

IN THE SUPREME COURT OF FLORIDA

CASE NO. _____

MICHAEL GORDON REYNOLDS

Petitioner

vs.

**EDWIN G. BUSS, as
Secretary of the Florida
Department of Corrections**

Respondent

PETITION FOR WRIT OF HABEAS CORPUS

**MELODEE A. SMITH
Florida Bar No. 33121**

**LAW OFFICES OF MELODEE A. SMITH
101 NE 3rd Ave. Suite 1500
Ft. Lauderdale, FL 33301
Tel: (954) 522.9297
Fax: (954) 522.9298
MSmith@SmithCriminalDefense.com**

Attorney for Petitioner

PRELIMINARY STATEMENT

Petitioner, MICHAEL GORDON REYNOLDS ("Reynolds"), was the defendant in the Circuit Court of the Eighteenth Judicial Circuit, in and for Seminole County, Florida. Respondent STATE OF FLORIDA ("the State"), was the plaintiff. References to the transcript of the jury trial in the record on direct appeal are cited to by the letter "V" (Volume), followed by page numbers and encased in parentheses.

JURISDICTION

This is a petition for Writ of Habeas Corpus filed pursuant to Fla.R.App.P. 9.100(a) and Art. I, § 13, Fla. Const.¹ This Court has jurisdiction pursuant to Fla.R.App.P. 9.030(a)(3); Art. V, § 3(b)(9), Fla. Const. Reynolds raises constitutional issues concerning the appellate process upon his convictions and sentences of death. Jurisdiction lies in this Court, *Smith v. State*, 400 So.2d 956, 960 (Fla. 1981), as the fundamental constitutional errors complained of arose in a capital case wherein this Court heard and decided the direct appeal. *Baggett v. Wainwright*, 229 So.2d 239, 243 (Fla. 1969). Habeas corpus is the proper remedy. *Way v.*

¹ Article 1, Section 13 of the Florida Constitution provides: "The Writ of Habeas Corpus shall be grantable of right, fully and without cost."

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).

This Court also has inherent power to do justice. The ends of justice urge the Court to correct the fundamental constitutional errors herein. *Dallas v. Wainwright*, 175 So.2d 785 (Fla. 1965); *Palmes v. Wainwright*, 460 So.2d 362 (Fla. 1984).

INTRODUCTION

Significant errors in Reynolds' capital murder trial and sentencing were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel. A review of issues appellate counsel neglected demonstrates deficient performance which prejudiced Reynolds because, but for such deficiencies, there remains a reasonable probability the outcome on appeal would have been different. As "extant legal principles . . . provided a clear basis for . . . compelling appellate argument," *Fitzpatrick v. Wainwright*, 490 So.2d 938, 940 (Fla. 1986), appellate counsel's neglecting to raise these fundamental issues fell "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 in concert, *Barclay v. Wainwright*, 444 So.2d 956, 959

(Fla.1984), the omitted appellate issues demonstrate “confidence in the correctness and fairness of the result has been undermined.” *Wilson*, 474 So.2d at 1165.

Appellate counsel's failure to provide constitutionally effective assistance on direct appeal of Reynolds’ Convictions and Sentences of Death in the following regards constitutes ineffective assistance of appellate counsel under the *Strickland* standard. *Strickland v. Washington*, 466 U.S. 668 (1984); *Freeman v. State*, 761 So. 2d 1055, 1069 (Fla. 2000); *Suarez v. Dugger*, 527 So. 2d 190 (Fla. 1998).

Following a review of the facts adduced at Reynolds’ jury trial and an examination of the errors committed and preserved for appeal at each stage of the proceedings in the trial court, this Petition will demonstrate that Reynolds’ appointed appellate counsel’s failure to raise or discuss those preserved errors on direct criminal appeal of Reynolds’ Judgments of Conviction and Sentences of Death constituted a substantial denial of the effective assistance of defense counsel guaranteed by the Sixth Amendment to the Constitution of the United States of America, as well as Article 1, Section 12 of the Florida Constitution, requiring that Reynolds be afforded a new jury trial and/or penalty phase proceeding.

Additionally, Petitioner will demonstrate that state action, in the form of the court reporter’s misstatement of trial testimony, falsely indicating Reynolds’ DNA

was found in the 11-year-old victim's vagina, deprived him of a full and fair direct appeal of his convictions and sentences.

STATEMENT OF THE CASE AND FACTS

On August 25, 1998, Michael Gordon Reynolds, was indicted on three counts of first-degree premeditated murder for the murders of Danny Ray Privett, Robin Razor, and Christina Razor, and burglary of a dwelling in which a battery upon Robin or Christina or both was committed while being armed with a weapon. (V1 31-33). Reynolds entered pleas of not guilty, and the case came to jury trial.

Facts Adduced at Trial

The circumstances of the crime and jury trial, as set forth in this Court's opinion on direct appeal, *Reynolds v. State*, 934 So.2d 1128 (Fla. 2006), follow:

On July 22, 1998, the bodies of the victims were found on the property located at 1628 Clekk Circle in Geneva, Florida. Danny's body was found outside near a large pine tree, and the bodies of Robin and Christina were found inside a trailer in which the victims were living. The trial in this case began on April 21, 2003, and on May 7, 2003, Reynolds was found guilty of the lesser-included offense of second-degree murder as to the murder of Danny, and guilty as charged as to the remaining three counts of the four-count indictment. The evidence established that on July 22, 1998, Shirley Razor, the mother of victim Robin Razor, traveled to the crime scene to deliver items Danny used in the work he was doing on trailers at that location. Upon arriving at the property, Shirley noticed Danny lying on the ground

outside. Shirley, being accustomed to seeing Danny drunk and passed out, proceeded to her separate trailer on the property and ate her lunch. After finishing her lunch, Shirley walked over to the trailer in which Danny and Robin were living when she noticed that Danny had a "hole in his head." After discovering that Danny was dead, Shirley ran to a neighbor's residence and called the authorities. Subsequent to the arrival of the fire department personnel, Shirley went to her daughter's trailer and upon looking inside found that her daughter, Robin, and her granddaughter, Christina, were inside and apparently dead. At trial, a medical examiner, Dr. Sara Hyatt Irrgang, testified that the deaths had occurred at least eight hours, but probably more than twelve hours prior to her arrival at the crime scene, placing the time of death between nine p.m. on July 21 and seven a.m. on the morning of July 22. The evidence demonstrated that Danny Ray Privett was found lying outside beneath a large pine tree on his side with his face down, surrounded by bloody pieces of concrete block and broken pieces of glass. Danny's jeans were partially unzipped suggesting that he had been in the process of urinating when the attack occurred. The autopsy of Danny Ray Privett revealed that he suffered a large depressed skull fracture with additional injuries to the head area. The wounds appeared to have been caused by three or more separate blows, with the injuries indicating that the assailant had been behind the victim. There was no indication of any defensive wounds on Danny, and examination of his major skull injury revealed that the injury was likely caused by a partially broken cinder block, based on fragments found within the wound. The medical examiner was unable to determine the order in which the injuries had been inflicted upon him. The cause of death for Danny was determined to be primarily due to blunt force trauma to the head with the large depressed skull fracture probably being the fatal blow. If this blow had been inflicted first, the medical examiner opined that the victim would have lost consciousness within a second to a minute or two. Robin and Christina Razor were found dead inside the living room portion of the camper trailer being used as living quarters. Robin was found lying on the floor, face up. Christina was found nearby sitting on the couch and leaning to her left. The living room area was in disarray and a large amount of blood was scattered throughout this area of the trailer. Robin Razor's autopsy revealed that she suffered multiple stab wounds along with multiple blows to the side of her face and a broken neck resulting in injuries to her spinal cord. Closer examination revealed that Robin suffered ten stab wounds to the head and

