from criminal sanctions, they do diminish their personal culpability. *Gregg*, 428 U.S. 153, identified retribution and deterrence of capital crimes by prospective offenders as the social purposes served by the death penalty. Unless the imposition of the death penalty on a severely mentally ill person measurably contributes to one or both of these goals, it is nothing more than the purposeless and needless imposition of pain and suffering, and hence an unconstitutional punishment.

With respect to retribution, the severity of the appropriate punishment necessarily depends on the culpability of the offender. In banning execution of the mentally retarded, the *Atkins* Court made the following observation that seems especially apt here: Mentally retarded Petitioners may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes.

Likewise, an ABA task force has come up with several proposals that have won endorsements from professional organizations such as the National Alliance for the Mentally Ill, the American Psychological Association and the American Psychiatric Association. One proposal would protect from capital punishment

those with serious mental illnesses, such as psychosis, that significantly impaired their ability to reason at the time of their crime. These prisoners are categorically less culpable than so-called average murderers. Another set of proposals addresses situations in which mental illness precludes condemned prisoners from assisting in their own defenses, causes them to waive their appeals or prevents those facing imminent execution unable to understand what is about to happen to them, or why.

With respect to deterrence, exempting the severely mentally ill from execution will not lessen the deterrent effect of the death penalty with respect to offenders who are not severely mentally ill. Such individuals are unprotected by the exemption and will continue to face the threat of execution.

For the foregoing reasons the Petitioner's death sentence should be vacated and barred.

CLAIM VIII

DOUBLE JEOPARDY PRECLUDES DEATH AS A POSSIBLE PUNISHMENT IN THE EVENT POSTCONVICTION RELIEF IN ANY FORM IS GRANTED.

This is an original petition stating grounds for relief which could not be asserted in a Rule 3.851 motion for postconviction relief. Petitioner moves that he be granted a new guilt phase trial or a new direct appeal of the judgment of guilt. Pending before this Court is Petitioner’s appeal of the denial of his Rule 3.851 claim

of ineffective assistance of counsel for failure to investigate and present mitigation. The prejudice prong of that claim must be evaluated in light of the penalty phase jury's life recommendation.

The Double Jeopardy Clause applies to capital sentencing proceedings that "have the hallmarks of the trial on guilt or innocence." *Bullington v. Missouri*, 451 U.S. 430 (1981). Those hallmarks include a hearing held separately from the guilt phase, legal standards constraining the jury's choice among sentencing options, and a requirement that the prosecution must prove additional facts beyond guilt in order to obtain a sentence of death. *Id*. at 438-39. If a defendant has been acquitted of the death penalty at a trial-like sentencing proceeding, "the protection afforded by the Double Jeopardy Clause to one acquitted by a jury also is available to him, with respect to the death penalty, at his retrial." *Id*. at 446, 101 S.Ct. 1852; *see also, Arizona v. Rumsey*, 467 U.S. 203, 212 (1984) (reaffirming that, after a defendant is "acquitted" of the death penalty in a capital sentencing proceeding that resembles a trial, he cannot be retried for the death sentence). Should the Petitioner be afforded any postconviction relief, the death penalty must be precluded due to the jury's verdict recommending a life sentence.

CONCLUSION AND RELIEF SOUGHT

To the extent that further fact finding is necessary to determine the issues raised herein or to the extent that an objection is raised to the effect that the allegations asserted herein must be based only on the record as it stands and that additional facts should not be considered, Petitioner moves that jurisdiction be relinquished to the trial court to hear and decide the facts at issue. Otherwise, Petitioner moves that he be afforded a new trial, a new direct appeal, or for such relief as this Court may deem proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Habeas Corpus has been furnished by United States Mail, first class postage prepaid, to all counsel of record and the Defendant on April _____, 2010.

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CERTIFICATE OF COMPLIANCE

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

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IN THE SUPREME COURT OF FLORIDA
CASE NO. SC09-1860

TIMOTHY ROBINSON,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, STATE OF FLORIDA

Respondent.

APPENDIX TO PETITION FOR WRIT OF HABEAS CORPUS

Exhibit "A"	Case Docket
Exhibit "B"	*Pro Se* Pleading and Correspondence
Exhibit "C"	Unpublished Order Denying Relief
Exhibit "D"	Correspondence Between CCRC and Appellate Counsel Concerning Certiorari Petition
Exhibit "E"	Belated Certiorari Petition
Exhibit "F"	Attachments Supporting *Harbison* Claim 18 U.S.C. §3599 Schwab v. McNeil, et al. Federal Defender's Response Correspondence from U.S. Eleventh Circuit Court of Appeals

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