IN THE SUPREME COURT OF FLORIDA
CASE NO. _____

TROY MERCK
Petitioner,
v.
KENNETH S. TUCKER
Secretary, Florida Department of Corrections,
Respondent.
and
PAMELA BONDI
Attorney General,
Additional Respondent,

PETITION FOR WRIT OF HABEAS CORPUS

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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. Merck 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. Merck 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. Merck accordingly requests that this Court permit oral argument.

INTRODUCTION

Significant errors which occurred at Mr. Merck'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. Merck. "[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. Merck 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. Merck'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. Merck'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. Merck 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. Merck's claims.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Merck 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

On November 14, 1991, Defendant Troy Merck Jr. was charged by indictment in Pinellas County with the first-degree murder of James Newton. A trial held before Judge Luten in November of 1992 ended in a hung jury. After a second jury trial held before Judge Luten in September, 1993, Mr. Merck was found guilty as charged and sentenced to death. On direct appeal, the Florida Supreme Court affirmed the conviction, but reversed the death sentence and remanded for a new

penalty trial. See Merck v. State, 664 So.2d 939 (Fla. 1995). In July, 1997, a resentencing proceeding was held before Judge Khouzam. The jury recommended a death sentence and in September, 1997, Judge Khouzam imposed the death penalty. The Florida Supreme Court reversed the death sentence. See Merck v. State, 763 So.2d 295 (Fla. 2000). Merck's third resentencing proceeding, held in March of 2004, resulted in a jury recommendation of death by a nine-to-three vote. The trial judge held a Spencer hearing on March 28, 2004. The trial court filed its sentencing order on August 6, 2004. A timely appeal was filed and the Florida Supreme Court denied relief. See Merck v. State, 975 So.2d 1054 (Fla. 2007). The United States Supreme Court Cert. Petition was denied on October 6, 2008.

Capital Collateral Regional Counsel - Middle Region was appointed to represent Merck in postconviction proceedings on February 27, 2008. Merck filed his motion for postconviction relief on September 2, 2009 and the State filed its response on October 30, 2009. The court conducted an evidentiary hearing on claims Ia, Ic, and II of Merck's motion for postconviction relief on July 20-July 21, 2010. The postconviction court entered its order denying relief on August 27, 2010. A timely notice of appeal was filed on September 17, 2010. On September 2, 2010 the Florida Supreme Court noticed all parties that Petitioner (Troy Merck) had filed a petition seeking to invoke all writs jurisdiction. The Respondent was

requested to serve a response to the petition on or before October 4, 2010. Respondent, Stephen Ake filed his response on September 30, 2010. On March 31, 2011, the Florida Supreme Court denied petitioner Troy Merck's petition for all writs. This appeal of the evidentiary hearing and subsequent denial of Mr. Merck's 3.851 motion follows.

CLAIM I

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

Mr. Merck 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. Merck'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. Merck's capital proceedings.

Trial counsel should have objected to the characterization made by the judge, during the final instructions to the jury, that **"the (**emphasis added) defense asserted in this case is of voluntarily intoxication by use of alcohol." Id. Such an assertion mislead the jury because voluntary intoxication was not "the" defense asserted in this case, but rather a lesser, secondary defense. Trial counsel was ineffective.

During jury selection, trial counsel was ineffective for allowing two jurors on the final panel, who were biased toward voting for the death penalty and mistaken about the proper legal standards for imposing death. Moreover, trial counsel was ineffective for failing to rehabilitate the two biased and confused jurors.

Trial counsel was ineffective for failing to proffer essential testimony which would have demonstrated that Mr. Merck was an accomplice or minor participant in the crime charged in accordance with Fl. Stat. 921.141 (6) (d). The minor participant mitigator would have been proven by a preponderance of the evidence, and Troy Merck would not have been sentenced to death.

The state acted in bad faith at the trial level, when a lead investigating

detective failed to preserve physical evidence that was exculpatory for Mr. Merck. Had the detective properly preserved this evidence for discovery at trial, Mr. Merck would have been acquitted.

There was ineffective assistance of counsel at the trial level during penalty phase. Trial counsel failed to provide proper background material to the mental health professional, which would have established both statutory and non-statutory mitigation.

Trial counsel was ineffective during penalty phase due to his ignorance of the law regarding statutory mitigation. Counsel failed to request two appropriate statutory mitigators which would have resulted in Mr. Merck being sentenced to life in prison.