neck area and one to the torso area. The wounds appeared to have been inflicted with a sharp object such as a knife or scissors. Based on examination of the Robin's body and the defensive wounds present, the medical examiner opined that she had been involved in a violent struggle. In addition to the above wounds, Robin suffered multiple superficial wounds to her torso area which the medical examiner stated to be consistent with torment wounds--wounds produced not to cause serious injury but to cause aggravation and produce fear in the victim. The medical examiner was of the opinion that because blows to the victim's head were inflicted at different angles and the presence of significant defensive wounds, it was likely that she was conscious and struggling when these wounds were inflicted. The primary cause of death for Robin was determined to be the broken neck and spinal cord injury, although bleeding from the stab wounds would have also resulted in death. The autopsy of Christina Razor revealed that she suffered blunt force trauma to her head, a stab wound to the base of her neck that pierced her heart, and another stab wound to her right shoulder that pierced her lung and lacerated her pulmonary artery. These latter two wounds would have resulted in significant internal and external hemorrhaging and would have been fatal. The medical examiner indicated that the only sign of defense wounds to Christina was the presence of a small contusion to her left hand, which could have occurred as she attempted to block a blow from her assailant. The medical examiner opined that Christina would have lost consciousness within a minute or two of receiving the stab wounds. The primary cause of death for Christina was determined to be internal and external hemorrhaging. During his investigation of the crimes, Investigator John Parker of the Seminole County Sheriff's Department made contact with Reynolds and requested that he submit to an interview, to which Reynolds voluntarily agreed. During this interview, Investigator Parker also inquired about injuries that he observed on Reynolds' hand and ankle. In response to inquiries made about these injuries, Reynolds advised the investigator that at approximately five a.m. on the morning that the victims' bodies were discovered, he was taking his dog outside and slipped on the exterior step of his camper, twisting his ankle. Reynolds stated that the cut on his hand occurred when he caught his hand on a burr on the aluminum door frame of his trailer as he attempted to break his fall by grabbing the door frame. Reynolds advised the investigator that approximately thirty or forty minutes after sustaining the injuries he cleaned the cut to his hand and proceeded to an emergency room for treatment.

Reynolds stated that while on his way to the emergency room he suffered a flat tire and borrowed a jack from a convenience store to change his tire and after doing so he proceeded to the emergency room. After receiving treatment for his injuries, Reynolds informed the investigator that he returned to his residence and removed the burr from the trailer door frame with a pair of channel-lock pliers. In addition to the discussion concerning the injury, Reynolds also discussed an altercation in which he was involved with Danny Ray Privett regarding a trailer that was allegedly given to Reynolds by his landlord. According to Reynolds, the argument with Danny was centered upon Danny removing the trailer from Reynolds' property without permission. Upon discovering that Danny had removed the trailer, Reynolds indicated that he confronted Danny and a heated argument ensued. Reynolds stated that after exchanging words with Danny, he left Danny's property but returned a short while later to apologize and advise Danny that he could keep the trailer. Significantly, during this interview Reynolds advised the investigator that he had never been inside the trailer in which the victims were living. Subsequent to this interview, Reynolds gave permission for the search of both his trailer and his vehicle, and he also agreed to provide hair and blood samples for DNA analysis. Additionally, pursuant to a search warrant certain evidence was seized from Reynolds' vehicle and residence. At trial, a neighbor of the victims testified that on the night prior to the discovery of the bodies he observed a car similar to that of Reynolds parked at the victims' residence. Fingerprint and shoe pattern analysis of the crime scene and items collected from the scene revealed several prints of value, but none of them connected Reynolds to the scene. However, extensive evidence with regard to DNA analysis resulting from testing of items of evidence recovered from the crime scene was presented. Several of the items recovered from the crime scene inside the trailer and on the exterior of the trailer contained a DNA profile matching that of Reynolds. There was no eyewitness testimony offered by the State and, other than the concrete block allegedly used to strike the victims, no other weapon was recovered. The defense attempted to establish mishandling and contamination of the evidence, along with suggesting that other individuals had committed the crimes with which Reynolds had been charged. The defense elicited testimony from Danielle Privett, Danny and Robin's other daughter, indicating that her parents had been having an ongoing disagreement regarding rent payments with a man by the name of Justin Pratt, a friend of Pratt's, Alan Combs, and Pratt's girlfriend, Nicole

Edwards. In addition to this testimony, Reynolds presented evidence consisting of portions of an interview conducted by the Sheriff's Department with Pratt wherein Pratt discussed the disagreement and admitted that he had left a note at the victims' residence indicating that "it was war, ... conventional weapons." After hearing all the evidence, the jury rendered a verdict finding Reynolds guilty of second-degree murder as to the death of Danny Privett, two counts of first-degree murder as to the deaths of Robin and Christina Razor, and burglary of a dwelling during which a battery was committed while Reynolds was armed with a weapon. During the penalty phase the State presented four witnesses. Danna Birks established multiple prior convictions of Reynolds. Tonya Chapple, the victim of Reynolds' prior conviction for aggravated battery, described the circumstances surrounding the prior crime. Christina Razor's grandmother testified as to Christina's age at the time of the crimes, and Robin Razor's brother read a prepared statement in the nature of victim impact evidence. Reynolds, after thorough consultation with his attorneys and the trial court, waived his right to present mitigating evidence. On May 9, 2003, the jury returned unanimous recommendations of death for both first-degree murder convictions. During the *Spencer* hearing, the sole testimony presented by the defense was the testimony of Reynolds himself. The State did not present any testimony, relying solely on the evidence and testimony admitted during the guilt and penalty phase trials as support for the aggravating factors. At sentencing, the State presented testimony of Teresa Barcia, the sister of Danny Ray Privett, who read a prepared statement expressing the pain caused by the victims' death and asking the court to impose the maximum sentence provided by law. On September 19, 2003, the trial judge sentenced Reynolds to concurrent sentences of life for the murder of Danny Ray Privett and the burglary conviction, and the trial judge entered separate sentences of death for the murders of Robin and Christina Razor. In pronouncing Reynolds' sentence, the trial court found that the State had proven beyond a reasonable doubt the existence of four statutory aggravators for the murder of Robin Razor: (1) Reynolds had previously been convicted of a another capital felony or a felony involving a threat of violence to the person (great weight); (2) Reynolds committed the murder while he was engaged in or was an accomplice in the commission of or an attempt to commit a burglary of a dwelling (great weight); (3) the murder was committed for the purpose of avoiding a lawful arrest (great weight); and (4) the murder was committed in

