IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-____

BRANDY BAIN JENNINGS,

Petitioner,

v.

EDWIN G. BUSS, Secretary
Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

The present habeas corpus petition is the first filed by Mr. Jennings in this case. The petition preserves claims arising under decisions of the United States Supreme Court and puts forth substantial claims of error under Florida law and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Those claims demonstrate that Mr. Jennings was deprived of effective assistance of counsel on direct appeal and that his convictions and death sentences were obtained and affirmed on appeal in violation of fundamental constitutional guarantees.[1]

JURISDICTION

A writ of habeas corpus is an original proceeding in this Court governed by Florida Rule of Appellate Procedure 9.100. This Court has original jurisdiction under Florida Rule of Appellate Procedure 9.030(a)(3) and Article V, section 3(b)(9) of the Florida Constitution. *See Wilson v. Wainwright*, 474 So. 2d 1162, 1163 (Fla. 1985). The Florida Constitution guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." FLA. CONST. Art. I, § 13.

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[1] Citations to the record on direct appeal appear as "(R. ____)." All other citations shall be self-explanatory.

Jurisdiction over the present action lies in this Court because the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied a direct appeal. *See, e.g.*, *Smith v. State*, 400 So. 2d 956, 960 (Fla. 1981); *see also Wilson*, 474 So. 2d at 1163. The Court's exercise of its habeas corpus jurisdiction and its authority to correct constitutional errors is warranted in this case.

REQUEST FOR ORAL ARGUMENT

Mr. Jennings requests oral argument on the claims asserted in the present petition.

STATEMENT OF CASE AND FACTS

The Circuit Court of the Twentieth Judicial Circuit, Collier County, Florida, entered the judgments of conviction and sentence under consideration.

Mr. Jennings was found guilty of three counts of first degree murder and one count of robbery. The jury voted in favor of death by a vote of ten (10) to two (2). The court followed the jury's recommendation and sentenced Mr. Jennings to die in the electric chair. Mr. Jennings's co-defendant, Charles Jason Graves, was tried separately, found guilty and, by agreement with the State, sentenced to life in prison.

Mr. Jennings filed a timely appeal to this Court, raising the following issues: 1) the circuit court erred in admitting Mr. Jennings's statements to law

enforcement; 2) the circuit court erred in admitting into evidence masks recovered from Mr. Jennings's vehicle after his arrest; 3) the state was permitted to improperly cross-examine penalty phase witness Mary Hamler; 4) the "avoiding arrest" aggravating circumstance was not proven and was improperly submitted; 5) the "cold calculated and premeditated" aggravating circumstance was not proven and was improperly submitted; 6) Mr. Jennings should not have been sentenced to death where his equally culpable co-defendant received a life sentence; and 7) the circuit court erred in sentencing Mr. Jennings to 15 years for robbery.

In affirming the conviction and sentences, this Court relied on the following facts:

> Dorothy Siddle, Vicki Smith, and Jason Wiggins, all of whom worked at the Cracker Barrel Restaurant in Naples, were killed during an early morning robbery of the restaurant on November 15, 1995. Upon arriving on the scene, police found the bodies of all three victims lying in pools of blood on the freezer floor with their throats slashed. Victim Siddle's hands were bound behind her back with electrical tape; Smith and Wiggins both had electrical tape around their respective left wrists, but the tape appeared to have come loose from their right wrists.
>
> Police also found bloody shoe prints leading from the freezer, through the kitchen, and into the office, blood spots in and around the kitchen sink, and an opened office safe surrounded by plastic containers and cash. Outside, leading away from the back of the restaurant, police found scattered bills and coins, shoe tracks, a Buck knife, a Buck knife case, a pair of blood-stained gloves,

and a Daisy air pistol.

Jennings (age twenty-six) and Jason Graves (age eighteen), both of whom had previously worked at the Cracker Barrel and knew the victims, were apprehended and jailed approximately three weeks later in Las Vegas, Nevada, where Jennings ultimately made lengthy statements to Florida law enforcement personnel. In a taped interview, Jennings blamed the murders on Graves, but admitted his (Jennings') involvement in planning and, after several aborted attempts, actually perpetrating the robbery with Graves. Jennings acknowledged wearing gloves during the robbery and using his Buck knife in taping the victims' hands, but claimed that, after doing so, he must have set the Buck knife down somewhere and did not remember seeing it again. Jennings further stated that he saw the dead bodies in the freezer and that his foot slipped in some blood, but that he did not remember falling, getting blood on his clothes or hands, or washing his hands in the kitchen sink. Jennings also stated that the Daisy air pistol belonged to Graves, and directed police to a canal where he and Graves had thrown other evidence of the crime.

