Filing # 15629547 Electronically Filed 07/07/2014 06:39:12 PM

RECEIVED, 7/7/2014 18:43:37, John A. Tomasino, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC

CLEMENTE JAVIER AGUIRRE-JARQUIN.,
Petitioner,
v.

MICHAEL D. CREWS
SECRETARY, DEPARTMENT OF CORRECTIONS
Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

MARIA DELIBERATO
Assistant CCRC
Florida Bar No. 664251
JULISSA FONTÁN
Assistant CCRC
Florida Bar No. 0032744
Capital Collateral Regional Counsel – Middle Region
3801 Corporex Park Dr., Suite 210
Tampa, FL 33619
(813)740-3544

MARIE-LOUISE SAMUELS PARMER
Florida Bar No. 0005584
The Samuels Parmer Law Firm
P.O. Box 18988
Tampa, FL 33679
(813) 732-3321

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

Page

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES.....ii

PRELIMINARY STATEMENT.....1

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF.....2

GROUNDS FOR HABEAS CORPUS RELIEF.....2

CLAIM I.....3
SENTENCING TO DEATH AND EXECUTING SOMEONE WHO IS ACUTALLY INNOCENT VIOLATES THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

CLAIM II.....11
APPELLATE COUNSEL FAILED TO RAISE ON APPEAL MERITORIOUS ISSUES WHICH WARRANT REVERSAL OF MR. AGUIRRE'S CONVICTIONS AND SENTENCES.

CONCLUSION AND RELIEF SOUGHT.....19

CERTIFICATE OF SERVICE.....20

CERTIFICATE OF COMPLIANCE.....22

TABLE OF AUTHORITIES

Baggett v. Wainwright, 229 So.2d 239 (Fla. 1969) 2

Ballard v. State, 923 So. 2d 475 (Fla. 2006) 7

Barclay v. Wainwright, 444 So.2d 956 (Fla. 1984) 12

Baze v. Rees, 553 U.S. 35 (2008).....5, 6

Bell v. State, 965 So. 2d 48 (Fla. 2007) 16

Bello v. State, 547 So. 2d 914 (Fla. 1989) 16

Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981) 2, 9

Chapman v. California, 386 U.S. 18, 24, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967) 2

Dallas v. Wainwright, 175 So.2d 785 (Fla. 1965) 2

Darling v. State, 808 So.2d 145 (Fla. 2002).....7

Dausch v. State, 2014 Fla. LEXIS 1884 (Fla. June 12, 2014).....7

Deck v. Missouri, 544 U.S. 622, 125 S.O. 2007 (2005) 14, 16, 17

DiMattina v. United States, 949 F. Supp. 2d 387 (E.D.N.Y. 2013) 4, 6

Estelle v. Williams, 425 U.S. 501, 48 L. Ed. 2d 126, 96 S. Ct. 1691 (1976).....18

Fitzpatrick v. Wainwright, 490 So.2d 938 (Fla.1986) 12

Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) 5

Gonzalez v. Sullivan, 934 F.2d 419, 422 (2d Cir. 1991).....6

Graham v. Florida, 130 S. Ct. 2011 (2010) 4, 5

Herrera v. Collins, 506 U.S. 390 (1993) 3, 6

Hill v. State, 921 So.2d 579 (Fla. 2006) 16

Holbrook v. Flynn, 475 U.S 560, 106 S.Ct. 1340, 89 L.Ed.2d. 525 (1986) 13, 16, 18