an especially heinous, atrocious, or cruel fashion (great weight). As to Christina Razor's murder, the trial court found that the State had proven beyond a reasonable doubt the existence of five statutory aggravators: (1) Reynolds had previously been convicted of a capital felony or a felony involving a threat of violence to the person (great weight); (2) Reynolds committed the murder while he was engaged in or was an accomplice in the commission of or an attempt to commit a burglary of a dwelling (great weight); (3) the murder was committed for the purpose of avoiding a lawful arrest (great weight); (4) the murder was committed in an especially heinous, atrocious, or cruel fashion (great weight); and (5) the victim of the murder was a person less than twelve years of age (great weight). In its analysis of the mitigation present, the trial court acknowledged the defendant's waiver of the presentation of mitigating evidence but, nonetheless, the court considered and weighed any mitigation that it found to be established. In doing so, the trial court found that the following nonstatutory mitigating circumstances had been established and were applicable to both the murders of Robin and Christina Razor: (1) that Reynolds was gainfully employed at the time of the crimes (little weight); (2) that Reynolds manifested appropriate courtroom behavior throughout the proceedings (little weight); (3) that Reynolds cooperated with law enforcement (little weight); and (4) that Reynolds had a difficult childhood (little weight). The trial court determined that the evidence did not establish that Reynolds could easily adjust to prison life. The trial court recognized that evidence was presented by Reynolds for purposes of establishing lingering doubt. However, the trial court noted that it would not consider any theory of lingering doubt as nonstatutory mitigation in its sentencing analysis.

Reynolds v. State, 934 So.2d at 1135-1139.

Direct Appellate Proceedings

On direct appeal of his judgments of conviction and sentences of death, Reynolds raised the following issues:

POINT I

THE TRIAL COURT ERRED IN REFUSING TO ADMIT THE ENTIRE STATEMENT OF AN UNAVAILABLE WITNESS WHERE THE REDACTED PORTIONS WERE NOT OFFERED TO PROVE THE TRUTH OF THE MATTER ASSERTED OR WERE AN ADMISSION AGAINST THE DECLARANT'S INTERESTS, AND WHERE THE EXCLUSION DEPRIVED THE DEFENDANT OF HIS RIGHT TO A FAIR TRIAL AND TO PRESENT HIS DEFENSE, UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9, 16, 17, AND 22 OF THE FLORIDA CONSTITUTION.

POINT II

THE CONVICTIONS FOR TWO FIRST-DEGREE MURDERS, SECOND DEGREE MURDER, AND BURGLARY VIOLATE THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION BECAUSE THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUPPORT THE GUILTY VERDICT.

POINT III

THE TRIAL COURT ABUSED ITS DISCRETION IN DECLINING THE DEFENDANT'S EXPRESS WAIVER OF HIS RIGHT TO A SENTENCING JURY RECOMMENDATION, RENDERING HIS SENTENCE UNCONSTITUTIONAL UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9, 16, 17, AND 22 OF THE FLORIDA CONSTITUTION.

POINT IV

THE TRIAL COURT ERRED IN ALLOWING TESTIMONY OF DETAILS OF A PRIOR VIOLENT FELONY FOR WHICH THERE HAD BEEN NO

CONVICTION, DEPRIVING HIM OF HIS RIGHT TO A FAIR TRIAL AND RENDERING HIS DEATH SENTENCES UNCONSTITUTIONAL UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9, 16, 17, AND 22 OF THE FLORIDA CONSTITUTION.

POINT V

PLACING A *HIGHER* BURDEN OF PERSUASION ON THE DEFENSE TO PROVE THAT LIFE IMPRISONMENT SHOULD BE IMPOSED THAN IS PLACED ON THE STATE TO PERSUADE THAT CAPITAL PUNISHMENT SHOULD BE IMPOSED VIOLATES FUNDAMENTAL FAIRNESS AND DENIES DUE PROCESS UNDER *IN RE WINSHIP* AND *MULLANEY V. WILBUR*.

POINT VI

THE TRIAL COURT ERRED IN REFUSING TO CONSIDER IN ITS DEATH SENTENCE DETERMINATION RESIDUAL DOUBT AS TO THE DEFENDANT'S GUILT, IN VIOLATION OF THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW AND RENDERING HIS DEATH SENTENCES UNCONSTITUTIONAL UNDER THE FLORIDA AND FEDERAL CONSTITUTIONS.

POINT VII

THE APPELLANT'S DEATH SENTENCES WERE IMPERMISSIBLY IMPOSED BECAUSE THE TRIAL COURT INCLUDED IMPROPER AGGRAVATING CIRCUMSTANCES, EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, AND FAILED TO PROPERLY FIND THAT THE MITIGATING CIRCUMSTANCES OUTWEIGH THE AGGRAVATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCES UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §17 OF THE FLORIDA CONSTITUTION.

POINT VII[I]

FLORIDA'S DEATH PENALTY IS UNCONSTITUTIONAL UNDER *RING V. ARIZONA*.

This Court affirmed Reynolds' convictions and death sentences on direct appeal, *Reynolds v. State*, 934 So.2d 1128 (Fla. 2006). Reynolds filed petition for certiorari in the United States Supreme Court, which was denied January 8, 2007. *Reynolds v. Florida*, 549 U.S. 1122, 127 S.Ct. 943 (2007).

Postconviction Filings

Reynolds subsequently sought postconviction relief pursuant to Rule 3.851, Florida Rules of Criminal Procedure, alleging the following sixteen grounds:

CLAIM 1

THE STATE COMMITTED PROSECUTORIAL MISCONDUCT WHEN IT INTRODUCED THE FALSE TESTIMONY OF A KEY WITNESS AND ALLOWED THE LIE TO REMAIN UNCORRECTED, VIOLATING MR. REYNOLDS' RIGHT TO DUE PROCESS THE STATE ALSO COMMITTED PROSECUTORIAL MISCONDUCT WHEN IT INTRODUCED A SEXUAL BATTERY THEORY UNSUPPORTED BY ANY EVIDENCE OTHER THAN THE FALSE TESTIMONY, INFLAMING THE JURY THE MISCONDUCT DEPRIVED MR. REYNOLDS OF A FAIR TRIAL IN VIOLATION OF HIS RIGHTS PROTECTED BY THE 4th, 5th, 6th, 8th AND 14th AMENDMENTS TO THE UNITED STATES CONSTITUTION.