In an untaped interview the next day, during which he was confronted with inconsistencies in his story and the evidence against him, Jennings stated, “I think I could have been the killer. In my mind I think I could have killed them, but in my heart I don't think I could have.”

At trial, the taped interview was played for the jury, and one of the officers testified regarding Jennings' untaped statements made the next day. The items ultimately recovered from the canal were also entered into evidence.

The medical examiner, who performed autopsies on the victims, testified that they died from “sharp force injuries” to the neck caused by “a sharp-bladed instrument with a very strong blade,” like the Buck knife found at the crime scene. A forensic serologist testified

> that traces of blood were found on the Buck knife, the Buck knife case, the area around the sink, and one of the gloves recovered from the crime scene, but in an amount insufficient for further analysis. An impressions expert testified that Jennings' tennis shoes recovered from the canal matched the bloody shoe prints inside the restaurant as well as some of the shoe prints from the outside tracks leading away from the restaurant.
>
> The State also presented testimony concerning previous statements made by Jennings regarding robbery and witness elimination in general. Specifically, Angela Chainey, who had been a friend of Jennings', testified that about two years before the crimes Jennings said that if he ever needed any money he could always rob someplace or somebody. Chainey further testified that when she responded, "That's stupid. You could get caught," Jennings replied, while making a motion across his throat, "Not if you don't leave any witnesses." On cross-examination, Chainey further testified that Jennings had "made statements similar to that several times."
>
> The State also presented testimony concerning previous statements made by Jennings regarding his dislike of victim Siddle. Specifically, Bob Evans, one of the managers at Cracker Barrel, testified that Jennings perceived Siddle to be holding him back at work and that, just after Jennings quit, he said about Siddle, "I hate her. I even hate the sound of her voice." Donna Howell, who also worked at Cracker Barrel, similarly testified that she was aware of Jennings' animosity and dislike of Siddle, and that Jennings had once said about Siddle, "I can't stand the bitch. I can't stand the sound of her voice."

Jennings v. State, 718 So. 2d 144 (Fla. 1998) (footnotes omitted). Mr. Jennings timely petitioned the United States Supreme Court for certiorari which was denied on June 24, 1999. *Jennings v. Florida*, 119 S. Ct. 2407 (1999).

On March 12, 2000, Mr. Jennings filed a "shell" Rule 3.850 motion in order to toll the time for filing a federal habeas corpus petition. Mr. Jennings amended his motion on June 22, 2000 and July 27, 2009. The Circuit Court granted an evidentiary hearing on several of Mr. Jennings's claims.

Following evidentiary hearings held in April and August, 2010, the Honorable Frederick R. Hardt, Circuit Judge, entered a Final Order Denying Motion for Postconviction Relief on January 31, 2011. Petitioner timely filed his Motion for Rehearing on February 18, 2011, which was denied on February 21, 2011. Pursuant to Florida Rule of Criminal Procedure 3.851, the Petitioner had until March 23, 2011, or thirty (30) days to file a notice of appeal in the circuit court.

On April 20, 2011, Counsel for Mr. Jennings filed a motion for belated appeal in this Court.[2] As of this filing, Mr. Jennings's motion for belated appeal,

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[2] Mr. Jennings's motion for belated appeal alleges:

> On April 15, 2011, undersigned counsel realized that it had been nearly two months since the filing of the Motion for Rehearing so he checked the office files to ensure that CCRC-South had received a "date-stamped" copy of the motion. It was then that the undersigned counsel found the circuit court's Order Denying Defendant's Motion for Rehearing dated February 21, 2011 which had been received by CCRC-South on February 25, 2011.

Case No. SC11-772, remains pending.