Under Florida case law, the cumulative effect of these errors denied Mr. Merck 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).

CLAIM II

MR. MERCK'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. Merck is filing this petition.

The appellant has been incarcerated since 1991. 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.

CLAIM III

The Florida death sentencing statute as applied is unconstitutional under the 6th, 8th, and 14th Amendments of the United States Constitution.

In Mills v. Moore, the Florida Supreme Court held that because Apprendi v. New Jersey, 120 S.Ct. 2348, (2000), did not overrule Walton v. Arizona, the Florida death penalty scheme was not overruled. Mills v. Moore, 2001 WL 360893 * 3-4 (Fla. 2001). Therefore, Mr. Merck raises these issues now to preserve the claims for federal review.

In Jones v. United States, the United States Supreme Court held, "under the

Due Process Clause of the Fifth Amendment and the notice and jury guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Jones v. United States, 526 U.S. 227, 243, n.6 (1999). Subsequently, in Apprendi v. New Jersey, the Court held that the Fourteenth Amendment affords citizens the same protections under state law. Apprendi v. New Jersey, 120 S.Ct. 2348, 2355 (2000).

In Apprendi, the issue was whether a New Jersey hate crime sentencing enhancement, which increased the punishment beyond the statutory maximum, operated as an element of an offense so as to require a jury determination beyond a reasonable doubt. Apprendi 120 S.Ct. at 2365. "[T]he relevant inquiry here is not one of form, but of effect-does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" Apprendi 120 S.Ct. at 2365. Applying this test, it is clear that aggravators under the Florida death penalty sentencing scheme are elements of the offense which must be noticed, submitted to a jury, and proven beyond a reasonable doubt. The state was obligated to prove at least one aggravating factor in the separate penalty phase proceeding before Mr. Merck was eligible for the death penalty. § 775.082 Fla. Stat. (1995).

> The aggravating circumstances of Fla. Stat. § 921.414(6), F.S.A., actually define those crimes-when read in conjunction with Fla. Stat. § 782.04(1) and 794.01(1), F.S.A.-to which the death penalty is applicable in the absence of mitigating circumstances.

State v. Dixon, 283 So.2d 1, 9 (Fla. 1973); Fla. Stat. § 775.082 (1995); § 921.141 (2)(a), (3)(a) Fla. Stat. (1995). Clearly, Florida capital defendants are not eligible for the death sentence simply upon conviction of first-degree murder. If the court sentenced Mr. Merck immediately after conviction, the court could only have imposed a life sentence. § 775.082 Fla. Stat. (1995). Dixon, 283 So.2d at 9. Therefore, under Florida law, the death sentence is not within the statutory maximum sentence, as analyzed in Apprendi, because it increased the penalty for first degree murder beyond the life sentence Mr. Merck was eligible for based solely upon the jury's guilty verdict. Under Florida law, the effect of finding an aggravator exposed Mr. Merck to a greater punishment than that authorized by the jury's guilty verdict alone. The aggravator was an element of the death penalty eligible offense which required notice, submission to a jury, and proof beyond a reasonable doubt. Apprendi, at 2365. This did not occur in Mr. Merck's case. Thus, the Florida death penalty scheme was unconstitutional as applied.

Mr. Merck's indictment violated the Sixth and Fourteenth Amendments because it failed to charge the aggravating circumstances as elements of the

offense for which the death penalty was a possible punishment. Under the principles of common law, aggravators must be noticed.

> Where a statute annexes a higher degree of punishment to a common-law felony, if committed under particular circumstances, an indictment for the offence, in order to bring the defendant within that higher degree of punishment, must expressly charge it to have been committed under those circumstances, and must state the circumstances with certainty and precision.[2M. Hale, Pleas of the Crown * 170]. Apprendi v. New Jersey, 120 S.Ct. 2348,2355 (2000) quoting Archbold, Pleading and Evidence in Criminal Cases, at 51.

Because aggravators are circumstances of the crime and the defendant's mental state, they are essential elements of a crime for which the death penalty may be imposed, and they must be noticed.