CLAIM 2

THE STATE VIOLATED THE REQUIREMENTS OF BRADY V. MARYLAND, 373 U.S. 83 (1963) WHEN IT FAILED TO DISCLOSE THE EXTENT OF JOHN FITZPATRICK'S POWER TO AFFECT ALL DNA RESULTS AT THE FDLE LAB, AND WHEN THE FULL EXTENT OF DEPUTY JOHN PARKER'S DISHONESTY WAS NOT DISCLOSED TO THE DEFENSE OR AT TRIAL.

CLAIM 3

DEFENSE COUNSEL WAS INEFFECTIVE IN THE GUILT AND PENALTY PHASES UNDER THE PRECEPTS OF STRICKLAND V. WASHINGTON, 466 U.S. 668 (1984), IN THE MANNER IN WHICH IT HANDLED THE DNA EVIDENCE AND THE SEXUAL BATTERY ARGUMENT THE INEFFECTIVENESS ON THESE ISSUES DEPRIVED MR. REYNOLDS OF A FAIR TRIAL IN VIOLATION OF HIS RIGHTS PROTECTED BY THE 4th, 5th, 6th, 8th AND 14th AMENDMENTS TO THE UNITED STATES CONSTITUTION. IAC FOR FAILURE TO OBJECT OR CURE THE FALSE TESTIMONY OF CHARLES BADGER. COUNSEL WAS INEFFECTIVE IN THE GUILT PHASE FOR FAILING TO OBJECT TO THE STATE'S UNSUPPORTED ARGUMENT THAT A SEXUAL BATTERY WAS THE MOTIVE FOR THE MURDERS.

CLAIM 4

MR. REYNOLDS WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN THE PENALTY PHASE WHEN THE DEFENSE FAILED TO OBJECT TO THE REPETITION OF THE SEXUAL BATTERY THEORY IN THE STATE'S CLOSING ARGUMENT OR EFFECTIVELY REBUT THE THEORY IN ITS CLOSING THE FAILURE TO OBJECT TO THE BADGER LIE IN THE GUILT PHASE ALSO RESULTED IN PREJUDICE IN THE PENALTY PHASE.

CLAIM 5

TRIAL COUNSEL WAS INEFFECTIVE AND PREJUDICED THE OUTCOME OF DEFENDANT'S CASE WHEN COUNSEL FAILED TO OBJECT TO A MISSTATEMENT OF THE LAW GIVEN BY THE COURT TO THE JURY. COUNSEL WAS FURTHER INEFFECTIVE AND PREJUDICED THE DEFENDANT BY NOT MOVING FOR A MISTRIAL BASED ON THIS IMPROPER AND HIGHLY PREJUDICIAL STATEMENT REGARDING THE BURDENS OF PROOF AT TRIAL.

CLAIM 6

TRIAL COUNSEL WAS INEFFECTIVE AND PREJUDICED THE OUTCOME OF DEFENDANT'S CASE BY FAILING TO CONDUCT PROPER AND REASONABLE VOIR DIRE. COUNSEL WAS ILL-PREPARED DURING VOIR DIRE AND WRONGLY RELINQUISHED HIS RIGHT TO AND OBLIGATIONS FOR CONDUCTING INDIVIDUAL QUESTIONING BY ALSO CEDING QUESTIONING TO THE COURT.

CLAIM 7

TRIAL COUNSEL WAS INEFFECTIVE AND PREJUDICED DEFENDANT WHEN, DURING VOIR DIRE, COUNSEL INFORMED THE JURY ABOUT THE DEFENDANT'S PRIOR CRIMINAL CONVICTIONS WHEN COUNSEL KNEW THE STATE HAD NOT FILED ANY MOTION

CLAIM 8

TRIAL COUNSEL WAS INEFFECTIVE AND PREJUDICED THE OUTCOME OF DEFENDANT'S CASE WHEN COUNSEL FAILED TO REQUEST A JURY INTERVIEW TO DETERMINE WHETHER ANY JURORS HAD SEEN AN IMPROPERLY CONSTRUCTED MEMORIAL OR SHRINE TO THE VICTIMS THAT WAS PLACED RIGHT OUTSIDE THE COURTROOM. COUNSEL WAS FURTHER INEFFECTIVE AND PREJUDICED THE DEFENDANT BY NOT MOVING FOR A MISTRIAL

BASED ON THIS IMPROPER AND HIGHLY PREJUDICIAL STATE-SANCTIONED ACTION BY THE VICTIM'S FAMILY.

CLAIM 9

TRIAL COUNSEL WAS INEFFECTIVE AND PREJUDICED DEFENDANT WHEN HE ALLOWED 37 AUTOPSY PHOTOGRAPHS INTO EVIDENCE WITHOUT OBJECTION.

CLAIM 10

COUNSEL WAS INEFFECTIVE AND PREJUDICED DEFENDANT WHEN COUNSEL FAILED TO OBJECT TO IMPERMISSIBLE LAY WITNESS TESTIMONY CONCERNING THE METALLURGICAL CONDITION OF DEFENDANT'S TRAILER DOOR.

CLAIM 11

COUNSEL WAS INEFFECTIVE AND PREJUDICED DEFENDANT WHEN COUNSEL FAILED TO OBJECT TO IMPERMISSIBLE TESTIMONY CONCERNING DEFENDANT'S ARREST IN SEMINOLE COUNTY, FLORIDA ON A WARRANT FROM HILLSBOROUGH COUNTY, FLORIDA AND THE SUBSEQUENT TRANSPORTATION BACK TO HILLSBOROUGH COUNTY.

CLAIM 12

COUNSEL WAS INEFFECTIVE AND PREJUDICED DEFENDANT WHEN COUNSEL FAILED TO OBJECT TO IMPERMISSIBLE LAY WITNESS TESTIMONY CONCERNING THE CONDITION OF DEFENDANT'S CLOTHING ON THE DAY OF THE HOMICIDES.