Kennedy v. Louisiana, 554 U.S. 407, 128 S. Ct. 2641, 171 L. Ed. 2d 525 (2008) 5

Kuhlmann v. Wilson, 477 U.S. 436, 106 S. Ct. 2616, 91 L. Ed. 2d 364 (1986).....6

Lindsey v. State, 14 So. 211 (Fla. 2009) 7

Long v. State, 823 S.W.2d 259 (Tex. Crim. App. 1991) 15

McCoy v. State, 503 So. 2d 371 (Fla. 5th DCA 1987).....15

Pagan v. State, 830 So. 2d 792 (Fla. 2002) 7

Palmes v. Wainwright, 460 So.2d 362 (Fla. 1984).....2

Pope v. Wainwright, 496 So.2d 798, 800 (Fla. 1986) 12

Reynolds v. State, 934 So. 2d 1128 (Fla. 2006).....7

Roper v. Simmons, 543 U.S. 551 (2005).....2, 4

Rutherford v. State, 940 So. 2d 1112 (Fla. 2006).....4

Santiago v. Bennett, 2001 U.S. Dist. LEXIS 5199 (S.D.N.Y. Apr. 27, 2001).....6

Sawyer v. Whitley, 505 U.S. 333, 112 S. Ct. 2514, 120 L. Ed. 2d 269 (1992).....6

Smith v. State, 400 So.2d 956 (Fla. 1981).....2

State v. DiGuilio, 491 So.2d 1129 (Fla. 1986) 12, 13

Strickland v. Washington, 466 U.S. 668 (1984) 11

Tompkins v. State, 994 So 2d. 1072 (Fla. 2008).....4

Trop v. Dulles, 356 U.S. 86 (1958).....5

United States v. Durham, 287 F.3d 1297 (11th Cir. Fla. 2002) 18

Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985)..... 2, 12

Wiseman v. State, 223 S.W.3d 45 (Tex. App. Houston 1st Dist. 2006).....15

Zygadlo v. Wainwright, 720 F.2d 1221 (11th Cir. 1983) 15, 18

Other Authorities:

See Garrett, *Judging Innocence*, 108 Colum. L.Rev. 55 (2008) 5

Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J.Crim. L. & C. 761 (2007) 5

PRELIMINARY STATEMENT

Article l, 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 filed to address substantial claims of error under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution. These claims demonstrate that Mr. Aguirre was deprived of his rights to fair, reliable, and individualized trial and sentencing proceedings, and that the proceedings resulting in his conviction and death sentence violated fundamental constitutional imperatives.

Citations shall be as follows: The record on appeal from Mr. Aguirre's trial proceedings shall be referred to as "TR" followed by the appropriate volume and page numbers. The post-conviction record on appeal shall be referred to as "R" followed by the appropriate volume and page numbers. All other references will be self-explanatory or otherwise explained herein.

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Florida Rule of Appellate Procedure 9.l00(a). *See* Art. l, Sec. 13, *Fla. Const.* This Court has original jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(a)(3) and Article V, Section 3(b)(9) of the Florida Constitution. This petition presents constitutional issues

which directly concern the judgment of this Court during the appellate process and the legality of Mr. Aguirre's death sentence.

This Court has jurisdiction, *see*, *e.g.*, *Smith v. State*, 400 So.2d 956, 960 (Fla. 1981), because the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Aguirre's direct appeal. *See Wilson v. Wainwright*, 474 So.2d 1162, 1163 (Fla. 1985); *Baggett v. Wainwright*, 229 So.2d 239, 243 (Fla. 1969); *cf. Brown v. Wainwright*, 392 So.2d 1327 (Fla. 1981).

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). This Court's exercise of its habeas corpus jurisdiction and of its authority to correct constitutional errors is warranted in this action. As the petition shows, habeas corpus relief is proper on the basis of Mr. Aguirre's claims.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Aguirre 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 guaranteed by the

Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

CLAIM I

SENTENCING TO DEATH AND EXECUTING SOMEONE WHO IS ACUTALLY INNOCENT VIOLATES THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

The Eighth Amendment prohibits cruel and unusual punishment. The United States Supreme Court has recognized that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional…" *Herrera v. Collins*, 506 U.S. 390, 417 (1993). In a concurring opinion, Justice O'Connor agreed that "executing the innocent is inconsistent with the Constitution", "contrary to the contemporary standards of decency", "shocking to the conscience", and "offensive to a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 419 (internal quotations and citations omitted). Justice O'Connor concluded that "the execution of a legally and factually innocent person would be a constitutionally intolerable event." *Id.* In light of the clear and convincing evidence of Mr. Aguirre's innocence, allowing Mr. Aguirre to be sentenced to death and executed violates his rights under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

The Florida Constitution also provides Mr. Aguirre with the right to be free from cruel and unusual punishments. The Florida Constitution specifically provides that "[t]he prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution." Article I, §17.