As well, Mr. Merck's death recommendation violates Florida law because it is impossible to determine whether a unanimous jury found any one aggravating circumstance. Florida Rule of Criminal Procedure 3.440 requires unanimous jury verdicts on criminal charges. "It is therefore settled that '[i]n this state, the verdict of the jury must be unanimous' and that any interference with this right denies the defendant a fair trial." Flanning v. State, 597 So.2d 864, 867 (Fla. 3d DCA 1992), quoting Jones v. State, 92 So.2d 261 (Fla. 1956). However, in capital cases, Florida permits jury recommendations of death based upon a simple majority vote, and does not require jury unanimity as to the existence of specific aggravating factors. See, e.g., Thompson v. State, 648 So.2d 692, 698 (Fls. 1994). Jones v. State, 569 So.2d 1234, 1238 (Fla. 1990). In light of the fact that aggravators are elements of a death penalty offense, the procedure followed in the sentencing phase must receive the protections required under Florida law and require a unanimous verdict. § 912.141(1),(2) Fla. Stat. (1999).

Mr. Merck's death recommendation violated the minimum standards of constitutional common law jurisprudence because it is impossible to know whether the jurors unanimously found any one aggravating circumstance. Each of the thirty-eight states that use the death penalty require unanimous twelve person jury

convictions.[1] "We think this near-uniform judgement of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not." Burch v. Louisiana, 441 U.S. 130, 138 (1979) (reversing a non-unanimous six person jury verdict in a non-capital case). The federal government requires unanimous twelve person jury verdicts. "[T]he jury's decision upon both guilt and whether the punishment of death should be imposed must be unanimous. This construction is more consonant with the general humanitarian purpose of the Anglo-American jury system." Andres v. United States, 333 U.S. 740, 749 (1948).

Implicit in the state and federal government's requirements that a capital conviction must be obtained through a unanimous twelve person jury, is the idea that "death is qualitatively different from a sentence of imprisonment, however long." Woodson v. North Carolina, 428 U.S. 280, 304 (1976). The Sixth,

[1]Ala.R.Cr.P 18.1; Ariz. Const. Art 2, s.23; Ark. Code Ann. § 16-32-202; Cal. Const. Art. 1, § 16; Colo. Const. Art 2, §23; Conn. St. 54-82(c), Conn.R. Super. Ct. C. R. §42-29; Del. Const. Art. 1, §4; Fla. Stat. Ann § 913.10(1); Ga. Const. Art. 1 § 1, P XI; Idaho. Const. Art. 1, § 7; Ill. Const. Art. 1, § 13; Ind. Const. Art. 1, § 13; Kan. Const. Bill of Rights § 5; Ky. Const. § 7, Admin. Pro. Ct. Jus. A.P. 11 § 27; La. C.Cr.P. Art. 782; Md. Const. Declaration Of Rights, Art. 5; Miss. Const. Art. 3, § 31; Mo. Const. Art. 1, §22a; Mont. Const. Art. 2, §26; Neb. Rev. St. Const. Art. 1, §3; N.H. Const. PH, Art. 16; N.J. Stat. Ann. Const. Art. 1, p. 9; N.M. Const. Art. 1 § 12; N.Y. Const. Art. 1, § 2; N. C. Gen. Stat. Ann. § 15A-1201; Ohio Const. Art. 1, § 5; Okla. Const. Art. 2, § 19; Or. Const. Art. 1, § 11, Or. Rev. Stat. § 136.210; Pa. Stat. Ann. 42 Pa. C.S.A. § 5104: S.C. Const. Art. V, § 22; S.D. ST § 23A-267; Tenn. Const. Art. 1, § 6; Tex. Const. Art. 1, § 5; Utah Const. Art. 1 § 10; Va. Const. Art. 1, § 8; Wash. Const. Art. 1, § 21; Wyo. Const. Art. 1, § 9.

Fourteenth, and Eighth Amendments require more protection as the seriousness of the crime and severity of the sentence increase. See Johnson v. Louisiana, 406 U.S. 354, 364 (1972).

Because the jury's death recommendation verdict did not list the aggravators found, it is impossible to know whether the jurors unanimously found any one aggravator proved beyond a reasonable doubt. The finding of an aggravator exposed Mr. Merck to a greater punishment than the life sentence authorized by the jury's guilty verdict, therefore, the aggravator must have been charged in the indictment, submitted to a jury, and proved beyond a reasonable doubt to a unanimous jury.

The Florida death penalty sentencing statute was unconstitutional as applied in Mr. Merck's case. The constitutional errors were not harmless. The denial of a jury verdict beyond a reasonable doubt has unquantifiable consequences and is a "structural defect in the constitution of the trial mechanism, which defies analysis by 'harmless error' standards'". Sullivan v. Louisiana, 508 U.S. 275, 2081-83 (1993) *quoting* Arizona v. Fulminante, 499 U.S. 279, 308-312 (1991). A new penalty phase trial is the remedy. Additional recent authority to support the above contention is Ring v. Arizona, 2002 WL 1357257 (U.S.).