CLAIM 13

TRIAL COUNSEL WAS INEFFECTIVE AND PREJUDICED THE DEFENDANT WHEN COUNSEL FAILED TO PROPERLY PRESENT

CERTAIN ISSUES TO THE JURY AND FAILED TO PRESERVE THOSE ISSUES FOR APPEAL

CLAIM 14

§ 27.702 FLA. STAT. IS UNCONSTITUTIONAL FACIALLY AND AS APPLIED IN VIOLATION OF THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FLORIDA AND FEDERAL CONSTITUTION

CLAIM 15

THE RULES PROHIBITING MR. REYNOLDS' LAWYERS FROM INTERVIEWING JURORS TO DETERMINE IF CONSTITUTIONAL ERROR WAS PRESENT VIOLATES EQUAL PROTECTION PRINCIPLES, THE FIRST, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION AND DENIES MR. REYNOLDS ADEQUATE ASSISTANCE OF COUNSEL IN PURSUING HIS POSTCONVICTION REMEDIES

CLAIM 16

CUMULATIVELY, THE COMBINATION OF PROCEDURAL AND SUBSTANTIVE ERRORS DEPRIVED MR. REYNOLDS 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

The State filed an Answer to Reynolds' postconviction motion on January 24, 2008. At a Case Management Conference held April 3, 2008, the trial court summarily denied Claims 1, 2, 3A, 5, 10, and 12. Claims 14 and 15 did not require

an evidentiary determination and the trial court deemed Claim 16, alleging cumulative error, premature. Before the evidentiary hearing, an irreconcilable conflict arose between Reynolds and collateral counsel. CCRC was discharged, and Reynolds acted *pro se* for a short time before undersigned counsel was appointed from the conflict registry. An Amended/Corrected/Supplemental Motion to Vacate Judgments of Conviction and Sentence was filed August 10, 2009, adding five additional grounds, designated Claims A-I through A-V:

CLAIM A-I

TRIAL COUNSEL FAILED TO INVESTIGATE AND PRESENT EVIDENCE OF SUBSTANTIAL MITIGATION, INCLUDING MENTAL HEALTH MITIGATION. TRIAL COUNSEL FAILED TO ENGAGE EXPERTS TO INTERVIEW AND EVALUATE THE DEFENDANT. TRIAL COUNSEL FAILED TO CALL WITNESSES TO TESTIFY DURING THE PENALTY PHASE WHO WOULD HAVE DEMONSTRATED THAT THE DEFENDANT WAS NOT ONE OF THE WORST OF THE WORST PERSONS TO BE CONVICTED OF CAPITAL MURDER. TRIAL COUNSEL FAILED TO INFORM THE DEFENDANT OF THE MITIGATION THE DEFENDANT COULD HAVE PRESENTED TO THE JURY AND THEREAFTER FAILED TO PRESENT THE DEFENDANT'S JURY WITH ANY REASON TO RECOMMEND LIFE OVER DEATH. MR. REYNOLDS WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL DURING THE PENALTY PHASE WHICH VIOLATED HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

CLAIM A-II

TRIAL COUNSEL FAILED TO INVESTIGATE OR PRESENT EXPERT OR CIVILIAN TESTIMONY TO SUPPORT THE DEFENSE THEORY THAT REASONABLE DOUBT EXISTED DUE TO A CONFLICT IN THE EVIDENCE OR BECAUSE THE EVIDENCE WAS LEGALLY INSUFFICIENT TO CONVICT THE DEFENDANT. TRIAL COUNSEL FAILED TO INVESTIGATE OR PRESENT EXPERT OR CIVILIAN TESTIMONY TO SUPPORT THE DEFENSE'S ALTERNATIVE THEORY THAT PERSON(S) OTHER THAN THE DEFENDANT KILLED DANNY RAY PRIVETT, ROBIN RAZOR AND CHRISTINA RAZOR.

CLAIM A-III

THE LETHAL INJECTION OF MR. REYNOLDS UNDER THE STATE'S PROCEDURES VIOLATES HIS RIGHT UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND UNDER THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION BECAUSE EXECUTION BY LETHAL INJECTION IS CRUEL AND/OR UNUSUAL PUNISHMENT.

CLAIM A-IV

TRIAL COUNSEL FAILED TO REQUEST THAT SLEEPING JUROR GOLDEN BE REMOVED DURING CRITICAL TESTIMONY PRESENTED BY THE STATE AFTER THE TRIAL COURT HAD ALREADY ADMONISHED THE JUROR THAT IT WOULD REQUIRE HER STAND OR TAKE DRASTIC MEASURES IF SHE FELL ASLEEP AGAIN.

CLAIM A-V

TRIAL COUNSEL FAILED TO PREPARE THE DEFENDANT TO TESTIFY ON HIS OWN BEHALF AFTER INFORMING THE JURY THAT THE DEFENDANT WOULD TESTIFY AND AFTER TRIAL COUNSEL INFORMED POTENTIAL JURORS THAT HE WAS A CONVICTED FELON. TRIAL COUNSELS' INEFFECTIVE ASSISTANCE

OF COUNSEL VIOLATED THE DEFENDANT'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

At a second Case Management Conference, claims A-III, A-IV, and A-V were summarily denied (PCR 995-1052). An evidentiary hearing was held on Claims 3B, 4, 6, 7, 8, 9, 11, 13, A-I, and A-II (PCR 1-925). The trial court entered an order denying Reynolds' postconviction motion and Reynolds filed notice of appeal. The appeal of the denial of Reynolds' postconviction motion remains pending in this Court, under Case Number SC10-1602.

This Petition for Writ of Habeas Corpus follows.

GROUNDS FOR RELIEF

A.

*Ineffective Assistance of Appellate Counsel
Unchallenged Errors:*

REYNOLDS WAS DENIED THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL GUARANTEED BY THE SIXTH & FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 & 16 OF THE FLORIDA CONSTITUTION BY APPOINTED COUNSEL'S:

- I. FAILURE TO RAISE FUNDAMENTAL ERROR IN THE TRIAL COURT'S MISSTATEMENT OF LAW IN INSTRUCTING JURORS ON THE BURDEN OF PROOF**

- II. FAILURE TO RAISE THE TRIAL COURT'S ERROR IN INSTRUCTING JURY AND FINDING AGGRAVATOR THAT REYNOLDS COMMITTED MURDERS IN THE COURSE OF A BURGLARY IN VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS**

B.

*State Action Depriving Reynolds' of His Right
to a Full and Fair Direct Appeal*

GROUND III

MR. REYNOLDS WAS DENIED HIS RIGHT TO A FULL AND FAIR DIRECT APPEAL OF HIS MURDER CONVICTIONS AND SENTENCES OF DEATH BY STATE ACTION WHEN THE COURT REPORTER ALTERED THE TESTIMONY OF DNA ANALYST BADGER SO THAT THE TRANSCRIPT BEFORE THIS COURT ON DIRECT APPEAL FALSELY INDICATED THAT DNA ON SWABS FROM 11-YEAR-OLD CHRISTINA RAZOR'S VAGINA WAS THAT OF REYNOLDS

Introduction

The following acts and omissions of Reynolds' appointed appellate counsel fell measurably below objective standards of reasonably effective assistance of counsel on direct appeal of a capital murder defendant's Judgments of Conviction for First-Degree Murder and Sentences of Death, but for which there remains a reasonable probability the outcome of the appeal would have been different.

GROUND I

APPELLATE COUNSEL WAS INEFFECTIVE AND PREJUDICED THE OUTCOME ON DIRECT APPEAL IN FAILING TO RAISE OR DISCUSS AS FUNDAMENTAL ERROR THE TRIAL COURT'S MISSTATEMENT OF LAW IN INSTRUCTING JURORS ON THE STATE'S BURDEN OF PROOF

Appellate counsel neither raised nor discussed as fundamental error on direct appeal the trial court's misinstruction on the State's burden of proof, telling jurors: "the State doesn't have to do anything, you can't hold it against them." (V9, R571).