This Court has not yet recognized a "freestanding" innocence claim under the State Constitution, as numerous other states have done. *Compare, e.g.*, *Tompkins v. State*, 994 So. 2d 1072, 1089 (Fla. 2008); *Rutherford v. State*, 940 So. 2d 1112, 1117 (Fla. 2006) *with Montoya v. Ulibarri*, 163 P.3d 476 (N.M. 2007); *State v. Graham*, 57 P.3d 54, 57 (Mont. 2002); *Ex parte Elizondo*, 947 S.W.2d 202, 209 (Tex. Crim. App. 1996); *Summerville v. Warden*, 641 A.2d 1356 (Conn. 1994). "The unwillingness of courts to explicitly acknowledge freestanding claims of actual innocence does not mean that such claims are never accepted." *DiMattina v. United States*, 949 F. Supp. 2d 387, 418 (E.D.N.Y. 2013). The Court should recognize such a claim, which Aguirre would surely satisfy.

The Eighth Amendment has been construed by the Supreme Court of the United States to require that punishment for crimes comport with "the evolving standards of decency that mark the progress of a maturing society." *Roper v.*

Simmons, 543 U.S. 551, 561 (2005) (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion)). "Society changes. Knowledge accumulates. We learn, sometimes, from our mistakes. Punishments that did not seem cruel and unusual at one time may, in the light of reason and experience, be found cruel and unusual at a later time…Standards of decency have evolved since 1980. They will never stop doing so." *Graham v. Florida*, 130 S. Ct. 2011, 2036 (2010) (Stevens, J., concurring). "This is because '[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.'" *Kennedy v. Louisiana*, 554 U.S. 407, 419, 128 S. Ct. 2641, 2649, 171 L. Ed. 2d 525, 538 (2008) (quoting *Furman v. Georgia*, 408 U.S. 238, 382, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) (Burger, C. J., dissenting)).

In *Baze v. Rees*, 553 U.S. 35 (2008), Justice Stevens explained that one of his strongest concerns about the continuing constitutionality of the death penalty was the possibility of executing an innocent person. "Whether or not any innocent defendants have actually been executed, abundant evidence accumulated in recent years has resulted in the exoneration of an unacceptable number of defendants found guilty of capital offenses. See Garrett, *Judging Innocence*, 108 Colum. L.Rev. 55 (2008); Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J.Crim. L. & C. 761 (2007). The risk of executing

innocent defendants can be entirely eliminated by treating any penalty more severe than life imprisonment without the possibility of parole as constitutionally excessive.” *Baze v. Rees*, 553 U.S. 35, 85-86 (2008) (Stevens, J., concurring).

Habeas courts, historically, have acted in the capacity to assure that a habeas petitioner is not being held in violation of his or her federal constitutional rights. *Herrera v. Collins*, 506 U.S. 390, 402; 113 S. Ct. 853, 861 (1993). It is a “fundamental legal principle that executing the innocent is inconsistent with the Constitution”. *Herrera* at 419 (O’Connor, J., concurring). A "fundamental miscarriage of justice" has been described as an "extraordinary case where a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Santiago v. Bennett*, 2001 U.S. Dist. LEXIS 5199 (S.D.N.Y. Apr. 27, 2001); citing *Sawyer v. Whitley*, 505 U.S. 333, 338-39, 112 S. Ct. 2514, 2518-19, 120 L. Ed. 2d 269 (1992); and *Gonzalez v. Sullivan*, 934 F.2d 419, 422 (2d Cir. 1991). The existence of a "gateway" to the merits founded on innocence underscores a prisoner's "powerful and legitimate interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated." *DiMattina v. United States*, 949 F. Supp. 2d 387, 418 (E.D.N.Y. 2013), citing *Kuhlmann v. Wilson*, 477 U.S. 436, 452, 106 S. Ct. 2616, 91 L. Ed. 2d 364 (1986).

The evidence that convicted Mr. Aguirre in this case was built largely on circumstantial evidence. Once the State obtains a conviction, this Court bears the

responsibility of ensuring that in every capital case, sufficient evidence exists in the record to support the conviction. *Ballard v. State*, 923 So. 2d 475, 482 (Fla. 2006); see also *Dausch v. State*, 2014 Fla. LEXIS 1884 (Fla. June 12, 2014). "If, after viewing the evidence in a light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt, sufficient evidence exists to sustain a conviction." *Reynolds v. State*, 934 So. 2d 1128, 1145 (Fla. 2006) (citing *Pagan v. State*, 830 So. 2d 792, 803 (Fla. 2002)). "[W]here a conviction is based wholly upon circumstantial evidence, a special standard of review applies." *Reynolds v. State*, 934 So.2d 1128, 1145 (Fla. 2006), quoting *Darling v. State*, 808 So.2d 145, 155 (Fla. 2002). "The special standard requires that the circumstances lead 'to a reasonable and moral certainty that the accused and no one else committed the offense charged. It is not sufficient that the facts create a strong probability of, and be consistent with, guilt. They must be inconsistent with innocence.'" *Lindsey v. State*, 14 So. 211, 215 (Fla. 2009).