> CCRC-South policy and procedures require that every pleading or order that is received by mail be copied to the entire defense team (including lead attorney, second-chair attorney, and investigator assigned to the case) as well as the Litigation Director and office administration. In this instance, it appears that the circuit court's order denying Mr. Jennings's motion for rehearing was not copied and distributed as is the usual practice, but merely placed in the central files without counsel's knowledge.
>
> Petitioner was aware that he had a right to appeal the order denying postconviction relief and he expressed his desire that his case be appealed to this Court with undersigned counsel.
>
> Pursuant to Florida Rule of Criminal Procedure 3.851, the Petitioner had until March 23, 2011, or thirty (30) days to file a notice of appeal in the circuit court. Undersigned counsel failed to file the appeal in a timely manner due to a break-down in internal office procedures. Petitioner was unaware that a timely appeal had not been filed; he is a prisoner on death row, dependant on counsel for the receipt of pertinent orders and pleadings in his case and the order denying rehearing was not served directly on him.
>
> The time for initiating review on appeal is jurisdictional. Counsel is responsible for filing a timely appeal, even in the case of office or administrative error. Petitioner has established that he has a right to belated appeal due to counsel's oversight in the pursuit of his appeal in this case. The right to a belated appeal applies to a postconviction order as well as a direct appeal. *Williams v. State*, 777 So. 2d 947 (Fla. 2000).

Mr. Jennings is aware that Florida Rule of Appellate Procedure 9.142(a)(5) requires him to file his Petition for Writ of Habeas Corpus simultaneously with his initial brief in the appeal from the lower court's denial of postconviction relief. However, pending a decision from this Court on his motion for belated appeal, Mr. Jennings files this petition now in an abundance of caution to preserve his claims for habeas corpus review.

CLAIM I

MR. JENNINGS WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL TO THE FLORIDA SUPREME COURT AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I §§ 9, 16(a) AND 17 OF THE FLORIDA CONSTITUTION.

Mr. Jennings had a constitutional right to effective assistance of counsel, *Strickland v. Washington*, 466 U.S. 668 (1984), which extended to his direct appeal to this Court. *See Evitts v. Lucey*, 469 U.S. 387, 396 (1985). "A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." *Id*. The two-prong test articulated in *Strickland* that governs ineffective assistance of counsel claims applies equally to ineffectiveness allegations of trial counsel and appellate counsel. *See Orazio v. Dugger*, 876 F. 2d 1508 (11th Cir. 1989). A defendant is prejudiced by the deficient performance of appellate counsel when the deficiencies

compromise the appellate process to such a degree as to undermine confidence in the correctness of the result. *Rutherford v. Moore*, 774 So. 2d 637, 643 (Fla. 2000). Such deficiencies and prejudice occurred in Mr. Jennings's case.

Appellate counsel failed to present for review to this Court compelling issues concerning Mr. Jennings's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Appellate counsel's brief was deficient and omitted meritorious issues which, had they been raised, would have entitled Mr. Jennings to relief.

In *Wilson v. Wainwright*, this Court said:

> [O]ur judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate. It is the unique role of that advocate to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deviations from due process. Advocacy is an art, not a science.

474 So. 2d 1162, 1165 (Fla. 1985). Appellate counsel in Mr. Jennings's case failed to perform its constitutionally-required function, as articulated in *Wilson*, of ensuring that all critical errors in the lengthy record were identified, highlighted for the Court and presented in the light of zealous advocacy. Appellate counsel's failure to focus the Court's attention on substantial constitutional errors amounted to a violation of *Strickland*.

As this Court stated in *Wilson*:

> The criteria for proving ineffective assistance of appellate counsel parallels the *Strickland* standard for ineffective trial counsel: Petitioner must show 1) specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance and 2) the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result.

Id. at 1163 (citing *Johnson v. Wainwright*, 463 So. 2d 207 (Fla. 1985)). While appellate counsel is not ineffective for failing to raise issues which were procedurally barred because they were not properly raised at trial, *Rutherford v. Moore*, 774 So. 2d 637, 646 (Fla. 2000), such failure does warrant reversal if it constitutes fundamental error, which has been defined as error that "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." *Urbin v. State*, 714 So. 2d 411, 418 n.8 (1998) (quoting *Kilgore v. State*, 688 So. 2d 895, 898 (Fla. 1996)); *see also Chandler v. State*, 702 So. 2d 186, 191 n.5 (Fla. 1997) (describing "fundamental error" as error "so prejudicial as to vitiate the entire trial"), *cert. denied*, 523 U.S. 1083 (1998).