This erroneous instruction, placing the burden of proof on Reynolds, was not cured by other instructions which properly noted the State's burden of proof, as "there is no reason to believe that [jurors] are likely to intuit which is the correct [instruction] and which is the erroneous one," and "[t]he conclusion is therefore

inescapable that the jury may well have decided this case under an erroneous instruction as to the burden of proof.” *Murray v. State*, 937 So.2d 277, 280 (Fla. 4th DCA 2006). In *Murray*, jurors were instructed that the defense had the burden of proof beyond a reasonable doubt (an erroneous instruction), but also instructed that if jurors had reasonable doubt whether the accused was justified in using force, they should find him not guilty (a proper instruction). The appellate court stated:

We emphasize that the defect involves an erroneous reasonable doubt standard. . . . When jurors are faced with both correct and erroneous instructions as to the applicable legal rules, there is no reason to believe that they are likely to intuit which is the correct one and which is the erroneous one.

* * *

The conclusion is therefore inescapable that the jury may well have decided this case under an erroneous instruction as to the burden of proof.

Murray, 937 So.2d at 280. Here, as in *Murray*, there is no reason to believe jurors were likely to intuit which instruction was correct and which erroneous, and the “conclusion is therefore inescapable that the jury may well have decided this case under an erroneous instruction as to the burden of proof.” *Id.* *Murray*, which held such an error was fundamental, *id.*, at 281, was neither new nor novel, as it relied upon a preexisting line of United States Supreme Court authorities:

“[for a valid conviction] the essential connection to a ‘beyond a reasonable doubt’ factual finding cannot be made where the instructional error consists of a misdescription of the burden of proof, which vitiates all the jury's findings. A reviewing court can only engage in pure speculation--its view of what a reasonable jury would have done. And when it does that, ‘the wrong entity judge[s] the defendant guilty.’ ” [e.s.]

Sullivan v. Louisiana, 508 U.S. 275, 281, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). In the critical words of the Court, an erroneous instruction on the burden of proof “vitiates all the jury's findings.” This kind of error is deemed structural--“the jury guarantee being a ‘basic protection[n]’ whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function.” 508 U.S. at 281, 113 S.Ct. 2078 (citing *Rose v. Clark*, 478 U.S. 570, 577, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986)). Were we to validate the verdict, the wrong entity--this court--would effectually decide defendant's guilt.

Murray v. State, 937 So.2d at 281-282.

Moreover, Reynolds’ *sole defense* at jury trial was one of reasonable doubt. The trial court’s erroneous burden of proof instruction--shifting the burden of proof to Reynolds--prejudiced his right to a fair trial by destroying his sole defense.

An instruction that negates a defendant's sole defense is fundamental error that cannot be deemed harmless. *Grier v. State*, 928 So.2d 368 (Fla. 3rd DCA 2006) (“the error was fundamental because it negated [defendant’s] sole defense, an error which cannot be viewed as harmless and which we agree mandates reversal irrespective of an objection”). Reynolds’ appointed appellate counsel acted

deficiently in failing to raise or discuss this fundamental error on direct appeal, which could not legally have been found harmless. A new trial is required.²

GROUND II

REYNOLDS WAS DENIED THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL GUARANTEED BY THE SIXTH AMENDMENT WHEN COUNSEL FAILED TO RAISE OR DISCUSS THE TRIAL COURT'S ERROR IN INSTRUCTING JURORS AND FINDING THAT REYNOLDS COMMITTED MURDERS IN THE COURSE OF BURGLARY WAS AGGRAVATING FACTOR IN VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

Reynolds' trial counsel filed a Motion to Declare Section 921.141(5)(d), Florida Statutes Unconstitutional, as each felony aggravator listed in that Section's Aggravating Factors, is also listed in Section 782.04(1)(a)(2)'s Felony Murder Statute, creating an automatic aggravating factor which fails to narrow the class of persons eligible for the death penalty, in violation of the Eighth Amendment to the

² The State should be bound by its position in its Answer to Reynolds' Rule 3.851 motion, adopted by the trial court: "this claim should have been raised on direct appeal," as the "record shows on its face that the judge failed to correct the misstatement." State's Answer to Rule 3.851 Motion, page 21 (Claim 5). *Johnston v. State*, 870 So.2d 877 (Fla. 1st DCA 2004) (appellate court declined on appeal to consider State's argument inconsistent with its earlier position at the trial level).

U.S. Constitution, and Art. I, §§ 9 and 17 of the Florida Constitution. (V1 94-95). The trial court denied Reynolds' Motion by written order. (V2 383-384). Reynolds' appellate counsel failed to raise or discuss this issue on direct appeal.

The State had charged Reynolds with the first-degree premeditated murders of Robin and Christina Razor, as well as burglary with aggravated battery with a weapon (V1 31-33). The trial court instructed the jury on both premeditated first-degree murder (V4 687), and felony murder, with the underlying felony being burglary. (V4 688, 700, 706, 707). The State argued that Reynolds had committed the homicides during a burglary. In defining burglary, the trial court instructed the jury that the offense underlying burglary was aggravated battery. (V4 679). The jury found Reynolds guilty of these two first-degree murders by general verdict (V4 713, 714), and found Reynolds guilty of burglary. (V4 715).

During the penalty phase of Reynolds' capital trial, the court instructed the jury on the aggravating factors jurors could find to justify recommending a death sentence; one of them being that Reynolds murdered the two victims in the course of a burglary. (V4 738-739). That is, the predicate to the State's felony murder theory became an aggravating factor in each murder which, without more, could justify sentencing him to death. The jury returned recommended death sentences for the murders of both Robin Razor, and Christina Razor. (V6 743, 744)

The trial court's sentencing order found burglary an aggravating factor in Robin's and Christina's homicides (V6 941, 953), giving the factor great weight. (V6 942, 954). The trial court erred as a matter of constitutional law in finding that Reynolds' alleged commission of the murders during a burglary constituted an aggravating factor. Burglary as an aggravator under the statutes poses constitutional problems, as the factors which separate a killer who commits a first-degree murder from one who commits a *death worthy* first-degree murder must "genuinely narrow" that latter class of defendants, as a system

could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman* could occur.

Gregg v. Georgia, 428 U.S. 153, 195, n. 46, 96 S.Ct. 2909, 2935, n. 46 (1976).

To avoid this constitutional flaw, an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty, and must reasonably justify imposition of a more severe sentence on the defendant compared to others found guilty of murder. *Zant v. Stephens*, 462 U.S. 862, 876-877 (1983).