Clear and convincing evidence discovered in post-conviction demonstrates that Mr. Aguirre is actually innocent of the murders. Exculpatory DNA evidence and post-trial admissions by Samantha Williams that she committed the murder constitute newly discovered evidence that was unavailable at the time of trial. Additionally, there was other evidence that was available to trial counsel at the

time of trial, but was not discovered or presented because of ineffective assistance of counsel. This evidence, as set forth in Mr. Aguirre's Initial Brief in SC13-2092, includes, but is not limited to, new forensic evidence about post mortem movement of the body of Cheryl Williams consistent with Mr. Aguirre's trial testimony, and the unrebutted conclusion that the shorts the State claimed Mr. Aguirre wore during the murders did not contain projected blood and thus could not have been worn during the homicides. R15:1523–24, 1531.

The post-conviction court granted DNA testing on some, but not all of the items collected by law enforcement. R3:518; R7:1310. The majority of the items tested were swabs of bloodstains that were taken from throughout the residence. These stains were documented and collected because crime scene technicians determined they were relevant to the homicides. R20:1487-88. After the first round of DNA testing, none of the DNA results inculpated Mr. Aguirre. R10:1919–24. Two of the bloodstains that were collected contained the DNA profile of Samantha Williams. R10:1919–24. One of the stains was on the kitchen floor, the same floor that had been mopped by Cheryl Williams the night before the bodies were discovered. R10:1920–21; R10:1869, 1875; R11:1987. Nearby in the kitchen was blood belonging to both Cheryl Williams and Carol Bareis. The second blood stain that belonged to Samantha Williams was in the SE Living Room, in the middle of the floor in a high traffic area, on the way to the SE

bathroom. This bloodstain was in close proximity to the blood of Cheryl Williams. R20:1560; R10:1893–94; R11:1985.

After these results came back, Mr. Aguirre sought additional DNA testing of the remaining swabs of blood, including swabs taken from the SE Bathroom and the SW Bedroom's half bathroom (Samantha Williams' bedroom/half bathroom). R7:1216–40. The post-conviction court granted Mr. Aguirre's request to test the additional bloodstains, but rejected Mr. Aguirre's renewed request to test a long blond/light brown hair clutched in Cheryl Williams' hand.[1]

The second round of DNA testing revealed six more bloodstains containing the DNA profile of Samantha Williams, and no blood at all at the scene belonging to Mr. Aguirre. R11:1925–77. Four of the bloodstains were in the SE bathroom where the State argued Mr. Aguirre had cleaned up after the murders. R20:1560. One of the stains was on the bathroom door and the other three were on the bathroom floor, in the middle of the floor, one of which was deposited within inches of Cheryl Williams' blood. R10:1881, 1883, 1885, 1887; R11:1978.

The other two stains were in the half bathroom of the SW Bedroom, which was Samantha Williams' bedroom. One of the stains was on the wall near the top of where the full length mirror had been hanging when Samantha Williams and

[1] Samantha Williams had long blond/light brown hair and admitted during post-conviction testimony that she and her mother Cheryl had gotten into physical fights that included hair pulling. R7:1310; R21:1774.

Mark Van Sandt purportedly left the house the night before the bodies were discovered. R10:1902; TR11:1117–18. The second bloodstain belonging to Samantha in that bathroom was on the floor, alongside of where the mirror had been put on the ground. R10:1903; R11:1986; R20:1562–63. Other bloodstains tested from the SW Bedroom and SW Bathroom belonged to Cheryl Williams. R20:1568, 1573–74, 1582. The blood of Cheryl Williams was also found outside, on the side of the trailer, underneath Samantha Williams' bedroom window, which was the only open window in the house when police arrived on scene.