Applicable professional standards are set forth in the American Bar Association Standards of Criminal Justice and Guidelines for the Performance of

Counsel in Death Penalty Cases ("ABA Guidelines"). "Given the gravity of the punishment, the unsettled state of the law, and the insistence of the courts on rigorous default rules, it is incumbent upon appellate counsel to raise every potential ground of error that might result in a reversal of defendant's conviction or punishment." Commentary to ABA Guideline 6.1 (2003). Appellate counsel failed to raise a number of such grounds. In light of the serious reversible error that appellate counsel failed to raise, there is more than a reasonable probability that the outcome of the appeal would have been different.

A. APPELLATE COUNSEL FAILED TO RAISE MERITORIOUS ARGUMENTS BASED ON REVERSIBLE ERRORS COMMITTED BY THE TRIAL COURT AND PRESERVED BY DEFENSE OBJECTION.

i. Witness Testimony

At Mr. Jennings's guilt phase, the state presented the testimony of Officer Robert Browning. Officer Browning testified that he responded to the crime scene and assisted with collection of evidence, securing the crime scene and taking photographs. Officer Browning also stated that he found blood transfers in the restaurant kitchen that "looked like shoe tracks" (T. 275). He further opined that the "tracks go this way" toward the sink (R. 276) and that the tracks went in the direction from the restaurant freezer to the office (R. 277). Trial counsel objected

to Officer Browning's testifying as crime scene expert and offering his interpretations the alleged shoe tracks:

> Judge, I'm going to object to this line of questioning. Because at this point, the witness is testifying as a crime scene – he's testifying as an expert, giving his opinion as to reconstruction of the crime scene. He's not testifying just to what he saw. But now, he's going into his opinions, which requires expert testimony. He's not been qualified as an expert in this area and we're going to object to this line.

(R. 266-7). The court overruled the objection, finding that the alignment of blood tracks was a "physical observation" (R. 277). Despite trial counsel having preserved the issue, appellate counsel failed to raise this issue on direct appeal.

Similarly, David Grimes was hired by the State Attorney's Office to examine the alleged print evidence after testing conducted by the Florida Department of Law Enforcement ("FDLE") yielded no results. Over repeated defense objections, Mr. Grimes offered opinion testimony. Mr. Grimes testified that shoe prints in a floor mat at the crime scene "correspond" with a Reebok shoe linked to Mr. Jennings, even though he was not able to locate any "individual characteristic" (R. 670). Mr. Grimes also testified that the size and size of the design "match" (R. 671).

With regard to an alleged shoe print found outside the restaurant, Mr. Grimes testified that all four areas "match" (R. 676). Counsel objected:

> Judge, frankly, I should have objected the first time, when he was going into this area you, but I'm going to object in the second time, when he is going to give his opinion at this point in his testimony. It is becoming narrative, because when he is going to give his opinion, the last time he said that the shoe print corresponds to the known shoe. And the word "corresponds" is an improper characterization of his opinion. He may say that certain tests are consistent or inconsistent.

(R. 676). The court chacterized the objection as "semantics" and overruled. (R. 677).

Mr. Grimes went on to state that, "in my opinion, the left boot made this impression that you see here in this cast." (R. 679). Again, counsel objected to the witness drawing a legal conclusion and moved to strike (R. 679) . Mr. Grimes also testified that the "same Reebok shoe" in the impression matched one of the alleged prints from inside the restaurant" (R. 680). According to Mr. Grimes, another alleged print inside the restaurant "corresponds" to the same Reebok shoe, even though all four areas do not "match" (R. 681). Mr. Grimes went so far as to testify that one of the impressions from the soil "matched" the Reebok shoe because he could not "eliminate the shoe" through an enlarged photo (R. 683).

