IN THE SUPREME COURT OF FLORIDA
CASE NO. _____

TERANCE VALENTINE
Petitioner,
v.
EDWIN G. BUSS
Secretary, Florida Department of Corrections,
Respondent.
and
PAMELA BONDI
Attorney General,
Additional Respondent,

PETITION FOR WRIT OF HABEAS CORPUS

RICHARD KILEY
ASSISTANT CCRC-M
FLORIDA BAR NO. 0558893

JAMES VIGGIANO, JR.
ASSISTANT CCRC-M
FLORIDA BAR NO. 0715336

ALI A. SHAKOOR
ASSISTANT CCRC-M
FLORIDA BAR NO. 669830
CAPITAL COLLATERAL
REGIONAL COUNSEL MIDDLE
REGION
3801 Corporex Park Drive
Suite 210
Tampa, Fl. 33619
(813) 740-3544
COUNSEL FOR PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

PRELIMINARY STATEMENT

Article I, Section 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. These claims demonstrate that Mr. Valentine was deprived of the right to a fair, reliable trial and individualized sentencing proceeding and that the proceedings resulting in his conviction and death sentence violated fundamental constitutional imperatives.

Citations shall be as follows: The record on appeal concerning the original court proceedings shall be referred to as "FSC ROA. ____" followed by the appropriate volume and page numbers. The postconviction record on appeal will be referred to as "PCR ____" followed by the appropriate volume and page numbers. All other references will be self-explanatory or otherwise explained herein.

REQUEST FOR ORAL ARGUMENT

The resolution of the issues in this action will determine whether Mr. Valentine lives or dies. This Court has allowed oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through

oral argument would be appropriate in this case, given the seriousness of the claims involved and the fact that a life is at stake. Mr. Valentine accordingly requests that this Court permit oral argument.

INTRODUCTION

Significant errors which occurred at Mr. Valentine's capital trial and sentencing were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel.

The issues, which appellate counsel neglected, demonstrate that counsel's performance was deficient and that the deficiencies prejudiced Mr. Valentine. "[E]xtant legal principles ...provided a clear basis for... compelling appellate argument[s]." Fitzpatrick v. Wainwright, 490 So.2d 938, 940 (Fl. 1986). Neglecting to raise fundamental issues such as those discussed herein "is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome." Wilson v. Wainwright, 474 So.2d 1162. 1164 (Fla. 1985). Individually and "cumulatively," Barclay v. Wainwright, 444 So.2d 956, 959 (Fla. 1984), the claims omitted by appellate counsel establish that "*confidence* in the correctness and fairness of the result has been undermined." Wilson, 474 So.2d at 1165 (emphasis in original).

Additionally, this petition presents questions that were ruled on at trial or on direct appeal but should now be revisited in light of subsequent case law or in order to correct error in the appeal process that denied fundamental constitutional rights. As this petition will demonstrate, Mr. Valentine is entitled to habeas relief.

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla. R. App. P. 9.100(a). See Art. I, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Art. V, Sec. 3(b)(9), *Fla. Const.* The Petition presents constitutional issues which directly concern the judgment of this Court during the appellate process and the legality of Mr. Valentine's sentence of death.

Jurisdiction in this action lies in this Court, See, e.g., Smith v. State, 400 So.2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Valentine's direct appeal. See Wilson, 474 So.2d at 1163 (Fla. 1985). A petition for a writ of habeas corpus is the proper means for Mr. Valentine to raise the claims presented herein. See e.g., Way v. Dugger, 568 So.2d 1263 (Fla. 1990); Downs v. Dugger, 514 So.2d 1069 (Fla. 1987); Riley v. Wainwright, 517 So.2d 656 (Fla. 1987); Wilson, 474 So.2d at 1162.

This Court has the inherent power to do justice. The ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. The petition pleads claims involving fundamental constitutional error. See Dallas v. Wainwright, 175 So.2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So.2d 362 (Fla. 1984). The Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action. As the petition shows, habeas corpus relief would be more than proper on the basis of Mr. Valentine's claims.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Valentine asserts that his capital conviction and sentence of death were obtained and then affirmed during this Court's appellate review process in violation of his rights as guaranteed by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

PROCEDURAL HISTORY

Mr. Valentine was charged by indictment on September 21, 1988 with: Count One, Burglary-Armed, F.S. 810.02, a first degree felony; Count Two, Kidnapping, F.S. 787.01 (1)(A)(3), a first degree felony; Count Three, Kidnapping, F.S. 787.01 (1)(A)(3), a first degree felony; Count Four, Grand Theft - Second

Degree, F.S. 812.014 (2)(B), a second degree felony; Count Five, First Degree Murder, F.S. 782.04, a capital felony; and Count Six, Attempted Murder-First Degree, F.S. 782.04 and F.S. 777.04, a first degree felony.