Of the 150 crime-scene bloodstains that now have been tested, none contained Aguirre's DNA. The bloodstains were collected because they appeared to be relevant to the homicides and were collected in the hopes of finding evidence to link the perpetrator to the murders. R20:1487-88. The eight bloodstains belonging to Samantha Williams were found in high traffic areas, on non-porous surfaces, in areas where the State argued at trial Mr. Aguirre's blood should have been, and near pieces of evidence that the State argued were moved during the commission of the homicides.

In addition to eight bloodstains at the crime scene belonging to Ms. Williams, Ms. Williams has made several admissions since the trial claiming responsibility for the murders, including an admission to a witness who testified at

the evidentiary hearing that "demons in her head caused her to kill her family." R22:1981, 1990; R11:2006 (sealed).

The evidence presented in post-conviction proceedings, detailed fully in his Initial Brief in SC13-2092, points strongly to Mr. Aguirre's actual innocence. As such, allowing his death sentence to stand and allowing his execution to go forward is at odds with the "evolving standards of decency that mark the progress of a maturing society." While not conceding that Mr. Aguirre had a constitutionally fair trial with constitutionally effective counsel, even if he had, upholding his death sentence and allowing his execution to go forward violates the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

CLAIM II

APPELLATE COUNSEL FAILED TO RAISE ON APPEAL MERITORIOUS ISSUES WHICH WARRANT REVERSAL OF MR. AGUIRRE'S CONVICTIONS AND SENTENCES.

A. Introduction:

Appellate counsel had the "duty to bring to bear such skill and knowledge as will render the [appeal] a reliable adversarial testing process". *Strickland v. Washington*, 466 U.S. 668 (1984). To establish that counsel was ineffective, *Strickland* requires a defendant to demonstrate (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. *Wilson v. Wainwright*, 474 So.2d 1162, 1163 (Fla. 1985).

In order to grant habeas relief based on ineffectiveness of appellate counsel, this Court must determine "whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result." *Pope v. Wainwright*, 496 So.2d 798, 800 (Fla. 1986).

Appellate counsel's failure to raise the meritorious issue addressed in this petition proves his advocacy involved "serious and substantial deficiencies" which establishes that "confidence in the outcome is undermined". *Fitzpatrick v. Wainwright*, 490 So.2d 938, 940 (Fla.1986); *Barclay v. Wainwright*, 444 So.2d 956, 959 (Fla. 1984); *Wilson v. Wainwright*, 474 So.2d 1162 (Fla. 1985).

This Court has held that "constitutional errors, with rare exceptions, are subject to harmless error analysis". *State v. DiGuilio*, 491 So.2d 1129, 1134 (Fla. 1986). Harmless error analysis:

> requires an examination of the entire record by the appellate court including a close examination of the permissible evidence on which

> the jury could have legitimately relied, and in addition an even closer examination of the impermissible evidence which might have possibly influenced the verdict.

Id. at 1135. Once error is found, it is presumed harmful unless the state can prove beyond a reasonable doubt that the error "did not contribute to the verdict or, alternatively stated, that there is no reasonable probability that the error contributed to the [verdict]". *DiGuilio*, 491 So.2d at 1138.

A. Appellate counsel was ineffective for failing to raise on appeal Mr. Aguirre's claim that he was deprived of his due process rights when he was shackled during his trial without objection. This violated Mr. Aguirre's Fifth, Sixth, Eighth, and Fourteenth Amendment rights under the United States Constitution. The shackling also amounted to fundamental error.

It was apparent on the face of the record that Mr. Aguirre was routinely shackled with leg irons during the guilt and penalty phases of his trial. TR 13:1415-1416. Appellate counsel should have argued on direct appeal that the routine shackling of Mr. Aguirre during both his guilt and penalty phase was a violation of his Due Process rights under both the Federal and Florida Constitutions. At the time of Mr. Aguirre's trial, the law was clear that a defendant's due process rights are violated when he is shackled in the presence of the jury during his trial. *Holbrook v. Flynn*, 475 U.S 560, 568-569, 106 S.Ct. 1340, 89 L.Ed.2d. 525 (1986). Routine shackling is prohibited; there must be an "essential state interest" to justify the practice such as a "security specific to the

defendant on trial." *Id*. Prior to Mr. Aguirre's 2006 trial, this right was extended by the Supreme Court to include the sentencing phase of a capital case.

> Nonetheless, shackles at the penalty phase threaten related concerns. Although the jury is no longer deciding between guilt and innocence, it is deciding between life and death. That decision, given the severity and finality of the sanction, is no less important that the decision about guilt.