The State also offered the testimony of Corporal Joe Barber, a crime scene investigator and latent fingerprint examiner. Corporal Barber testified that he recovered certain items of evidence from the crime scene, including a Daisy air pistol found lying in the grass outside the Cracker Barrel. (R. 361). Corporal

Barber described the Daisy air pistol as "almost identical" to a real firearm. (R. 362). The State then presented a real firearm for "demonstrative purposes," to which trial counsel objected:

> [T]he witness has already testified that he thought that the gun looked like a real gun and, quite frankly, I had problems with that, but assuming the Court would allow that in as a lay opinion, now what he's doing is – he's already said that the pellet gun looked like a real gun. The jury, as lay persons, could probably look and see that that gun is a pellet gun looks like a real gun. Now, he wants to do a third thing and have the witness do a demonstrative aid, hold up a real gun to, again, show the jury that it looks like a real gun. At this point, it is cumulative. It's already been done once. It's really been done twice. It's cumulative.

(R. 362-3). The objection was overruled, and the witness held up both exhibits for the jury. Counsel's fear that the witness's testimony would prejudice Mr. Jennings was realized when the witness offered that the air pistol "seems as it's almost a perfect replica." (R. 363). Trial counsel objected to this statement as nonresponsive, which was sustained.

Despite counsel's timely objections to these witnesses' testimony, direct appeal counsel failed to raise any of these issues on direct appeal. It cannot be said that Mr. Jennings was not prejudiced as a result. The testimony offered by these witnesses is precisely the kind of testimony that has come under scrutiny for its lack of scientific basis. The "scientific" and/or "expert" evidence used to convict

Mr. Jennings was the result of methods with questionable and untested underlying scientific principles, in violation of Mr. Jennings's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Despite offering "expert" opinions, the witnesses at Mr. Jennings's trial did not use any standard terminology or follow any standardized protocols in reaching their opinions. In particular, terms used to describe the degrees of association between evidentiary material, *e.g.*, "match," "consistent with," "identical," "similar in all respects tested," and "cannot be excluded as the source of" lack any scientific basis. Nevertheless, the use of varying degrees of terms resulted in Mr. Jennings's conviction and sentences of death.

The testimony at Mr. Jennings's trial was fraught with subjective terms, varying in degree of conclusiveness. Corporal Barber's testimony that the Daisy air pistol found at the scene was "almost a perfect replica" to an actual gun he compared it to (R. 363) and his characterizations of prints being "similar" to a boot (R. 367-368) are exactly the kind of imprecise and non-scientific evidence that should not be permitted to persuade a jury. Similarly, Mr. Grimes's testimony that the sole and design portion of the Reebok shoe "correspond," and that the size and design of the shoe "match" (R. 671), even though he was not able to locate "an individual characteristic" (R. 670), demonstrate that his opinion was lacking in any scientific or objective basis.

It was error for this highly prejudicial, yet unreliable, testimony to be admitted over defense objection. Appellate counsel was constitutionally ineffective for failing to raise these meritorious issues on appeal.

ii. State Misconduct

Ron Bowling, an investigator with the State Attorney's Office, was heavily involved in Mr. Jennings's case, including conducting interviews of the co-defendant, Mr. Graves. Several officers testified regarding Investigator Bowling's involvement in the case.

During the testimony of one-such officer, counsel raised concerns regarding conduct in the courtroom:

> MR. SAPENOFF: Your Honor, I'm not objecting to any of the questions, but I want it to be on record that Ron Bowling, who is a member of the State Attorney's Office and on the team sitting at the State's table, a moment ago just walked over to the jury box and handed one of the jurors, I think, a drink and it looked like – I don't know what it was. It looked like it might have been an aspirin or something.
>
> I know he just walked over in the jury box in the middle of [the prosecutor] and I want that to be on the record. And, quite frankly, Judge, I'm concerned about the affect that that's going to have on the jury.
>
> THE COURT: I agree with you. What is this?

(R. 342).

After the court excused the jury and inquired of Mr. Bowling, he explained:

> It was a cough drop. I indicated to the bailiff that I would like to give it to the bailiff so that it could be given to the juror, who was having a coughing spell and she just told me to place it over there, which I did.