Mr. Valentine's first trial resulted in a mistrial where the jury was unable to reach a verdict. After a second trial, Mr. Valentine was convicted on all counts. The jury recommended death on the first-degree murder charge and the judge imposed a sentence of death. The Florida Supreme Court reversed the conviction and vacated the sentence due to a jury selection error under State v. Neil, 457 So.2d 481 (Fla. 1984). See Valentine v. State, 616 So.2d 971 (Fla. 1993). On retrial, Mr. Valentine was again convicted on all counts. Mr. Valentine waived the jury advisory sentence and presented mitigating evidence directly to the judge.

The trial court again sentenced Mr. Valentine to death on September 30, 1994. On direct appeal, the Florida Supreme Court reversed the conviction for attempted first-degree murder and vacated the sentence. The Court affirmed the remaining convictions and sentences including the first-degree murder conviction and sentence of death. See Valentine v. State, 688 So.2d 313 (Fla. 1996), cert. Denied, 522 U.S. 830, 118 S.Ct. 95, 139 L.Ed.2d 51 (1997).

On May 28, 1999, Capital Collateral Regional Counsel filed Defendant's Motion to Vacate Judgment of Conviction and Sentence with Special Request for

leave to Amend. (Shell motion). On July 16, 1999, Capital Collateral Regional Counsel filed a Motion to Extend or Toll filing time for 3.850 Motion.

On August 9, 1999, Capital Collateral Regional Counsel withdrew from the instant case and Mr. Nick Sinardi (Registry counsel) was appointed to represent Mr. Valentine. On October 4, 1999, the Court formally entered an order appointing Mr. Nick Sinardi to represent Mr. Valentine in this case. Mr. Sinardi filed his 3.850 motion on May 25, 2001. On August 1, 2002 a "Huff" hearing was held. On October 28, 2002, the post conviction court entered an Order Denying, In Part, Defendant's Motion to Vacate and Set Aside the Judgment of Conviction and Sentence. (PCR Vol. V p. 906-984).

On February 23, 2006, Mr. Nick J. Sinardi withdrew from the case and a Mr. Daniel F. Daly was appointed to represent Mr. Valentine. Mr. Daly withdrew from the case on April 2, 2007.

On August 8, 2007, CCRC-M filed a Notice of Appearance. The post-conviction Court allowed CCRC-M to amend the previously filed motion regarding PENALTY PHASE CLAIMS ONLY.

An evidentiary hearing was held on October 13, 2008, October 14, 2008 and July 22, 2009. The post conviction Court entered its order denying relief on July2, 2010. A timely Notice of Appeal was filed, and this petition follows.

CLAIM I

APPELLATE COUNSEL WAS INEFFECTIVE ON DIRECT APPEAL FOR NOT RAISING THE CLAIM THAT MR. VALENTINE WAS DENIED A FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION DUE TO THE STATE'S IMPROPER COMMENTS DURING CLOSING ARGUMENT.

Mr. Valentine was denied a fair trial due to prosecutorial misconduct during closing argument. Prosecutorial misconduct during the trial rendered the guilty verdicts fundamentally unfair and unreliable. Because the prosecutor's misconduct deprived the appellant of a fair trial, he is entitled to a new trial. Kellogg v. State,761 So.2d 409 (Fla.2d DCA 2000); Ruiz v. State, 743 So.2d 1 (Fla. 1999); Martinez v. State, 761 So.2d 1074 (Fla. 2000).

During closing argument, the assistant state attorney, Karen Cox, told the jury:

A. "She [Livia] had seen **her husband** rendered helpless and bound." (Emphasis added) (FSC ROA Vol. XV p. 1660).

B. "...and it has always been about **Livia Porche** and Terance Valentine ." (Emphasis added) (FSC ROA Vol. XV p. 1663).

C. "...**Livia and her husband, Ferdinand,** were the victims of violence and bloodshed in that house." (Emphasis added) (FSC ROA Vol. XV p. 1664).