Defendants facing death argued that while aggravating factors must "genuinely narrow" the class of persons subject to the death penalty; the felony

murder aggravator did not. Anyone guilty of first-degree felony murder automatically had at least one aggravator which, alone, justified imposing death.

In *Blanco v. State*, 706 So.2d 7, 11 (Fla. 1997), this Court rejected that argument, holding the felony murder aggravator passed constitutional scrutiny as it “genuinely narrowed” the class of persons eligible for a death sentence, as the list of felonies that made a defendant death-worthy was shorter than that which made him or her guilty of capital felony murder, and the list of enumerated felonies in the provision defining felony murder is longer than the list of enumerated felonies in the provision defining the aggravating circumstance of commission during the course of an enumerated felony. A person can commit felony murder via trafficking, carjacking, aggravated stalking, or unlawful distribution, and yet be ineligible for this particular aggravating circumstance. *Id.*

Disagreeing with this approach, Justice Anstead argued the felony murder aggravator does not “genuinely narrow” the class of convicted killers eligible for death sentence, as the concept of “narrowing” requires that once it has been established a defendant is guilty of first-degree murder, the sentencer may properly consider only *additional* factors that genuinely narrow the class of convicted murderers who may be eligible for the death penalty. If a person is found guilty of premeditated murder and is shown to have been guilty of *additional* aggravating

misconduct, for example, he becomes part of a narrower, less numerous class of killers eligible for the death penalty. But a person convicted of felony murder who has the *same* felony which was used to convict him then used against him as an “aggravator” does not become a member of a smaller group, as the felony aggravator used would make the entire larger group of felony murderers automatically eligible for the death penalty without proof of any additional aggravating conduct. Thus, the felony aggravator serves no legitimate narrowing function in such a case. *Blanco*, 706 So.2d at 12. (Anstead, specially concurring).

Though Reynolds may have had no defense to the felony murder allegation in the guilt phase, the constitutional requirement that the felony murder aggravator must “genuinely narrow” the class of persons eligible for a death sentence precludes its application in the penalty phase of his trial.

While Reynolds acknowledges this Court’s holding in *Blanco*, and Justice Anstead’s approach in the same case, the felony murder aggravator, when burglary is the underlying felony, fails to genuinely narrow the class of persons eligible for the death penalty. A felony which, under either the majority’s or Justice Anstead’s concurrence in *Blanco*, might justify the felony murder aggravator, might also be so broadly defined that it does not “genuinely narrow” the class of person eligible for a death sentence.

Reynolds became eligible for a death sentence because the jury who had convicted him of the murders on alternative theories of premeditated and felony murder based on the underlying felony of burglary, found he entered the Razors' camper, though the United States and Florida Constitutions prohibit making Reynolds, and every other defendant who enters a car, house or lawn and kills someone, *automatically* eligible for a death sentence. If the aggravating factors defined in Section 921.141(5), Florida Statutes, withstand constitutional scrutiny because they “genuinely narrow” the class of persons eligible for a death sentence, then every aspect of those factors, including the definition of the felonies a capital defendant can commit during the course of a murder that makes him or her eligible for execution, must also “genuinely narrow” that class.

At bar, the burglary statute does not “genuinely narrow” that class, and this Court should hold Reynolds was denied the effective assistance of appellate counsel by virtue of appellate counsel’s failure to raise or discuss this properly preserved issue on direct appeal, as the trial court erred in instructing jurors they could consider that the murder was committed during the course of a burglary as an aggravating factor, and erred in finding, as an aggravating factor, that Reynolds committed the murders in the course of a burglary. But for appellate counsel’s failure to raise or discuss this issue on direct appeal, there remains a reasonable

probability its assertion would have resulted in reversal. *Strickland v. Washington*; *Freeman v. State*; *Suarez v. Dugger*, *Wilson v. Wainwright*, *supra*.

GROUND III

MR. REYNOLDS WAS DENIED HIS RIGHT TO A FULL AND FAIR DIRECT APPEAL OF HIS CONVICTIONS AND SENTENCES OF DEATH BY STATE ACTION WHEN THE COURT REPORTER ALTERED THE TESTIMONY OF DNA ANALYST BADGER SO THAT THE TRANSCRIPT BEFORE THIS COURT IN REYNOLDS' DIRECT APPEAL FALSELY INDICATED THAT DNA ON SWABS FROM THE 11-YEAR-OLD CHRISTINA RAZOR'S VAGINA WAS THAT OF REYNOLDS

Reynolds was denied his right to a full and fair direct appeal of his convictions and sentences of death in this Court by state action, as the court reporter altered the transcribed testimony of DNA Analyst Charles Badger, so that DNA on swabs from the 11-year-old victim's vagina appeared to be Reynolds'.

The trial transcript in the record on direct appeal in this case, which this Court relied upon in issuing the opinion in *Reynolds v. State*, 934 So.2d 1128 (Fla. 2006), contains materially false representations of testimony indicating the presence of Reynolds' DNA on vaginal swabs from the 11-year-old victim, Christina Razor.

The trial transcript provided to this Court on direct appeal represents that DNA Analyst Charles Badger testified:

That was designated as *vaginal swabs from Christina Razor*. . . . And those results that were obtained were found to be consistent or matched the DNA results that were obtained were found to be consistent or *matched the DNA profile of Christina Razor and Michael Reynolds*. Robin Razor and Danny Privett were excluded from being the donors of the DNA profile observed.

(Vol. 17, R2015) (emphasis added).

The State took the position below (*after Reynolds' direct appeal*) that the foregoing was a “scrivener’s error,” moving the postconviction court to correct this record misstatement concerning the content of Mr. Badger’s actual DNA testimony. The postconviction court denied the State’s motion to correct the trial transcript, and what the State represented below after direct appeal as being a false representation of DNA testimony remains uncorrected. More saliently, this misstatement misled the Court on direct appeal as to the content of the DNA testimony at trial.

On direct appeal, the record spoke for itself, leading the Court to believe Badger testified before jurors that Reynolds’ DNA was found in the child’s vagina. This damning scientific testimony played directly into the State’s introduction of testimony concerning an alleged prior sexual assault (V25 50-65), as well as the

State's closing argument suggesting Reynolds committed the murders and did so in attempting to commit Sexual Battery on the minor victim. (V21 2937-39, 2949).

Article V, Section 4(b), of the Florida Constitution guarantees a criminal defendant a constitutional right to direct appeal. *Griffis v. State*, 759 So.2d 668, 672 (Fla. 2000) (“the Florida Constitution ... contains an express right of appeal”); *Amendments to the Fla. Rules of Appellate Procedure*, 685 So.2d 773 (Fla. 1996) (Art. V, §4 (b), Fla. Const., is a constitutional protection of the right to appeal).

This Court, in *Baggett v. Wainwright*, 229 So.2d 239 (Fla.1970), held that, because a defendant's right to a full and fair appeal is governed by Due Process, *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814 (1963), he is entitled to full and fair appellate review when state action has deprived him of this right, and trial proceedings should not be validated if the State fails to initiate steps necessary to insure affording all requirements of due process. *Id.*, at 241.