Deck v. Missouri, 544 U.S. 622, 632, 125 S.O. 2007, 2014 (2005) (internal quotations and citations omitted).

The reasons for prohibiting routine shackling are threefold. First, every criminal defendant is presumed innocent until proven guilty. *Deck* at 2103. "Visible shackling undermines the presumption of innocence and the related fairness of the fact finding process." *Id*. Moreover, "it suggests to the jury that the justice system itself sees a need to separate a defendant from the community at large." *Id*. (internal quotations omitted).

Second, every defendant has a Sixth Amendment right to counsel. Having a defendant physically restrained interferes with that right. *Id*. Shackling will "interfere with the accused's ability to communicate with his lawyer" and "ability to participate in his own defense...." *Id*. (internal citations and quotations omitted).

Third, the judicial process is supposed to be a dignified one.

> The courtroom's formal dignity, which includes the respectful treatment of defendants, reflects the importance of the matter at issue, guilt or innocence, and the gravity with which Americans consider

> any deprivation of an individual's liberty through criminal punishment.
>
> ****
>
> [t]he use of shackles at trial affronts the dignity and decorum of judicial proceedings that the judge is seeking to uphold.

Id. at 2013, 631. (Internal quotations and citations omitted).

The employment of restraints, such as shackles, cannot be justified based on a general appeal to the need for courtroom security or simple reference to the severity of the charged offense. *Wiseman v. State*, 223 S.W.3d 45, 50 (Tex. App. Houston 1st Dist. 2006); see also *Long v. State*, 823 S.W.2d 259, 283 (Tex. Crim. App. 1991). Rather, a trial court must state with particularity its reasons for shackling a defendant. *Wiseman* at 50. The use of shackles to restrain a defendant at trial should rarely be employed as a security device. *McCoy v. State*, 503 So. 2d 371, 371 (Fla. 5th DCA 1987); citing *Illinois v. Allen*, 397 U.S. 337, 344, 90 S. Ct. 1057, 1061, 25 L. Ed. 2d 353 (1970), *reh'g denied*, 398 U.S. 915, 90 S. Ct. 1684, 26 L. Ed. 2d 80 (1970). "Restraints may confuse the defendant, impair his ability to confer with counsel, and significantly affect the trial strategy he chooses to follow." *McCoy* at 371, citing *Zygadlo v. Wainwright*, 720 F.2d 1221, 1223 (11th Cir. 1983), cert. denied, 466 U.S. 941, 104 S. Ct. 1921, 80 L. Ed. 2d 468 (1984). "A trial court should not simply defer to the security measures set forth by the sheriff." *Id*.

Shackling a defendant before the jury is considered an "'inherently prejudicial practice' [that] must not be done absent some showing of necessity." *Bell v. State*, 965 So. 2d 48, 66 (Fla. 2007), citing *Bello v. State*, 547 So. 2d 914, 918 (Fla. 1989) (quoting *Holbrook v. Flynn*, 475 U.S. 560, 568, 106 S. Ct. 1340 (1986)). The requisite showing of necessity was not demonstrated in this case.

Because it is an inherently prejudicial practice, there is no requirement to show actual prejudice. "Thus, where a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation." *Deck v. Missouri*, 544 U.S. 622, 635 (U.S. 2005). The State must prove "beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained." *Id*., *quoting Chapman v. California*, 386 U.S. 18, 24, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967); *see also Hill v. State*, 921 So.2d 579, 585 (Fla. 2006)("[T]he law in Florida has been that shackling a defendant during the penalty phase without ensuring his due process rights are protected is a sufficient ground for reversing a death sentence.").

The *Deck* Court rejected the state's claim that the defendant did not show prejudice because there was no evidence as to how much the jury was aware of the shackling or any record that the defendant's ability to participate in the proceedings was diminished. "This statement does not suggest that the jury was unaware of the

restraints. Rather it refers to the degree of the jury's awareness, and hence to the kinds of prejudice that might have occurred." *Deck v. Missouri*, 544 U.S. at 2015.