D. "Now, did this man consciously decide to kill **Livia Porche**?" (Emphasis added) (FSC ROA Vol. XV p. 1664).

E. "Terance Valentine was a wanted man in the United States in connection with the homicide of Ferdinand Porche and shooting of **Livia Porche."**

(Emphasis added) (FSC ROA Vol. XV p. 1707).

F. "... bring it to Giovana's room where **Livia Porche** is laying..." (Emphasis added) (FSC ROA Vol. XV p. 1717).

G. "What motive does anybody in the would have to do this to **Livia Porche**...?"(Emphasis added) (FSC ROA Vol. XV p. 1723).

H. "...photos of her [Livia] **husband** and children..." (Emphasis added) (FSC ROA Vol. XV p. 1724).

I. "...he's the man who shattered the live of **Livia Porche**..." (Emphasis added) (FSC ROA Vol. XV p. 1727).

The prosecutor, Karen Cox, knew that Livia was not divorced from Terance Valentine and that Livia and Ferdinand Porche were not married. *See*

accompanying Initial Brief, ISSUE I. Karen Cox continuously made improper, false and misleading representations that she knew were false and misleading. See Taylor v. United States, 229 F.2d828,829, 832 (8th Cir.), cert denied 351 U.S. 986 (1956). It is as much a prosecutor's duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. See Jackson v. Wainwright, 390 F.2d 288, 294 (5th Cir. 1968); Burger v. United States, 295 U.S. 78, 88 (1935).

During closing argument, the assistant state attorney, Karen Cox, told the jury as follows:

> "The day after this happened, Elizabeth Valentine, his sister, was called and asked, 'where is he? We are looking for him.' She provided no information. They would have you believe that there was this party on Children's Day, and Children's Day, this party on this particular Children's Day, was the most memorable social event the history of mankind, right up there with the wedding of Charles and Diana; and yet these people, they don't storm the United States Embassy an say, 'Wait a minute. Wait a minute. What is going on here? This is my brother you are talking about, and he was right here in San Jose with us." (FSC ROA Vol. XV p. 1708).

> Defense counsel objected to the prosecution's improper comments stating that:
> "I am going to object. There is no evidence as to when these people-that these people knew the date on which the offense occurred. There is just simply no evidence as to when these people-that these people knew the date on which the offense occurred. There is just simply no evidence of it, and that is unfair commentary. They

> didn't find out in certain cases until lawyers came there and later on were they first advised of the date and then. (FSC ROA Vol. XV p. 1709).

Next, the trial court overruled the objection stating that "The lawyers are allowed to argue the evidence the evidence and reasonable inferences." (FSC ROA Vol. XV p. 1709).

There is no evidence or testimony that anyone called Elizabeth Valentine or anyone else a day after the incident, or that she provided no information. There is no evidence as to when or where the appellant's witnesses learned of the incident. This was in improper reference to matters not in evidence and an improper attack on the credibility of the appellant's witnesses and alibi. The comments were intended to inflame the jury and discredit the witnesses.

During closing argument, the assistant state attorney, Karen Cox, told the jury:

"...he calls us [Defendant's family] from prison to Costa Rica. What is going on here. Why did every single other family member and in-law deny any kind of contact?" (FSC ROA Vol. XV p. 1713). There is no evidence or testimony that he made calls from Florida State Prison, where he was incarcerated at the time. This was an improper reference to matters not in evidence and an

improper attack on the credibility of the appellant's witnesses and alibi. The comments were intended to inflame the jury and discredit the witnesses.

During closing argument, the assistant state attorney, Karen Cox, told the jury:

"Mr. Unterberger says that the shooting didn't happen in the back seat of the Blazer, but he ignores the testimony of Dr. Miller that said that there is blood spatter on this Blazer..." (FSC ROA Vol. XV p. 1727). There is no evidence or testimony that Dr. Miller examined the Blazer. Dr. Miller did not testify that there was any blood spatter on the Blazer. Ms. Cox made an improper reference to matters not in evidence, intended to inflame the jury.

During closing argument, the assistant state attorney, Karen Cox told the jury:

> "Now, Mr. Unterbeger wants you to believe that she [Livia] is lying and to have you believe that she is lying, he has to provide you with a motivation for why she was lying and so her motivation is this Costa Rican divorce. He somehow wants you to believe and wants to suggest to you that it is this woman, she was laying there, bound bloodied, naked, wondering if she was going to live or die, not knowing if she would ever see her children again, she thought 'Hey, if I say Terance did it, maybe he has got some property in Costa Rica and I will get an attorney, and we will do a property search, and maybe I will get half..." (FSC ROA Vol. XV p. 1724).