Trial counsel for Mr. Jennings expressed concern for the affect this might have on the jury and moved for a mistrial, arguing that a curative action under these circumstances would not suffice. (R. 343-45). The court agreed that the issue was serious, but denied a mistrial:

> THE COURT: I'm going to deny the motion of a mistrial. I don't think the misconduct rises to that level. I hasten to add, I'm ordering all of you now, lawyers, investigators, anybody sitting at counsel table or anywhere else in this courtroom for that matter, there is only one person here who is going to give any aid, comfort medication, water, whatever to the jury and that's the bailiff who is attending the jury.
>
> And if anybody violates that and it's brought to my attention or I observe it, I will have a proper contempt hearing for that individual. There is too much at stake here to start and stop a trial for this sort over this kind of affair...

(R. 345-6). The court then gave the jury instructions not to take anything from anyone but the bailiff, and to "not be influenced in any way by this gesture on the part of the individual who passed whatever it was to you." (R. 347).

Investigator Bowling's conduct was particularly egregious because he was not merely an uninformed, naive person in the courtroom. Rather, he was an active

member of the prosecution team, sitting at counsel table, who had years of experience in law enforcement and employment with the State Attorney.

Direct appeal counsel failed to raise this issue on appeal, to Mr. Jennings's prejudice.

B. APPELLATE COUNSEL FAILED TO RAISE MERITORIOUS ARGUMENTS BASED ON OBJECTIONS TO PREJUDICIAL, NON-PROBATIVE AND/OR GRUESOME PHOTOGRAPHS

During the guilt phase of the trial, the State presented numerous inflammatory and highly prejudicial photographs over defense objection.

The State presented Danielle Martel, an exotic dancer. Ms. Martel testified that on November 16 and 17, 1995, days after the Cracker Barrel homicides, she was a dancer at an exotic bar and spent the two days partying with Mr. Jennings and the co-defendant. (R. 505). The two men spent "a lot of money" and bought roses for Ms. Martel and another dancer (R. 506). Ms. Martel also thought that Mr. Jennings and Mr. Graves "seemed like they were just having a good time" (R. 509). The State sought to introduce highly prejudicial photos of Ms. Martel and the other dancer sitting on the defendants' laps (R.509). Trial counsel objected:

> Ground number one is they are cumulative. One looks almost the same as the other. I think, actually, they look like the same pictures, but frankly, that's not my major argument, Judge.
>
> The major argument is that it's prejudicial value outweighs any – significantly outweighs any probative

> value that they would have, as far as it relates to any of the elements of the crime.

(R. 510-11). The State countered that the photographs were "relevant" because they corroborate the witness's testimony and they demonstrate that Mr. Jennings did not appear to be afraid of Mr. Graves. (R. 511-12).

The Court overruled the defense objection, finding that the photographs were relevant "to dispel any idea or notion that either one of [the co-defendants] was particularly afraid of the other" and "in regard to the affluent lifestyle they were both enjoying shortly after the crime with which they are charged." (R. 513). Despite the timely objection and adverse ruling, appellate counsel failed to raise this issue on direct appeal.

Similarly, the State introduced numerous gruesome photographs of the victims and the bloody crime scene over defense objection. (R. 232-337). Sergeant Browning referred to the photographs in his testimony when describing what he observed at the scene of the crime. The same graphic photographs were used multiple times during his testimony. Additional photographs offered were nothing more than extremely graphic close ups and enlargements of the previously used photographs, which were themselves extremely graphic. (R. 232-37). Over repeated defense objections that the photographs were cumulative and that their

prejudice outweighed their probative value, the court allowed the photographs to be admitted through Sergeant Browning.

Similarly, during Deputy John Horth's testimony the State again introduced unnecessarily graphic photographs. These photographs depicted large amounts of blood on the boxes in the freezer where the victims found. (R 583). Despite defense objections that these photographs were cumulative and prejudicial, the court admitted these photographs as well.

During the testimony of Dr. Manfred Borges, the medical examiner, the State again to sought to introduce highly inflammatory and shocking photographs. The State had already offered graphic autopsy photographs through Dr. Bourges to establish cause of death, yet the State tendered additional very detailed, ghoulish photographs of all three victims' neck wounds (R384-399). The court admitted the photos over defense objections.

This Court has consistently held that photographs which have the potential for unduly influencing a jury should be admitted only if they have some relevancy to the facts in issue. *Reddish v. State*, 167 So. 2d 858, 863 (Fla. 1964). While it is true that photographic evidence, if relevant, is generally held admissible regardless of its character as gruesome or gory, if such photograph's primary effect is to inflame the passions of the jury, its introduction will result in a reversal of the

conviction. *Allen v. State*, 340 So. 2d 536 (Fla. 3rd DCA 1976); *Jackson v. State*, 359 So. 2d 1190 (Fla. 1978).