The Supreme Court of the United States held in Ring v. Arizona, 122 S.Ct. 2428,

2431 (2002):

> If a legislature responded to such a decision by adding the element the Court held constitutionally required, surely the Sixth Amendment guarantee would apply to that element. There is no reason to differentiate capital crimes from all others in this regard. Arizona's suggestion that judicial authority over the finding of aggravating factors may be a better way to guarantee against the arbitrary imposition of the death penalty is unpersuasive. Id. at 2431

Most recently, the court in Evans v. McNeil, 08-14402-CIV-JEM (2011), out of the United States District Court for the Southern District of Florida, determined that Florida's death penalty procedures violate Ring. Mr. Merck's sentence of death should be vacated pursuant to this ruling.

In Mr. Merck's case the trial court found the following two aggravators: (1) defendant was previously convicted of a capital felony or of a felony involving the use or threat of violence to a person and (2) the murder was especially heinous, atrocious or cruel (HAC). A new penalty phase is the remedy because it is impossible to know whether the jurors unanimously found any one aggravating circumstance in support for the recommendation of death.

CLAIM IV

Florida's capital sentencing statute is unconstitutional on its face and as applied for failing to prevent the arbitrary and capricious imposition of the death penalty and for violating the guarantee against cruel and unusual punishment in violation of the 5th, 6th, and 14th Amendments to the United States Constitution. To the extent this issue was not properly litigated at trial or on appeal, Mr. Merck received prejudicially ineffective assistance of counsel.

All other allegations and factual matters contained elsewhere in this pleading are fully incorporated herein by specific reference.

Florida's capital sentencing scheme denies Mr. Merck his right to due process of law, and constitutes cruel and unusual punishment on its face and as applied. Florida's death penalty statute is constitutional only to the extent that it prevents arbitrary imposition of the death penalty and narrows application of the penalty to the worst offenders. See Profitt v. Florida, 428 U.S. 242 (1976).

Florida's death penalty statute, however, fails to meet these constitutional guarantees, and therefore violates the Eighth Amendment to the United States Constitution. Richmond v. Lewis, 113 S.Ct. 528 (1992).

Execution by both electrocution and lethal injection impose unnecessary physical and psychological torture without commensurate justification, and therefore constitutes cruel and unusual punishment in violation of the Eighth

Amendment to the United States Constitution. Florida's death penalty statute fails to provide any standard of proof for determining that aggravating circumstances "outweigh" the mitigating factors, Mullaney v. Wilbur, 421 U.S. 684 (1975), and does not define "sufficient aggravating circumstances." Further, the statute does not sufficiently define for the judge's consideration each of the aggravating circumstances listed in the statute. See Godfrey v. Georgia, 446 U.S. 420 (1980).

Florida's capital sentencing procedure does not utilize the independent reweighing of aggravating and mitigating circumstances envisioned in Profitt v. Florida, 428 U.S. 242 (1976). The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner. See Godfrey v. Georgia; Espinosa v. Florida, 112 S. Ct. 2926 (1992).

Florida law creates a presumption of death where but a single aggravating circumstance applies. This creates a presumption of death in every felony murder case, and in almost every premeditated murder case. Once one of these aggravating factors is present, Florida law provides that death is presumed to be the appropriate punishment, and can only be overcome by mitigating evidence so strong as to outweigh the aggravating factors.

The systematic presumption of death is fatally offensive to the Eighth Amendment's requirement that the death penalty be applied only to the worst

offenders. See Richmond v. Lewis, 113 S. Ct. 528 (1992); Furman v. Georgia, 408 U.S. 238 (1972); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988). To the extent trial counsel failed to properly preserve this issue, defense counsel rendered prejudicially deficient assistance. See Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990).

Because of the arbitrary and capricious application of the death penalty under the current statutory scheme, the Florida death penalty statute as it exists and as it was applied in this case is unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution and under Article 1 Section 17 of the Constitution of the State of Florida. Its application in Mr. Merck's case entitles him to relief.

CONCLUSION AND RELIEF SOUGHT

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

Respectfully submitted,

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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 on _____ August 2011.

_____
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CERTIFICATE OF COMPLIANCE

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

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