Ms. Cox made improper comments expressing her personal beliefs concerning defense counsel's presentation of his case and improperly attacked opposing counsel's theory of defense. See United States v. Young, 105 S. Ct. 1038 (1985). It is impermissible for a prosecutor to criticize defense counsel's closing argument or ridicule a defendant or his theory of defense. See Riley v. State, 560 So.2d 279, 280 (Fla. 3d DCA 1990); Rosso v. State, 505 So.2d 611, 612 (Fla. 3d DCA 1987).

In this case, the prosecutor continued beyond the limits of proper and ethical prosecutorial conduct. In closing, the prosecutor commented on facts not in evidence and interjected improper personal comments. This case is yet another example where the prosecutor's over zealousness in prosecuting the State's cause worked against justice rather than for it. Gore v. State, 719 So.2d 1197, 1203 (Fla.1998) (quoting Ryan v. State, 457 So.2d 1084, 1091 (Fla. 4th DCA 1984)). See Ruiz v. State, 743 So.2d 1 (Fla. 1999); Kellogg v. State, 761 So.2d 409 (Fla. 2d DCA 2000).

In Ruiz, the Defendant was convicted in the Circuit Court, Hillsborough County, of first-degree murder and sentenced to death. Mr. Ruiz appealed. The Florida Supreme Court held that the prosecutor, the same Karen Cox, engaged in misconduct in closing arguments. The court reversed the conviction and vacated the sentence because of prosecutorial misconduct.

In Ruiz, as here, the defendant presented an alibi defense, claiming that he was in Orlando on the day of the murder. Several witnesses attested to this. At the conclusion of the evidence, Ruiz was convicted and charged. On appeal, Ruiz argued, inter alia, prosecutorial misconduct on the part of Karen Cox during closing argument. The Florida Supreme Court held:

> "A criminal trial provides a neutral arena for the presentation of evidence upon which alone the jury must base its determination of a defendant's innocence or guilt. Attorneys for both sides, following rules of evidence and procedure designed to protect the neutrality and fairness of the trial, must stage their versions of the truth within that arena. That which has gone before cannot be considered by the jury except to the extent it can be properly presented at the trial and those things that cannot properly be presented must not be considered at all." Ruiz, 743 So.2d at 4.

The role of the attorney in closing argument is "to assist jury in analyzing, evaluating and applying the evidence. It is not for the purpose of permitting counsel to "testify" as an expert witnesses .' The assistance permitted includes counsel's right to state his contention as to the conclusions that the jury should draw from the evidence." United States v. Morris**,** 568 F.2d 396, 401 (5th Cir. 1978). "To the extent an attorney's closing argument ranges beyond these boundaries it is improper. Except to the extent he bases any opinion on the evidence in the case, he may not express his personal opinion on the merits of the

case or the credibility of witnesses. Furthermore, he may not suggest that evidence which was not presented at trial provides additional grounds for finding defendant guilty." Ruiz, 743 So.2d at 4.

The witnesses for both the State and the defense were subjected to extensive cross-examination and impeachment, and the credibility of each was called into question. During closing argument, prosecutor Cox sought to bolster the credibility of the State's case with the following improper statements:

> [MS. COX:] What motive does anybody in the world have to do this to Livia Proche except the man who so hated her and who thought that she was keeping him from his child and who thought that she had his belongings and that they were rightfully his?
> What other person in the world would do this to Livia Porche and Ferdinand Porche and, before taking them out of the scene, would take the time and the trouble to subject her to the degradation having photos of her mother and photos of her husband children shredded and dropped over her body?
> Who else would do this type of commando raid into that house and really not take anything except the life of her husband? Who else was calling her and telling her to disappear? No one. No one in the world. (FSC ROA Vol. XV p. 1723).

Mr. Valentine's convictions are irreparably tainted. The record shows that this trial was permeated by egregious and inexcusable prosecutorial misconduct. Ms. Cox attempted to tilt the playing field and obtain a conviction and death sentence in a number of improper ways: by demeaning and ridiculing the defendant and his counsel; by appealing to the jurors' raw emotions; and by introducing improper evidence.