Autopsy photographs may be admissible when used to "illustrate the medical examiner's testimony and the [victim's] injuries," *Pope v. State*, 679 So. 2d 710, 714 (Fla. 1996), or when "relevant to the medical examiner's determination as to the manner of the victim's death," *Mansfield v. State*, 758 So. 2d 636, 648 (Fla. 2000). Moreover, "[t]o be relevant, a photo of a deceased victim must be probative of an issue that is in dispute." *Looney v. State*, 803 So. 2d 656, 670-71 (Fla. 2001); *Almeida v. State*, 748 So. 2d 922, 929 (Fla. 1999).

The number and nature of the gruesome crime scene photographs presented at trial, depicting the horrific nature of a bloody crime scene, served no purpose other than to inflame the passions of Mr. Jennings's jury to secure a conviction and death sentence. Rather than being offered as evidence probative of an issue in dispute, the crime scene photographs entered at Mr. Jennings's trial were offered solely to secure a conviction and sentences of death out of passion.

Furthermore, there was no dispute as to the cause of death—the medical examiner testified that to a reasonable degree of medical certainty, the cause of death for all three victims was homicide by sharp force injuries. Photographs of all three victims were tendered and admitted to establish cause of death (R. 381). The additional photographs depicting details of the knife wounds were not relevant to

the cause of death or any other issue in dispute. The only reason for the admission of the additional autopsy photos was to inflame the jury.

The prejudice to Mr. Jennings is evident. These horrific photographs were in the minds of the jurors not only during their deliberations as to Mr. Jennings's guilt, but also when they were deciding whether he should live or die.

The issue was preserved and appellate counsel's failure to raise the issue on direct appeal was deficient performance which prejudiced Mr. Jennings. This Court has found this issue to be harmful error on direct appeal in similar circumstances. *Czubak v. State*, 570 So. 2d 925 (Fla. 1990) ("where the probative value of the photographs was at best extremely limited and where the gruesome nature of the photographs was due to circumstances above and beyond the killing, the relevance of the photographs is outweighed by their shocking and inflammatory nature"); *Reddish v. State*, 167 So. 2d 858 (Fla. 1964); *Hoffert v. State*, 559 So. 2d 1246, 1249 (Fla. 4th DCA 1990).

Habeas corpus relief should issue.

CLAIM II

APPELLATE COUNSEL FAILED TO RAISE MERITORIOUS ISSUES THAT CONSTITUTED FUNDAMENTAL ERROR.

Mr. Jennings sought, and was granted, a change of venue due to the enormous pre-trial publicity resulting from this case. At the commencement of jury

selection, before any evidence or argument had even been presented, the trial court characterized Mr. Jennings's case for the jury pool: "This case is particularly referred to by a lot of people as the infamous Cracker Barrel case." (R. 26). Trial counsel did not object.

This comment tainted the proceedings before they had even begun. Despite the fact that the trial had been moved from Collier County to Pinellas County in an attempt to ensure an untainted jury pool, the Court's comments served to underline the notoriety of the case and prejudice the jury. The court's characterization of the case as "infamous" to a presumably untainted jury pool negated any effect the change of venue had on securing a fair and impartial venire to which Mr. Jennings was constitutionally entitled.

Appellate counsel was ineffective for failing to raise this issue on direct appeal.

CLAIM III

APPELLATE COUNSEL FAILED TO CHALLENGE FLORIDA'S RULE PROHIBITING COUNSEL FROM INTERVIEWING JURORS, WHICH VIOLATES THE FIRST, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Florida Rule of Professional Responsibility 4-3.5(d)(4) provides that a lawyer shall not initiate communications or cause another to initiate communication with any juror regarding the trial after the dismissal of the jury.

Appellate counsel failed to challenge the unconstitutional barrier which prevented him from investigating how juror biases, caused in part by the improper comments of the prosecutor described above, translated into the jury's deliberations and potentially led to juror misconduct. This ethical rule is unconstitutional on its face.