A complete record on appeal is indispensable to this constitutional right. *Delap v. State*, 350 So.2d 462 (Fla. 1977); *Thomas v. State*, 828 So.2d 456, 457 (Fla. 4th DCA 2002) (“Once a criminal defendant has chosen to exercise his right to appeal, he is entitled to a full transcript of the trial record”) (citations and internal quotation marks omitted); *Johnson v. Singletary*, 695 So.2d 263, 268 (Fla. 1996)

(Anstead, J., concurring) (“an unequivocally accurate record of the proceedings is required to enable counsel and the Court to ensure that justice is done.”).

Habeas corpus relief is not limited to grounds of ineffective assistance of appellate counsel. See, e.g., *Rumph v. State*, 746 So.2d 1249 (Fla. 1st DCA 1999) (“although an error by counsel may give rise to a right to a belated appeal, a belated appeal may also be granted where it is found that other exceptional circumstances have rendered the ordinary appellate process unavailable”); *Davis v. Singletary*, 716 So.2d 273 (Fla. 4th DCA 1998) (loss of legal papers as result of prison transfer was exceptional circumstance entitling petitioner to second appeal); *Tal-Mason v. Singletary*, 596 So.2d 796, 797 (Fla. 4th DCA 1992) (“Tal-Mason seeks habeas corpus relief in the nature of a second appeal of his life sentence for second degree murder. He claims that he was effectively deprived of the right to appeal on the first occasion when counsel was appointed [by the trial court] just a few days before this court dismissed his appeal. We agree. . . . This constitutes state action that can be deemed to be equivalent to a denial of the right.”).

At bar, state action in the form of the court reporter’s misstatement of trial testimony, falsely indicating Reynolds’ DNA was found in an 11-year-old victim’s vagina, deprived him of a full and fair direct appeal of his convictions and sentences.

All three cases cited by this Court on direct appeal in holding that this was not a circumstantial evidence case, *Reynolds*, at 1146-1147, involved attempted or completed sexual batteries. *Meyers v. State*, 704 So. 2d 1368 (Fla. 1997) (murder involving attempted sexual battery of 14-year-old); *Orme v. State*, 677 So. 2d 258 (Fla. 1996) (DNA evidence suggesting defendant engaged in sexual relations with murder victim); and *Fitzpatrick v. State*, 900 So.2d 495 (Fla. 2005) (DNA evidence suggesting the defendant engaged in sexual relations with murder victim).

The lone case this Court cited on direct appeal for the burden of proof in non-circumstantial evidence cases, *Reynolds v. State*, at 1147, dealt with an *ostensibly* similar murder involving a sexual battery. *Darling v. State*, 808 So.2d 145 (Fla. 2002) (DNA in murder victim's vagina matched defendant's DNA).

The Court's exclusive reliance on the foregoing enumeration of sex-murder cases in its opinion reviewing the *apparent* content of record evidence and affirming Reynolds' conviction on direct appeal, illustrates the pernicious effect of the court reporter's misstatement of trial testimony, falsely stating that DNA Analyst Badger had testified that Reynolds' DNA was found inside the child victim's vagina. E.g., *Coverdale v. State*, 940 So.2d 558, 561 (Fla. 2nd DCA 2006) ("Few criminal allegations would be more prejudicial to a defendant than molesting a child. If the jury believed the statement that Coverdale was a child molester, this

gratuitous statement would deny him a fair trial . . . and no curative instruction could un-ring that bell."'). At bar, the court reporter's misstatement of trial testimony deprived Reynolds of his right to a full and fair direct appeal.

The court reporter's misstatement of trial testimony, falsely indicating that Reynolds' DNA was found inside the child victim's vagina, reasonably skewed the Court's evaluation of the facts and circumstances surrounding this case on direct appeal, depriving Reynolds of his right to a full and fair appeal of his convictions and sentences, and, in fairness, entitling him to a new one. As this Court stated in *State v. Owen*, 696 So.2d 715 (Fla. 1997):

Generally, under the doctrine of the law of the case, "all questions of law which have been decided by the highest appellate court become the law of the case which must be followed in subsequent proceedings, both in the lower and appellate courts." *Brunner Enters., Inc. v. Department of Revenue*, 452 So.2d 550, 552 (Fla.1984). However, the doctrine is not an absolute mandate, but rather a self-imposed restraint that courts abide by to promote finality and efficiency in the judicial process and prevent relitigation of the same issue in a case. See *Strazzulla v. Hendrick*, 177 So.2d 1, 3 (Fla.1965) (explaining underlying policy). ***This Court has the power to reconsider and correct erroneous rulings in exceptional circumstances and where reliance on the previous decision would result in manifest injustice, notwithstanding that such rulings have become the law of the case.***

State v. Owen, 696 So.2d at 720.

It would be manifestly unjust to perpetuate the trial transcript's misstatement concerning DNA evidence this Court deemed so central to affirming Reynolds' convictions and sentences of death. The court reporter's misstatement of trial testimony, falsely indicating Reynolds' DNA was found in an 11-year-old victim's vagina, constitutes an exceptional circumstance, justifying the Court's reconsideration and correction of its direct appellate ruling.³

³ “Where the allegations in a habeas petition support a claim of denial of the petitioner's right to an appeal, petitioner is entitled to habeas relief, without an additional showing of arguable reversible error at trial which might have prompted reversal on appeal.” *Tal-Mason v. Singletary*, 596 So.2d at 797 (citing *Baggett v. Wainwright*, 229 So.2d 239 (Fla.1969), *receded from on other grounds*, *State v. District Court of Appeal, First District*, 569 So.2d 439 (Fla.1990)).

RELIEF SOUGHT

For the foregoing reasons and those set forth in the accompanying Initial Brief, Mr. Reynolds should be accorded a new trial.

Respectfully submitted,

MELODEE A. SMITH
Florida Bar No. 33121

LAW OFFICES OF MELODEE A. SMITH
101 NE 3rd Ave. Suite 1500
Ft. Lauderdale, FL 33301
Tel: (954) 522.9297
Fax: (954) 522.9298
MSmith@SmithCriminalDefense.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing has been furnished to (1) Thomas Hastings, Esquire, Office of the State Attorney, 101 Bush Boulevard Sanford, FL 32773, (2) Barbara Davis, Esquire, Office of the Attorney General, 444 Seabreeze, Daytona Beach, FL 32118, and (3) Mr. Michael Gordon Reynolds, #324170, Union Correctional Institution, 7819 N.W. 228th Street, Raiford, FL 32026, by United States Mail, this 1st day of April, 2011.

CERTIFICATE OF FONT AND TYPE SIZE

This petition is word-processed utilizing 14-point Times New Roman type.

MELODEE A. SMITH
Florida Bar No. 33121