The prosecutor crossed the line of zealous advocacy by a wide margin and compromised the integrity of the proceeding. See Garcia v. State, 622 So.2d 1325, 1332 (Fla. 1993) ("Once again, we are compelled to reiterate the need for propriety, particularly where the death penalty is involved....") Nowitzke v. State, 572 So.2d 1346, 1356 (Fla. 1990) ("[W]e are distressed over the lack of propriety and restraint exhibited in the overzealous prosecution of capital cases, and we feel compelled to reiterate [the warning expressed in Bertolotti]."); Garron v. State, 528 So.2d 353, 359 (Fla. 1988) ("Such violations of the prosecutor's misconduct in several death penalty cases...This Court considers this sort of prosecutorial misconduct, in the face of repeated admonitions against such overreaching, to be grounds for appropriate disciplinary proceedings."); Urbin V. State, 714 So.2d 411 (Fla. 1998) (reversing death sentence and condemning extensive prosecutorial misconduct).

The cumulative effect of the prosecutor's improper conduct constitute fundamental error. Here, the prosecutor made an attack on defense counsel, commented on a matters not in evidence, invaded the jury's providence , bolstered the officers, bolstered the state witness, and shifted the burden of proof. This is the type of error which 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. See McDonald v. State**,** 743 So.2d 501 (Fla. 1999).

Here, the prosecutor's comments were so prejudicial as to vitiate the entire trial. McDonald at 505. Fundamental error in closing occurs when the "prejudicial conduct in its collective import is so extensive that its influence pervades the trial, gravely impairing a calm and dispassionate consideration of the evidence and the merits by the jury." Silva v. Nightingale**,** 619 So.2d 4, 5 (Fla. 5th DCA 1993). The cumulative effect of the prosecutor's improper comments vitiated the fairness of the appellant's trial. See Caraballo v. State**,** 762 So.2d 542 (Fla. 5th DCA 2000).

Here, the cumulative effect of the prosecutor's improper comments deprived Mr. Valentine of a fair trial. See Brown v. State**,** 593 So.2d 1210 (Fla.2d DCA 1992) (holding that a combination of improper comments made by the prosecutor during closing argument required reversal and remand for a new trial). Accordingly, Mr. Valentine's judgment of conviction and sentence must be

vacated and set aside. See Ruiz. To the extent that appellate counsel failed to raise this issue on direct appeal, counsel was ineffective.

CLAIM II

CUMULATIVELY, THE COMBINATION OF PROCEDURAL AND SUBSTANTIVE ERRORS DEPRIVED MR. VALENTINE OF A FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Mr. Valentine 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). The sheer number and types of errors in Mr. Valentine's guilt and penalty phases, when considered as a whole, virtually dictated the sentence of death. While there are means for addressing each individual error, addressing these errors on an individual basis will not afford adequate safeguards required by the Constitution against an improperly imposed death sentence. Repeated instances of ineffective assistance of counsel, prosecutorial misconduct, and an unconstitutional process significantly tainted Mr. Valentine's capital proceedings.

The improper prosecutorial misconduct perpetrated by Karen Cox, the failure to conduct a proper investigation into Mr. Valentine's mental health problems, in addition to the errors on direct appeal; all of these errors deprived Mr. Valentine of a fair adversarial testing of the evidence in both guilt and penalty phase. When considered in the aggregate, these errors cannot be harmless.

Under Florida case law, the cumulative effect of these errors denied Mr. Valentine his fundamental rights under the Constitution of the United States and the Florida Constitution. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986); Ray v. State, 403 So. 2d 956 (Fla. 1981); Taylor v. State, 640 So. 2d 1127 (Fla. 1st DCA 1994); Stewart v. State, 622 So. 2d 51 (Fla. 5th DCA 1993); Landry v. State, 620 So. 2d 1099 (Fla. 4th DCA 1993), Penalver v. State, 926 So.2d 1118 (Fla. 2006).

Reason the claim could not have been or was not raised on appeal: This claim did not exist prior to postconviction proceedings.

CLAIM III

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

In accordance with Florida Rules of Criminal Procedure 3.811 and 3.812, a prisoner cannot be executed if "the person lacks the mental capacity to understand

the fact of the impending death and the reason for it." This rule was enacted in response to Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595 (1986).

The undersigned acknowledges that under Florida law, a claim of incompetency to be executed cannot be asserted until a death warrant has been issued. Further, the undersigned acknowledges that before a judicial review may be held in Florida, the defendant must first submit his claim in accordance with Florida Statutes. The only time a prisoner can legally raise the issue of his sanity to be executed is after the Governor issues a death warrant. Until the death warrant is signed the issue is not ripe. This is established under Florida law pursuant to Section 922.07, Florida Statutes (1985) and Martin v. Wainwright, 497 So.2d 872 (1986)(If Martin's counsel wish to pursue this claim, we direct them to initiate the sanity proceedings set out in section 922.07, Florida Statutes (1985).