Under the Sixth, Eighth, and Fourteenth Amendments, Mr. Jennings is entitled to a fair trial and sentencing. Mr. Jennings's inability to fully explore possible misconduct and biases of the jury prevents him from fully detailing the unfairness of the trial. Misconduct may have occurred that Mr. Jennings could only discover through juror interviews. *Cf. Turner v. Louisiana*, 379 U.S. 466 (1965) (finding a showing of prejudice and violation of Due Process when an intimate relationship is established between jurors and witnesses); *Russ v. State*, 95 So. 2d 594 (Fla. 1957) (finding "where a juror on deliberation [relies on or] relates to the other jurors material facts claimed to be within his personal knowledge, but which are not adduced in evidence, it is misconduct which may vitiate the verdict").

In the present case, Mr. Jennings believes that circumstances existed that prejudiced his jury. At the commencement of jury selection, before any evidence or argument had even been presented, when the trial court characterized Mr. Jennings's case for the jury pool: "This case is particularly referred to by a lot of people as the infamous Cracker Barrel case." (R. 26). Despite the fact that the trial had been moved from Collier County to Pinellas County due to prejudicial

pretrial publicity, the court's comments served only to underline the notoriety of the case and inflame the passions of the jury.

In another incident, trial counsel asked the court to declare a mistrial after Investigator Bowling, a State Attorney investigator and member of the prosecution team, gave a juror cough drops during the State's examination of another police officer (*See* Claim I, *supra*). Trial counsel for Mr. Jennings expressed concern for the affect this might have on the jury and moved for a mistrial, arguing that curative action under the circumstances would not suffice. (R.343-345). While the trial judge agreed to the seriousness of the issue, the judge's corrective action was limited to a brief instruction to the jury that this conduct is "very inappropriate" and that the jury should not be influenced by it. (R. 346-7).

Appellate counsel failed to challenge the rules that prevented him from interviewing those jurors and investigating the prejudice which resulted from these events at trial. Rule 4-3.5(d)(4), Rules Regulating the Florida Bar, is unconstitutional because it is in conflict with the First, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. It unconstitutionally burdens the exercise of fundamental constitutional rights, including Mr. Jennings's rights to due process, *see Smith v. Phillips*, 455 U.S. 209, 217 (1982) (finding "due process means a jury capable and willing to decide the case solely on the evidence before it"); *Turner v. Louisiana*, 379 U.S. 466 (1965) (finding "[t]he right to a jury

trial guarantees to the criminally accused a fair trial by a panel of impartial, indifferent jurors") and access to the courts of this State under Article I, § 21 of the Florida Constitution. Appellate counsel failed to argue this issue on direct appeal and, thereby, caused this Court to assess the constitutionality of Mr. Jennings's conviction and sentence without full knowledge of the errors undermining his trial.

CONCLUSION

The errors described above, and appellate counsel's failure to present such errors to this Court on direct review, entitle Mr. Jennings to relief. Because the constitutional violations which occurred during Mr. Jennings's trial were "obvious on the record" and "leaped out upon even a casual reading of the transcript," it cannot be said that the "adversarial testing process worked in [Mr. Jennings's] direct appeal." *Matire v. Wainwright*, 811 F. 2d 1430, 1438 (11th Cir. 1987). Appellate counsel's failure to present the meritorious issues discussed above demonstrates that the representation of Mr. Jennings involved serious and substantial deficiencies. *See Fitzpatrick v. Wainwright*, 490 So. 2d 938, 940 (Fla. 1986). The burden remains on the State to prove beyond a reasonable doubt that the individual and cumulative errors did not affect the verdict and/or sentence. *Chapman v. California*, 386 U.S. 18 (1967). In light of the serious reversible error that appellate counsel never raised, relief is appropriate. For the foregoing reasons

and in the interest of justice, Mr. Jennings respectfully urges this Court to grant habeas corpus relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been provided to Carol Dittmar, Assistant Attorney General, 3507 East Frontage Road, Suite 200, Tampa, Florida 33607, by Untied States Mail this 24th day of May, 2011.

_____
PAUL KALIL
Assistant CCRC-South

CERTIFICATE OF FONT

I HEREBY CERTIFY that the foregoing petition is prepared in Times New Roman 14-point font.

_____
PAUL KALIL
Assistant CCRC-South