It is undisputed that Mr. Aguirre was shackled during his trial. TR 13:1415-1416. At no point did trial counsel object to the shackling or ask for a hearing. Furthermore, it is undisputed that the jury was present when Mr. Aguirre became upset and stood up during Dr. Riebsame's testimony at the penalty phase. TR 15:315-316. Without sending the jury out of the room or attempting to otherwise contain the situation, the courtroom deputies grabbed the 4'11" Mr. Aguirre by the arms and took him from the court room within plain view of the jurors. The transcript reflects that the jurors were present during this incident. TR 15:316. Mr. Aguirre's shackled legs would have been clearly visible to the jury and the chains would be heard rattling as he was dragged out.[2] As noted in *Deck*, the degree of the jury's awareness is not relevant. The jury is not required to have seen Mr. Aguirre shackled for a long period of time, the mere vision of a defendant in shackles is inherently prejudicial.

Mr. Aguirre's rights were violated by his unnecessary shackling during his trial. The Supreme Court has held that the presumption of innocence is an integral

[2] The courtroom where Mr. Aguirre was tried has the technology to video record the entire proceedings. Mr. Aguirre has made the video of his trial part of the record in post-conviction (R5:941-949, Joint Exhibit 1-9), but the video was equally available to appellate counsel and he should have moved to make it part of the direct appeal record.

part of a criminal defendant's right to a fair trial. *United States v. Durham*, 287 F.3d 1297, 1304 (11th Cir. Fla. 2002), citing *Estelle v. Williams*, 425 U.S. 501, 503, 48 L. Ed. 2d 126, 96 S. Ct. 1691 (1976). "The presence of shackles and other physical restraints on the defendant tend to erode this presumption of innocence." *Id*. "Even if the physical restraints placed upon the defendant are not visible to the jury, they still may burden several aspects of a defendant's right to a fair trial." *Id*. "In *Zygadlo*, we noted that leg shackles 'may confuse the defendant, impair his ability to confer with counsel, and significantly affect the trial strategy he chooses to follow.' *Durham* at 1304, citing *Zygadlo v. Wainwright*, 720 F.2d 1221, 1223 (11th Cir. 1983). Furthermore, "whenever a courtroom arrangement is challenged as inherently prejudicial, therefore, the question must be not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether 'an unacceptable risk is presented of impermissible factors coming into play'". *Holbrook v. Flynn*, 475 U.S. 560, 570 (U.S. 1986), citing *Estelle v. Williams*, 425 U.S. 501, 505 (U.S. 1976).

Mr. Aguirre is entitled to a new trial free from the burdens of leg irons. Absent a prior specific finding of risk or danger, the dignity of the judicial process is compromised. Furthermore, Mr. Aguirre's right to the presumption of innocence and to freely participate in his defense was unconstitutionally compromised by the trial court's unreasonable practice of routine shackling. The shackling in this case

inhibited Mr. Aguirre's ability to freely communicate with counsel and actively participate in the trial without the worry that the jury would see or hear his shackles. It was apparent on the face of the trial record that Mr. Aguirre was shackled and the jury was aware of it. Appellate counsel should have raised this meritorious claim on appeal.

CONCLUSION AND RELIEF SOUGHT

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been electronically filed with the Clerk of the Florida Supreme Court and electronically served upon Mitchell Bishop, Assistant Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32118 on this 7th day of July, 2014.

/s/MARIA E. DELIBERATO
Maria E. DeLiberato
Florida Bar No.664251
Assistant CCRC
deliberato@ccrmr.state.fl.us

/s/JULISSA FONTÁN
Julissa Fontán
Florida Bar No. 0032744
Assistant CCRC
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE
3801 Corporex Park Dr., Suite 210
Tampa, Florida 33619
813-740-3544
813-740-3554 (Facsimile)
fontan@ccmr.state.fl.us

/s/MARIE-LOUISE SAMUELS PARMER
Marie-Louise Samuels Parmer
Samuels Parmer Law Firm
Florida Bar No. 0005584
813-732-3321
marie@samuelsparmerlaw.com

Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Petition for Writ of Habeas Corpus, was generated in Times New Roman 14 point font, pursuant to Fla. R. App. P. 9.100 and 9.210**.**

/s/MARIA E. DELIBERATO
Maria E. DeLiberato
Florida Bar No.664251
Assistant CCRC
CAPITAL COLLATERAL REGIONAL COUNSEL-MIDDLE
3801 Corporex Park Dr., Suite 210
Tampa, Florida 33619
813-740-3544
813-740-3554 (Facsimile)
deliberato@ccmr.state.fl.us