The same holding exists under federal law. Poland v. Stewart, 41 F. Supp. 2d 1037 (D. Ariz 1999) (such claims truly are not ripe unless a death warrant has been issued and an execution date is pending); Martinez-Villareal v. Stewart, 118 S. Ct. 1618, 523 U.S. 637, 140 L.Ed.2d 849 (1998)(respondent's Ford claim was dismissed as premature, not because he had not exhausted state remedies, but because his execution was not imminent and therefore his competency to be

executed could not be determined at that time); Herrera v. Collins, 506 U.S. 390, 113 S. Ct. 853, 122 L.Ed.2d 203 (1993)(the issue of sanity [for Ford claim] is properly considered in proximity to the execution).

However, most recently, in In RE:Provenzano, No. 00-13193 (11th Cir. June 21, 2000), the 11th Circuit Court of Appeals has stated:

> Realizing that our decision in In Re: Medina, 109 F.3d 1556 (11th Cir. 1997), forecloses us from granting him authorization to file such a claim in a second or successive petition, Provenzano asks us to revisit that decision in light of the Supreme Court's subsequent decision in Stewart v. Martinez-Villareal, 118 S.Ct. 1618 (1998). Under our prior panel precedent rule, See United States v. Steele, 147 F.3d 1316, 1317-18 (11th Cir. 1998)(en banc), we are bound to follow the Medina decision. We would, of course, not only be authorized but also required to depart from Medina if an intervening Supreme Court decision actually overruled or conflicted with it.[citations omitted]

Stewart v. Martinez-Villareal does not conflict with Medina's holding that a competency to be executed claim not raised in the initial habeas petition is subject to the strictures of 28 U.S.C. Sec 2244(b)(2), and that such a claim cannot meet either of the exceptions set out in that provision. Id. at pages 2-3 of opinion

Federal law requires that in order to preserve a competency to be executed claim, the claim must be raised in the initial petition for habeas corpus, and in

order to raise an issue in a federal habeas petition, the issue must be raised and exhausted in state court. Hence, Mr. Valentine is filing this petition.

The appellant has been incarcerated since [1989]. Statistics have shown that an individual incarcerated over a long period of time will diminish his mental capacity. Inasmuch as the appellant may well be incompetent at time of execution, his Eighth Amendment right against cruel and unusual punishment will be violated.

Reason this claim could not have been raised on direct appeal:

This claim is unripe for review until a death warrant is signed.

CONCLUSION AND RELIEF SOUGHT

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

Respectfully submitted,

_____

Ali A. Shakoor
Florida Bar No. 0669830
Assistant CCC

_____

Richard E. Kiley
Florida Bar No. 0558893
Assistant CCC

_____

JAMES VIGGIANO
Florida Bar No. 0715336
Assistant CCC
CAPITAL COLLATERAL
REGIONAL
COUNSEL-MIDDLE
3801 Corporex Park Drive, Suite 210
Tampa, Florida 33619
(813) 740-3544
Counsels for Appellant

CERTIFICATE OF SERVICE

HEREBY CERTIFY that a true copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS has been furnished by United States Mail, first class postage prepaid, to all counsel of record on this_____, day of March, 2011.

_____
RICHARD E. KILEY
Florida Bar No. 0558893
Assistant CCC

_____
JAMES VIGGIANO
Florida Bar No. 0715336
Assistant CCC

_____
ALI ANDREW SHAKOOR
Florida Bar No. 669830
CAPITAL COLLATERAL REGIONAL COUNSEL-MIDDLE REGION
3801 Corporex Park Drive
Suite 210
Tampa, Florida 33619
813-740-3544
813-740-3554 (Facsimile)

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that a true copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUSwas generated in a Times New Roman 14 point font, pursuant to Fla. R. App. P.9.210.

_____
RICHARD E. KILEY
Florida Bar No. 0558893
Assistant CCC

_____
JAMES VIGGIANO
Florida Bar No. 0715336
Assistant CCC

_____
ALI ANDREW SHAKOOR
Florida Bar No. 669830
CAPITAL COLLATERAL REGIONAL COUNSEL-MIDDLE REGION
3801 Corporex Park Drive
Suite 210
Tampa, Florida 33619
813-740-3544
813-740-3554 (Facsimile)